Litigation Funding
2020

Contributing editors
Steven Friel and Jonathan Barnes
Woodsford Litigation Funding
Woodsford Litigation Funding is one of the world’s leading providers of finance to law firms and their clients. Founded in 2010 with offices in London, Philadelphia, Singapore and Tel Aviv we deliver litigation and arbitration financing solutions for law firms, businesses and individuals around the world.

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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.
Contents

Introduction 3
Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

Third-party funding in international arbitration 4
Zachary D Krug, Charlie Morris and Helena Eatock
Woodsford Litigation Funding

Australia 7
Simon Morris, Martin del Gallego, Gordon Grieve and Greg Whyte
Piper Alderman

Austria 16
Marcel Wegmueller and Jonathan Barnett
Nivalion AG

Bermuda 20
Lilla Zuill
Zuill & Co

Brazil 23
Luiz Olavo Baptista and Adriane Nakagawa Baptista
Atelier Jurídico

England & Wales 27
Steven Friel, Jonathan Barnes and Alex Hickson
Woodsford Litigation Funding

Germany 34
Arndt Eversberg
Roland ProzessFinanz AG

Hong Kong 38
Dominic Geiser, Simon Chapman, Briana Young and Priya Aswani
Herbert Smith Freehills

India 43
Vaibhav Gaggar and Sumedha Dang
Gaggar and Partners

Israel 49
Yoav Navon and Steven Friel
Woodsford Litigation Funding

Italy 53
Davide De Vido
FiDeAL

Korea 56
Beomsu Kim, John M Kim and Byungsup Shin
KL Partners

Mauritius 60
Rishi Pursem and Taroo Ramtale
Benoit Chambers

New Zealand 64
Adina Thorn and Rohan Havelock
Adina Thorn Lawyers

Poland 71
Tomasz Waszewski
Kocur and Partners

Spain 76
Armando Betancor, César Cervera, Carolina Bayo, Francisco Cabrera
and Eduardo Frutos
Rockmond Litigation Funding Advisors

Switzerland 80
Marcel Wegmueller and Isabelle Berger-Steiner
Nivalion AG

United Arab Emirates 85
James Foster, Courtney Rothery and Jennifer Al-Salim
Gowling WLG

United States – New York 91
David G Liston, Alex G Patchen and Rebecca Rothkopf
Liston Abramson LLP

United States – other key jurisdictions 98
Zachary D Krug, Robin M Davis and Alex Lempiner
Woodsford Litigation Funding
Introduction

Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

This is the fourth edition of our global survey of the law and practice of litigation funding. Reflecting on the previous three editions, we can see that certain international norms are now becoming clear.

As to the law of litigation funding, the last year has highlighted that most relevant legal principles are now relatively settled.

We are a generation on from a time when many jurisdictions were still grappling with the lawfulness of litigation funding and the enforceability of litigation funding agreements. With limited exceptions (places such as Ireland will catch up eventually), it is now well established in the leading global dispute resolution centres that the historic principles of champerty and maintenance have little impact on our industry.

The Supreme Court of Queensland in Murphy v Gladstone found that the funding agreements at issue in the case did ‘not involve unlawful conduct or purpose and are not prejudicial to the administration of justice’. In making declarations that the funding agreements were ‘not, by reason of maintenance, champerty or public policy, unenforceable’ the court held that the agreements accord with the public policy considerations of representative proceedings in Queensland.

Glustein J. in Marriott v General Motors of Canada Company stated, ‘It is settled law [in Canada] that funding agreements are an acceptable way to promote access to justice.’

As to privilege, while there are a wide variety of approaches to evidential issues across the world, particularly as between common law and civil law jurisdictions, it is now commonly accepted that a litigant’s communications with litigation funders are protected from disclosure. Whether this protection comes from common interest privilege or some version of the work product doctrine, the global norm is to recognise a circle of confidence and privilege that includes the litigant, its legal advisers and its third-party litigation funder.

There is perhaps less uniformity around the world on whether litigants are required to disclose, to opposing parties and to the relevant court or tribunal, the fact that the litigation is funded by a third party, but a norm is forming. While the fact of litigation funding, and possibly also the identity of the litigation funder, is required to be disclosed in certain jurisdictions, it is almost universally the case that the confidential funding terms contained in the litigation agreement are not to be disclosed. In an environmental contamination case in the US Federal Court in New Jersey, Magistrate Judge Schneider stated:

[T]he Court rejects the notion that it must know the details of plaintiffs’ funding arrangements to decide the scope of discovery, the outcome of discovery cost-shifting, and the proper assessment of sanctions. The Court routinely decides these issues without inquiring as to how the parties finance their cases. If the Court accepted defendants’ argument, the source(s) of defendants’ assets and funding could become fair game for discovery.

The Court has no intention of going down this ‘rabbit hole’.

Most other attempts by defendants to disrupt litigation funding arrangements have also proved unsuccessful. Attacking the propriety of a plaintiff’s standing to sue is a common defence strategy in US litigation, particularly patent enforcement litigation. Some defendants have sought to argue that litigation funding agreements may affect a patent owner’s standing to sue.

In the WAG Acquisition v Multi Media litigation, a US company alleged that defendants were infringing its patents as part of their businesses, namely by providing and streaming adult entertainment videos and related online social venues. The defendants sought to dismiss the plaintiff’s cases for lack of standing by alleging that the plaintiff’s funding agreement with Woodsford deprived the plaintiff of the rights necessary to sue independently for patent infringement. All of the defendants’ arguments against standing were solidly rejected by the district court.

As to the practice of litigation funding, we can now clearly see the positive impact that this additional tool of access to justice is having on certain key legal practice areas.

For far too long, large corporate enterprises have engaged in misconduct, to the detriment of their shareholders, customers and others, without fear of litigation because of inadequate collective redress mechanisms. That is beginning to change, in no small part because of litigation funders. The last year or so has seen an increase in the number of group actions in the competition and securities space in particular. In many of these cases, litigation funders play a key role in providing the professional and intellectual input, as well as the financial investment, that is required to get these claims off the ground, and ultimately to bring corporate wrongdoers to account.

Wider public and press interest in litigation funding is increasing. When we first published this survey in 2017, only a small number of legal industry journalists had any interest in what we do. Now, litigation funding stories frequently appear in the mainstream press, particularly in the financial pages. Litigation funders back some of the most high-profile litigation, we hire some of the most impressive lawyers and other professionals, and we raise and deploy significant capital. Some of the most successful funders, including Woodsford, continue to grow impressive track records of success, earning significant returns for investors. Most of the press about litigation funding is positive, and most journalists and other commentators have a fairly good understanding of what litigation funders do. However, the press surrounding Muddy Waters v Burford Capital highlights that there remain significant pockets of confusion.

The future for litigation funding remains bright; a good thing for everyone who cares about access to justice.

As always, we are grateful to all of the chapter authors for their hard work in putting this book together.
Third-party funding in international arbitration

Zachary D Krug, Charlie Morris and Helena Eatock
Woodsford Litigation Funding

While international arbitration spans multiple types of claims, overlapping jurisdictions and legal regimes, there are some commonalities to consider an appropriate subject for a brief addendum within this guidebook’s framework. A practitioner considering a transaction involving third-party funding of international arbitration will need to consider multiple potentially relevant jurisdictions. For example, one might need to consider the applicable arbitral rules (if any), the law of the seat of the arbitration, the governing law of the underlying agreements, any applicable international treaties, the law of the jurisdiction in which the award will be enforced, and, potentially, the law of the parties’ counsels’ home jurisdictions. Accordingly, this addendum is necessarily limited and endeavours to highlight some of the issues and approaches that are common in the context of third-party funding and international arbitration.

Prime among these commonalities is the tremendous uptake of third-party funding in international arbitration in recent times, regardless of claim type or venue. This is hardly surprising: international arbitration generally involves complex commercial disputes with sophisticated counsel at premier international law firms. The resulting fee burden can be substantial. Moreover, many international arbitrations involve claimants who are capital constrained (often as a direct result of a respondent’s conduct) and would not be in a position to have their claims heard in the absence of third-party funding.

Third-party funding is an increasingly routine part of the landscape of international arbitration. Anecdotally, our experience speaking with claimants, practitioners and others who are frequently involved in international arbitration suggests that most claimants involved in larger international arbitrations are either being funded or have, at some stage of the process, considered using funding. What little public data is available tends to confirm this trend. As an example, when the International Centre for Settlement of Investment Disputes (ICSID) proposed updated rules on a variety of key topics, it included new rules on third-party funding because it had noted an ‘increased resort’ to funding, with at least 20 recent ICSID cases involving third-party funding. That number has likely grown substantially. Likewise, it has recently been announced that the European Commission will begin negotiations to modernise the Energy Charter Treaty and will be including new provisions on third-party funding, while we understand a number of bilateral investment treaties texts under negotiation also include specific provisions on funding.

Growing recognition of the use of funding in international arbitration

Concomitant with the increased use and availability of funding generally, there has been a gradual easing of the traditional doctrines of champerty and maintenance, which typically exist in common law (rather than civil law) jurisdictions. As is well covered in the country-specific chapters of this guide, this trend is occurring rapidly in a number of jurisdictions globally. For arbitration, this is potentially significant given that the law of the arbitral seat is most likely to govern whether or not a claimant is permitted to avail itself of funding.

Indeed, certain jurisdictions, notably Singapore and Hong Kong, have recently introduced legislation to expressly allow third-party funding of international arbitration. In 2017, Singapore’s parliament passed the Civil Law Amendment Act and the Civil Law (Third-Party Funding) Regulations 2017, which effectively abolish the common law torts of champerty and maintenance, and permit third-party funding in respect of international arbitration and associated proceedings (eg, enforcement and mediation proceedings). In addition to the legislative provisions, the Singapore Institute of Arbitrators (SIArb) has introduced a set of guidelines for third-party funding, with which funders will be expected to comply. It is also anticipated that the key arbitral institutions, such as Singapore International Arbitration Centre (SIAC), will amend their rules to accommodate the new legislative provisions (indeed, SIAC has already addressed third-party funding in the first edition of its Investment Arbitration Rules).

In 2013, Hong Kong’s Law Reform Commission launched a public consultation on whether to permit third-party funding for international arbitration seated in Hong Kong. This culminated in October 2016 with a recommendation to allow it. Following approval of the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2017, the Arbitration Ordinance was amended to provide, in summary, that the doctrines of champerty and maintenance no longer apply to third-party funding of arbitration or related court or mediation proceedings. Interestingly, unlike in Singapore, no distinction is made in Hong Kong between domestic and international arbitration; funding will be permitted in both. Along with the amendments, a code of practice has been promulgated which regulates a funder’s conduct on a variety of matters, including capital adequacy, disclosure and the funding agreement.

The trend has expanded to other jurisdictions. In Nigeria, for example, where recent amendments to the Nigerian Arbitration and Conciliation Act have been passed which would allow the costs of obtaining third-party funding to be included in the arbitration costs.

Nevertheless, some jurisdictions have been more hesitant when it comes to the current legacy of champerty and maintenance restrictions. In May 2017, delivering the judgment for Persona Digital Telephony Ltd v The Minister for Public Enterprise [2017] IESC 27, the Supreme Court of Ireland ruled the common law prohibitions on maintenance and champerty remain in force in Ireland, thereby restricting the availability of third-party funding. While the Persona decision did not itself address international arbitration, the court’s decision will have implications
Disclosure and conflicts of interest
A topic of substantial discussion in the international arbitration community has been the potential for conflicts to arise in funded cases, and whether disclosure of the fact that a party is funded and, if so, the identity of the funder is necessary to prevent such conflicts. While the same discussion has arisen in the context of litigation, the issue is perhaps more acute in the context of international arbitration, because the parties have a role in appointing arbitrators, and there is a relatively small pool of practitioners who act as both arbitrators and advocates, who themselves may be involved in funded matters. (See ICCA Report, chapter 4.)

After some healthy debate, a consensus has begun to emerge that the disclosure of a party’s funded status and the identity of the funder (but not of the terms of the funding arrangement) in an arbitration may be beneficial so as to avoid potential conflicts. Accordingly, in the last several years, a number of jurisdictions, arbitral institutions and organisations have offered specific rules of guidance on this matter, summaries of which follow.

ICSID proposed rules
In 2018, ICSID published a set of proposed changes designed to modernise its rules, offering states and investors an improved range of dispute settlement mechanisms. Since then, the proposed rules have been subject to comment and undergone a series of further revisions. As regards funding, the proposed rules would make it compulsory for parties to file a written notice identifying the existence of funding at any stage in the proceedings. Importantly, disclosure is limited to use of funding and the identity of the funder. The proposed rules also define funding for disclosure purposes to include donation and grant-originated funding. In the latest ICSID Working Paper No. 3 (August 2019) discussing the proposed rule, it is expressly noted that the proposed rules do not contemplate ‘further right to information or disclosure of the agreement’, while noting that a tribunal has the power to order such disclosure where appropriate.

International Criminal Court
The International Criminal Court (ICC) International Court of Arbitration addressed the issue of potential conflicts in its 2017 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (October 2017) (paragraph 24), which noted, among other things, that ‘relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case’.

Singapore International Arbitration Centre
The SIAC’s newly released Investment Arbitration Rules (IARs) specifically allow arbitral tribunals to order disclosure of the existence of third-party funding and the identity of such a funder (IAR 24(1)).

Hong Kong International Arbitration Centre
The Hong Kong International Arbitration Centre (HKIAC) has recently proposed rules amendments, at article 44.1, which echo the requirement in section 98U of the Arbitration Ordinance in Hong Kong, stating that if a funding agreement is made, the funded party must give written notice of the fact that a funding agreement has been made, and the name of the third-party funder.

China International Economic and Trade Commission
The China International Economic and Trade Commission (CIETAC) mandates disclosure of third-party funding pursuant to article 27 of its International Arbitration Investment Rules (2017). Specifically, the rule provides that ‘as soon as a third-party funding arrangement is concluded’ the funded party ‘shall notify in writing and without delay’ the tribunal and other parties. Such a disclosure must provide the ‘existence and nature’ of the funding arrangement and the identity of the funder. Moreover, the rules provide the tribunal shall have the power to order further disclosure as appropriate.

Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CAM-CCBC’s Administrative Resolution No. 18 (2016) ‘recommends’ the parties disclose the use of funding ‘at the earliest opportunity’.

ICCA – Queen Mary Task Force Principles
The Task Force Principles of the ICCA state that a party ‘should’ voluntarily disclose the existence of funding, and that arbitral institutions have the authority to request disclosure.

IBA
The International Bar Association (IBA) was the first organisation to take a position on funding, when it published the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. The IBA Guidelines state that parties shall disclose ‘any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration’.

Nevertheless, such disclosure obligations should be narrowly limited to their intended purpose of avoiding conflicts, rather than an opportunity for distraction, delay or satellite litigation regarding, for example, disclosure of the terms of a funding agreement or waiver of privilege or confidentiality. As ICSID’s comments to the proposed rule make clear that its proposed disclosure requirement ‘does not create a general duty to disclose the terms of funding or the agreement itself’ as ‘this more elaborate information is not required to achieve the objective of preventing conflicts of interest’.

Confidentiality and privilege
Another issue that has frequently arisen in domestic litigation in various jurisdictions around the world is whether a claimant’s sharing of confidential and privileged information with a funder might raise issues of waiver. Parties to arbitrations are similarly mindful of the issue.

Arbitration is commonly a confidential process between the parties to the arbitration. However, the emerging consensus is that the sharing
of information with a funder pursuant to a non-disclosure agreement will not result in a waiver. That said, an arbitral tribunal often has wide discretion to determine the scope of material admitted into the proceedings and application of privilege is generally determined by resort to the relevant law of the seat of the arbitration (or potentially the substantive law of the dispute).

The rules of the major arbitral institutions do not yet, for the most part, address this issue expressly. However, in its recent rules consultation the HKIAC has indicated how arbitral instructions may do so. Article 45.3(3) of the HKIAC’s proposed new rules, which are based on section 98 of the Arbitration Ordinance, expressly permits the sharing of confidential information to a person for the purposes of having, or seeking, third-party funding of arbitration.

Similarly, the recent Task Force Principles provide that although the existence of funding is not itself privileged, the underlying provisions of a funding agreement may be privileged and should only be ordered disclosed in ‘exceptional circumstances’. Moreover, the Task Force Principles note the disclosure of information between a party and a funder should not be a basis for privilege waiver. Further, as the comments to ICSID’s proposed rules note parties should be able to seek appropriate confidentiality protections on privilege in the context of disclosure.

Ultimately, while we predict that concerns over waiver will fade, those contemplating funding should still ensure that all communications with funders are made pursuant to non-disclosure agreements.

Third-party funding and costs in international arbitration

Another important issue is the impact of third-party funding, if any, in the allocation of costs and related costs orders.

While arbitral panels generally have wide discretion in the allocation of costs, the principle of ‘costs shifting’ (i.e., the loser pays the winner’s costs) is prevalent in arbitration in numerous jurisdictions. In general, the fact that a prevailing party has been funded has not been deemed relevant as a basis to deny the recovery of costs. (See Kardassopoulos and Fuchs v The Republic of Georgia (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award (3 March 2010); RSM Production Corporation v Grenada (ICSID Case No. ARB/05/14), Decision on Costs (28 April 2011)).

Significantly, particularly in circumstances involving improper conduct on the part of the respondent, a funded claimant may be able to recover not only the costs of the arbitration but also the premium or success fee paid to the funder. For example, in Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm.), the English High Court, which had supervisory jurisdiction, reviewed the decision made in an ICC arbitration seated in London to award the claimant (Norscot) not only its legal costs of the arbitration, but also the cost of paying the funder, Woodsford, the funding’s ‘success fee’ on the basis that the respondent had caused the claimant’s impecuniosity and effectively ‘forced’ it to seek funding. The respondent challenged the award on the basis that the arbitrator erred in concluding that he had jurisdiction to award such costs as ‘other costs’, but the English High Court upheld the award.

A further important issue is the relevance, if any, of third-party funding in connection with a tribunal’s consideration of security for costs applications. While each jurisdiction or tribunal has different rules that apply to such applications, in general, unless a tribunal establishes a likelihood that costs could, in principle, be awarded against an unsuccessful claimant, it cannot make a decision on security for costs applications. Moreover, a tribunal will often lack the jurisdiction to make an order for security for costs against a funder which is not party to the arbitration agreement.

Respondents seeking a security for costs application sometimes argue that the fact that a party has sought funding is evidence of impecuniosity or that it will render it less likely to be able to satisfy an award of costs in the event the claim fails. But third-party funding is frequently used by parties which are solvent and, in any event, such funding is generally provided on a non-recourse basis and therefore does not compromise a party’s financial position if the claim is lost. As such, there is a growing consensus, particularly in investor-state arbitration, that the mere fact a party has obtained third-party funding is not, by itself, a reason to justify a security for costs order. (See EuroGas Inc and Belmot Resources Inc v Slovak Republic (ICSID Case No. ARB/14/14), Procedural Order No. 3 (23 June 2015); South American Silver Limited v The Plurinational State of Bolivia, (UNCITRAL, PCA Case No. 2013–15), Procedural Order No. 10 (11 January 2016); Guaracachi & Rurelec v Bolivia, (UNCITRAL, PCA Case No. 2011–17), Procedural Order No. 14 (March 11, 2013).) However, in two ‘exceptional’ matters, the existence of third-party funding has been an important – but not the sole – factor in the ultimate decision to order security for costs. In RSM Production Corporation v Saint Lucia (ICSID Case No. ARB/12/10), the tribunal made an order for security for costs, apparently on the basis of the claimant’s poor conduct during the course of the arbitration (including, for example, repeated failures to comply with the tribunal’s orders). (See also Manuel García Armas et al v Venezuela (PCA Case No. 2016–08), Procedural Order No. 9. [20 June 2018]) There is reason to suggest that RSM and García Armas may be relatively isolated cases.

Consistent with these decisions, under ICSID’s proposed rules amendments, it is contemplated that a tribunal ‘may consider’ with regard to a party’s ability to pay a costs order, but expressly cautions that ‘the existence of third-party funding by itself is not sufficient to justify’ a security for costs order.
Australia

Simon Morris, Martin del Gallego, Gordon Grieve and Greg Whyte
Piper Alderman

REGULATION

Overview

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

Third-party litigation funding is permitted in Australia, however, not without complexity.

Maintenance and champerty are obsolete as crimes at common law (Clyne v NSW Bar Association (1960) 104 CLR 186, 203) and have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory. Queensland, Western Australia, Tasmania and the Northern Territory retain torts of maintenance and champerty.

Notwithstanding legislation, it remains the position in all Australian jurisdictions that general principles of contract law, pursuant to which a contract may be treated as contrary to public policy or as otherwise illegal, are not disturbed. This means that a third-party litigation funding agreement could be set aside by an Australian court if it was found to be inconsistent with common law public policy considerations.

The High Court in Campbell’s Cash & Carry Pty Ltd v Fostif Pty Ltd (2006) CLR 386 (Fostif) considered provisions of the New South Wales legislation abolishing maintenance and champerty as torts. The High Court held that third-party funding per se was not contrary to public policy or an abuse of process. The court ruled that the fact that a funder may exercise control over proceedings and bought the rights to litigate to obtain profit did not render the funding arrangements contrary to public policy. The court held that profiting from assisting in litigation and encouraging litigation could only be contrary to public policy if there was a rule against maintaining actions (which in New South Wales had been abolished). Concerns raised about the possibility of unfair bargains and the potential for litigation funding to distort the administration of justice were rejected. The court ruled that where these concerns arose they could be adequately dealt with through existing doctrines of contract and equity (unfair contracts), abuse of process (rules of court dealing with the administration of justice), and existing rules regulating lawyers’ duties to the court and clients (conflicts, etc).

Importantly, Fostif did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished. In the recent decision in Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4) [2019] QSC 228, Crow J ruled, in the context of a third-party funded class action, that the torts of maintenance and champerty had not been abolished but that provisions of the Civil Proceedings Act 2011 (Qld) regulating class action procedures lay down a regime that permits class action proceedings to be funded by a commercial litigation funder.

In a joint publication by the Law Council of Australia and the Federal Court of Australia it was stated that:

In many cases, litigation funding has proven to be the lifeblood of much of Australia’s representative proceeding litigation at federal and state level. Not all cases are funded by third-party litigation funders but a sufficiently large number of class actions have been funded in this manner that it has had a major impact of the sort of cases conducted.

The availability of funding has not been attributed to any overall rise in litigated matters, suggesting that litigation funding is being used cautiously in order to improve access to justice while bringing commercial gain and without encouraging vexatious or unmeritorious claims.

The available statistics about class action filings demonstrate that funded litigation is on the increase in Australia. Between June 1997 and May 2002, funded class actions comprised 1.7 per cent of all class actions. In the period from March 1992 to March 2013, 15 per cent of class action proceedings filed in the Federal Court were funded.

From 2013 to 2018, 64 per cent of filed class actions were funded, and between March 2017 and 2018, this number increased to 78 per cent. In the year ending 30 June 2019, 54 class actions commenced in Australia. This is the same number of class action claims as commenced in the previous year. The percentage of those claims that are funded by third-party litigation funding has stabilised at around 75 per cent of all class action claims filed. This is significantly higher than earlier periods both in terms of filings and the percentage of funded claims. The increase in volume and the proportion of funded class actions would appear to correlate with the judicial approval of common fund orders (see further below) which have increased the certainty of returns for litigation funders and reduced barriers to entry.

Restrictions on funding fees

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

There is no legislation or regulation in Australia that limits the fees that funders can charge.

The High Court in Fostif held that contract law considerations such as illegality, unconscionability and public policy may still arise in relation to a litigation funding agreement, but there is no objective standard against which the fairness of the agreement may be measured. Accordingly, whether a particular clause in a litigation funding agreement may contravene public policy will be answered having regard to the circumstances of each particular case.

Theoretically, Australian courts could set aside a litigation funding agreement where the funder’s interest constituted an equitable fraud in the sense that it involved capturing a bargain by taking surreptitious advantage of a person’s inability to judge for him or herself, by reason of weakness, necessity or ignorance.

Australian courts exercising equitable jurisdiction can set aside bargains where terms are harsh or unfair. The High Court in Commercial Bank of Australia v Amadio (1983) 151 CLR 447 renotated
the principles relating to unconscionable conduct. A court may set aside a bargain as unconscionable if one party, by reason of some condition or circumstance, is placed at a special disadvantage compared to another and the other party takes unfair or unconscientious advantage of that special disadvantage. In those circumstances, the innocent party may be relieved of the consequences of the unconscionable conduct. In *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392 HCA 25, a gambling addict sought to avoid losses with a casino, arguing that the casino had taken unconscionable advantage of his vulnerability. The court, in rejecting his claim, ruled that inequality of bargaining power was relevant, but not essential to establish unconscionability and that a party must rely upon standards of personal conduct known as ‘the conscience of equity’. The High Court drew a clear distinction between the equitable principles of unconscionable conduct and undue influence.

Prohibitions against unconscionable and misleading or deceptive conduct that may apply to dealings between litigation funders and funded litigants are also reflected in general consumer protection provisions in the Competition and Consumer Act 2010 (Cth) and provisions in the Australian Securities and Investment Commission Act 2001 (Cth).

The Federal Court Class Actions Practice Note (GPN-CA) requires disclosure to group members which are clients or potential clients of the applicant’s lawyers regarding applicable legal costs or litigation funding charges in class action matters, and sets out the manner in which these arrangements should be communicated. The court must also be provided with a copy of any litigation funding agreement. Disclosure of a litigation funding agreement to other parties to the litigation is also required, with the disclosure being redacted to conceal information that might reasonably be expected to confer a tactical advantage.

While not a means of formally limiting litigation funding charges, settlements in funded class actions (including the amounts allocated for the payment of a funder’s fee) are subject to approval by the court.

In a number of recent cases the courts have made common fund orders, both as part of a class action settlement and also at an early stage of proceedings. A common fund order has the effect of binding all members of the represented group to the terms of a funding agreement, not just those who have executed the agreement. Common fund orders are made pursuant to the statutory protective and supervisory role that the courts are required to assume to do what is appropriate and necessary to ensure justice is done. The courts also have the discretion to impose a funding rate that avoids excessive or disproportionate charges to class members or which reflect the costs and risks taken by the funder, and which avoid hindsight bias.

While there are trends emerging in the common fund orders that are being made, there is as yet no uniformity and there is no certainty of outcomes for funders or class members. Points of distinction in the common fund orders made in the year in review are whether the order is net or gross of the funder’s costs, capped to the lesser of a percentage of the funder’s capital deployed or involve a minimum recovery guarantee. A trend in the year in review has been the increased prevalence of competing overlapping class actions and how the courts have sought to manage multiplicity through the application of case management principles. A feature of these multiplicity disputes has been the courts evaluating the hypothetical returns to class members from the competing funding proposals. This increased competition has placed downward pressure on pricing.

In respect of common fund orders Lee J in *Lenthall v Westpac Life Insurance Services Limited* (2018) FCA 1422 said that a percentage cap on a funder’s commission under a common fund order may lead to a ‘spurious air of authority to the figure, in the sense [of] communicating a default position’. In *Lenthall*, Lee J proposed a funding rate of the lesser of three times the total amount spent on legal costs, disbursements and adverse costs orders, or 25 per cent of the gross recovery upon resolution of the proceedings. Lee J’s exercise of discretion in *Lenthall* was upheld on appeal.

In *Brewster v BMW Australia Ltd* (2019) NSWCA 35, the Supreme Court of New South Wales Court of Appeal upheld an order capping the funder’s share of the proceeds of litigation to an amount based upon a multiple of the total amount paid by the funder so as to prevent the order from yielding a benefit which is out of all proportion to the capital deployed and the risk assumed by the funder. The court doubted that an interlocutory order:

[W]hereby a funder becomes contingently entitled to a return which might be out of all proportion to the capital deployed and put at risk, is one which is appropriate or necessary to ensure that justice is done.

The decision of the Full Court of the Federal Court in *Lenthall* and the Court of Appeal in *Brewster* upholding the validity of common fund orders are on appeal to the High Court of Australia. Issues on appeal to the High Court involve constitutional questions, including whether making a common fund order involves the court acting in a manner that is inimical to the judicial function in breach of the doctrine of the separation of powers, and whether a common fund order involves the acquisition of property on other than just terms. At the time of publication the appeals have been heard and judgment is reserved.

**Specific rules for litigation funding**

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

Third-party litigation funders in Australia currently are not required to be licensed and are not subject to any form of prudential supervision. In 2012, the federal government exempted a person providing financial services to a litigation scheme from all forms of regulation that apply to providers of financial services and credit facilities. However, the federal government has enacted a regulation that requires that providers of litigation funding services adopt and maintain adequate processes to manage conflicts of interest. Criminal sanctions apply for non-compliance with the conflict management requirements. The conflict management requirements are policed by the Australian Securities and Investment Commission (ASIC).

The purpose of the regulation is to ensure that conflicts – ordinarily where the interests of funders, lawyers and claimants diverge – are appropriately managed by the litigation funder. ASIC’s Regulatory Guide 248 sets out ways in which funders can meet their conflict management obligations under the regulation, but otherwise do not prescribe the required mechanism for compliance with the regulation. There is a requirement that providers of litigation funding maintain adequate practices and follow certain procedures for managing conflicts of interest. However, the regulation does not prescribe the content of the policy or
the processes that a litigation funder must have in place to respond to a conflict of interest.

The Federal Court Practice Note Class Actions (GPN-CA) requires that:

[any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of ‘duty and interest’ and ‘duty and duty’) between any of the applicants, the class members, the applicant’s lawyers and any litigation funder.]

Similar practice notes operate in Victoria, Queensland and New South Wales.

On 7 September 2017, the Victorian Law Reform Commission published its review of current regulation of litigation funders and lawyers in Victoria. The Commission’s Report suggested that, as the Federal Court has done, the Supreme Court could also introduce practice requirements for litigation funders involved in class actions in relation to conflicts of interest.

In December 2017, the Australian Law Reform Commission (ALRC) was asked to consider a range of matters relating to class action proceedings and third-party litigation funders and in particular whether third-party funders should be subject to Commonwealth regulation.

The ALRC released a discussion paper in June 2018 that proposed that third-party litigation funders be required to obtain and maintain a ‘litigation funding licence’ to operate in Australia and that such licence should include requirements relating to adequate risk management systems, adequate arrangements for managing conflicts of interest, ensuring that the licensee does all things necessary to provide services efficiently, honestly and fairly and have sufficient resources (including financial, technology and human resources). (See Australian Law Reform Commission, Class Action Proceedings and Third-Party Litigation Funding, Discussion Paper No. 85 (2018).) After a period of extensive industry consultation in December 2018, the ALRC provided its report and recommendations to the federal government. (See Australian Law Reform Commission, Integrity, Fairness and Efficiency – An inquiry into Class Action Proceedings and Third-Party Litigation Funding, ALRC Report 134 (2018).) On the topic of a licensing regime for litigation funders, the ALRC concluded that, if its other recommendations were implemented, those measures would provide sufficient consumer protection that it would not be necessary for litigation funders to also be subject to a licensing regime. The Commission was also concerned that imposing capital adequacy restrictions on funders may stifle competition and add to costs.

**Legal advice**

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

There are no specific professional or ethical conduct rules that apply to the role of legal professionals in advising clients in relation to third-party litigation funding or in funded proceedings.

Australian legal practitioners are regulated by state-based regimes prescribing professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons.

The interposition of a third-party litigation funder into the lawyer-client relationship raises ethical issues around conflicts, loyalty, independence of a lawyer’s judgement and confidentiality. Legal practitioner conduct rules in all Australian jurisdictions deal with each of these concepts. The conduct rules reflect a lawyer’s fiduciary duty towards his or her client and primary duty to the court.

A practitioner (which includes a law practice) will have a conflict of interest when the practitioner serves two or more interests that are not able to be served consistently, or honours two or more duties that cannot be honoured compatibly.

**Regulators**

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

See question 3 with respect to the regulation of conflicts of interest. Outside of managing conflicts of interest, there is currently no formal regulatory framework applying to litigation funders.

There are some specific examples where the terms of litigation funding agreements are subject to review by the courts.

In a corporate insolvency context, it is common for a liquidator to enter into a funding agreement with a third-party funder to pursue recoveries on behalf of creditors. Under the Corporations Act 2001 (Cth), a liquidator is required to seek the approval of the company’s creditors or the court’s approval, where the terms of a contract that he or she enters into will last for more than three months. This means that in many cases where a liquidator enters into a litigation funding agreement, court approval is sought.

When reviewing a litigation funding agreement for approval, the court takes account of a range of factors, including:

- the liquidator’s prospects of success in the litigation;
- the interests of creditors;
- possible oppression in bringing the proceedings;
- the nature and complexity of the cause of action;
- the extent to which the liquidator has canvassed other funding options;
- the level of the funder’s premium and other funding terms;
- the liquidator’s consultations with creditors; and
- the risks involved in the claim, including the amount of costs likely to be incurred in the proposed litigation and the extent to which the funder is to contribute to those costs, to the costs of the defendant in the event that the action is not successful, or towards any order for security for costs.

The decisions involving approval of funding agreements demonstrate that the courts do not simply ‘rubber stamp’ a funding proposal put forward by a liquidator. The approval of the court is not intended to be an endorsement of the proposed funding agreement or the proposed claim, but merely a permission for the liquidator to exercise his or her own commercial judgement in the matter.

The case management of class actions commenced in the Federal Court and other state courts involving litigation funding require at or prior to the initial case management conference that each party disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. All settlements reached in class action proceedings must be approved by the court. Where a settlement involves a funder’s success fee being deducted from funds otherwise available to class members, those terms are subject to judicial scrutiny as to reasonableness and proportionality.

**FUNDERS’ RIGHTS**

**Choice of counsel**

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

Yes. It is a permissible level of control over the litigation process for a third-party funder to insist their choice of lawyers be retained. Third-party funders are invariably consulted when it comes to retaining counsel. Commonly, the funder will, pursuant to the funding...
arrangement, appoint the lawyers to provide the legal work, and the retainer agreement between the lawyers and the funded client will be pursuant to terms agreed by the funder subject to the lawyers’ overriding duties to act in the best interests of their client.

**Participation in proceedings**

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

Yes. It is a permissible level of control over the litigation process for the litigation funding agreement to provide that the funder has the right to give instructions to the lawyers concerning the conduct of the litigation, subject to the funded client having the right to override the funder’s instructions.

Commonly, save in respect of settlement (see below), in circumstances where a conflict arises between the lawyer’s duty to his or her client and the funder, the lawyer is required to prefer the interests of, and to take instructions from, his or her client.

It is submitted that this level of control over the litigation process is consistent with the principles in *Fostif* and not contrary to public policy.

In a settlement context, in recognition of the funder’s interest in the resolution of the litigation, where there is a difference of opinion between the funded client and the funder in respect of a settlement offer, the standard practice among funders operating in Australia, consistent with ASIC’s Regulatory Guide 248, is that the difference of opinion is referred to the most senior counsel acting in the matter for advice whether the settlement offer is reasonable in all the circumstances and the parties agree to act in accordance with that advice.

In the class action context, any settlement reached on behalf of the representative applicants, including the reasonableness of the funder’s commission, will be subject to court approval. The Federal Court Practice Note Class Actions (GPN–CA) sets out a range of requirements for parties in order to satisfy the court that the proposed settlement is fair and reasonable and in the interests of the group members.

**Veto of settlements**

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

In class actions, a funder cannot veto a settlement and any difference of opinion between a funder and a representative applicant regarding a proposed settlement are dealt with pursuant to the practice outlined in question 7. For other types of funded litigation, the funder’s control over a settlement is subject to terms of the funding agreement.

**Termination of funding**

**9** In what circumstances may a funder terminate funding?

Commonly, litigation funding agreements entered into in Australia allow a funder to terminate the litigation funding agreement without cause on the giving of notice.

Usually, the circumstances giving rise to the termination of a funding agreement will relate to the commercial viability of the claim, a material change to the legal merits or to the value of the claim. Circumstances may also arise where the funder considers that there is an irreconcilable and unavoidable conflict of interest in its continuing to be a party to the funding agreement. Contract law principles that apply to the termination of contracts generally will apply.

It is usual that the litigation funder will have responsibility to pay adverse costs and provide security of costs incurred up to the date of termination. In *Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd* [2016] WASC 159, LCM, the funder, terminated a litigation funding agreement that obliged it to satisfy orders for security for costs. Beech J held that under that litigation funding agreement LCM was obliged to satisfy orders for security for costs made prior to the termination date but not after the termination date.

**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?

It is recognised and accepted that litigation funding plays an important role in providing access to justice. Especially in the class action context, decisions of Australian courts following *Fostif* are philosophically supportive of the role that lawyers and third-party funders have in the identification and management of claims.

In a number of cases where the court is considering a common fund order or orders that could affect the funder’s interest, the courts have permitted the funder to retain its own representation and appear before the court to make submissions (a recent example of this approach is *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 (18 September 2018)).

**CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

**Conditional fees**

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

‘No win, no fee’ conditional costs agreements are permitted in Australia. There are prohibitions on legal service providers obtaining a fee calculated by reference to the amount of a settlement or judgment. While the regulations differ from state to state, lawyers are prohibited from entering contingent fee arrangements, but are permitted in a conditional fee agreement to charge an ‘uplift’ of up to 25 per cent of ‘at risk’ fees based on standard hourly rates. The permissible percentage uplift may vary from state to state.

The Productivity Commission’s Access to Justice Report (September 2014) recommended lifting the prohibition on contingency fee arrangements because they promote access to justice by addressing imbalances between individual litigants in complex matters and well-resourced defendants.

The recommendation was on the basis that comprehensive disclosure was provided as to the percentage of damages to be recovered by law firms, responsibility for liability for disbursements and adverse costs orders and capping the percentage limit on a sliding scale (to prevent law firms gouging, or earning windfalls on high-value claims).

As a safeguard against contingency fees giving rise to unmeritorious claims, the Commission referred to the existing powers of courts to make adverse costs orders against non-parties, the regulation of the legal profession and lawyers’ ethical and professional obligations. The Commission’s recommendations have yet to be implemented.

The question of contingency fees was addressed in the ALRC Report and also in a report of the Victorian Law Reform Commission. Both reports recommended that the ban on solicitor contingency fee arrangements be lifted in class actions, subject to limitations that included a prohibition on solicitors recovering a contingency fee if a litigation funder is also taking a percentage of the recoveries.

In *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107, notwithstanding that a law firm may not enter into a cost agreement where the amount payable to the law practice is calculated by reference to the amount of any award that may be recovered, Lee J observed that a common fund order incorporating a contingency payment could be made and could be approved in a settlement approval. Lee J’s comments did not form part of the ratio of the decision of the Full Court.
Whilst there may be a move towards contingency payments being payable from a settlement sum, there is yet to be any change made to the regulations, and it is still in breach of the Legal Profession Uniform Law for lawyers to enter into a costs agreement that contains a contingency fee.

Other funding options

12 | What other funding options are available to litigants?

After-the-event insurance (ATE), while having long been available in the United Kingdom’s market is relatively new in Australia. It can be purchased after a dispute has arisen or a proceeding is contemplated and covers a claimant’s liability to pay adverse cost orders in the event litigation fails. When purchasing ATE insurance for use in Australian courts, it is important to understand whether the policy includes an obligation on the insurer to provide security for costs and the form in which such security will be provided, in particular, the availability of a deed of indemnity by the insurer. See question 19 regarding security for costs.

On 1 January 2017, the Commonwealth government extended funding for its Fair Entitlements Guarantee Program, which provides litigation funding for liquidators of companies and trustees in bankruptcy. It is focused on recovering employee entitlements paid by the Commonwealth government to employees of insolvent enterprises. Evidence of the scheme in practice can be seen in Needham, Re; Bruck Textile Technologies Pty Ltd (In Liquidation) (2016) FCA 837.

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?

It is not possible to say how long a commercial claim may take to reach a decision at first instance.

All Australian civil courts adhere to procedures, court rules and written practices of case management directed to the cost-effective, efficient and expeditious administration of justice. Cases must be brought under court management soon after their commencement. Different kinds of cases require different kinds of management. The general rule is that the number of court appearances must be minimised. Realistic but expeditious timetables must be set and trial dates are generally set as soon as possible and practicable. Unless there is good reason, the timetable provided to the legal practitioners to manage the progression of the case must be adhered to. One key objective of the state and federal regimes currently in place is to identify the issues in dispute early in the proceedings. Alternative dispute resolution is encouraged and sometimes mandated. There is monitoring of the courts’ caseloads in order to provide timely and comprehensive information to judges and court officers managing cases.

The Productivity Commission’s Report into Government Services 2019 set out the clearance rates for Australian courts for 2017-18. While this figure encompasses all civil matters – not merely commercial proceedings – the overall picture is that the clearance rate in both lower and superior courts (from which data was available) suggests that Supreme Courts of each state and the Federal Court are, on average, clearing around 99 per cent of all civil matters listed in a given calendar year. This statistic discloses only that courts are close to disposing of as many proceedings as are commenced in any given calendar year with a very small increase in caseload during the reporting period. However, complex commercial matters are unlikely to be resolved within one year of commencement, for example, according to its 2017-18 Annual Report, 12.5 per cent of the Federal Court’s caseload was over 24 months old, and that largely comprised matters where the causes of action are described as corporations, intellectual property, trade practices and taxation. That said, case management is an important component of the administration of justice in Australian courts.

Time frame for appeals

14 | What proportion of first-instance judgments are appealed?

Nationally, in 2017-18, 1,514 appellate cases were filed in the Federal Court. Despite variance in completion rates, and accepting that the caseload of the appellate court was preferable to proceedings on appeal that had been on the court lists outside 2017-19, in the reporting year 1,229 appeals and related actions were finalised by the Federal Court. On 30 June 2018, there were 15 matters that were 24 months or older. The clearance rate for Australian court appeals was 98.8 per cent for 2017-18. Accordingly, it is appropriate to conclude that most appeals in Australian courts are determined within 12 months of the filing of a notice of appeal.

In New South Wales, as a further example, Supreme Court of NSW Provisional Statistics (as at 26 June 2019) show that 355 cases were filed in the NSW Court of Appeal during 2018, and 361 cases were finalised. Note, where an appeal has been preceded by a grant of leave, this is counted as one continuous case, with a final disposal being counted only when the substantive appeal is finalised. For this reason, the figures for disposals of notices of appeal (and applications for relief) and disposals of applications for leave, combined, exceed the number of final disposals. From these statistics it is hard to calculate the number of appeals not determined within a calendar year.

Enforcement

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

There is no available data showing the proportion of judgments requiring contentious enforcement processes.

Enforcement of judgments in Australia can be undertaken through insolvency mechanisms. Non-compliance with a judgment is a recognised basis for the appointment of a liquidator or a trustee in bankruptcy. Judgments may also be enforced with the assistance and supervision of the court through the issuing of writs of execution. A judgment creditor may obtain a garnishee order directing a third party who holds funds on behalf of the judgment debtor, or owes the judgment debtor funds, to pay the funds, or a proportion of the funds, to the judgment creditor. In some jurisdictions, judgment creditors have a right to secure a judgment against real and personal property of the judgment debtor through the registration of a security interest.

COLLECTIVE ACTIONS

Funding of collective actions

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

Yes. Class actions are permitted in Australia and are common. Class actions can be funded by third parties. In late 2016, the Supreme Court of Queensland became the third state after New South Wales and Victoria to introduce court procedures specifically directed to the conduct of class actions in that court. Legislation was recently introduced to the Western Australian parliament in the Civil Procedure (Representative Proceedings) Bill 2019 which seeks to provide a legislative regime for the WA Supreme Court to mirror the current Federal Court regime pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth).
**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?

Yes. The courts in Australia have power to order an unsuccessful party to pay the costs of the successful party, although the amount that may be recovered varies from court to court. Costs are at the discretion of the court. Unless it appears to the court that some other order should be made, costs follow the event. The usual adverse order for costs requires the unsuccessful party to pay the successful party’s reasonable legal costs.

There are differing regimes for the determination of the reasonable legal costs that an unsuccessful party is obliged to pay.

There is currently no case law in Australia that holds that an unsuccessful party to litigation may be required 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?

Yes. Confirmation that a court can order costs against a non-party was confirmed by the High Court in *Knight v FP Special Assets* (1992) 174 CLR 178 (*Knight*). In this case, Mason CJ and Deane J stated that there was a general category of cases in which an order for costs should be made against a non-party. The category consists of circumstances where the non-party has played an active part in the conduct of the litigation and where the non-party has an interest in the subject of the litigation. In these circumstances, an order for costs should be made against the non-party if the interests of justice require that it be made.

In a third-party litigation funding context, the *Knight* case was cited in *Gore v Justice Corp Pty Ltd* (2002) FCR 429 FCA 354, where Justice Corp was held liable to pay the appellants’ costs in this appeal and the costs of and incidental to the hearing of the appellants’ notice of motion in the court below.

In *Ryan Carter v Esplanade Holdings Pty Ltd v Caason Investments Pty Ltd & Ors* (2016) VSCA 236, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against a litigation funder Global Litigation Funding Pty Ltd (*Global*), a company that was Global’s only shareholder, and an individual who was Global’s sole director and company secretary. The decision arose in a context where the amounts ordered by way of security for costs were insufficient to cover the defendant’s actual costs. Arguments that making a costs order against the company director was ‘piercing the corporate veil’ were rejected. The Court of Appeal determined that the trial judge had exercised his discretion appropriately, there was no miscarriage of justice and the appeal was dismissed.

Legislation also confers power on the courts to make adverse costs orders against non-parties. For example, section 98 of the Civil Procedure Act 2005 (NSW) confers a general power to make costs orders against parties and non-parties alike.

Non-party costs orders are rarely made against litigation funders because in almost all third-party funded cases the funded litigant will be ordered to provide security for the defendant’s costs.

In *Wigmans v AMP Ltd (No 3)* (2019) NSWSC 162, five competing class actions had been commenced, all with different lawyers and funders; four in the Federal Court, and one in the Supreme Court of New South Wales. There ensued a contest as to whether the litigation would be conducted in the Federal Court or the Supreme Court of New South Wales. Those applications were resolved in favour of the representative applicant in the Supreme Court action and the four Federal Court actions were transferred to the Supreme Court. Under the Civil Procedure Act 2005 (NSW) the Supreme Court did not have power to make a cost order against the Federal Court applicants. Stevenson J ruled that the court has power to make a costs order against non-parties and held that as each of the funders stood to make a significant profit from the fruits of the litigation, in the circumstances where the applications had failed, each of the funders should pay the 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 courts have the power to order a plaintiff to give security for the defendant’s cost of defending the plaintiff’s claim. The court can order a stay of proceedings until security is given and if there is persistent non-compliance, the court may dismiss the plaintiff’s claim. The power to order security for costs comes both from statutory rules and from the inherent jurisdiction of the court. Security is sought in circumstances where there is a concern that the plaintiff may be unable to satisfy an adverse costs order made against it should the plaintiff’s claim fail.

The existence of a litigation funding agreement will be relevant in an application for security for costs. In most instances, the litigation funding agreement would be tendered in any response to an application for security, and consideration will be given to the ability of the funder to meet its indemnity obligations in respect of adverse costs.

If recourse to the third-party funder’s balance sheet is not accepted as satisfactory evidence of the funder’s ability to meet its indemnity obligations, recognised forms of security include the payment of money into court, bank guarantees and in more recent times, after-the-event (ATE) insurance and deeds of indemnity from insurers securing direct recovery rights to the defendants in the event of an adverse cost order. (See question 21.)

In that regard, in the matter of *DIF III Global Co-Investment Fund LP* (formerly Babcock & Brown DIF III Global Co-Investment Fund LP) v *BBLP LLC* (formerly Babcock & Brown LP) [2016] VSC 401 (*DIF*), the court accepted as adequate security a deed of indemnity proffered by an overseas based ATE insurer. In *Capic v Ford Motor Company of Australia Ltd*, the court approved security for costs being provided by way of a deed of indemnity from an ATE insurer in the UK, together with a payment of $20,000 into court for the purpose of covering the enforcement costs of the deed in the United Kingdom.

However, in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699, Yates J, while accepting that an appropriately worded ATE policy may be capable of providing sufficient security for an opponent’s costs, in the circumstances of that case and based on the terms of the ATE policy before him, rejected an ATE insurance policy from an overseas insurer as providing sufficient security.

The amount of security is calculated by reference to the reasonable and necessary costs of defending the action. This will be a matter for evidence. In complex claims, it is usual that security orders will be given in stages by reference to identified phases in the litigation.

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

If the matter is funded, the court will generally order security for costs. It is a relevant consideration in the granting of security that a third-party litigation funder intends to benefit from any recovery (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744).

In the case of *Perera v Getswift Ltd* [2018] FCA 732, the court observed, ‘it is accepted that in the event that funders are using the
processes of the court in order to procure a commercial benefit, a sine qua non of this is the provision of adequate security’. The ALRC Report also made a recommendation that there be a statutory presumption that a litigation funder will provide security for costs.

**Insurance**

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

ATE insurance is permitted and is commonly used, particularly in funded class action litigation.

**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?

Generally, no. However, for class actions commenced in the Federal Court and certain of the state courts, claimants are required to disclose the litigation funding agreement subject to redactions to conceal information which might reasonably be expected to confer a tactical advantage to another party. The commercial terms may be redacted. Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd (t/as ANZ Investment Bank) [2016] FCA 306 provides examples of terms that may be redacted.

**Privileged communications**

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

Some, but not all, communications between a litigant or their lawyers and a funder may be protected by privilege.

A claim of privilege can be made to object to the production of, or access to, documents in response to a subpoena to produce, notice to produce or order to give discovery. In addition, privilege can be claimed to object to answering interrogatories.

Client legal privilege protects confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice or a lawyer providing legal services relating to litigation. Professional confidential relationship privilege protects communications to preserve the confidentiality of certain relationships that could be undermined by disclosure. Settlement negotiations privilege protects communications or documents created in connection with an attempt to settle a dispute. A common interest privilege may arise if two parties with a common interest exchange information and advice relating to that interest, the documents containing that information may be privileged from production in the hands of each.

With the exception of the common interest privilege each of these privileged communications was derived from the common law but is now given a statutory basis in the Uniform Evidence legislation.

In IOOF Holdings Ltd v Maurice Blackburn Pty Ltd [2016] VSC 311, the claimant sought production of certain documents created in connection with investigations carried out by law firm Maurice Blackburn in anticipation of the commencement of representative proceedings. Maurice Blackburn claimed client legal privilege over the majority of the documents sought by IOOF. The court accepted, for the most part, the client legal privilege claims made by Maurice Blackburn. However, the court stopped short of accepting in their entirety similar claims from the litigation funder, Harbour Litigation Funding Ltd, who separately claimed privilege over certain documents relating to communications with Maurice Blackburn.

Despite the fact that there was no ‘traditional client-lawyer relationship’ between Harbour and Maurice Blackburn, the court accepted that Harbour sought legal advice from Maurice Blackburn (despite not formally retaining them) and could claim privilege over that advice. Where documents that could be subject to a claim for litigation privilege by Maurice Blackburn’s ‘client’ had been confidentially shared with Harbour, the court accepted that this may not amount to a waiver.

Harbour was, however, required to produce certain communications with Maurice Blackburn that related to proposed funding agreements for the class action as these were found to be ‘commercial negotiations between . . . two arm’s length parties’ and not created for the dominant purpose of legal advice. This finding is noteworthy because it distinguished previous authority that had held that litigation privilege could apply to a funding agreement and related documents on the basis that, in this case, there was no evidence that any client had sought to claim privilege over the documents in question and Harbour could not claim litigation privilege in its own right (as it was not a potential party to the class action).

**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

There are numerous decisions involving challenges to the funding relationship brought by defendants to the funded litigation, but very few reported decisions in disputes between plaintiffs and their funders.

The two reported cases arose in the context of the termination of a litigation funding agreement.

In International Litigation Partners Pte Ltd v Chameleon Mining NL [Receiveers and Managers Appointed] [2012] HCA 45, which is significant for its clarification that a litigation funder did not require an Australian Financial Services Licence (AFSL), the funder sought payment of an early termination fee that arose as a result of a change in control transaction by the litigant. The litigant resisted the payment of the early termination fee on the basis that it had a statutory right of rescission due to the funder’s failure to hold an AFSL. The court held that the funder was not required to hold an AFSL and the litigant could not avoid the financial consequences under the funding agreement.

Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd [2016] WASC 159 considered whether a litigation funder was obliged to satisfy a staged security for costs order made prior to termination. The court dismissed the litigant’s claim and determined that LCM was not obliged to satisfy the remaining stages of the order.

**Other issues**

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

Practitioners should be aware of two cases awaiting judgment in the High Court of Australia, Westpac Banking Corporation & Anor v Lenthill & Ors [S14/2019] and BMW Australia Limited v Brewster & Anor (S152/2012) where the legality of common fund orders made by justices of the Federal Court and the New South Wales Supreme Court will be decided.
**UPDATE AND TRENDS**

**Current developments**

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

The developments and trends that should be noted are the preparedness of courts to use broad case management powers to influence litigation funding terms and practises. This trend manifests itself in judicial activism and flexibility in:

- resolving overlapping competing funded actions;
- making common fund orders; and
- scrutinising settlements for fairness and reasonableness.

The courts’ approaches to each of these topics affects how litigation funders conduct themselves in Australia, especially when funding class actions.

**Resolving overlapping funded actions**

In Perera v GetSwift Ltd [2018] FCAFC 202, the Full Court of the Federal Court of Australia provided guidance on how courts deal with multiple competing class action claims against the same defendant. The Full Court concluded that whilst courts have a general power to consolidate proceedings, an order for consolidation of competing proceedings will seldom be made without conferment between the subject solicitors, funders and applicants to resolve differences in funding models, rates and progress. Although, there are some concerns that such conferrals may contravene laws regulating anticompetitive trade practices as they reduce competition in the market.

Factors relevant to whether a funded competing action is stayed or consolidated include, in addition to factors directly bearing on the real issues in dispute, the following:

- the funder’s percentage;
- the extent of the funder’s book-build and the size of the respective classes;
- the funder’s experience; and
- how the funder proposes to meet obligations for security for costs.

Reflecting some level of concern with substantive rights being determined through the use of procedural case management powers to address complexities associated with competing class actions, the ALRC’s report Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders recommended that Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to give the court an express statutory power to resolve competing class actions. Practically speaking, unless and until the ALRC’s recommendation is adopted, the courts will continue to manage competing class actions. Practically speaking, unless and until the ALRC’s recommendation is adopted, the courts will continue to manage competing class actions. Practically speaking, unless and until the ALRC’s recommendation is adopted, the courts will continue to manage competing class actions. Practically speaking, unless and until the ALRC’s recommendation is adopted, the courts will continue to manage competing class actions. Practically speaking, unless and until the ALRC’s recommendation is adopted, the courts will continue to manage competing class actions. Practically speaking, unless and until the ALRC’s recommendation is adopted, the courts will continue to manage competing class actions. Practically speaking, unless and until the ALRC’s recommendation is adopted, the courts will continue to manage competing class actions.

Resolutions for overlapping funded actions

In Wigmans v AMP Ltd [2019] NSWSC 603, directing consolidation (see Southernwood v Brambles Limited [2019] FCA 1021) and directing one action proceed by way of an open class and the other as a closed class (see McKay Super Solutions Pty Ltd (trustee) v Bellamy’s Australia Ltd [2017] FCA 947).

**Common fund orders**

One curious feature of the common fund application process is the tension that arises between funders as to the timing of the making of the application, to maximise returns and the peculiarity of defendants taking on a quasi-contradictor role through class members arguing against common fund applications on grounds of the fairness and reasonableness of funder returns (see Asirifi-Okthera v Swann Insurance (Aust) Pty Ltd [2019] FCA 1500).

The recent decisions in Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No. 3) [2019] NSWSC 871 and Kuterba v Sirtex Medical Limited (No. 3) [2019] FCA 1374 involved the approval of class action settlements and the reasonableness of the litigation funders’ success fees. Both decisions considered whether the court ought appoint a person independent of the funder and the lawyers for the class to act as a contradictor in order to protect the legal rights of group members. In Tredrea, Parker J referenced Dr Kirk SC’s paper The Case for Contradictors In Approving Class Action Settlements (2018) 92 Australian Law Journal 716 in ruling that a contradictor be tasked with acting as a respondent to the application for settlement approval, to ensure that the legal costs, funding commission and distribution of the settlement sum are all appropriate. In Sirtex, Beach J rejected the appointment of a contradictor as a waste of time and expense preferring instead to rely on the evidence of an independent costs referee and the court’s understanding of the broader dimension of risk borne by litigation funders. In a different context, Botsman v Bolitho [2018] VSCA 278 saw the Court of Appeal hold that a trial judge erred by not appointing a contradictor to safeguard the interests of group members in circumstances where the interests of some group members and the funder were in conflict.

**Fair and reasonable settlements**

There have been a number of class action settlements approved by the courts in the year in review. The settlement approval process is an important feature in the maintenance of public confidence in the class action regime. Liverpool City Council v McGraw Hill Financial, Inc [2018] FCA 1289 and Petersen Superannuation Fund Pty Ltd v Bank of Queensland [2018] FCA 1842 illustrate the flexibility in the judicial oversight of settlement approvals. In Liverpool City Council, a settlement that returned a substantial return to the funder, Lee J appointed an amicus to report on the reasonableness of the returns to the funder and the legal costs incurred and the returns to the class members. Notwithstanding the levels of returns to the funder and the legal costs Lee J, after hearing from the amicus, approved the settlement and warned against the risk
of hindsight bias. In Petersen, the settlement involved less than 2 per cent of the settlement sum returning to the class members, in order to achieve a modicum of parity between the class, funder and lawyers, Murphy J adjusted the settlement by limited the funding commission and reducing the lawyers' costs.

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Austria

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REGULATION

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

The Austrian Supreme Court approved litigation funding by third parties in a 2013 decision (OGH, 6 Ob 224/12b). In addition, in 2004 and 2012, the Vienna Commercial Court denied the defendants’ objections to third-party funding of the respective claims.

Thus, today, litigation funding in Austria is accepted practice and has been judicially endorsed by the Austrian courts. Although the courts did not comprehensively cover all aspects involved, they established an unquestioned and favourable environment for third-party litigation funding in Austria.

Compared to other jurisdictions, third-party litigation funding has had a late start in Austria. Recently, it has started to become an established litigation tool, but with regard to the potential market size, it might still be an exaggeration to declare third-party litigation funding to be of common use in Austria.

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

There is no explicit limit on what is an acceptable compensation for the funder’s services. However, as a general rule, a third-party funding agreement – as any other agreement under Austrian law – must not constitute profiteering (ie, exploitation of a person in need; article 1 of the Act against Profiteering).

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

There are no specific provisions in Austrian legislation.

Lawyers’ professional conduct in Austria does not allow for lawyers to be paid only on the basis of contingency fees (section 16 of the Lawyer's Ordinance (RAO) and section 879 II of the Austrian Civil Code (ABGB)), so any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer violates these provisions.

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

Lawyers’ professional conduct in Austria is provided by the RAO. In light of the RAO, the lawyer’s independence in acting on behalf of the litigant is crucial, and this also applies to cases involving a third-party funder. However, by a clear separation of the roles between the lawyer and the funder, in principle a lawyer who advises their clients in relation to a funder has no conflict of interest.

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

As at the time of writing, neither the Austrian financial regulator nor any other governmental body has any known interest in overseeing litigation funding.

FUNDERS’ RIGHTS

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

Independence in acting on behalf of the litigant described above (see question 4) is an important principle of the lawyer’s professional conduct. In light of the established third-party litigation funding concept, this means that, in general, the litigant’s lawyer must be able to act freely from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder’s right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that, if the litigant intends to replace their lawyer, funding will only be further granted if the new lawyer is accepted by the funder.

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

In domestic litigation, court hearings are generally public and funders can attend without having to obtain specific permission. On the other hand, settlement and organisational proceedings are conducted in private. However, if the counterparty does not object to it, a litigant might invite their funder to participate in such proceedings.

This also applies to arbitration. While the respective hearings and proceedings are generally private, funders may participate if there is no objection by the counterparty.

However, it has to be kept in mind that the majority of cases funded by third-party funders in Austria so far have been carried out without disclosing the funder’s engagement. As such, the relevance of the funder’s permission to attend or participate is limited.

Veto of settlements
8. Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in a funding agreement. This is, in general, permissible.
under the ABGB and does not interfere with the independence of the litigant’s lawyer or with any other provision of Austrian law. Moreover, it is common for litigants and funders to agree in advance on certain minimum and maximum amounts concerning the limitation of the funder’s veto right and their right to oblige the claimant to accept a particular settlement.

Termination of funding

9 In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. Usually, such circumstances fall into two categories. On the one hand, there are events that are deemed to have a major effect on the risk of the proceedings, which often include:

• a court or authority decisions that result in a full or partial dismissal of the claim;
• the disclosure of previously unknown facts;
• a change in case law that is decisive for the current litigation process;
• a loss of evidence or evidence that is accepted and tends to be negative; and
• a major change in the creditworthiness of the respondent.

In practice, a funder would, under such circumstances, terminate the funding agreement and bear any costs incurred or caused until the termination, as well as costs that occur as a result of the termination.

While these clauses prevent the funder from having to continue funding legal proceedings that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such cases, the funder can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, given these circumstances, the litigant is usually obliged to reimburse the funder for its costs and expenses.

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 light of the independence of the claimant’s lawyer from the third-party litigation funder, a funder is not allowed to instruct the lawyer during the proceedings. The lawyer would violate professional conduct rules as provided by the RAO if their actions were based on a funder’s, rather than on their client’s instructions. Therefore, any rights and actions the funder intends to exercise during the course of the litigation have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation and any rights to veto the actions a litigant is usually free to take.

Consequently, the litigant is usually obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written permission of the funder. Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding (see question 3), funders only need to take an active role as provided by the litigation funding agreement. In addition, the involvement of a litigation funder is not disclosed to the court nor the counterparty in the majority of the cases, which also considerably limits the funder’s role within the litigation.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

The lawyer’s professional conduct prohibits fee agreements in which the lawyer’s fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are not permitted. Only if the lawyer charges a basic fee (flat or on an hourly basis) for the services that cover the actual costs of the lawyer’s practice are they allowed to agree on a premium in the event of a successful outcome.

Consequently, the litigation funding agreement must not directly or indirectly provide a model resulting in a conditional or contingency fee for the lawyer. However, it is permissible to add a success fee for the lawyer within the limits described above in the funding agreement.

Other funding options

12 What other funding options are available to litigants?

Legal cost insurance is widely available in Austria. However, the extent and limits of coverage depend upon the specific policy, as this kind of insurance usually only covers the costs of certain types of claims. Furthermore, the insurance policy usually has to be arranged before a person or entity becomes aware of the need to litigate. After-the-event (ATE) litigation insurance is not common in Austria (see question 21).

A claimant may also seek legal aid if they lack the financial resources to fund the proceedings and if the case does not seem devoid of any chance of success. However, both conditions are handled rather strictly by Austrian courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs, to pay court costs and to provide security. It can also comprise the appointment of a lawyer by the court if this is necessary to protect the rights of the party. Since 2013, legal aid is also available to companies with financial constraints if the claim does not seem devoid of any chance of success.

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 general, a commercial litigation before a court of first instance in Austria takes between 12 and 18 months. If the case is rather complex or if the court accepts an extended range of evidence to be heard, the litigation process may take considerably longer. In domestic arbitration, the duration is normally between one and three years.

Time frame for appeals

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

There is a considerable difference in the respective practice of the various states of Austria. As a general rule, approximately half of the judgments are appealed before the second instance of the respective state. On average, the second instance takes between 12 and 18 months. Only a small proportion of these judgments are appealed before the Austrian Supreme Court. There, an average appeal takes approximately one year.
Enforcement

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective numbers seem to be rather low.

The enforcement of Austrian judgments is governed by the Code of Civil Procedure (CCP) and by the provisions of the Austrian Enforcement Regulation (EO). A judgment rendered by an Austrian court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement or if it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

In general, the enforcement of an enforceable judgment or arbitral award in Austria is not seen as particularly burdensome, expensive or unpredictable.

COLLECTIVE ACTIONS

Funding of collective actions

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

Apart from the joinder of parties, Austrian law does not provide for specific collective redress. However, a class action mechanism has nevertheless been part of Austria’s civil procedural law practice for more than 10 years. This particular instrument, often referred to as ‘class action Austrian-style’ is based on the combination of several elements of the CCP. In principle, a claim can be asserted by the original owner of a claim and a third party to whom the claim has been assigned. Furthermore, if a plaintiff asserts several claims against the same defendant, they can bundle all claims into a single set of proceedings. Finally, if the assignee and class action claimant happen to be a specific association (e.g., a consumer organisation), claim-size restrictions are removed so that all claims can be brought before the Supreme Court, regardless of their individual claim size. The Austrian Supreme Court explicitly approved the funding of such a class action by a third party in the 2013 OGH decision (see question 1). Subsequently, third-party funders have shown increasing interest in funding Austrian-style class actions, which has gained public interest. Cases include those against VW, a trucks cartel, GIS and AWD.

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?

As a general principle, court fees as well as all other expenses arising from the litigation, including the opposing lawyer’s fees, are borne by the losing party. If a party prevails only in part, the fees and expenses will be split proportionately between the parties. In the event of a settlement, the costs are incurred by the parties according to the terms and conditions of the settlement agreement.

The Austrian courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before the state courts and the Austrian Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party, although section 41 of the CCP would provide the basis for a rather broad spectrum of costs compensation in favour of the successful party.

Liability for costs

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

The CCP does not provide a basis for the court to order or find liable a third-party funder to pay adverse costs. In practice in Austria, a funder’s contractual obligation towards the claimant to cover the costs of the litigation does not apply to the opposing party.

In theory, there are two ways in which a litigation funder can be held liable for these costs by the prevailing respondent:

- If the unsuccessful claimant assigns their claim against the funder to the court to cover the adverse costs imposed on them by the court to the respondent (and the litigation funding agreement allows for such an assignment), the respondent can take the assigned claim against the funder to the competent court.

- If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow for an assignment), then the respondent must take legal action against the claimant. In practice, the Austrian courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the enforcement order that govern the enforcement of a judgment, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

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?)

There are two different types of security for costs that Austrian courts may order a claimant to provide.

- The courts usually order the claimant to post a security for the expected court costs. In addition, the claimant must advance the costs for taking the evidence they requested.

- At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party’s costs if the claimant has no residence or registered office in Austria. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Austria has entered into a treaty that excludes such security.

The CCP does not provide a basis to request such security from the funder of a claim and there have been no cases reported where Austrian courts considered such a request.

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

In most of the cases funded so far by third-party funders in Austria, the funder’s engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts determined advances and securities solely based on the claimant’s status (see question 19) and did not take the existence of the third-party funder into account.
Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE litigation insurance is not common in Austria (see question 12). Although no legal or regulatory restrictions limit the respective product, there is currently no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases in Austria.

By contrast, legal costs insurance is commonly used in Austria. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy, but usually it is limited to certain types of claims.

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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?

The CCP does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that they are supported by a third-party funder. It also does not provide a basis for an Austrian court to order a litigant to do so.

Whereas some authors have argued that a litigant might have such an obligation in domestic arbitration under specific circumstances, there have been no cases reported where a litigant had to disclose the litigation funding agreement in an Austria-based arbitration.

Privileged communications

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

Whereas any legal advice given by an Austrian or non-Austrian lawyer to a litigant is privileged and does not have to be disclosed to the other party or the court, the communications between litigants or their lawyers and third-party funders are not protected by legal privilege. Confidentiality can be provided, however, by way of non-disclosure agreements between a funder, lawyer and client.

However, there have been no cases reported where such communications had to be disclosed by order of an Austrian court.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No disputes between litigants and funders have been reported in Austria so far.

Other issues

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

Yes. See question 26 regarding developments in insolvency law and the permitted sale of avoidance claims.

Current developments

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

The Austrian Supreme Court recently declared permissible the sale of insolvency avoidance claims, and thus overruled the view of scholars in Austria that has prevailed for decades (OGH 17 June 2019, 17 Ob 6/19k). This opens up new possibilities for third-party funders to finance avoidance claims in insolvency proceedings, and will give insolvency administrators a valid new option to pursue claims which was previously not possible due to a lack of assets. The creditors in insolvency proceedings will ultimately benefit from this development.
Bermuda

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REGULATION

Overview

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

Litigation funding is fairly common in Bermuda and there is judicial authority to support the now commonly held view that such funding agreements are valid as a matter of Bermuda law.

In Stiftung Salle Modulable and Rütli Stiftung v Butterfield Trust (Bda) Ltd [2014] Bda LR 13 (Salle Modulable), Bermuda Chief Justice Ian Kawaley (as he then was) held that a litigation funding agreement with Harbour Litigation Funding (which was governed by English law) was not only valid but also suggested that use of such funding arrangements in civil litigation should be encouraged.

In that 2014 decision, it was held that the constitutionally protected rights of access to the court implicit in the Bermuda Constitution, as read with the relevant section of the European Convention on Human Rights, suggest that ‘such funding arrangements should be encouraged rather than condemned’.

‘I see no reason why Bermuda’s common law should adopt the antiquarian approach contended for by the [defendant],’ he added, rejecting the argument advanced by the defendant that common law prohibitions against such arrangements were still good law in Bermuda.

While Salle Modulable scrutinised the legality of funding from a professional funder, there have been a number of cases tried by the Bermuda courts where funding for the litigation was provided more generally by third parties, including by related entities.

Although there are no known Bermuda judicial decisions dealing directly with this point in the context of an arbitration, it is likely that the position would be the same.

Restrictions on funding fees

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

There are, at present, no statutory limitations on the fees or interest that funders may charge; however, draft legislation has been submitted to the Bermuda government for consideration and review, which, if adopted, could put a percentage cap on the amount that funders may claim (see question 5).

It should also be noted that, while the Bermuda court has expressly validated third-party litigation funding for civil matters, the question of whether the costs of litigation funding can be recovered from the losing party as damages remains open.

In Salle Modulable, Chief Justice Kawaley (as he then was) said: ‘The present case is not one where the issue of recoverability of litigation is truly engaged head on and so the weight to be attached to my findings on this issue in future cases is clearly limited.’

That case related to a contractual dispute and the proper law of the contract was deemed to be Swiss law, under which litigation funding expenses are regarded as legal costs. Chief Justice Kawaley held, however, that the procedural law of the forum (Bermuda) would govern recovery of legal costs, writing that: ‘Litigation expenses, absent new statutory rules, properly fall to be dealt with under the taxation of costs regime under Bermuda law as the procedural law governing the present proceedings.’

All indications are that how this may be dealt with by Bermuda’s taxation regime is still to be tested.

Specific rules for litigation funding

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

No. At present there are no specific Bermuda legislative or regulatory provisions applicable to third-party litigation funding. (See questions 2 and 5.)

Legal advice

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

No. Lawyers are not, at present, able to participate alongside third-party litigation funders by entering into separate conditional fee arrangements with the client. This is because contingent and conditional fee arrangements are prohibited in Bermuda, subject to a very few exceptions. Lawyers who deal in undefended debt collections, for example, may enter into contingent fee arrangements, as set out in the Bermuda Barristers Code of Professional Conduct 1981.

Regulators

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

A subcommittee of the Bermuda Bar Council – the regulatory council governing the legal profession – has submitted draft legislation to the Bermuda government that would not only legislate the use of third-party litigation funding but also allow lawyers in Bermuda to enter into conditional fee arrangements in respect of most civil litigation matters.

The push to introduce some form of conditional fee agreement was presented to the Ministry of Justice in late 2014 and there has been little in the way of development since. The prospect did, however, garner praise from Bermuda’s then Chief Justice who stated, in the 2016 Bermuda Judiciary Annual Report, that the efforts by the Bar Council to introduce such arrangements was ‘close to his heart’ as a way to promote enhanced and affordable access to justice.
FUNDERS’ RIGHTS

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

It is not unusual for counsel to be instructed on a matter prior to a funder becoming involved but, where the funder becomes involved from an early stage, it is plausible that the funder could have a greater degree of influence over the course of proceedings, including the choice of counsel. It should also be noted that leading counsel will typically be instructed to act in cases of considerable complexity or legal importance and it is fairly common for the funder to help determine the choice of leading counsel.

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

While funders do not typically attend Bermuda court hearings, nor is it common to become directly involved in settlement negotiations, there would be nothing to prevent a funder, for example, attending proceedings in open court to observe. The need to do so, however, is no doubt moderated by it being a common feature of funding agreements to provide the funder with timely updates on proceedings (including as to any settlement discussions).

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

The funding agreement will dictate the extent to which a funder will be able to influence the course of the proceedings, including as to settlement. In our experience, however, it is uncommon for a funder to have veto rights per se, but to have the right to terminate the agreement if a reasonable settlement offer is refused by the client.

Termination of funding
9 | In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate funding will vary according to the terms of the agreement between the parties, but typically the funder will, for example, protect its right to be able to withdraw from funding a claim in certain circumstances, including in respect of a settlement offer (see question 8), or if there is a material change to the prospects of the claim succeeding.

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 is likely to be prescribed by the terms of the funding agreement. However, the degree of involvement is usually limited to what would be required for the funder to monitor its financial exposure.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

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

No, except in very limited circumstances (see question 4).

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

Although uncommon, it may be possible to get a bank loan for this purpose. After-the-event insurance may also be obtained, although this type of coverage is typically purchased in conjunction with third-party funding in order to limit exposure to an adverse costs order.

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?

It is fairly common for a substantive commercial claim to take two years or more to be tried and decided. In cases where there is either a greater degree of complexity or the need for a preliminary trial of certain issues, for example, the time to reach a decision at first instance may be extended beyond that period by a year or more.

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

Although the number of first-instance judgments is reported each year in the Bermuda Judiciary’s annual report, as are the number of matters decided by the Court of Appeal, the proportion of first-instance judgments that are appealed in any year fluctuates. Between 2013 and 2016, the number of published civil appeals represented between 11 and 18 per cent of the total civil judgments published during the same period.

Bermuda’s Court of Appeal generally sits three times a year, usually for a period of about three weeks each session. In urgent circumstances, the Court of Appeal Registrar may request that the Court of Appeal have a special sitting to hear a matter outside of the normal calendar, but this is exceptionally rare because the majority of the Court of Appeal justices also sit as Court of Appeal judges in other jurisdictions and therefore have limited time in which to accommodate extra sittings.

Under normal circumstances, an appeal can usually be heard within six to nine months, or sooner if the issues on appeal are of particular public importance.

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

There is no official information as to the number of judgments that require contentious enforcement proceedings. In circumstances where enforcement becomes necessary, however, there are a number of ways to pursue the judgment debtor, although this is much more straightforward if there are assets within the jurisdiction.

COLLECTIVE ACTIONS

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

Under Bermuda’s Rules of the Supreme Court 1985, a plaintiff or a defendant is able to not only represent themselves but others with the same interest. While we did not find any decisions directly on this point, given the reasoning of the Chief Justice in Salie Modulable about constitutionally protected rights of access to the court, we think it likely...
that funding of litigation in a representative capacity would be consid-
ered favourably by the Bermuda court, bearing in mind that there is
a distinction between a party suing or being sued in a representative
capacity and a nominal plaintiff.

**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?

As a general rule, costs will be awarded to the successful party. As to
the payment of the litigation funding costs of the successful party, see
question 2.

**Liability for costs**

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

The court does have the jurisdiction to make a third-party costs order.

**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?)

See question 20.

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

It is likely to be a factor that is taken into consideration by the court.
In Phoenix Global Fund Limited and another v Citigroup Fund Services
(Bermuda) Limited and the Bank of Bermuda Limited [2007] Bda LR 61,
the Bermuda Supreme Court ordered the third-party funder to put up
security for costs. Security for costs was also paid into court by the
funder in the Salle Modulable case.

**Insurance**

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

ATE insurance is permitted, although it is typically purchased in
conjunction with litigation funding (see question 12).

**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?

That a litigant has entered into a litigation funding agreement is likely to
have to be disclosed but the exact terms of the funding agreement may
be privileged and protected from disclosure. In Stiftung Salle Modulable
and Rüti Stiftung v Butterfield Trust (Bda) Ltd [2011] Bda LR 53,
litigation privilege was held to have been waived because the agreement
was referred to in the pleadings without the necessary qualification. Even so,
the court held that certain redacted information in a copy of the funding
agreement provided to the defendant did not have to be disclosed as it
was either of limited relevance or it would be prejudicial to the plaintiff’s
right to a fair trial to have to disclose that information.

**Privileged communications**

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

Yes. These communications will be protected by litigation privilege
although care should be taken not to waive that privilege. See the
decision in Stiftung Salle Modulable, referred to in question 22.

**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

No.

**Other issues**

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

No. The main issues are covered above.

**UPDATE AND TRENDS**

**Current developments**

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

There are no updates at this time.

* This chapter was correct at the time of writing in November 2018.
Third-party funding is not a regulated activity in Brazil. Aside from the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) Administrative Resolution No. 18, issued in July 2016, there are no other rules expressly dealing with the subject, and no statutory regulation exists. Despite the lack of regulation, third-party funding activities in Brazil are increasing, especially in arbitrations. The same is not true as far as litigation is concerned.

Since last year’s survey, the number of third-party financed arbitrations has increased from four to fifteen. However, it would be an exaggeration to say third-party funding is commonly used. There is no record of court cases involving third-party funding issues and, consequently, there is no common understanding or approach concerning funding by third parties in Brazil.

**Restrictions on funding fees**

There are no specific statutory limitations for the fees or the interest owed to the funder. However, should a limit apply, the chances are that the court or arbitral tribunal would consider a limit of around 30 per cent, given a relevant precedent by the Superior Court of Justice (REsp No. 1155200) from March 2011. In this case, an ad exitum collection of 50 per cent of the amount in dispute was deemed excessive by the court because this rate was not a reasonable proportion between the quota litis agreement and the amount in dispute. Further to that, the court ruled that the lawyer had taken advantage of their client’s need to solve the conflict, thus deeming such percentage unacceptable. This case could provide a good starting point for creating limits on payments to third-party funders, but given this issue has not yet been raised, such understanding is still subject to much debate and interpretation.

**Specific rules for litigation funding**

If one were to imagine any type of control or rule to be applicable – even indirectly – a valuable source would be the Statute of the Brazilian Bar Association (EOAB), which sets forth the conditions and the boundaries of lawyers with regard to their clients. In addition, the Brazilian Code of Civil Procedure (BCCP) and the Brazilian Arbitration Act (BAA) impose upon arbitrators’ duties of independence and impartiality. Therefore, some may say that the duty to disclose the existence of a funder derives from these instruments.

**Legal advice**

At the time of writing, there were no specific ethical rules applicable to third-party litigation funding. As mentioned in question 1, when it comes to arbitration, the only rule regulating client-attorney relationships and third-party funding is CAM-CCBC’s Administrative Resolution No. 18. Section 1 of the Resolution establishes a set of guidelines applicable to the parties involved in arbitration funding and describes funding as the situation:

> [W]hen a natural or legal person who is not party to the arbitration proceedings provides full or partial resources to one party so as to enable or assist the payment of the arbitration costs, receiving in return a portion or percentage of any profits earned from the award or from the agreement.

To avoid conflicts of interest, the CAM-CCBC recommends full disclosure (ie, full qualification) of the funder at the ‘earliest opportunity’ (section 4 of the Resolution). In addition, according to our research, other arbitral institutions, such as the Arbitration and Mediation Center of the American Chamber of Commerce (AMCHAM) and the Business Arbitration Chamber (CAMARB), also seem to be concerned with establishing recommendations regarding third-party funding.

**Regulators**

No public entities in Brazil have laid down any principles or established any oversight mechanisms to control third-party funding in Brazil yet.

**FUNDERS’ RIGHTS**

**Choice of counsel**

Since there is no regulation regarding third-party funding in Brazil, the parties are free to negotiate the terms of the financing.
Participation in proceedings

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

Funders’ attendance at, or participation in, arbitration proceedings depends mainly on the parties’ consent. However, in court cases, so long as the case is not held in legal confidentiality, hearings are public, as stated in section 189 of the BCCP.

Veto of settlements

8  Do funders have veto rights in respect of settlements?

As mentioned in question 6, the parties are free to negotiate the terms of financing.

Termination of funding

9  In what circumstances may a funder terminate funding?

As the parties are free to negotiate the terms of financing, the provisions of the applicable law chosen by the parties will describe the termination procedure.

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?

This depends on the interpretation given to ‘active role’. If by active role one means intervening directly in the course of a litigation or arbitration and hence acting as a lawyer (ie, filing submissions and requests to the tribunal on behalf of the lawyers and the party), then according to section 3 of the EOAB, the funder is not permitted to take an active role in the litigation process. Other than that, surveillance and control of the relationship between funder-party-attorneys is subject to the contractual commitments from one party to the other.

In that sense, it seems that, under the law, having a third-party funder taking an active role in the arbitral procedure would not necessarily constitute a breach of the BAA or the EOAB. However, it is too soon to assume that parties, judicial courts and arbitration institutions would easily accept such level of participation without resistance.

Since there is no provision regarding third-party funding in Brazil, the funder’s role in the process shall be bound by the terms of the financing contract. It is interesting to highlight that some funds will only accept financing the litigation or arbitration process if the parties permit them to interfere in the procedure (ie, strategy definition, hiring experts or prohibiting amicable settlement between the parties).

To verify whether this issue has been discussed in the context of arbitration, we asked some of the most prominent arbitration institutions about their experiences with cases involving third-party funding. These institutions were:  
- the CAM-CCBC;  
- the Chamber of Mediation and Arbitration (CMA CIESP/FIESP);  
- AMCHAM;  
- the Market Arbitration Chamber (CAM-BOVESPA);  
- the Brazilian Centre of Mediation and Arbitration (CBMA);  
- the Arbitration and Mediation Chamber of Fundação Getúlio Vargas (FGV);  
- the Arbitration and Mediation Chamber of the Federation of Industries of Paraná,  
- CAMARB;  
- the Arbitration Council of the State of São Paulo;  
- the European Court of Arbitration;  
- the Chamber of Conciliation, Mediation and Arbitration of the Commercial Association of Bahia; and  
- the Brazilian Secretariat of the International Chamber of Commerce – Team 10 (ICC-Brazil)

We found that, as of the time of writing, only five of these arbitration institutions have ever dealt with such cases. As a result, one cannot yet establish with certainty the acceptable standard of participation a funder may have in an arbitration. Most institutions, however, when reporting cases, brought no additional information as to the funder’s participation in the proceedings, which leads us to the conclusion – at least without having access to the funding agreements and their obligations – that, in Brazil, most funders do not actively participate in them.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

The Brazilian Bar Association Federal Council is not supportive of conditional fees – as is the case of quota litis, believing this fee arrangement represents a potentially harmful practice that leads to the depreciation of the work of attorneys. Consequently, the Brazilian Bar Association has stated that hourly fees – duly supported by the client throughout the litigation – is the rule, while quota litis remains an exception.

Since Superior Court of Justice case REsp No. 805.919 of October 2015, contingency or conditional fee agreements have become more accepted in lawsuits dealing with civil law matters. In his opinion, the reporting justice stated that it is valid and admissible for an attorney to receive only success fees, to be borne by the losing party. According to this interpretation, it is permitted for lawyers to be paid on a fixed percentage of the final amount collected by their clients. Nonetheless, this decision has not yet been confirmed in other Superior Court cases.

Other funding options

12  What other funding options are available to litigants?

Aside from contingency or conditional fee arrangements and third-party funding, there are no other funding options available. Although one might think that assignment of claims may provide a choice of funding, it is not encompassed by the idea of third-party funding – rather, it consists in the actual transfer of monies and rights in connection with a claim to a third party.

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 length of time taken to reach a first instance decision depends on the city in which the lawsuit is filed as well as other factors, such as the complexity of the case and the number of procedural issues and events. Every year, the National Council of Justice publishes a report with statistics regarding the national administration of justice in Brazil. The latest report indicates that, on average, the cognisance procedure takes just 1.5 years and the enforcement procedure takes about four years and nine months. It is important to mention that, after 2005, the enforcement procedure became a procedural step in court cases, automatically commencing after the cognisance procedure.
The research conducted by the National Council of Justice, *Justice in Numbers 2019*, provides that approximately 11.8 per cent of cases in all jurisdictions (eg, state courts, labour courts, military courts, etc) are subject to appeal. However, the values can greatly vary when analysing the jurisdictions separately. In the state and federal levels, 7.6 per cent and 18.8 per cent of judgments are appealed, respectively, whereas in labour courts the value skyrocket to 50.2 per cent. The research indicates that an appeal may take from three months to two years and two months, depending on the jurisdiction.

**Enforcement**

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

Not applicable. See question 13.

**COLLECTIVE ACTIONS**

**Funding of collective actions**

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

Group actions are permitted in Brazil in a few areas. Since there is no regulation regarding third-party funding in Brazil, there seems to be no restriction on third parties financing class actions or group actions.

**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 BCCP lays down a distinction between legal fees (section 85) and other procedural costs (ie, translations, transfer, expert’s fees, hotel fees, etc; see section 84). The legal fees of the winning party shall be borne by the losing party according to section 85. However, the same rule does not apply to other procedural expenses (section 86, chapeau). Despite the ‘loser pays’ rule of section 85, court practice shows judges are more prone to embrace a proportional allocation of costs and legal fees. In other words, judges tend to apply the rationale of section 86 to both procedural costs and legal fees.

In addition, claimants are mandatorily responsible for costs arising from proceedings whenever possible, except in cases where the state is the counterparty. Therefore, if the claimant handles its case successfully and is proven right, the respondent will have to reimburse the claimant for initial costs, in addition to any other costs incurred throughout the proceedings.

There are plenty of examples of the application of adverse costs by Brazilian tribunals. The Superior Court of Justice, for instance, in *EDF International SA v Endesa Latinoamérica SA and YPF SA* (Supreme Court of Justice, SEC 5.782-EX), ordered the losing side to pay all the costs of the procedure. Another example is *Eletrônica SA v INACE Indústria Naval do Ceará SA* (Supreme Court of Justice, SEC 14.679).

Therefore, the judge can rule the payment of adverse costs (ie, all the judicial costs, expert fees, registration taxes and even monetary penalties fixed during proceedings). The same applies to arbitration. However, section 2 of CAM-CCBC Administrative Resolution No. 18 provides other examples of payment of adverse costs, such as attorneys’ and arbitrators’ fees. Therefore, arbitration costs covered by the adverse costs’ awards may be even higher.

**Liability for costs**

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

Parties are free to negotiate the terms of the financing (see question 6).

**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?)

According to section 83 of the BCCP, courts may order the claimant to provide ‘security for costs’ if it is not domiciled in Brazil. The aim of the legislator was to guarantee that the costs and legal fees would be paid if the claimant did not hold assets in Brazil. There is no fixed standard for security for costs and it can be deposited in a public financial institution account (ie, Banco do Brasil) or – upon justified request – in an escrow account in a private financial institution.

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

No. Since security for costs may only be provided when the claimant does not live in Brazil, third-party funding will not influence the court’s decision on granting it.

**Insurance**

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

There is no specific statutory prohibition; however, ATE insurance is not commonly used in Brazil. Usually, parties bear the costs of the adverse party themselves if they lose the case.

**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?

Not applicable.

**Privileged communications**

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

The law does not require parties to treat arbitrations as confidential, but it is reasonable to say this is a customary rule. In most cases, parties prefer to include an explicit confidentiality provision, either in the arbitration clause or in the terms of reference. On top of that, many Brazilian arbitration institutions have, among their rules, express provisions to maintain the confidentiality of proceedings, including the arbitral award and all documents presented therein, for example:

- CAM-CCBC arbitration rules (section 14);
- CMA CIESP/FIESP arbitration rules (section 10.6);
- CAMARB arbitration rules (section 13.1);
- CAM-BOVESPA arbitration rules (section 9.1);
• AMCHAM arbitration rules (section 20);
• FGV arbitration rules (section 46); and
• CBMA arbitration rules (section 11.2 and 17.1).

However, there are no guidelines regarding communications between parties and their funders, neither in arbitration nor in court proceedings. Considering the standard approach of maintaining confidentiality for most aspects related to arbitration, it is possible that communications between litigants and funders would likely be treated as confidential.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

One of the arbitral institutions consulted reported discussions arising from third-party funding regarding the following:
• violation of the procedure confidentiality;
• the funders’ commitment to the confidentiality of the arbitral proceedings;
• whether the funder could be liable for any breach of confidentiality;
• whether the financing contract exclusively concerns one particular arbitral procedure;
• whether the financing contract grants the third party the right to interfere in the arbitral procedure (eg, strategy definition, hiring experts, prohibiting amicable settlement between the parties);
• whether the funder was granted a guarantee of some kind; and
• whether the financing contract included the allocation of the costs of loss.

We do not have access to the answers provided.

Other issues

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

Most information collected on the practice comes from informal, therefore not publishable, sources. This information shows that third-party funding is a reality in Brazil, though in a limited way. However, comparing our data with that of last year, we see an increase in the number of cases financed by a third parties and, to us, it is clear that third-party funding is expected to increase in coming years.

UPDATE AND TRENDS

Current developments

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

Recent events brought up discussions surrounding the use of arbitration as a dispute settlement mechanism in case of large-scale disasters. On 5 November 2015, a dam in Mariana, located in the state of Minas Gerais, collapsed, causing catastrophic damage. Four years have passed and the environmental damage from the disaster remains, with an aftermath of 19 deaths and lawsuits being filed at the state and federal levels. Dozens of public civil actions and more than 50,000 individual lawsuits remain pending before the judiciary awaiting trial. On 25 January 2019, another dam collapsed near Brumadinho, also in the state of Minas Gerais.

Learning from past mistakes (ie, taking all lawsuits of this incident to state courts, consequently jamming the judicial system, which could take decades to settle), scholars began discussing the possibility of filing class arbitrations in order to provide individuals with a faster and more efficient dispute settlement mechanism. At the end of 2018, the Court of Justice of the State of São Paulo accepted a collective arbitration. Shareholders of Petrobras (one of Brazil’s main state-owned companies) decided to sue the company as a class after Federal Police’s Operation Car Wash corruption scandals were revealed. As a defence, Petrobras argued, before the first instance court, that the shareholders signed contracts with arbitration clauses, thus removing the state courts’ jurisdiction over their claims. The shareholders replied that they signed the clause as individuals, not as a group. In the decision, the judge ruled that, since all members of the class signed the arbitration clause, the arbitral tribunal had jurisdiction to adjudicate the claim. Yet, it would not be necessary for each individual to file an independent action. Collective arbitration could happen through class representation, reducing costs for the claimants. The Court of Justice thus upheld the decision of the first instance judge.

Despite being a cost-reducing solution to claimants, class arbitrations should be considered an attractive business to funders, as the higher amount in dispute when compared to most arbitration proceedings should lead to better funding deals, as well as a higher success rate, since the damage-causing act is already widespread information.

* The authors would like to thank Caique Bernardes Magalhães Queiraz for their assistance with this chapter.
Third-party litigation funding is permitted and endorsed by the judiciary and policymakers as a tool of access to justice. Consistent with modern public policy, English courts have a generally positive attitude to third-party funding.

The historic, and long-abandoned, prohibition of third-party litigation funding was rooted in the ancient concepts of maintenance and champerty. Maintenance is third-party support of another’s litigation. Champerty is a form of maintenance in which the third party supports the litigation in return for a share of the proceeds.

At the start of the twentieth century, maintenance and champerty were both crimes and torts. Following the Second World War, the law on funding of civil litigation changed dramatically. The introduction of legal aid in 1950 created a state-funded exception to the historic prohibition on litigation funding. Further exceptions came with the growth of insurance and trade union-funded litigation. The Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty. While those principles continue to exist in the public policy relating to litigation funding, their scope has been much reduced, and they apply nowadays only to discourage funders from exerting undue control over the litigation that they fund. ‘No win, no fee’ arrangements between litigants and lawyers (in effect, another form of litigation funding) were introduced in the early 1990s and substantially liberalised in 2000.

R (Factortame Ltd) v Secretary of State for Transport was a case taken against the United Kingdom’s government by a company of Spanish fishermen who claimed that the UK had breached European Union law by requiring ships to have a majority of British owners if they were to be registered in the UK. The case produced a number of significant judgments on British constitutional law. In 2002, the Court of Appeal in Factortame (No. 8) [2002] EWCA Civ 932 explained that only those funding arrangements that tended to ‘undermine the ends of justice’ should fall foul of the prohibition on maintenance and champerty. In other words, reasonable litigation funding arrangements entered into with professional and reputable third-party funders who respect the integrity of the judicial process are perfectly lawful.

In its 2005 decision in the case of Arkin v Borchard Lines, the Court of Appeal was again sympathetic to the position of professional litigation funders as tools for access to justice (see question 18).

In a landmark ruling in 2016 (Essar Oilfields Services Limited v Norscot Rig Management [2016] EWHC 2361 (Comm)), a case funded by Woodsford, the English Commercial Court upheld the decision of an arbitrator (former Court of Appeal judge, Sir Philip Otton) to allow a successful claimant to recover its third-party litigation funding costs from the losing defendant as ‘other costs’ under section 59(1)(c) of the Arbitration Act 1996 (AA 1996).

In the 2017 case of Walter Hugh Merricks v MasterCard & Others [2017] CAT 16, while the Competition Appeal Tribunal rejected class certification (see question 16), the tribunal stated that it would have approved the litigation funding arrangements in that case. In keeping with the dominant trend of judicial comment on both sides of the Atlantic, Mr Justice Roth and his colleagues on the bench spoke in positive terms about litigation funding, noting ‘a range of extrajudicial material which recognised the importance of third-party funding in enabling access to justice’.

In March 2018, Sir Rupert Jackson, while reviewing the reforms made as a result of his 2009 report into the civil litigation costs regime in England and Wales, noted that his proposals to:

- promote [third-party funding] and introduce a code for funders
- have been successful. These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so. Funders are highly experienced litigators and they exercise effective control over costs. They often insist upon having court-approved budgets. Self-evidently, these reforms promote access to justice and tend to control costs.

Third-party funding is now a well-established and commonly used part of the English litigation landscape. The third-party funding industry, which is arguably centred in London, has grown significantly in terms of the number of market participants, the capital available to them, the types of disputes that are funded and the size of investments made.

In a decision handed down on 28 October 2019, in respect of preliminary issues in UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others and Road Haulage Association Limited v Man SE and Others the Competition Appeal Tribunal described third-party litigation funding as ‘a well-recognised feature of modern litigation and facilitates access to justice for those who otherwise may be unable to afford it’.

Restrictions on funding fees

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

Third-party funding is well established in England and Wales. There are a significant number of professional litigation funders in London, and the market is competitive. A litigant with a good case should readily be able to find litigation funding on attractive commercial terms.
Specific rules for litigation funding

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

The voluntary Code of Conduct for Litigation Funders was facilitated by the Civil Justice Council, a government agency that is part of the Ministry of Justice of England and Wales (Ministry of Justice), on 23 November 2011. This code sets out the standards of practice and behaviour required of members of the Association of Litigation Funders (ALF) funding litigation in England and Wales. ALF membership is voluntary, however, most of the more long-standing, professional third-party funders in the London market have joined. The Code includes provisions ensuring the capital adequacy of funders, the limited circumstances in which funders may be permitted to withdraw from a case, and the roles of funders, litigants and their lawyers.

The Competition Appeal Tribunal in UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others and Road Haulage Association Limited v Man SE and Others described the code of conduct of the Association of Litigation Funders as ‘a voluntary code’, but that in their view it was ‘wholly unrealistic to suppose that a leading litigation funder that is commercially active in this field would not honour these commitments to the Association of which it is a founder member, and thus place at risk the whole regime of self-regulation’.

Legal advice

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

The Solicitors Regulation Authority (SRA) Standards and Regulations are made up of the SRA Principles, which comprise the fundamental tenets of ethical behaviour that underpin all areas of legal practice for solicitors and the SRA Codes of Conduct for solicitors and firms. The code of conduct for solicitors applies to UK practitioners, registered European lawyers and registered foreign lawyers, and establishes a framework for ethical and competent practice to which individual practitioners are personally accountable for compliance with the code. The code of conduct for firms describes the standards and business controls expected of firms authorised to provide legal services. The codes contain a number of provisions relevant to solicitors and firms advising on funding. These include sections relating to ‘Maintaining trust and acting fairly’, ‘Service and competence’, ‘Conflict, confidentiality and disclosure’ and ‘Referrals, introductions and separate businesses’. Solicitors should advise litigants on all reasonable funding options, including insurance and third-party funding. A failure to do so could result in sanction by the SRA, and, potentially, also liability for professional negligence.

Regulators

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

The Association of Litigation Funders (ALF), founded in November 2011, is an independent body charged by the Ministry of Justice with delivering self-regulation of disputes whose resolution is to be achieved principally through litigation procedures in the courts of England and Wales.

The ALF has been charged with administering self-regulation of the voluntary code of conduct for Litigation Funders that are ALF members and it also maintains the complaint procedure to govern complaints made against members by funded litigants.

Most professional litigation funders in London are staffed by solicitors and other professionals (eg, chartered accountants) who will ordinarily be regulated by their professional bodies.

Also, litigation funding necessarily exists in the context of litigation or arbitration proceedings, in which the relevant court or tribunal will have oversight.

In January 2017, Lord Keen of Elie, speaking on behalf of the UK government, stated that the market for third-party litigation funding continued to develop well and that he had no concerns about the activities of litigation funders. While the UK government continues to keep the industry under review, it remains of the view that the ALF voluntary code of conduct works well, and that there is no need for statutory regulation for third-party litigation funding.

FUNDERS’ RIGHTS

Choice of counsel

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

In deciding whether or not to fund a case, third-party funders will take into account the expertise of the litigant’s choice of counsel. If a funder does not think that the litigant’s legal team is suitable, the funder can choose not to fund. Alternatively, it is open to the claimant to change its legal team in order to persuade a funder to invest.

Once invested in a case, a third-party funder must not exercise control over the litigation, including making demands as to the choice of counsel. To do so would risk offending the remaining vestiges of the principles of maintenance and champerty and render the litigation funding agreement unenforceable by the funder. This point is reflected in clause 9.3 of the voluntary Code of Conduct for Litigation Funders, which provides that members of the ALF must not seek to influence the funded party’s solicitor or barrister to cede control or conduct of the dispute to the funder.

Participation in proceedings

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

Yes. Subject to objections from the judge, tribunal or mediator with authority over the relevant proceedings, it is perfectly lawful for funders to attend hearings and proceedings, and there are often good reasons why they should do so. Just as it has long been accepted that insurers and reinsurers with a financial interest in proceedings should be welcome to attend mediations and other settlement discussions, it is becoming increasingly common for third-party funders to also attend.

Veto of settlements

8  Do funders have veto rights in respect of settlements?

The ALF voluntary Code of Conduct for funder members states that the litigation funding agreement must note whether (and if so, how) the third-party funder may provide input into the litigant’s decision in relation to settlements. It is standard for English litigation funding agreements to provide that third-party funders will be kept abreast of settlement discussions and offers, and some agreements will also provide that settlement offers within a pre-agreed range will be considered reasonable and should be accepted.

Termination of funding

9  In what circumstances may a funder terminate funding?

For members of the ALF, the only permissible circumstances for terminating funding are set out at clause 11.2 of the voluntary Code of Conduct for Litigation Funders, as follows:

- where a third-party litigation funder reasonably ceases to be satisfied on the merits of the dispute;
where the funder reasonably believes that the dispute is no longer commercially viable (eg, where costs have escalated significantly, or the likely recovery has reduced significantly from what was anticipated at the outset); and
• where the funder reasonably holds the view that there has been a material breach of the litigation funding agreement by the funded litigant.

Clause 12 of the Code provides that, in the absence of the circumstances described in clause 11.2, the litigation funding agreement must make clear that there is no discretionary right for a funder to terminate the agreement.

In circumstances where the Code does not apply, for example, because the funder is not an ALF member, the principles of maintenance and champerty may apply to prohibit the funder from using the threat of terminating funding as a means of exercising control over the litigation.

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 a February 2016 publication, International Arbitration: 10 trends in 2016, the arbitration team at international law firm Freshfields Bruckhaus Deringer LLP stated that third-party litigation funding ‘is here to stay, and not just for small or cash-strapped claimants . . . [the] involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk and cost-benefit assessments’.

This comment reflects the maturity of the litigation funding market in London, even four years ago. While the early discussions about litigation funding, informed by the out-dated principles of maintenance and champerty, tended to focus on how to limit the funder’s involvement in the litigation process, it has come to be recognised that, in addition to financial assistance, funders can also bring a lot of professional expertise to the proceedings. It remains the position in English litigation that funders should not ‘control’ the proceedings, but it is nonetheless acceptable that they provide input.

In Excalibur Ventures LLC v Texas Keystone Inc & Ors [2016] EWCA Civ 1144 (18 November 2016), the Court of Appeal endorsed the first instance judge’s determination that a responsible funder is expected to carry out a ‘rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate levels’ and that such steps would not be champertous. This decision makes it clear that funders should take an active role in conducting thorough due diligence prior to funding the litigant and maintain a robust process for reviewing the litigation as it proceeds. Importantly, the Court of Appeal correctly pointed out that none of the litigation funders in this case were ALF members and the court drew the crucial distinction between ‘professional funders’ and ‘the funders [in this case] [who] were inexperienced and did not adopt what the ALF membership would regard as a professional approach to the task of assessing the merits of the case’.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Yes. Conditional fee agreements (CFAs) have been permitted since the 1990s. In a CFA, some or all of the lawyer’s fees are conditional on success. In the event of a success, the solicitor is entitled to payment of the conditional fees, plus a further uplift. The maximum uplift is 100 per cent of base rates. The Law Society publishes a model CFA and related guidance.

Damages-based agreements (DBAs) were introduced in England as part of the Jackson Reforms in 2012. DBAs are similar to the United States’ concept of contingency fee agreements. In a DBA, if the case is successful, the lawyer’s fee is calculated as a percentage (capped at 50 per cent in commercial cases) of the financial benefit obtained; if the case is lost, no fee is payable to the lawyer.

DBAs were envisaged by Sir Jackson in his report ‘Review of Civil Litigation Costs’ (December 2009) as an important litigation funding option. They have, however, been used relatively infrequently. The lack of popularity relates in part to the slow speed at which lawyers adopt new business models, and in part because of uncertainty as to how the rules governing DBAs apply in practice. More recently, Sir Jackson stressed the importance of regulatory change to allow for hybrid DBAs which he suggests ‘are an obvious way of promoting access to justice’. Hybrid DBAs would allow for lawyers to act on a partially speculative basis, charging a reduced fee which could be made whole in the event of a successful outcome.

In June 2019, the Competition Appeal Tribunal heard applications in two claims where Collective Proceedings Orders are being sought. In UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others and Road Haulage Association Limited v Man SE and Others applications were made seeking determination of preliminary issues regarding the applicant’s funding arrangements. One of the issues for determination concerned whether the funding agreements should be characterised as DBAs. If so, they were subject to the DBA regulations, which provide that DBAs are unenforceable in opt-out collective proceedings. Ultimately, the Tribunal found that funding agreements were not DBAs and that ‘the regime of collective proceedings . . . is dependent on [third-party litigation funding] for its success since there will be few cases where the class members will themselves be able to fund their claims’.

Other funding options

12 What other funding options are available to litigants?

The availability of legal aid has been significantly restricted in recent years. However, it is still available for some types of litigation, including judicial review. Litigants who are members of a professional body or a trade union may benefit from a legal assistance scheme. And various insurance policies (eg, home or car insurance policies) 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?

The time taken for a case in the courts of England and Wales to reach a decision at first instance will vary greatly according to the complexity of the issues in the case, the urgency of its determination and the case-load of the court in question. The Civil Justice provisional statistics for the first quarter of 2019, the most recent period available, stated there was an average of 37 weeks for a small claim to reach trial from issue and for a fast and multi-track claim (ie, higher value claims) it was almost 59 weeks.
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, the Civil Justice Council’s provisional statistics for the first quarter of 2018 stated that the Court of Appeal Civil Division had 914 appeals filed in 2017, down approximately 10 per cent on 2016.

The length of time from the date an appellant’s notice is issued in the Court of Appeal to the date the appeal is likely to be heard varies from two months in urgent matters to around 18 months in very complex, non-urgent matters. The majority of appeals are resolved within nine months.

Enforcement

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

There are no statistics on the proportion of High Court judgments or arbitration awards that require contentious enforcement proceedings. However, the Civil Justice Council’s provisional statistics for the first quarter of 2018 recorded that there were 105,102 warrants (one of the methods of enforcing money judgments) issued in January to March 2018, an increase of 7 per cent on the same quarter in 2017. It is relatively easy to enforce judgments or awards against defendants within the jurisdiction of England and Wales. Civil Procedure Rule (CPR) 70 contains general rules about enforcement of judgments and orders. The methods of enforcement available to a judgment creditor include:

- seizing a judgment debtor’s assets;
- third-party debt orders;
- charging orders;
- attachment of earnings;
- insolvency proceedings;
- appointment of a receiver;
- writs of sequestration; and
- orders of committal.

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

Yes. In English litigation, there are a number of ways in which multiparty claims can be pursued. The following procedures are covered by Part 19 of the Civil Procedure Rules:

- multiple joint claimants can proceed using a single claim form where their claims can be ‘conveniently disposed of in the same proceedings’;
- multiple claims can be managed under a group litigation order where the claims have ‘common or related issues of fact or law’; and
- representative actions are permitted where one or more claimants can represent other claimants with the same interest (eg, beneficiaries of a trust).

There is no direct equivalent in English law to the US shareholder class action, but the Companies Act 2006 introduced changes to directors’ duties and the derivative claims that may be brought against them.

Changes to English competition law in 2015 gave rights to individuals (consumers and businesses) to bring private damages actions and to allow authorised class representatives to bring collective proceedings on their behalf, either on an opt-in or an opt-out basis, in the Competition Appeal Tribunal. Collective proceedings may be continued only on the basis of a collective proceeding order (CPO). To date, the Competition Appeal Tribunal has heard two CPO applications (Dorothy Gibson v Pride Mobility Products Limited and Walter Hugh Merricks v MasterCard Incorporated & Others). Both of those applications were rejected at first instance. The MasterCard decision was appealed and in April 2019 the Court of Appeal overturned the Competition Appeal Tribunal decision and remitted the application to be re-heard, finding that ‘the Competition Appeal Tribunal demanded too much of the proposed representative at the certification stage’.

Four further applications for CPOs have been filed between the summer of 2018 and the time of writing. These are:

- Road Haulage Association Limited v Man SE and Others;
- UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others;
- Justin Gutmann v London & South Eastern Railway Limited (funded by Woodsford); and
- Michael O’Higgins FX Class Representative Limited v Barclays Bank Plc and Others.

All of the above types of action may be funded by a third-party litigation funder.

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?

Yes. Under CPR 44.2, the court has discretion as to whether costs are payable by one party to another, the amount and when they are to be paid. However, if the court decides to make an order in relation to costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to some exceptions. There are a number of circumstances the court will have regard to, including the conduct of the parties.

In relation to domestic English arbitrations, the tribunal is under no duty to make an award as to costs, subject to any agreement between the parties. However, in practice, it is generally accepted that the tribunal should, unless the parties agree otherwise. If a cost award is made, unless otherwise agreed by the parties, section 61(2) of AA 1996 provides that the tribunal shall award costs on the general principle that costs should follow the event, subject to circumstances where this is not appropriate. That is, the unsuccessful party pays the costs of the successful party as well as its own.

In most forms of arbitration, a successful party can recover its funding costs, according to the 2016 decision in Essar Oilfields Services Limited v Norscot Rig Management Pvt Ltd. In light of the defendant’s behaviour in the arbitration, the Commercial Court upheld the decision of an arbitrator to allow a party to recover its third-party funding costs as ‘other costs’ under section 59(1)(c) of AA 1996. There is no equivalent procedure for litigation, and it is therefore uncertain whether an English court would order an unsuccessful litigant 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?

In English litigation, yes, but not in arbitration.

In the case of Arkin v Borchard Lines, the claimant had owned a shipping line that he said had been forced out of business by anticompetitive and unlawful behaviour. Third-party funding was obtained, with the funder to receive 25 per cent of the recoveries up to £5 million and
Arbitration is a consensual process, founded in the contractual arbitration agreement. This is unlikely to include a third-party funder. The role of the third-party funder, in particular the funder’s liability to pay the defendants’ costs, came to be considered by the Court of Appeal. It is an established principle of English law that costs follow the event. It was held ‘unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action’. However, the Court of Appeal was concerned that there would be a denial of access to justice if this principle were taken too far. If a professional funder who had undertaken to fund a discrete part of litigation were potentially liable for all the costs of all the opponents, then no professional funder would be likely to undertake the risk. The Court of Appeal’s solution was that a professional funder who finances part of a litigant’s costs of litigation should be potentially liable for the costs of the opposing party to the extent of the funding provided (commonly known as the ‘Arkin cap’). In this case, the funder had spent £1.3 million on experts and supporting services, and would be ordered to contribute the same sum to opponents’ costs.

Further guidance on the Arkin cap was recently given by the Court of Appeal in Excalibur Ventures LLC v Texas Keystone Inc & Ors. In this decision, the judge upheld the Commercial Court’s decision that stated the Arkin cap should be calculated not only by reference to the amount a litigation funder provided in respect of the funded litigant’s costs but also the amount provided by way of security for costs. The court found that the money the litigation funders advanced to Excalibur to enable it to provide security for costs was an investment in the claim just as much as the money provided to pay Excalibur’s own costs. The Commercial Court and the Court of Appeal agreed that both are components to be included in arriving at a figure for the Arkin cap. Therefore, payment of security for costs is simply part of the costs required to be met in order to be able to pursue the action.

It is also worth noting in the Excalibur decision that the court found that litigation funders are liable to pay indemnity costs awarded against the claimant. The court’s reasoning was that a litigation funder cannot dissociate itself from the conduct of those whom the litigation funder relies to make a return on its investment. Litigation funders, absent any extenuating circumstances, ‘follow the fortunes of those from whom [they] hoped to derive a small fortune’ and, in this case, that meant being held jointly liable for the indemnity costs ordered against Excalibur.

The recent costs decision in Davy v Money & Others reflects a further evolution in the application of the Arkin cap. In this case, the judge found that the Arkin cap was not a rule to be applied automatically to cases involving commercial funders, but rather is ‘best understood as an approach which . . . should be considered for application in cases involving a commercial funder as a means of achieving a just result in all the circumstances of the particular case’.

Ultimately, in considering the facts of the case, the judge in Davy chose not to apply the Arkin cap and awarded indemnity costs against the commercial funder of the claim. The court held that while the funder had not directed the way that the case was conducted, it nevertheless had every opportunity to investigate and form a view as to the nature of the claim and the support for the allegations which were being made before choosing to fund it.

Arbitration is a consensual process, founded in the contractual arbitration agreement between the parties in dispute. An arbitral tribunal has jurisdiction to make orders only in respect of the parties to the arbitration agreement. This is unlikely to include a 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?)

**Security for costs by a claimant**

An English court may order a claimant to provide security for costs. Pursuant to CPR 25.13, the court may make an order for security for costs if it would be just to do so and one or more of the following conditions apply:

- the claimant is resident in a jurisdiction where it would be difficult to enforce a costs order;
- if the claimant is a corporate entity, or acting on behalf of another as a nominal claimant (other than a representative claimant under Part 19 of the CPR), and there is reason to believe that it will be unable to pay the defendant’s costs if ordered to do so;
- the claimant has withheld or changed his or her address with a view to evading the consequences of the litigation; or
- the claimant has taken steps in relation to his or her assets that would make it difficult to enforce an order for costs against him or her.

Section 38(3) of AA 1996, and the rules of most arbitration institutions based in common law jurisdictions, including England, expressly provide that arbitrators may order security for costs. While, technically, CPR 25.13 does not apply to arbitration, an English tribunal is likely to be guided by the approach referred to above.

**Security for costs by a funder**

CPR 25.14(2)(b) allows an English court to make an order for security for costs to be given by any party who ‘has contributed or agreed to contribute to the claimant’s costs in return for a share of any money or property which the claimant may recover in the proceedings’. This definition is likely to cover many litigation funding arrangements.

Given the contractual basis of arbitration, an arbitral tribunal may order a party to pay security for costs only if that party enters into the arbitration agreement pursuant to which the arbitration proceeds. A third-party litigation funder is unlikely to do so.

### Method and amounts

In court proceedings, security for costs usually takes the form of a payment into court or the provision by the claimant of a bond. Other alternatives are available in litigation, and also in arbitration, include payment into an escrow account, bank guarantees, parent company guarantees, a solicitor’s undertaking or, in some circumstances, an after-the-event (ATE) insurance policy. (See Premier Motorauctions Ltd & Anor v PricewaterhouseCoopers LLP & Anor [2017] EWCA Civ 1872 (see question 21).)

The amount awarded will usually be calculated by reference to the amount of costs the defendant would likely be awarded in the event that the claimant’s case is unsuccessful. In arbitration, security may also be ordered in respect of arbitrators’ fees.

#### 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, in itself, a ground on which a court may make an order for security for costs against a claimant under CPR 25.13. 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 is a ground on which a court may make an order for security for costs against a claimant under CPR 25.13(c). However, while many claimants who seek third-party funding...
are impecunious, many others are not, and the mere fact of litigation funding would not be sufficient. Such a fact should not, in itself, influence the court’s decision.

Under CPR 25.14, the court has the jurisdiction to make an order for security for costs against someone who has contributed to the claimant’s costs in return for a share of any proceeds recovered in the proceedings, where the court is satisfied it is just to do so. This potential exposure of litigation funders to orders for security for costs against them does not, of course, of itself mean that an order for security for costs should be granted. In the High Court decision of RBS Rights Issue Litigation [2017] EWHC 1217 (Ch), the court examined factors it might consider in exercising its discretion, under CPR 25.14, as to whether or not to order security for costs against funder. These factors included:

- the motivation of the funder to be involved;
- the risk of non-payment by the funder;
- the link between the funding and the costs;
- the funder’s understanding of the liability for costs; and
- other factors, including delay in bringing the application for security for costs, such as to tip the overall balance against making an order.

While, technically, CPR 25 does not apply to arbitration, an English tribunal is likely to be guided by the English court’s approach referred to above.

Insurance

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

Yes. ATE is both permitted and commonly used. There is a well-established and competitive market for ATE in respect of litigation and arbitration alike.

Because London is arguably the centre of the global insurance market, it is perhaps unsurprising that there are many other insurance products related to litigation and arbitration, including insurance for lawyers acting on contingency fee agreements, which covers the lawyers’ fees in the event that the claim is lost, and judgment default insurance, which covers the risk that the defendant does not comply with a judgment against it.

As a general rule, London insurers will consider insuring any high-value risk relating to litigation or arbitration. There are specialist brokers who can liaise between litigants and insurers.

In Premier Motor auctions Ltd, the Court of Appeal held that an appropriately framed ATE insurance policy could, in theory, answer an application for security for costs, but only if the ATE policy provided ‘sufficient protection’ to the defendant for the claimant being unable to meet the defendants’ costs. Whether an ATE policy would provide that protection will depend upon the terms of the particular policy. In this case, the court held that the ATE cover provided did not give sufficient protection to the defendants because the policy could be avoided by the insurer. The ability for the insurer to avoid the policy led the court to conclude that there was reason to believe that the claimant would be unable to pay the defendants’ costs and security for costs was granted. It should be noted that the court considered the ATE policy as part of its determination of whether it had jurisdiction to grant the order for security for costs (ie, whether there was reason to believe the claimants would not be able to pay the defendants’ costs), and not as part of its discretion to grant or refuse an order for security once jurisdiction had been established. As to discretion, the court noted that once it is satisfied that the claimants are insolvent, that there was jurisdiction to order security for costs, and that an order would not stifle the claim, it is normally appropriate to order security.

In a further recent ruling (Recovery Partners GB and Another v Rukhadze and Others [2018] EWHC 95 (Comm)), the High Court held that an ATE policy could be sufficient security, when accompanied by a deed of indemnity from the ATE insurer (ie, when the deed constituted a separate promise by the insurer to pay the defendant’s costs, which was not subject to the same avoidance rights as the ATE policy itself).

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.

A litigant may, of course, voluntarily choose to do so. The fact that a professional third-party funder has agreed to back a litigation or arbitration may send a strong signal to the defendant both that the litigant has financial backing to bring the case through to trial, and that an objective third party believes the claim to be strong.

CPR 25.14(2)(b) is referred to in question 19. In the High Court case of Wall v The Royal Bank of Scotland Plc [2016] EWHC 2440 (Comm), the claimant was ordered to reveal the identity of third-party funders in order for the defendant to consider an application for security for costs against the funder. The court held that it has the power to order the claimant to disclose the identity of its litigation funder and determine whether the litigation funder would share in the proceeds of the litigation. However, this power could not be used as a ‘fishing expedition’ and such a disclosure would only be granted if there is good reason to believe the claimant is in receipt of litigation funding and an application for security for costs would have reasonable prospects of success. The court concluded the facts of The RBS Rights Issue Litigation case met this test and ordered the relevant disclosure.

In the case of In the Matter of Edwardian Group Limited [2017] EWHC 2805 (Ch), the High Court rejected an application for an order disclosing the identity of the litigation funder, holding that it was irrelevant to the wider dispute.

Privileged communications

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

In an unreported judgment in Excalibur Ventures LLC v Texas Keystone Inc & Ors, Mr Justice Popplewell held that legal advice privilege may apply ‘insofar as the disclosure of the funding arrangements would or might give the other side an indication of the advice which was being sought or the advice which was being given’, but that not all documents brought into existence for the purposes of actual or contemplated litigation will be protected by litigation privilege. Popplewell J agreed with previous authorities that it is the ‘use of the document or its contents in the conduct of the litigation which is what attracts the privilege’. The judge endorsed the principle stated in Dadourian Group International Inc & Ors v Paul Simms & Ors [2008] EWHC 1784 (Ch) that:

Litigation privilege . . . can include a communication between a client and his lawyer or between one of them and a third party which comes into existence after litigation is commenced or contemplated for the dominant purpose of obtaining information or advice in connection with such litigation or of obtaining evidence (or information which might lead to evidence) for use in the conduct of such litigation.

In Excalibur, Popplewell J held that the funding arrangements were directly relevant to the claims and defences pleaded in that case and
as a result, the defendants were granted copies of Excalibur’s funding agreements that were found not to be privileged. The court was content for certain terms (including the success fee, settlement and termination provision) to be redacted to avoid any tactical advantage the defendants may get from reviewing the terms.

In the Matter of Edwardian Group Ltd [2017] EWHC 2805 (Ch) confirmed that a litigation funding agreement will be privileged where it ‘gave a clue to the advice given by the solicitor (Lyell v Kennedy (No. 3) (1884) 27 Ch D 1), or betray[ed] the trend of the advice which [the solicitor] is giving the client’ (Ventouris v Mountain [1991] 1 WLR 607).

Subject to Excalibur and Dadourian, the dominant view of practitioners appears to be that the litigant’s privilege is protected in communications with a third-party funder by the common interest doctrine. A third-party funder may also be appointed as the litigant’s agent for the limited purpose of reviewing and funding the case, which may add an additional layer of protection for the litigant’s privilege.

**DISPUTES AND OTHER ISSUES**

Disputes with funders

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

There have been remarkably few publicly reported disputes between litigants and their funders.

In Harcus Sinclair v Buttonwood Legal Capital Limited and Others [2013] EWHC 1193 (Ch), there was a dispute in relation to the termination of a litigation funding agreement. The High Court held that the funder validly terminated the agreement under a clause that allowed for termination if, in the funder’s reasonable opinion, the claimant’s prospects of success were 60 per cent or less.

In Therium (UK) Holdings Limited v Brooke and Others [2016] EWHC 2421, a litigant was sentenced to prison for contempt of court after failing to obey court orders that arose from his alleged failure to pay his litigation funder a success fee following the settlement of his litigation.

In October 2018, the High Court handed down its decision in Vannin Capital PCC v RBoS Shareholders Action Group Ltd and another [2018] EWHC 2821 (Ch) in relation to an application for summary judgment made by Vannin. Vannin seeks £14 million it alleges it is entitled to under litigation funding agreements entered with a claimant action group established by shareholders in the RBS Rights Issue Litigation. The application for summary judgment was dismissed by the court as the issues in dispute were too extensive to resolve. Vannin was effectively asking the court to conduct a ‘mini-trial’, which was inappropriate and not the object of summary judgment applications.

The ALF has a procedure for complaints against its members. While there have been a small number of references, none have been upheld.

**UPDATE AND TRENDS**

Current developments

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

No updates at this time.

Litigants and their instructed lawyers would be well advised to do business only with professional, regulated and properly capitalised funders (eg, funders that are ALF members). ALF members have committed to comply with the ALF voluntary Code of Conduct, which sets out clear and important rules governing the relationship between a funder and its client and provides significant benefits to both parties, including clarity on issues such as case control, settlement and withdrawal.
Germany

Arndt Eversberg
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REGULATION

Overview

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

Third-party funding was launched in Germany in 1999. As is customary with new ideas, there were a few who took a critical standpoint, but the overwhelming majority of the legal community welcomed the idea. Litigation funding closed the gap between credit facilities provided by banks, which are typically not granted without securities being provided by the claimant, and the prohibition of lawyers providing legal services whose remuneration is based solely on a successful outcome of the case. Commercial litigation funders do not – and are not allowed to – provide legal services. Therefore, statutory limitations on providing funding in return for a share of the proceeds do not apply in their case. Since 2010, conditional fee agreements may be concluded, pursuant to section 4a of the German Law on the Remuneration of Attorneys (RVG), but only in limited cases.

Third-party funding has, in fact, never been legally challenged; today, it is widely known and accepted. A small number of court decisions have also confirmed its legal structure as a partnership organised under the laws of the German Civil Code between claimant and funder. The courts’ attitude ranges from neutral to positive, with no negative decisions against professional funders being known. This is different in cases in which lawyers try to use their own funding firms with the intention of acquiring clients and therefore funding their own mandates. Such practices trigger conflicts of interest and accordingly constitute infringements of the German lawyers’ code of conduct, the Federal Regulations for Practising Lawyers (BRAO).

Restrictions on funding fees

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

When it comes to determining a reasonable share of the proceeds for which a funder may ask, very few court decisions have been delivered so far. The standard terms and conditions call for a 30 per cent share of proceeds amounting to €500,000, and a 20 per cent share for any proceeds in excess of said amount. The Higher Regional Court of Munich confirmed in one case that a share of 50 per cent was justified because the funder stepped in after the first-instance hearing had already been lost. A good rule of thumb is that a share of 50 per cent is safe, but any share higher than that would, in all likelihood, and unless fully justified, go against public policy. As a matter of principle, the market regulates the share amounts to be agreed in litigation funding.

German funders do not charge interest. They prefer to structure their remuneration either as a percentage of the amount actually recovered or as a multiple of the amount invested. A hybrid model equipped with a cap or a floor is also a conceivable structure, for example, in international arbitration.

Specific rules for litigation funding

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

Because third-party funders are not qualified as banks nor insurers, neither legislative nor regulatory provisions apply.

Legal advice

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

The BRAO stipulate professional and ethical rules and regulations for lawyers; however, no specific rules regarding third-party funding exist. In accordance with various regulations and confirmed by innumerable court decisions, lawyers are obliged to advise their clients comprehensively and impartially. There have been no court decisions to date obliging lawyers to advise a client specifically about litigation funding and its options.

However, various contributions to the legal field champion a duty of enabling the clients to choose whether they would like to take on the cost risk themselves or whether they would like to pass it on to a litigation funder. Because lawyers are already obligated to inform their clients about the possibility of obtaining litigation protection insurance, they are well advised to cover litigation funding, too, when informing their clients. This obligation has been recently confirmed by a decision of the Higher Regional Court of Cologne.

Regulators

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

Financial institutions such as banks and insurance providers are regulated and supervised by the Federal Financial Supervisory Authority (BaFin), located in Bonn. Commercial litigation funders are neither qualified as banks nor insurance providers, which is why they are not under the oversight of any public authority.

FUNDERS’ RIGHTS

Choice of counsel

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

Most cases are referred to the funders by lawyers; the latter have assessed the claim’s prospects of success and are aware that their clients do not want to fund or cannot afford to pursue legal proceedings. Funders are thus well advised to not interfere with the already existing lawyer-client relationship. If they did, and if that course of action
became public knowledge, they would irreparably damage their main sales channel.

Hence, funders take into account the lawyer’s quality and willingness to cooperate in their own overall assessment of a claim, and they will rather forgo offering funding than demand an alternative lawyer. Only where the claimant has not yet retained counsel do funders recommend lawyers to their clients. Of course, all funders have their own network of lawyers and specialists.

Participation in proceedings

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

This is handled differently depending on the funder. Some like to be involved to a higher degree and some prefer to remain in the background. However, all funders share the general conception of themselves as being more than just a cash provider and have a preference for taking on an advisory role during the funding process.

Veto of settlements

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

All litigation funding contracts provide for this key issue. As a matter of principle, a settlement always requires the approval of both the claimant and the funder. If one party would like to settle and the other does not, the party willing to settle has a contractual right to terminate the funding contract. This has a twofold effect:

- the terminating party has the right to receive the share agreed for the case of a settlement being reached; and
- the party unwilling to settle at the offered terms succeeds with the case at its own risk (which might end with a better or worse result, or even a total loss).

In practical terms, funders and clients are almost always able to come to a mutual understanding on whether a given settlement offer is to be accepted or denied. The most sensible course of action is for the funder and client (together with the lawyer) to work as a team. Should one party decide to leave the team, this weakens the remaining players, at the very least, and increases the risk for the party proceeding with the case (eg, the funder). As a matter of fact, claimants availing themselves of litigation funding will rarely be in a position to pay out a funder while the case has not yet been brought to a successful close.

Termination of funding

9 | In what circumstances may a funder terminate funding?

The commercial funder may terminate a funded case at any time and at its sole discretion should the chances of a successful outcome become impaired. This may be because of new court rulings to the detriment of the claim, financial problems of the defendant, or new facts that have come to light during the proceedings that negatively influence the assessment of the claim. If, however, the funder terminates the funding contract, it is contractually obligated to pay all costs that have already been triggered in the course of the action (yet limited to those necessary to stop the case as quickly as possible). The funder further loses its right to receive a share of the proceeds. It retains, however, the right to have its investment refunded, provided the claimant finally succeeds on his or her own and receives payment.

This, however, is an ugly situation for a funder. Terminating the funding for an ongoing case, therefore, is always a funder’s last resort. In a negative assessment of the case, the funder will have contemplated the case thoroughly and extensively and will also provide reasons for such an assessment.

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?

As a general rule, German funders see themselves as active partners in a team that includes the claimant and the lawyer. They look at and check all writs and communication, and assist in analysing the best strategy and tactics before the case is officially pursued and also throughout the whole process. The funders’ representatives usually join meetings and take part in settlement discussions. It is also common that the funders’ in-house lawyer who is responsible for the case to be present in court or arbitration hearings. Because of the confidentiality of the funding, the lawyer’s identity will, of course, not be disclosed. The defendant will only be informed of it if a disclosure strengthens the claimant’s position (eg, in settlement negotiations).

Because class actions are gaining in relevance for business, litigation funders are book-building ever more cases. This means that the funder is active very early in the process and this, in turn, leads to the funder being heavily involved in the later proceedings as well, which then also includes choosing lawyers and experts. There are, however, no requirements in place for funders to take on an active role, but more than 19 years of experience in professional litigation funding in Germany shows that funders are well advised to do so.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Since July 2010, German lawyers have been allowed to work for a partly success-based fee. The development came about because the government needed to limit expenses for legal aid, while at the same time improving access to justice. Section 4a of the RVG is not very precise, and the new regulation still lacks precedents setting a legal framework. As a matter of principle, it is understood that a lawyer may work for a success-based fee only if the client were deterred from proceeding on his or her own on account of his or her economic situation. The lawyer has to review whether or not this is true for his or her client. The scope of this due diligence has not yet been clearly defined and helpful court decisions are still lacking. One could argue that the lawyer must expend a reasonable amount of time and effort for the purposes of assessing his or her client’s financial situation. In contrast to the rule in the United States, a lawyer is not allowed to fund court costs, corresponding costs or disbursements. He or she cannot agree on a success fee that provides for a percentage share in the proceeds, as funders do, because it lacks a connection to the statutory fees. Only a few lawyers – mostly those from big international firms – use this opportunity, which is still quite new. Limited as they are to their fees, these firms and lawyers are not direct competitors for litigation funders. On the contrary, funders make use of this circumstance to diversify the risk by agreeing on a fee that is (at least partially) contingent on a successful outcome.

Other funding options

12 | What other funding options are available to litigants?

If a creditor does not qualify for legal aid in accordance with section 114 of the German Code of Civil Procedure (ZPO), which applies only to a very limited range of people, and if the claim cannot be sold, which is common for disputed claims, litigation funding is the only remaining possibility to enforce a claim. Some funders offer what is called ‘mone- tarisation’ or ‘monetisation’ and buy the claim for a portion of its value.
This sounds like a good idea, but in practice it usually does not work. Either the creditor’s price expectation is too high or the funder’s offer is too low. In any case, agreeing on a sale of the claim and the further enforcement, including the involvement of the seller, may turn out to be rather cumbersome, if at all possible.

**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? |

One needs to distinguish between the nature and the complexity of the claims. A comprehensive construction claim always takes longer than a claim based on a standard agency contract because of the necessity of obtaining expert reports in almost all cases. In any case, the majority of first-instance decisions are taken within one to two years, but the length of the proceedings differs from court to court.

**Time frame for appeals**

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

About one-third of first-instance judgments are appealed, of which appeals about 50 per cent are successful. This can mean a partial change, a settlement, or an overturn. Under normal circumstances, an appeal takes at least another year or two. Difficult cases may run on for years. A third instance needs the approval of the court of appeals, which is delivered along with the decision. Today, only a few appellants move on to the Federal Court of Justice (BGH). If the court of appeals denies its approval, the unsuccessful party may bring a complaint against the refusal to grant leave to appeal on points of law directly with the BGH. If its approval, the unsuccessful party may bring a complaint against the refusal to grant leave to appeal on points of law directly with the BGH, but only about 5 to 10 per cent of complainants succeed in doing so.

**Enforcement**

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

Only a minority of judgments require enforcement proceedings. Because of Germany’s long-lasting relative economic stability, non-payment of awards appears to be a negligible problem. Enforcement actions are triggered through the local courts. Court bailiffs work on a tariff system and have to take various legal limitations into account. They usually work slowly, but they do work. The defendant has a certain number of legal remedies at his or her disposal by which to hinder enforcement. As in almost all countries around the world, enforcement is an unpleasant and unsatisfying task.

**COLLECTIVE ACTIONS**

**Funding of collective actions**

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

Class actions as such, as they are customary in the US legal system, are unknown in Germany. It is possible to combine claimants through a bundling of claimants, but the legal framework is unclear and jurisdiction is colourful. A bundling of five to 10 claimants in one suit seems possible, provided their claims have the same legal basis and the individual taking of evidence (eg, hearing the individual parties) is not necessary. The handling differs from court to court and there is a risk of the court breaking up the suit into its individual, original cases. Apart from these procedural problems, class actions can be funded.

In any case, the lack of class-action regulations (apart from a special vehicle for the finance market called Kapitalanleger-Musterverfahrensgesetz (KapMuG, Act on Model Case Proceedings in Disputes under Capital Markets Law)) still limits a wider use, but consumer protection is on the agenda of the government and Brussels. The European Commission published the ‘New deal for customers’ in April 2018, and on 1 November 2018, the German government decided to establish a special kind of class action (Musterfeststellungsklage – the model declaratory action). It is expected that we will see corresponding developments in the next years.

**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 accordance with section 91 of the ZPO, the unsuccessful party always pays the costs of proceedings. These include court costs, expert costs (if ordered by the court), and the adverse costs in accordance with the German tariff system, but no costs beyond these. If the defendant, for example, incurred costs in excess of those stipulated by the German tariff system, or if the defendant provided a private expert opinion, those costs are generally not refundable. In case of a partial loss or win, costs are apportioned in the corresponding ratio. Because of the tariff system, court costs and those of lawyers can easily be calculated in advance; well-functioning calculators are available free of charge on the internet (eg, www.der-prozesskostenrechner.de).

Court decisions or orders that additionally refund the litigation funding costs, these being the funder’s share in the proceeds, do not exist. Theoretically, a claimant would have to prove that his or her ability to enforce his or her claim depended solely on the support by a professional litigation funder (in return for a share in the proceeds). German courts are reluctant to expand access to damages and evidence hurdles are high. Premiums paid for litigation protection insurance are, for example, not accepted as damages (and after-the-event (ATE) insurance is unknown – see question 21).

**Liability for costs**

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

No. Third-party funding is neither frivolous (the funder always supports a financially weaker party against a stronger party, and its service allows access to justice and creates a desired ‘balance of power’ before the courts), nor is the contractual relationship between funder and claimant a contract with a third-party beneficiary.

**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?) |

Court orders for the provision of security for costs are very rare. In practice they are only possible for claimants from outside the European Union. Even an insolvency administrator, who often has no funds at his or her disposal to cover adverse costs in case of a lost trial, cannot be prevented from suing somebody. Because funders are not a party to a trial, they cannot be ordered to deposit securities for the claimant. In addition, no obligations exist to disclose the (commercial) funding of a claim. In the rare case that security for costs is ordered, those costs are...
calculated and limited to the applicable tariff system for the defendant’s and the court’s costs.

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

See question 19.

Insurance

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

Almost 40 per cent of German consumers and 20 to 25 per cent of companies have taken out litigation protection insurance, which covers all standard costs of a trial. ATE insurance is unknown. In practice, there is no necessity for it because of the easily calculated costs of lawyers and courts pursuant to the tariff system (which is, in comparison with the United Kingdom, inexpensive).

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. The disclosure of litigation funding is not required by law or by jurisprudence. As a matter of principle, litigation funding is confidential and will not be disclosed to the opponent unless advantageous (eg, in settlement negotiations).

Privileged communications

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

The client-lawyer privilege common in Anglo-American contexts does not exist in German civil law. A German lawyer is, of course, obliged to keep all client information strictly confidential (as stipulated by section 43a(2) of the BRAO) and client documents in his or her possession cannot be seized by the authorities. But, importantly, there is also no obligation to disclose information in a trial. A party may keep unfavourable information and documents to itself and cannot be forced to disclose those to the other party or to the court. This principle is only deviated from under very limited exemptions (eg, a document that by its nature is only in the party’s possession not bearing the onus of proof and that is relevant for a decision).

In addition, a party in civil proceedings (in contrast with criminal proceedings) has no right to lie (see section 138 of the ZPO). A lie in court is punishable under criminal law (as stipulated by section 263 of the German Criminal Code). Because a disclosure obligation similar to that in the British and American legal systems practically does not exist in Germany, the provision for privilege can be dispensed with as well.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

Only very few. Disputes between commercial funders and their clients are rare. Limited attempts at challenging funding agreements as such have all failed.

Other issues

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

The German market of commercial litigation funding is neatly arranged. In fact, only three funders control more than 90 per cent of the market: Roland ProzessFinanz AG in Cologne, Foris AG in Bonn, and Legial AG in Munich. With respect to individual cases, no funders from outside of Germany are currently playing a major role in the German market. The minimum amount in dispute being funded is €100,000, and the standard share of the proceeds amounts to 30 per cent for any sum up to €500,000 and 20 per cent of any amount exceeding €500,000. However, individually agreed shares are common in larger cases.

UPDATE AND TRENDS

Current developments

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

The entry of more UK and US funders into the German funding market, announcing their intentions to invest hundreds of millions of euros in the German litigation market has reawakened the old fear of bringing the so-called ‘American litigation style’ to continental Europe – a development that is broadly disliked. In the autumn of 2018 and in the spring of 2019, the BGH ruled that the funding by a professional litigation funder of a claim brought by a consumer organisation is illegal. The decision was met almost exclusively with criticism by lower courts as well as by various scholars. However, it shows that Germany is not as easy to ‘conquer’ as some might think. If investment announcements locally are considered threats, those releases related to marketing and sales may have various negative effects – with regard to individual decisions as well as the reputation of the industry as a whole.
Overview

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

Third-party funding is not generally permitted for litigation in the Hong Kong courts. Such funding is considered infringement of the doctrines of champerty and maintenance, which prohibit any party without a legitimate interest in the action from assisting or encouraging a party to that action in return for a share in the proceeds if the claim succeeds. Champerty and maintenance are both torts under Hong Kong law. They are also indictable offences at common law, punishable under section 1011 of the Criminal Procedure Ordinance by imprisonment and a fine.

There are three – limited – exceptions to the general prohibition on litigation funding, namely the:

- ‘common interest’ cases, involving third parties with a legitimate interest in the outcome of the litigation;
- where ‘access to justice considerations’ apply; and
- a miscellaneous category, including insolvency proceedings.

These exceptions were set out in Unruh v Seeberger [2007] 10 HKCFAR 31. Where one of the exceptions applies, litigation funding will be permitted.

Litigation funding is most commonly used in Hong Kong in respect of the third category: insolvency proceedings. Hong Kong courts will permit a funding agreement where it includes an assignment of a cause of action by a liquidator (In re Cyberworks Audio Video Technology Ltd [2010] 2 HKLDR 1137). The liquidator’s right to assign causes of action is conferred by section 199(2)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), which empowers liquidators to ‘sell the real and personal property and things in action of the company by public auction or private auction’. This includes a cause of action.

Section 199(2)(a) does not require the liquidator to seek the court’s consent to the funding arrangement. In practice, however, the liquidator may choose to do so (eg, Chu Chi Ho Ian v Yeung Ming Kwong [2014] HKEC 1901).

Even where a claim falls outside the section 199(2)(a) exception to champerty and maintenance, Hong Kong courts have been willing to facilitate litigation funding in the insolvency context, as long as there is a ‘legitimate commercial purpose’ (Jeffrey L Berman v SPF CDO I Ltd [2011] 2 HKLDR 815; In re Po Yuen (To’s) Machine Factory Ltd [2012] 2 HKLDR 752).

As of 1 February 2019, third-party funding is also allowed for arbitration and related court and mediation proceedings outside Hong Kong. Following a lengthy consultation period and legislative process, the government introduced amendments to the Arbitration Ordinance (Cap. 609) to provide that third-party funding of arbitration and related mediation and court proceedings is not prohibited on grounds of champerty and maintenance. Similar amendments to the Mediation Ordinance have been drawn up, but are not yet in force.

Hong Kong’s Secretary for Justice has also issued a Code of Practice for Third-Party Funding of Arbitration (see question 5).

As funding is only permitted in limited circumstances, it is not commonly used in Hong Kong. However, we are aware of some litigation funding activity, particularly for insolvency proceedings. We anticipate that funding activity will increase significantly in coming years, now that third-party funding of arbitration is permitted.

Restrictions on funding fees

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

Fees and interest are matters for agreement between the funder and the funded party. Hong Kong law does not impose specific limitations on the amounts that third-party funders can charge.

Specific rules for litigation funding

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

Part 10A of the Arbitration Ordinance permits third-party funding of arbitration and related court and mediation proceedings in Hong Kong, as well as funding of work done in Hong Kong on arbitrations and related proceedings outside Hong Kong.

Third-party funding of arbitrations that are not related to an arbitration will be permitted under Part 7A of the Mediation Ordinance, but the relevant amendments are not in force as at August 2019.

Law firms are prevented from funding cases by the Legal Practitioners’ Ordinance and by professional conduct rules (see question 11). Section 980 of the Arbitration Ordinance expressly prohibits lawyers and law firms from funding cases in which they act for any party in relation to the arbitration.

Legal advice

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

Professional conduct rules prevent Hong Kong lawyers and registered foreign lawyers from entering into conditional or contingency fee arrangements to act in contentious business. This prevents lawyers themselves, or their firms, from funding clients’ claims in litigation or arbitration through such fee arrangements (see question 11). However, we are not aware of any rules that prevent lawyers from advising their clients on using third-party litigation, selecting funders or working with the funders during the proceedings.
Regulators

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

Section 98X of the Arbitration Ordinance empowers the Secretary for Justice to appoint an ‘authorised body’, which may issue a ‘code of practice setting out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third-party funding of arbitration’. Section 98G sets out a number of criteria that the code of practice might include.

The same section authorises the Secretary for Justice to appoint an ‘advisory body’ to monitor and review the operation of the Funding Ordinance, including the Code of Practice.

On 18 May 2018, Hong Kong’s Department of Justice appointed Ms Teresa Cheng SC, Secretary for Justice, as the authorised body with a remit to draw up the code of practice.

On 24 August 2018, the advisory body was appointed. It comprises three senior, Hong Kong-based lawyers: Anthony Chow, Robert Pang SC and Victor Dawes SC.

On 7 December 2018, the Secretary for Justice issued the ‘Code of Practice for Third-Party Funding of Arbitration’. The Code applies to any funding agreement commenced or entered into on or after 7 December 2018. Failing to comply with the Code of Practice does not, of itself, give rise to civil or criminal liability. However, the Code is admissible in evidence before a court or arbitral tribunal, which may take into account any failure to comply with it, if such failure is relevant to a question that court or tribunal is deciding (Section 98S of the Arbitration Ordinance).

In addition, to the extent that funders raise capital in Hong Kong, those activities could arguably be regulated by the Securities and Futures Commission, if the sources of funds amount to a ‘collective investment scheme’ under the Securities and Futures Ordinance. If the funds provided by a funder are considered a loan, the funder might be considered a ‘money lender’ under the Money Lenders’ Ordinance and require a licence to conduct business with the funded party. However, most of the funding structures of which we are aware are unlikely to be considered a loan.

Where funders operating in Hong Kong, but based elsewhere, belong to regulatory bodies, such as the United Kingdom’s Association of Litigation Funders, they will typically adhere to that regulator’s requirements when funding proceedings in Hong Kong.

FUNDERS’ RIGHTS

Choice of counsel

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

In practice, yes, through their decision whether to fund the claim. Funders may decline to offer funding for a number of reasons, including that they are not happy with the party’s choice of counsel. Where the funder is involved in the case before counsel is selected, the funder will generally be involved in the selection process.

Whether a funder is entitled to terminate funding during proceedings because it is dissatisfied with counsel will depend on the terms of the funding agreement.

Participation in proceedings

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

Funders of arbitration proceedings may attend hearings, if the tribunal and all parties agree. Court hearings in Hong Kong are generally open to the public (apart from arbitration-related proceedings, which are not open to the public, unless one or more parties apply for it to be heard in open court and can satisfy the court that there is good reason), meaning that representatives of a funder may attend if they wish. In neither case is it usual for funders’ representatives to take an active part in the proceedings.

Funders may attend mediation or other settlement negotiations if the parties (and any mediator or other third-party facilitator) agree.

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 on the terms of the funding agreement. In practice, the funded party will be guided by the terms of the funding agreement in deciding what to accept in settlement negotiations. This is because any settlement must allow the funded party to pay the funder its agreed share of the settlement amount or percentage of the funding amount (depending on the terms of the funding agreement).

Termination of funding

9 | In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate funding are a matter for agreement between the funder and the funded party, and should be recorded in the relevant funding agreement. Examples include the assessment of the merits becoming significantly worse during the case or the funder becoming aware of wrongdoing by the funded party.

In respect of arbitration, paragraph 2.13 of the Code of Practice requires funding agreements to state ‘whether (and if so, how) the third-party funder may terminate the funding agreement’ if the funder:

- reasonably ceases to be satisfied about the merits of the arbitration;
- reasonably believes there has been a material adverse change to the funded party’s prospects of success, or recovery on success; or
- reasonably believes that the funded party has committed a material breach of the funding agreement.

This list is exhaustive. The Code of Practice stipulates that funding agreements ‘may not establish a discretionary right for a third-party funder to terminate the funding agreement in the absence of the circumstances described in paragraph 2.13’.

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?

Hong Kong’s Code of Practice (paragraph 2.3(2)) requires funding agreements to ‘set out and explain clearly their key features and terms of the proposed funding and the funding agreement’ including ‘the degree of control that third-party funders will have in relation to an arbitration’. The Code prohibits funders from seeking to influence the funded party, or its lawyers, ‘to give control or conduct of the arbitration or mediation to the third-party funder except to the extent permitted by law’. It also requires the funder not to take steps that cause, or are likely to cause, the funded party’s legal representatives to breach their professional duties, and not to seek to influence the arbitral tribunal or institution (see paragraph 2.9 of the Code).

In practice, some funders take a much more active role than others. At minimum, funders generally require regular updates from counsel on the progress of the case. They may also ask for updates on an ad hoc basis, or when there is a significant development in the case. Funders may also advise counsel and the funded party on aspects of the case. In England and Wales, it is generally accepted that funders must not control the conduct of the case; such control remains with the litigant.
Funders in other jurisdictions, notably Australia, exercise a higher degree of control. For example, some funders are known to have placed a representative within the counsel team for the duration of the case.

**CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

**Conditional fees**

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

No. Hong Kong solicitors and barristers may not enter into conditional or contingency fee arrangements for acting in contentious business. The same restriction applies to foreign lawyers who are registered to practice in Hong Kong.

The restriction derives from section 64(1) of the Legal Practitioners Ordinance, Principle 4.17 of the Solicitors Guide to Professional Conduct, paragraph 124 of the Bar Association Code of Conduct, and the common law. This is confirmed by section 980 of the Arbitration Ordinance (see question 3). These restrictions prevent law firms from acting as funders in Hong Kong, other than where they are providing third-party funding at arm’s length in relation to a matter in which they do not act for any party.

**Other funding options**

12. What other funding options are available to litigants?

Litigants may fund proceedings using a bank loan, obtained on an arm’s-length basis. However, a significant number of claimants who seek funding are impecunious, and may have difficulty obtaining a loan.

There is anecdotal evidence in Hong Kong of third parties who wish to fund a litigation, in which they have no legitimate interest, acquiring shares in the claimant entity, in order to create an interest and avoid liability for champerty and maintenance.

**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 statistics on Eight Years’ Implementation of the Civil Justice Reform released by the Judiciary of Hong Kong covering the period from April 2009 to March 2017, commercial claims at first instance take an average of two to two and a half years from commencement to trial. Anecdotal evidence suggests that it can take anywhere from three to six months before judgment is handed down after trial.

**Time frame for appeals**

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

Data from the Hong Kong Judiciary Annual Report 2018 (the 2018 Report) shows that only a small proportion of first instance judgments under the civil jurisdiction are appealed to the Court of Appeal, despite the fact that leave is not required (apart from certain limited circumstances) to make an appeal from the Court of First Instance to the Court of Appeal. According to the 2018 Report, only an estimated 3.7 per cent of first instance civil judgments were appealed to the Court of Appeal. Although the overall proportion of judgments that were appealed is small, interestingly the percentage of first instance civil judgments that were appealed to the Court of Appeal recorded in the 2018 Report has doubled since the 2017 Report. The 2018 Report recorded 88 days (ie, three months) as being the average waiting time for civil cases at the Court of Appeal from application to fix a hearing to the hearing date, which represents a 21 per cent improvement from the time reported in 2015 (ie, 112 days).

**Enforcement**

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

These statistics are not available. Whether or not a judgment may easily be enforced in Hong Kong depends on various factors, including the following:

- the availability of assets within the jurisdiction;
- the accessibility of assets that may be available;
- the type of judgment being enforced;
- whether a party is seeking to enforce a domestic or a foreign judgment; and
- in the case of a foreign judgment, whether there is a reciprocal enforcement arrangement between that country and Hong Kong.

**COLLECTIVE ACTIONS**

**Funding of collective actions**

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

At present, there is no class action regime in Hong Kong. The only avenue that is currently available for multiparty litigation is by way of a ‘representative action’ brought by a party on behalf of a group of others who have the same interest in the proceedings. The ‘representative action’ framework, however, is inadequate for dealing with large-scale multi-party situations, and courts in Hong Kong have had to proceed on an ad hoc basis without rules designed to deal specifically with group litigation. Representative actions are not common in Hong Kong. Where they do occur, third-party funding is, in principle, permitted, where one of the recognised exceptions to champerty and maintenance applies (see question 1).

In May 2012, the Law Reform Commission published a report recommending the introduction of class actions in Hong Kong with a number of key features, including:

- the regime is implemented on an incremental basis, beginning with consumer cases (ie, tort and contract claims by consumers);
- such actions may only proceed with certification by the court;
- one of the criteria of the certification should be a representative plaintiff’s financial ability to satisfy an adverse costs order; which should also be required to prove to the court’s satisfaction that suitable funding and costs-protection arrangements are in place at the certification stage;
- an ‘opt-out’ approach be adopted as the default position for local parties and an ‘opt-in’ approach be adopted for overseas parties; and
- a general class actions fund be established in the long term to help fund eligible impecunious plaintiffs to pursue class actions, and the Consumer Legal Action Fund be expanded in the short term to fund class actions arising from consumer claims.

The Department of Justice, in response to the report, established a working group to consider the details of the proposed regime and make recommendations to the government. No reports have been published by the working group to date.
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?

Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B of the High Court Ordinance empower the Hong Kong courts to order costs for or against any party to the proceedings, or a non-party, including a third-party funder. This is usually referred to as an ‘adverse costs order’. The courts also have the discretion to order the extent to which the costs are to be paid. Usually the courts order that costs ‘follow the event’ (ie, that the unsuccessful party must pay to the successful party costs that were necessary to pursue or defend the action). It is exceptionally rare for a successful party to recover all of its costs in litigation. In practice, a party can expect to recover about half of the actual costs incurred by the litigant. It is not clear whether Hong Kong courts will be willing to order an unsuccessful litigant to pay the funding costs of its successful counterparty. English law is no longer binding on Hong Kong courts, although it is persuasive. Hence, it is at least possible that the Hong Kong courts might make such an order in appropriate circumstances, following the English case of Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm).

Arbitral tribunals sitting in Hong Kong have broad discretion to allocate the costs of the arbitration as they see fit. Section 74(2) of the Arbitration Ordinance provides that the tribunal may direct in its award ‘to whom and by whom and in what manner the costs [of the arbitral proceedings] are to be paid’. However, the tribunal must only allow costs that are ‘reasonable in all the circumstances’ (section 74(7)(a) of the Arbitration Ordinance). It is most usual for Hong Kong tribunals to order that costs follow the event, but there is no universal practice.

In arbitration-related court proceedings in Hong Kong, the courts have developed a practice of ordering costs on a higher basis (known as the ‘indemnity’ basis) against a party that fails in an arbitration-related application. This has been applied in applications to challenge arbitral agreements, set aside arbitral awards, and resist enforcement of awards (among others). On the ordinary basis, the unsuccessful party will generally pay 50–75 per cent of the other side’s actual expenditure. An indemnity costs order requires the unsuccessful party to pay all of the successful party’s costs, except where they are unreasonable in amount or have been unreasonably incurred (Order 62, Rule 28(4A) of the Rules of the High Court).

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?)

Order 23, Rule 1 of the Rules of the High Court provides that the court can order security for costs against the plaintiff only. The court has no power to order security for costs against a third-party funder. However, the funding agreement can provide for the funder to reimburse the plaintiff for any amount paid into court in compliance with a security for costs order. This is a matter for agreement between the funder and the funded party.

Unless the parties agree otherwise, arbitral tribunals sitting in Hong Kong can order security for costs against a party to the arbitration (section 56(1)(a) of the Arbitration Ordinance). The tribunal has no jurisdiction to make such an order against a third-party funder. However, funding agreements will typically provide that a funder will pay any security for costs order, because, if such order is not paid, the claim will not proceed. Paragraph 2.12 of the Code of Practice requires funders to ensure that the funding agreement stipulates whether, and to what extent, the funder will be liable to the funded party for security for costs orders made against the funded party. Funders’ practice with respect to accepting liability for adverse costs varies.

Liability for costs

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

In Hong Kong litigation, Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B of the High Court Ordinance empower the courts to order any third-party, including a third-party funder, to pay costs. The court’s order is known as an ‘adverse costs order’.

In arbitration, the funder is generally not a party to the arbitration agreement. As a result, the tribunal lacks jurisdiction over the funder and cannot order it to pay adverse costs. Instead, the tribunal may make the adverse costs order against the funded party. Whether the funder will fund (or reimburse) the funded party in respect of any adverse costs paid will depend on the terms of the funding agreement. Paragraph 2.12 of the Code of Practice requires funders to ensure that the funding agreement stipulates whether, and to what extent, the funder will be liable to the funded party for adverse costs orders made against the funded party. As a result, the tribunal lacks jurisdiction over the funder.
In June 2016, a Hong Kong court ordered plaintiffs to disclose details of the court’s earlier approval of their litigation funding arrangements, where these were contained in evidence filed in support of the plaintiffs’ ex parte applications to extend time for service of legal proceedings (Enrich Future Ltd v Deloitte Touche Tohmatsu HCCL 10/2011, 22 June 2016). The judge acknowledged that disclosure of the funding arrangement might put the defendant at an advantage, in particular by giving it an understanding of the plaintiffs’ litigation ‘war chest’. However, he considered that the principle of open justice prevailed over any concern about giving one party a tactical advantage. In accordance with that principle, the plaintiffs were entitled to know in full the evidence that had been presented to the court to obtain ex parte relief against them, including the evidence regarding the funding arrangements.

Section 98U of the Arbitration Ordinance requires a funded party to give written notice of the fact that a funding agreement has been made, as well as the name of the funder. The notice must be given to each other party to the arbitration, and to the arbitral tribunal, court or mediator (as appropriate). The funded party must also give notice if the funding agreement ends, other than because the arbitration has ended.

Privileged communications

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

The right to assert legal professional privilege is enshrined in Hong Kong’s Basic Law. Article 35 provides that Hong Kong residents shall have the right to ‘confidential legal advice’.

To maintain privilege in any communication under Hong Kong law, the communication must remain confidential. Assuming that communications between a funder and the funded party are confidential (either pursuant to a confidentiality agreement or otherwise), they should be protected by litigation privilege. Litigation privilege protects communications between a lawyer, the lawyer’s client and any third-party, where litigation is pending or in reasonable contemplation, and the communications are made for the ‘sole or dominant’ purpose of preparing for or dealing with the litigation. (For the purposes of this test, ‘litigation’ includes both litigation and arbitration proceedings.)

In the context of arbitration, section 98T of the Arbitration Ordinance permits a party to disclose information relating to the arbitration to a person without losing confidentiality in the information, for the purpose of having or seeking third-party funding from the person. However, the person to whom the information is disclosed may not communicate it further, subject to certain exceptions.

Common interest privilege may also apply between the funder and the funded party, since they will have a common interest in the outcome of the proceedings. Common interest privilege is not a freestanding form of privilege, as it relies on the existence of a communication or document that satisfies the test for either legal advice privilege or litigation privilege. For common interest privilege to apply, the purpose of the communication must be for the parties to inform each other of the facts, issues or advice received in respect of a legal issue, or to obtain or share legal advice in respect of contemplated or pending litigation.

Disputes and other issues

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

We are not aware of any such disputes.
India

Vaibhav Gaggar and Sumedha Dang
Gaggar and Partners

REGULATION

Overview

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

Third-party litigation funding is permitted in India. The concept of third-party funding is statutorily recognised under the Civil Code of Procedure, 1908 in some states (e.g., Maharashatra, Gujrat, Madhya Pradesh and Uttar Pradesh) by their respective state amendments to Order XXV rules 1 and 3 of the Civil Procedure Code, 1908 (CPC). Therefore, the permissibility of third-party funding in India can be deduced from the CPC. Even though the remaining states have not statutorily recognised the concept of third-party funding, there is no express bar under any legislation against the same. In fact, the Hon’ble Supreme Court of India in Bar Council of India v AK Balaji (2018) 5 SCC 379 has clarified the legal permissibility of third-party funding in litigation and observed that:

There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation.

The same has been reiterated in 'G’ Senior Advocate, In re, AIR 1954 SC 557, where the Supreme Court has laid down that lawyers are not permitted to fund litigation, but there seems to be no bar on the same being done by third parties:

The rigid English rules of champerty and maintenance do not apply in India, so if this agreement had been between what we might term third parties, it would have been legally enforceable and good. It may even be that it is good in law and enforceable as it stands though we do not so decide because the question does not arise; but that was argued and for the sake of argument even that can be conceded. It follows that there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in such a transaction per se, that is to say, when a legal practitioner is not concerned.

The only restriction on third-party funding in India is on lawyers. Lawyers are not permitted to fund litigation in India. The recognition of funding by a third party who is not a party to the lis, aids litigation. However, the concept of third-party funding in various forms of alternate dispute resolution is yet to be recognised, jurisprudentially as well as legislatively. The Arbitration and Conciliation Act, 1996 does not recognise the concept of third-party funding and remains unexplored in India.

Restrictions on funding fees

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

There is no legislation which limits or regulates the fees or interest a funder can charge. However, the terms of the contract entered into for the purpose of third-party funding are subject to scrutiny and review by the courts. The terms of such contracts have been subject to judicial scrutiny since 1867, when the Privy Council in Ram Coomar Coondoo v Chunder Canto Mookerjee (1876-77) 4 IA 23, for the first time, permitted third-party funding on the ground of promoting access to justice in India. Even though on the ground of accessibility of justice, third-party funding was permitted, the Privy Council noted that:

[Agreements] of this nature must carefully be watched, and as and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefore, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them.

Hence, the agreements for third-party funding must be entered into with good conscience and the courts may limit the fee or interest being charged if the agreement is contrary to these principles. The Courts in India are wary of these agreements being used as a tool of vendetta against a specific individual or entity.

Specific rules for litigation funding

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

In India, apart from the specific state amendments (as discussed above), there is no other legislative or regulatory provisions applicable to third-party funding of litigation in India.

Legal advice

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

In India, there are no specific provisions that apply to lawyers in advising clients in relation to third-party litigation funding. But there are standards of professional conduct rules made by the Bar Council of India under section 49(1)(c) of the Advocates Act, 1961, an ethical and professional guide for all advocates in conducting matters related to law and said ethical rules of the legal profession apply, not only when an advocate appears before a court, but also to practices outside of the court. Adhering to such rules is integral to the administration of justice. Therefore, on a conjoint reading of the said rules, specifically,
Choice of counsel

In 2018, the Supreme Court in *Bar Council of India v AK Balaji* also clarified that advocates in India cannot fund litigation on behalf of their clients and the 1876 Privy Council decision in *Ram Coomar Coondoo v Chunder Canto Maokerjee* provides guidance in this regard (see question 1).

Therefore, the aforementioned judgments and rules are some of the ethical guidelines that lawyers must keep in mind while advising their client.

Regulators

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

There is no specific public body that oversees or governs third-party funding of litigation. However, the terms of such a contract are subject to the Indian Contract Act, 1872, and may further be subject to scrutiny by courts in India.

In case where one of the parties to the contract for third-party funding is a foreign entity, the said contract must at all times be compliant with the provisions of the Foreign Exchange Management Act, 1999 (FEMA). FEMA classifies all transactions involving foreign exchange and non-residents into two primary categories: current and capital account transactions. Since FEMA does not unequivocally classify third-party funding as either a current or capital account transaction, it is not clear as to how such funds would attract the regulatory regime, especially since both of these transactions are viewed distinctively under FEMA rules and regulations.

**FUNDERS’ RIGHTS**

Choice of counsel

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

There is no jurisprudence in India regarding the third-party funders insisting on a choice of counsel. However, since the engagement of the counsel is ‘party autonomy’ and in absence of any legislation prohibiting the engagement of choice of counsel by the third-party financers, third-party funders may choose to insist upon their choice of counsel, provided the said counsel must not have any interest for or against the parties to the lis.

Participation in proceedings

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

All proceedings in India are essentially open court proceedings, so they may be attended by any person, irrespective of them being a party to the suit. There are very few proceedings that are held in camera, such as those of heinous crimes and rape which the general public is not allowed to attend. Therefore, there is nothing stopping financers or funders from attending proceedings or hearings. As and when the funder or financer is impleaded as a party to the suit, such financers or funders must participate in the proceedings and settlement proceedings, on account of being a third-party funder under Order XXV, as per state amendments (discussed in detail below). However, he or she may choose to attend the proceedings or hearings as and when required.

Veto of settlements

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

The funders can have veto rights in respect to settlements, which may arise from the terms of the funding agreement entered between the parties or on the basis of understanding between the parties to the funding agreement.

Termination of funding

9 | In what circumstances may a funder terminate funding?

Termination of a third-party funding agreement depends upon the termination clause in the agreement entered between the parties. The terms and conditions of terminating the contract squarely rest on the rights and obligations of each party and non-fulfilment of the same. The parties have the autonomy to decide the conditions of the termination of such an agreement. The parties may agree to terminate the funding agreement in the event of default or material change of their funding arrangement. The termination clause in the funding agreement should cover all the circumstances and must define the rights and obligations of the party in case of termination of the agreement by the other. For example, if the third-party funder terminates the funding agreement, the third-party funder is liable to fulfil all monetary obligations accrued up to the date of termination, unless the termination is due to a material breach by the party being funded.

It must be borne in mind that a funding agreement must include a clause for automatic termination if the same falls foul of any legislation, due to fresh enactment including amendment, which is introduced during the subsistence 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?

Apart from the participation in hearing(s), the funders may engage themselves in interaction with the lawyers during the preparation of the matter, including for the hearing. In absence of any legislation defining the role of the funders and the extent of their involvement, a specific road map cannot be carved out at this stage.

**CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

Conditional fees

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

The Bar Council of India, which is the apex body controlling the conduct of all advocates across the country, has set out certain standards of professional conduct – the Bar Council of India rules under section 4(1)(c) the Advocates Act, 1961. Rule 20 of the Bar Council Rules stipulates that advocates cannot enter into conditional or contingency fee agreements. A joint reading of the Bar Council Rules, wherein, rule 18 prohibits advocates from participating in fomenting litigation; rule 20 prohibits stipulation of fees contingent on the result of the litigation; rule 21, which bars Advocates from receiving a share or interest in an actionable claim; and rule 22, which prohibits an advocate from participating in bids in execution etc., strongly suggests that advocates in India cannot enter into conditional or contingency fee agreements.
Other funding options

12 | What other funding options are available to litigants?

Litigants who are indigent or who may not be in a position to adequately represent themselves are provided with free legal aid by the state. The principle of free legal aid is enshrined under various provisions of the Constitution of India. Article 39A of the Constitution directs the state to ensure equal opportunity for all to be represented under the legal system and in furtherance of the same enact legislations that provide free legal aid so that no citizen is denied justice by reason of economic or other disabilities. The right to free legal aid or free legal services is also an essential fundamental right guaranteed under Article 21 of the Constitution.

The Supreme Court in State of Maharashtra v Manubhai Pragaji Vashi, 1995 SCC (5) 730, laid down that the failure to provide free legal aid to an accused at the cost of the state, unless refused by the accused, would vitiate the trial. In MH Hoskot v State of Maharashtra, AIR 1978 SC 1548, Krishna lyer J observed that providing free legal aid is the state’s duty and not government’s charity.

Under these fundamental guiding principles, the Legal Services Authorities Act, 1987 was enacted. The Act provides for cost effective and easy access of competent legal services to litigants. The Legal Services Authorities Act, 1987 further stipulates that People’s Courts shall also be organised on periodical interval to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

The National Legal Services Authority, State Legal Services Authority and District Legal Services Authority are established under section 3, 6 and 9 of the Legal Services Authorities Act, 1987 respectively. It additionally provides for the creation of Supreme Court Legal Services Committee under section 3A, High Court Legal Services Committee under section 8A and Taluk Legal Services Committee under section 11A of the Act. Legal Aid funds are set up by the National Authority, State Authority and District Authorities under sections 15, 16 and 17 respectively to consolidate the funds and grants received at different levels and to put them to use in furtherance of the objective of the Act.

People’s Courts (Lok Adalats) are set up by every state authority, district authority, Supreme Court Legal Services Committee or every High Court Legal Services Committee as per their discretion. The People’s Courts, consisting of retired or serving judicial members or any other person as may be specified by the authorities, have the jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute. The services of the People’s Court are free of cost, funded by the government and the dispute may be contested by the parties themselves or by their advocates or counsellors. On arriving at a settlement or compromise, the court fees, if any, collected prior to the matter being referred to the People’s Court, shall be refunded. An award passed by the People’s Court is deemed to be a decree of a civil court under section 21 of the Legal Services Authority Act.

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?

With the steep increase in the commercial transactions, the need for specialised courts only dealing with such commercial disputes was felt in India. By way of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, commercial courts have been established at various levels (as per the pecuniary jurisdiction) to deal with such commercial disputes. These specialised courts under the statute have been provided with indicative timelines to adjudicate the disputes between the parties, such as conclusion of the arguments and delivering the judgment within six months of the first case management hearing, under Order XVA of CPC.

Apart from the CPC, the Arbitration and Conciliation Act, 1996 has also undergone major changes. The Arbitration and Conciliation (Amendment) Act, 2015 provides that arbitration proceedings must be concluded in a time-bound manner by the Arbitral Tribunal within 12 months from the date of reference. A subsequent amendment to the Arbitration Act further provides that the arbitration proceedings are to be concluded within 12 months from the date of completion of pleadings.

Time frame for appeals

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

Under section 96 of the CPC, every litigant has a right to appeal from a decree passed by the court of first instance, therefore, it is the discretion of the litigant as to whether he or she wishes to exercise this right in case of an unfavourable order or observation made by the court.

Further, under section 21(2) of the Legal Services Authority Act, 1987, the awards passed by the People’s Court are final and binding on all parties to the dispute and no appeals shall be preferred from these awards. In addition to the above, the same is also incorporated under section 22E of the Legal Services Authority Act, for the orders passed by Permanent People’s Court. The section reads:

4. Every award made by the Permanent People’s Court under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding.

Therefore, no appeal is permissible statutorily under the Legal Services Authority Act against the orders passed by the People’s Court or the Permanent People’s Court as the case may be.

Hence, the proportion of first instance judgments against which appeals are preferred is a matter of statistical review and study because it totally depends on the facts and circumstances of each matter.

Also, the CPC does not provide for any specific provision limiting the time period within which appeals are to be heard and disposed off. The length and duration of the proceedings in appeals is subject to the facts and circumstances of each case. However, section 14 of the Commercial Courts Act, 2015 provides for an expeditious disposal of appeals within a period of six months from the date of filing of such appeal.

Enforcement

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

A decree, order, award or judgment may be enforced by the decree holder through execution proceedings, in case the same is not complied with by the judgment debtor. Under Article 136 of the Schedule to the Limitation Act, 1963, the period of limitation for the execution of any decree (other than a decree for granting mandatory injunction) or any order of the Civil Court is 12 years from the date when the decree or order becomes enforceable (ie, the date of decree). The proportion of judgments that may need contentious enforcement by the decree holder depends on the facts and circumstances of each case and is a matter of statistical review and research.
COLLECTIVE ACTIONS

Funding of collective actions

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

The class action suit is a well-recognised concept in India. The procedure for class action suits is mentioned under Order I rule 8 Code of Civil Procedure. Apart from the civil proceedings, class actions or group actions suits are also recognised under the Consumer Protection Act, 1986 under section 12. The object of the Consumer Protection Act is to promote and protect the rights of the consumer such as:

- [The] right to be protected against marketing of goods which are hazardous to life and property;
- the right to be informed about the quality, quantity, potancy, purity, standard and price of goods to protect the consumer against unfair trade practices;
- the right to be assured, wherever possible, access to an authority of goods at competitive prices;
- the right to be heard and to be assured that consumers’ interests will receive due consideration at appropriate forums;
- the right to seek redress against unfair trade practices or unscrupulous exploitation of consumers; and
- right to consumer education.

Apart from the two legislations mentioned above, securities and shareholders class action suits are also legally permissible in India under the Companies Act, 2013. However, the same is fairly new.

Another form of class action suits that are prevalent in India are public interest litigations (PILs). Since there is no legislation dictating the terms and conditions of third-party funding, it is debatable if it may be allowed in PILs as well. There is nothing that bars a third-party funder from funding a PIL. Further, the Competition Act, 2002, envisages class action in cases of compensation under section 53N (4).

Another form of class action suits that are prevalent in India are public interest litigations (PILs). Since there is no legislation dictating the terms and conditions of third-party funding, it is debatable if it may be allowed in PILs as well. There is nothing that bars a third-party funder from funding a PIL. Further, the Competition Act, 2002, envisages class action in cases of compensation under section 53N (4).

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?

Costs towards litigation and adverse costs are generally sought for by both parties to the lis against each other. The grant of the same however, is the dependent upon the proof of costs incurred by the party towards litigation. The concrete proofs may be submitted towards proving the actual costs incurred. It is also dependent on the discretion of the judge based on the facts and circumstances of every case. The unsuccessful party may be deprived of costs as well in case of misconduct on his or her part. The concept of costs flows from section 35 of the Civil Procedure Code. Under section 35A the court may also allow for compensatory costs if the costs awarded under section 35 is not sufficient in the eyes of the judge and the same has been claimed by the successful party on grounds of a claim being vexatious and frivolous. A similar regime of cost is enshrined under section 31A of the Arbitration and Conciliation Act, 1996 wherein the discretion for grant of cost rests on the Arbitral Tribunal.

A similar regime of cost is enshrined under section 31A of the Arbitration and Conciliation Act, 1996 wherein the discretion for grant of cost rests on the Arbitral Tribunal.

Liability for costs

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

The costs are usually awarded to the successful party to the lis. The court cannot pass an order against a person who is not a party to the suit before it. However, the liability of a third-party funder for costs imposed would depend upon the funding agreement entered between them. The parties have to decide whether and to what extent will a third-party funder be liable for adverse costs and liable to pay any premium to obtain costs insurance, provide security for costs and meet any other financial liability by way of the agreement entered between them. Adverse costs are usually imposed on the party engaging in vexatious and frivolous law suits and wasting the precious time of the court, while causing unnecessary trouble to the other party. In the event that such a party, initially vexatious claims has been funded by a third party, the litigant is awarded exemplary costs and the liability of the third-party funder would arise only if the third-party funding agreement between them includes adverse costs awarded as funding of litigation.

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?)

Security for cost is ordered by the Courts under Order XXV of the CPC. Courts usually order for security for costs, suo motu or based on an application made by the defendant when the plaintiff is residing out of India and does not possess sufficient immovable property other than the property in suit within India. Security for costs may also be sought when such plaintiff leaves India causing a reasonable apprehension that he will not be forthcoming if called to pay costs subsequently.

However, some states, such as Allahabad and Madhya Pradesh, have amended rules 1 & 3 of Order XXV to include ‘plaintiff being financed by another person’ and ‘or that any plaintiff is being financed by a person not a party to the suit’ (ie, the funder), respectively, as a ground for ordering a security for costs.

By way of further state amendments to Order XXV, Maharashtra, Gujarat and Madhya Pradesh have added rules 1 & 3 to Order XXV, which is titled as ‘Power to impound and demand security from a third person financing litigation’. Under rules 1 & 3 of Order XXV, added by the above-mentioned state amendments, the courts are empowered to impound third-party funders as a plaintiff to the suit and order for a payment of security for costs by such third parties for costs that might be incurred. If the third-party financier declines to be impounded as a plaintiff, then he or she will not be entitled to claim any interest in the suit property.

The court is also empowered under Order XXV rule 3 to impound the third-party financier as a defendant in the suit in case of such party’s denial to be impounded as a plaintiff under sub-rule 1, the court may further order the third party to deposit the security for any cost that may be incurred subsequently.

From the framework under rule 3 of Order XXV, it becomes clear that a third-party funder will be required to furnish security for cost, in the above-mentioned states, as soon as the court becomes aware of the existence of a third-party funding agreement.

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

Yes. As has been discussed in detail in answer to question 19, for the states of Madhya Pradesh, Maharashtra and Gujarat, that as soon as the existence of a third-party funding agreement comes into light, the courts
would implead such third-party financier to the suit and order them to furnish costs.

However, this is limited to only those states where rule 3 of Order XXV has been added by way of subsequent state amendments. In the state of Allahabad, being a third-party financer of a suit is one of the grounds in addition to others, under which security for costs may be imposed. For the rest of the states in India, the answer to the question would be in the negative and the existence of a third-party funding agreement would have no bearing on the decision of the court to order for furnishing security for costs.

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 concept of ATE insurance in India as of now because the concept of third-party funding in litigation is a fairly recent one. There are, however, general insurance products, such as liability insurance for directors, employees etc, that are prevalent in the market.

Also, the attorney fees that may be incurred in case of a dispute arising can be covered under an insurance policy before the cause of action for such dispute has arisen. This is a common form of before-the-event liability insurance cover provided by the insurers in India.

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?

On a combined reading of all the provisions and precedents that pave the way for third-party funding in India, it may be deduced that a litigant must disclose the existence of a third-party funding agreement. State amendments to Order XXV of the CPC, empowering the courts to implead third-party funders to the suit and ordering to furnish security for costs from third-party financers would become infructuous if the court was not aware of such third-party funding arrangements.

Even though third-party funding of litigation in India is not illegal, the concept is nascent and is developing, and as such it does not have much jurisprudence, unlike other mature jurisdictions of the world. Hence, there is no authority or provision which may be used to compel the disclosure of such third-party funding agreements and their existence.

Privileged communications

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

The concept of attorney-client privilege is applicable in India as well. Professional communications between attorney and client finds mention in section 126 of the Evidence Act, 1870:

126. Professional communications. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any illegal purpose;

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation. The obligation stated in this section continues after the employment has ceased.

From a bare perusal of the above produced provision, it becomes amply clear that the communication exchanged between an attorney or advocate with the client is privileged and cannot be disclosed to any other person. The same applies to the funder and its attorney as well.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No, to date there have been none. Third-party funding is still an evolving area in India.
Other issues

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

While in foreign jurisdictions, third-party funding in arbitration proceedings is an established concept, the same is yet to be implemented in India. The limited extent to which third-party funding is allowed in India is through the combined reading of all the regulations and laws that remotely facilitate the same; however, there should be exhaustive rules and regulations to regulate and facilitate third-party funding in India. Such regulations must list out the rights and duties of the parties, the disclosure requirements and insurances that can be obtained while engaging in third-party funding.

The benefits of having third-party agreements in place must be highlighted to the litigants and the financers, while the court must ensure that a less stringent procedure is in place to facilitate third-party funding in India. Given the litigation scheme in India, third-party funding agreements can help the litigants to have better access to justice while the financers can gain from blockbuster damages being awarded, making it a win-win for all the parties.

UPDATE AND TRENDS

Current developments

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

Third-party funding of arbitration is yet to be implemented and allowed in India; therefore, given the rise of this concept in arbitrations in foreign jurisdictions, the same will aid institutional arbitrations in India as well. When this concept of third-party funding in arbitrations will be implemented by the authorities and when it will be legally allowed in India by way of specific rules and regulations is just a matter of time and should be closely monitored.
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.

Insurance

21 | Is after-the-event (ATE) insurance permitted? Is ATE insurance 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.
Italy

Davide De Vido
FiDeAL

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.

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.

Current developments

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

No updates at this time.

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.
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.

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.

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).

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.

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.

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.

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.

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 (i.e., 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 or confidential (i.e., 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 article109(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 article109(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.
Are there any other current developments or emerging trends that should be noted?

No updates at this time.
**Overview**

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.

**Restrictions on funding fees**

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.

**Specific rules for litigation funding**

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 Mauritian 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.

**Legal advice**

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.

**Regulators**

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.

**Funders’ Rights**

**Choice of counsel**

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.

**Participation in proceedings**

1. **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.

**Veto of settlements**

2. **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.

**Termination of funding**

3. **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.

**Other permitted activities**

4. **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.

**CONDITIONAL FEES AND OTHER FUNDING OPTIONS**

**Conditional fees**

5. **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.

**Other funding options**

6. **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.

**JUDGMENT, APPEAL AND ENFORCEMENT**

**Time frame for first-instance decisions**

7. **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.

**Time frame for appeals**

8. **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.

**Enforcement**

9. **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.

**COLLECTIVE ACTIONS**

**Funding of collective actions**

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.

**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 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.

**Liability for costs**

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.

**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 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.
Insurance

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.

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 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.

Privileged communications

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 Mauritian 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 Mauritian courts are, however, not bound to follow the English decisions.

DISPUTES AND OTHER ISSUES

Disputes with funders

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.

Other issues

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 Mauritian law regarding the invalidation or revision of unfair contract terms.

UPDATE AND TRENDS

Current developments

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

There are no updates at this time.

* This chapter was correct at the time of writing in November 2018.
New Zealand

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**Overview**

Third-party litigation funding is permitted. Although the common law torts of maintenance (assisting a party in litigation without justification) and champerty (assisting in consideration of a share of proceeds of the litigation) have not technically been abolished in New Zealand, the recent attitude of the New Zealand courts to third party-funding can be described as ‘cautiously permissive’ and, perhaps, increasingly receptive. To describe this approach, a distinction needs to be drawn between representative proceedings under Rule 4.24 of the High Court Rules (which allows one or more persons to sue on behalf of, or for the benefit of, all persons with the same interest in the subject matter) and ordinary non-representative proceedings.

**Representative proceedings**

A representative proceeding requires that the representatives sue with the consent of the other persons who have the same interest (Rule 4.24(a)), or the court directs this on an application (Rule 4.24(b)). The Court of Appeal has confirmed that the existing procedure does not require the court to give prior approval for a funding arrangement (Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group [2017] NZCA 489 (Southern) at [79]). Instead, the court will ensure that in making a direction it is not facilitating an abuse of process. If a representative proceeding is based on clearly misleading funding arrangements or amounts to a bare assignment of claims, then the court will not grant leave knowing that its processes are being used to facilitate unlawful conduct. In this regard, the courts will exercise a greater supervisory role over the setting up of representative proceedings (ie, the funding arrangements and communications with prospective class members) than where a party bring an ordinary proceeding that is funded.

**Non-representative proceedings**

The Supreme Court of New Zealand has made it clear that it is not the role of the courts to act as general regulators of litigation funding arrangements or to give prior approval to such arrangements, outside its supervisory role in ‘representative’ proceedings (see above). Instead, the role of the courts is to adjudicate on any applications brought before them to which the existence and terms of a litigation funding arrangement may be relevant (Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91 (Waterhouse) at paragraphs 28 to 29). The Supreme Court has accepted that some measure of control by a third-party funder is ‘inevitable’ to enable a litigation funder to protect its investment (Waterhouse at paragraph 46).

**Scope for intervention**

Under the High Court Rules or its inherent powers, the High Court may intervene (for example, by imposing a stay of proceedings) in both representative or non-representative funded proceedings under the following circumstances.

**Abuse of process**

The High Court may intervene if there is a manifestation of an abuse of process on traditional grounds, such as where proceedings:

- deceive the court, are fictitious, or mere sham;
- use the process of the court in an unfair or dishonest way, for some ulterior or improper purpose, or in an improper way;
- are manifestly groundless, without foundation or serve no useful purpose; and
- are vexatious or oppressive.

See PriceWaterhouseCoopers v Walker [2016] NZCA 338 (PriceWaterhouseCoopers) at paragraph 14(e).

**Non-permitted bare cause of action**

A funding arrangement (including an assignment of a security agreement) amounts to an assignment of a bare cause of action to a third-party funder in circumstances where this is not permissible (ie, the exceptions to maintenance and champerty do not apply).

In assessing whether litigation funding arrangements amount to an assignment that is not permitted, the court will have regard to the level of legal (rather than de facto) control able to be exercised by the funder, the profit share of the funder and the role of the lawyers acting (Waterhouse and PriceWaterhouseCoopers). Even where such concerns arise, the provision of appropriate undertakings by a funder may be effective to allay them. In PriceWaterhouseCoopers, a funding agreement was in place between the plaintiff company (in liquidation) and the litigation funder (SPF No. 10 Ltd), in conjunction with an assignment under a security agreement to the funder of the plaintiff’s right of action against the defendant (being its only valuable asset). The defendant argued that this arrangement was an impermissible assignment of a bare cause of action to the funder, which amounted to an abuse of process. The majority of the Supreme Court held (paragraphs 77 to 91) that the belated provisions of the following undertakings given by the funder to the court satisfied concerns as to the permissibility of the assignment:

- to not rely on clauses in the security agreement giving it greater control than it had under the funding agreement; and
- to pay a proportion of proceeds of a successful claim for the benefit of unsecured creditors (where the funder was otherwise entitled to all of these under the security agreement).
Misleading statements given to the court
Where a representative action has been promoted to prospective litigants using misleading statements, the court may also intervene, either by refusing a direction under Rule 4.24(b), or to correct the harm done by the distribution of the material (Southern at paragraphs 78 and 82).

Funding of arbitration
Given the private nature of arbitration, the treatment of third-party litigation funding in domestic arbitration in New Zealand is largely unknown. The relevant legislation (the Arbitration Act 1996) does not contain any provisions relating either directly or indirectly to litigation funding (or even class arbitrations). Instead, an arbitrator has the power to conduct the arbitration, or to control the conduct of the arbitration, subject to the agreement between the parties and the rules of natural justice (article 19, Schedule 1). An arbitrator may also order ‘any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently’ (Clause 3(1)(c) of Schedule 2). These broad powers would encompass the ability to regulate funded domestic arbitrations with respect to those referred to in the following questions.

In addition, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request assistance from the High Court or a district court in the exercise of the powers conferred on the arbitral tribunal relating to the conduct of arbitral proceedings (Clause 3(2) of Schedule 2). This ability would allow either the arbitral tribunal of its own motion, or one of the parties with its approval, to request assistance from the High Court or a district court in the event of an issue arising in the context of a funded domestic arbitration.

Litigation funding is becoming more commonly used in New Zealand, although it is not as commonly used as in other common law jurisdictions (such as the United Kingdom and Australia). In recent years, a variety of proceedings funded by third parties have been brought, with allegations in relation to:

• losses on share investments resulting from misleading statements in a share prospectus (Saunders v Houghton [2014] NZHC 2229);
• building products (White v James Hardie New Zealand [2017] NZHC 2112);
• losses resulting from kiwi fruit being affected by the entry of disease into the country (Strathbass Kiwifruit Ltd v Attorney-General [2018] NZHC 1559 (Strathbass Kiwifruit);
• illegitimate fees charged to consumers by banks (Cooper v ANZ [2013] NZHC 2827);
• insurance claims arising out of earthquakes (Southern Response Unsolved Claims Group v Southern Response Earthquake Services Ltd [2017] NZCA 489, [2018] 2 NZLR 312); and

Restrictions on funding fees
There are no limits prescribed by either legislation or the common law. In the context of a non-representative funded action, the Supreme Court of New Zealand has said that it is not the role of the courts to assess the fairness of any bargain between a funder and a plaintiff, presumably including funder remuneration (Waterhouse, paragraph 48). In the context of a representative funded action, the High Court was not persuaded that the terms of the funding agreement (including an entitlement to terminate the funding agreement without cause on five days’ notice and a power to veto in relation to settlement) were inappropriate for a representative action (Strathbass Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, [2015] 23 PRNZ 69 at paragraph 70).

That said, in assessing whether litigation funding arrangements amount to an assignment that is not permitted, the courts will have regard to the profit share of the funder (see question 1).

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

There are no provisions specifically applicable to third-party litigation funding, but there are general provisions which have application. As providers of financial services and products in trade, litigation funders are subject to the provisions of the Fair Trading Act 1986. This contains consumer protections against misleading and deceptive conduct, unsubstantiated representations, and false or misleading representations. It provides redress against such conduct by funders in, for example, marketing funding, negotiating with prospective plaintiffs, or in relation to acts or omissions while a funding arrangement is in place. The Consumer Guarantees Act 1993, which imposes statutory guarantees in relation to services, may also have application.

Funders with a place of business in New Zealand, and who provide a ‘financial service’ (typically, this is because they act as a creditor under a credit contract, as defined in section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act), must register as a financial service provider (FSP). Those providing services to ‘retail clients’ (as defined in section 49 of the Financial Service Providers (Registration and Dispute Resolution) Act) must also belong to a dispute resolution scheme. All financial service providers are subject to the ‘fair dealing’ provisions in the Financial Markets Conduct Act 2013, which prohibit misleading conduct, false or misleading representations and unsubstantiated representations in relation to financial products and services. The regulatory authority, the Financial Markets Authority, can take civil action against financial service providers whose conduct breaches these provisions. Possible civil orders include declarations of contravention, pecuniary penalties and compensatory orders.

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

No specific rules apply. The general professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 apply. In Houghton v Saunders (2011) 20 PRNZ 509, the High Court, at paragraph 75, found the following guidelines ‘helpful’:

• There should be a direct client-solicitor relationship between the members of the represented group and the lawyer acting for the represented group in the litigation.
• The lawyer acting for the represented group must be responsible for advising the named claimants and members of the represented group about the merits of the case and all material developments in the case. That advice must be prepared and provided without interference by the litigation funder.
• The litigation funder must not provide expert evidence in the litigation. Expert witnesses must be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.

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

No public bodies have specific interest in or oversight over third-party litigation funding, apart from the courts and the Financial Markets Authority.
Choice of counsel

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

It does not appear that this issue has come before the courts to date. It is very unlikely that third-party funders have such a legal entitlement, because choice of counsel is the exclusive right of the client (ie, the plaintiff). This right is reflected in the professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Participation in proceedings

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

There is no restriction on representatives of funders attending hearings or settlement discussions, unless excluded by order of the court. Funders do not have a right to participate in hearings, and attempts to do so might raise concerns as to inappropriate control or abuse of process. Funders may participate in settlement negotiations, but cannot influence or make settlement decisions unless this is provided for under the funding agreement.

Veto of settlements

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

Only if such rights are provided for under the funding agreement. The courts take a fairly liberal approach to such veto rights. In Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraphs 70 to 73, the High Court was not persuaded that the existence of a power of veto in relation to settlement was inappropriate for a representative action. This was for the following reasons:

- in most scenarios, the claimants and the funder should continue to have aligned interests in relation to what would constitute an acceptable settlement;
- to the extent the action requires positive input from all the claimants, the funder will need to maintain their goodwill to carry on with the action; and
- where the funding agreement contemplates the involvement of independent third parties with appropriate expertise to resolve disputes, reputationally this will provide a fetter on the funder’s ability to act unreasonably.

Termination of funding

9 | In what circumstances may a funder terminate funding?

In the first instance, this will depend on the terms of the funding agreement (which often provides for termination upon notice). In the unlikely event that the funding agreement does not make express provision for termination, the Contracts and Commercial Law Act 2017 will apply by default. A funder would be able to cancel (prospectively) a funding agreement in the following circumstances:

- for misrepresentation by the plaintiff(s) prior to the agreement that has induced the funder to enter the agreement;
- if a term of the funding agreement is broken by the plaintiff(s); or
- if it is clear that a term in the funding agreement will be broken by the plaintiff(s).

In all these situations, the funder may exercise the right to cancel if, and only if:

- the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term, is essential to the funder; or
- the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be:
  - substantially to reduce the benefit of the contract to the funder;
  - substantially to increase the burden of the funder under the contract; or
  - in relation to the funder, to make the benefit or burden of the contract substantially different from that represented or contracted for.

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?

Funders may not take any active role in the litigation process if that would amount to an abuse of process (see question 1).

That said, it should be noted that, in the context of a funded representative action, the High Court has stated that concerns as to chameleonic pursuit of claims have to be tempered by the reality that funded arrangements are commercial arrangements and it ‘would be somewhat naïve to expect that he who pays the piper will not have some ability to call the tune’ (Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 66).

There are no ways in which funders are required to take an active role.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Litigation lawyers may enter into conditional or contingency fee agreements, but only of a certain type. ‘Conditional fee agreements’ (where payment depends on whether the outcome of the matter is successful) are permissible under sections 333 to 335 of the Lawyers and Conveyancers Act 2006 if the fee arrangement amounts to:

- the normal fee that would have been charged for the services provided; or
- the normal fee accompanied by a premium that:
  - compensates counsel for the risk of not being paid at all;
  - compensates counsel for waiting to be paid until proceedings have been concluded; or
  - is not calculated as a proportion of the amount recovered by the proceedings.

However, conditional fee agreements are prohibited for criminal proceedings, immigration proceedings and family law proceedings.

Conditional or contingency fee agreements that fall outside this statutory permission may be illegal or unenforceable, especially where the payable fee is calculated as a proportion of the amount recovered (and therefore amounts to the tort of champerty).

Other funding options

12 | What other funding options are available to litigants?

Government-funded legal aid for litigants who cannot afford lawyers is available through the Ministry of Justice for certain civil disputes.
Time frame for first-instance decisions

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

This will depend on the nature and complexity of the claim, the number of parties, the level of court in which it is filed and the workload of that court. Given the typical quantum of funded claims, almost all of these will be filed in the civil jurisdiction of the High Court.

In the civil jurisdiction of the High Court, the statistics for the last four years available are as follows:

- 1 January to 31 December 2018: the average age at disposal was 699 days;
- 1 January to 31 December 2017: the average age at disposal was 759 days;
- 1 January to 31 December 2016: the average age at disposal was 669 days; and
- 1 January to 31 December 2015: the average age at disposal was 650 days.

Time frame for appeals

What proportion of first-instance judgments are appealed?

This can be estimated as a function of the number of cases disposed of and the number of appeals brought.

In the civil jurisdiction of the High Court, the statistics for the last four years available are as follows:

- 2018: 2,308 cases were disposed;
- 2017: 2,352 cases were disposed;
- 2016: 2,360 cases were disposed; and
- 2015: 2,456 cases were disposed.

New civil appeals to the Court of Appeal:

- 2018: 239, which means that 10.36 per cent were appealed;
- 2017: 234, which means that 9.95 per cent were appealed;
- 2016: 214, which means that 9.07 per cent were appealed; and
- 2015: 248, which means that 10.09 per cent were appealed.

The length of time an appeal takes depends on the nature and complexity of the appeal, the number of parties and the workload of the Court of Appeal. On average, an ordinary civil appeal might take at least one year to be disposed of, from the date of filing until the date of judgment.

Enforcement

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

There are no statistics available on this issue. Whether enforcement proceedings are required will depend on the defendant’s financial position in each case.

In the High Court, following the sealing of judgment, a range of enforcement options are available against the judgment debtor and the judgment debtor’s personal or real property (Part 17 of the High Court Rules). These are as follows:

- order for examination of the debtor;
- attachment orders over salary or wages due and payable by an employer;
- charging orders over real or personal property;
- sale orders over land and chattels;
- possession orders over land and chattels;
- arrest orders;
- sequestration orders over rents and profits from real and personal property; and
- imprisonment until security deposited or bond executed.

Generally, an enforcement procedure in respect of real property (such as a sale order) is the most difficult to implement.

Funding of collective actions

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

The High Court Rules allow for ‘representative actions’ rather than ‘class actions’ or ‘group actions’ per se. Rule 4.24 provides:

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding:

1 with the consent of the other persons who have the same interest; or

2 as directed by the court on an application made by a party or intending party to the proceeding.

The threshold for the ‘same interest’ requirement is low: there must be a common issue of fact or law of significance for each member of the class represented (see Credit Suisse Private Equity LLC v Haughton [2014] NZSC 37, [2014] 1 NZLR 541 at paragraphs 53 and 151).

In addition:

- all members of the class must have been able to claim as plaintiffs in separate actions in respect of the event concerned, with no defences applicable to only some of the class;
- the action must be beneficial to all of the class; and
- the action must cover the whole or virtually the whole of the class of potential plaintiffs and consent of all represented members of global damages to the representative plaintiff must be given (Credit Suisse, paragraph 151).

Sub-paragraph (a) allows a group of identified plaintiffs with the ‘same interest’ to sue together if they consent to this. The plaintiffs are then listed together in the same statement of claim.

Sub-paragraph (b) requires the party or intended party to make an application to the court for a representative order. In granting a representative order, it is standard practice for the court to impose a final ‘opt-in’ date for qualifying members of the class (Cridge v Studorp Limited [2017] NZCA 376 at paragraph 41). This has the benefit of protecting members of the represented group against a limitation bar...
arising after the date of their election to opt in to the proceeding (Credit Suisse, paragraphs 65 to 66 and 129).

Representative actions may be funded by third parties, although there are greater restrictions on these than on non-representative actions. In Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 79, the Court of Appeal concluded (in the context of a representative action) that litigation funding arrangements will not be tortious or otherwise unlawful maintenance and champerty where:

- the court is satisfied there is an arguable case for rights that warrant vindicating;
- there is no abuse of process; and
- the proposal is approved by the court.

Funding arrangements have been approved in earlier cases (In re Nautilus Developments Ltd [2000] 2 NZLR 505 (HC) and In re Gellert Developments Ltd (in liquidation) (2001) 9 NZCLC 262,714). It remains unclear whether such approval must, as a matter of course, be obtained in advance of proceedings, or simply in the event that the proposal is challenged by the defendant.

**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?**

Yes. The courts may order the unsuccessful party to pay the costs (and certain disbursements) of the successful party in litigation. All matters of costs are at the discretion of the High Court (Rule 14.1), but one of the default principles is that the party that fails with respect to a proceeding or an interlocutory application should pay (scale) costs to the party who succeeds (Rule 14.2(a)).

Generally, costs are assessed by applying a notional daily recovery rate (normally, two-thirds of the daily rate considered reasonable for each step of the proceeding) to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application (Rule 14.2(c) and (d)).

According to Rule 14.6(3), the court may award increased costs where:

- the nature of the proceeding, or the step it is in, such that the time required by the party claiming costs would substantially exceed the time allocated under the highest scale band;
- the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by:
  - failing to comply with the rules or with a direction of the court;
  - taking or pursuing an unnecessary step or an argument that lacks merit;
  - failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument;
  - failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under the rules; or
  - failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under Rule 14.10 or some other offer to settle or dispose of the proceeding;
- the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or
- some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

According to Rule 14.6(4), the court may award indemnity (ie, actual) costs where:

- the party has acted vexatiously, frivolously, improperly or unneces-sarily in commencing, continuing or defending a proceeding or a step in a proceeding;
- the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party;
- costs are payable from a fund, the party claiming costs is a neces-sary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding;
- the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it;
- the party claiming costs is entitled to indemnity costs under a contract or deed; or
- some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

Litigation funding costs do not constitute either ‘costs’ or ‘disburse-ments’ within the meaning of the above costs regime. The only basis on which the High Court might order the unsuccessful party to pay the litigation funding costs of the successful party would be pursuant to its inherent jurisdiction, there does not appear to be precedent for this.

**Liability for costs**

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

In exceptional circumstances, funders may be liable for adverse costs as non-parties, even in the absence of any abuse of process (Waterhouse at paragraph 52) or impropriety (Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) [2004] UKPC 39, [2005] 1 NZLR 145 (Dymocks) at paragraph 33). Further, the level of such costs is not limited to the amount of funding provided (Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91 at paragraph 53).

According to the leading case on costs against non-parties (Dymocks at paragraph 25):

Where . . . the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes.

In this case, a non-party had funded unsuccessful litigation by an insolvent company. The Privy Council did not have litigation funding specifically in contemplation. Given that a litigation funder always stands to benefit financially from the proceedings and will ordinarily exercise at least some control over the proceedings, the above proposition must be read down. It seems likely, therefore, that for a funder to be liable for adverse costs, something more is required. One situation might be where the funder exercises control over the proceedings to the effective exclusion of the plaintiffs. Another might be where the funder withdraws funding part way through the litigation, leaving the defendant or defendants to face a plaintiff who is impecunious or insolvent. A third, and very rare, instance might be where it should have been clear at the time of filing that the funded claim was simply not tenable and litigation should have been avoided (Poh v Cousins & Associates Unreported, HC Christchurch, CIV 2010-409-2654, 4 February 2011 at paragraph 61).

Indemnity or increased costs will not be awarded merely because a litigation funder with a profit motive stands behind the losing party.
(Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZCA 67 at paragraph 135).

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?)

Yes. Under Rule 5.65 of the High Court Rules, on the application of a defendant, a judge may order the giving of security for costs if:

- a plaintiff is resident outside New Zealand;
- a plaintiff is a corporation incorporated outside New Zealand;
- a plaintiff is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
- there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff’s proceeding.

The evolving practice is for funders of funded representative actions to provide security for costs that tend to be quantified on a relatively generous basis in favour of defendants ([Saunders v Houghton (No 1) [2009], NZCA 610, [2010] 3 NZLR 331 at paragraph 36 and Walker v Forbes at paragraphs 92 to 94].

Calculation of the sum is a matter for the court to assess in all the circumstances.

Those circumstances include the:

- amount or nature of the relief claimed;
- nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of interlocutory procedures;
- estimated duration of trial; and
- probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant’s estimated actual (ie, solicitor and client) costs.

Insofar as past awards of security are a legitimate guide, they generally represent some discount on the likely award of default scale costs.

The sum ordered must either be paid into court or security for such sum must be given to the satisfaction of the judge or registrar. Where the litigation funder is overseas, an appropriate form of security will be a bank guarantee directly enforceable by the defendant.

In that case, the Court of Appeal ordered security (for the appeal) in the sum of NZ$100,000 (increased from NZ$86,000) because the overseas litigation funder retained the right to terminate its indemnity to the representative plaintiff for costs on notice and the scale costs of the proceeding were unusually high.

It was confirmed by the High Court in Highgate on Broadway Ltd v Devine [2013] NZHC 2288, [2013] NZAR 1017 at paragraph 22(d) that the fact the plaintiff is funded is a ground for the order of security.

Insurance

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

Yes. ATE is permitted in New Zealand. In our experience, it is commonly used by funders.

Generally, the only types of parties who would use other types of insurance to cover legal (defence) fees would be company director defendants (directors and officers’ insurance) and professional defendants, such as lawyers, accountants, architects and engineers (professional indemnity 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?

Upon the commencement of funded proceedings, a litigant must disclose the following matters to the other party or parties:

- the fact there is a litigation funder and the funder’s identity;
- the amenability of the funder to the jurisdiction of the New Zealand courts; and
- the terms of withdrawal of funding, but only if those terms in some way give legal control over the proceedings to the funder (eg, the ability to withdraw finding if the funded party refuses to obey instructions given) ([Waterhouse, paragraphs 67 to 69 and 72].

The litigation funding agreement itself must be disclosed to the opposing party and court where an application is made to which the terms of the agreement could be relevant, such as applications for a stay on the basis of abuse of process, applications for third-party costs orders, and applications for security for costs ([Waterhouse, paragraphs 73 to 74].

In relation to the latter type of application, the Supreme Court has said that it is ‘strongly arguable’ that the courts have power to order disclosure of at least the existence of a litigation funder and the relevant terms of the funding agreement ([Waterhouse, paragraph 63].

Disclosure to the opposing party is subject to redactions being made to preserve confidentiality, litigation-sensitive matters, and privilege.

In domestic arbitrations, an arbitral tribunal may order the discovery and production of documents or materials within the possession of power of a party (Schedule 2, Rule 3(1)(f) to the Arbitration Act 1996). This is broad enough to encompass a litigation funding agreement, although an arbitral tribunal would be cognisant of the need to protect confidentiality and privilege.
Privileged communications

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

Yes. The Evidence Act 2006 provides that the following communications and materials are protected by privilege of three kinds:

- privilege for communications with legal advisers that are intended to be confidential and are made in the course of, and for the purpose of, the person obtaining professional legal services from the legal adviser or the legal adviser giving such services to the person (section 54);
- privilege for a communication or information (section 56), where a person who is, or on reasonable grounds contemplates becoming, a party to the proceeding, has a privilege in respect of:
  1 a communication between the party and any other person;
  2 a communication between the party’s legal adviser and any other person;
  3 information compiled or prepared by the party or the party’s legal adviser; or
  4 information compiled or prepared at the request of the party, or the party’s legal adviser, by any other person; and
- privilege for settlement negotiations or mediation (section 57), where a person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was:
  1 intended to be confidential; and
  2 made in connection with an attempt to settle or mediate the dispute between the persons.

(In all cases described under points (1) to (4) above, the communication or information must be made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.)

A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute (section 57(2)).

Disputes with funders

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

There do not appear to be any 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?

It appears that some funded litigation has occurred in the main Pacific Islands. The civil procedure rules of the Cook Islands, Fiji and Samoa all permit ‘representative actions’, rather than ‘class actions’ or ‘group actions’ per se.
Poland

Tomasz Waszewski
Kocur and Partners

REGULATION

Overview

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

Third-party litigation funding is permitted in Poland on the basis of the rule of freedom of contract. Since third-party litigation funding has not yet become popular in Poland, there are no court rulings that allow us to establish Polish courts’ attitudes towards third-party litigation funding. According to information provided by the leading Polish arbitration court – the Court of Arbitration at the Polish Chamber of Commerce in Warsaw – issues related to third-party funding have not yet arisen in arbitral proceedings held before it.

Restrictions on funding fees

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

Polish law does not lay down specific rules limiting the fees of third-party funders. If Polish law governs the funding agreement, funders and litigants may determine their legal relationship at their own discretion within the general limits of freedom of contract laid down by Polish law. These limits follow the nature of the contractual relationship, good customs and the provisions of law.

Specific rules for litigation funding

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

No specific legislative or regulatory provisions applicable to third-party litigation funding have been adopted in Poland.

Legal advice

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

No specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding. The rules of ethics applicable to qualified lawyers do not distinguish funders from other third parties. Lawyers are obliged to act in the best interest of their clients and may not be under any third-party influence, including that of funders. Lawyers may take instructions from their clients only. All information the lawyers obtain in relation to the case is confidential.

Regulators

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

According to publicly available information, so far, no public bodies, including the financial regulator and the Minister of Justice, have any particular interest in or oversight over third-party litigation funding.

FUNDERS’ RIGHTS

Choice of counsel

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

The choice of attorneys belongs only to litigants. Nonetheless, it seems that it would not violate Polish law if funders and litigants agreed that the choice of a reputable attorney indicated by the funders would be a condition for funding the case.

Participation in proceedings

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

Funders may attend all hearings that are open to the public. In Polish domestic litigation, the general rule is that the public may attend all hearings, unless the court orders a closed hearing. The court orders a closed hearing if hearing the case with the public in attendance would be a threat to public policy or morality, or if there is a possibility that protected confidential information or company secrets might be revealed.

According to the rules of the two leading Polish arbitration courts: the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, and the Court of Arbitration at the Confederation of Lewiatan, hearings held in arbitration proceedings are closed unless the parties agree otherwise. Thus, funders may attend the hearing only upon the consent of both parties.

Funders may participate in out-of-court settlement proceedings. There are no restrictions on attending institutionalised settlement proceedings before the court, which are in general open to the public. Funders may not attend institutionalised mediation proceedings, which are confidential. The parties and their lawyers are not allowed to disclose any facts made known to them in mediation proceedings to any third parties, including funders, without the consent of both parties.

Veto of settlements

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

Funders do not have veto rights in respect of settlements.
Termination of funding

9 | In what circumstances may a funder terminate funding?

Polish law does not determine in which circumstances funders may terminate funding. If Polish law governs a funding agreement, the agreement should indicate the circumstances in which a funder may terminate funding.

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?

Polish procedural rules do not envisage that the funders may 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?

According to the rules of ethics applicable to qualified lawyers, they are not permitted to enter into conditional or contingency fee agreements if the whole fee is payable only if the case is won. However, lawyers may enter into an agreement upon which a part of fee is due regardless of the outcome of the case, while the remaining part of the fee is paid if the case is won. The rules of ethics do not give a clear-cut answer as to what the proportion between these two parts of the fee should be.

Specific provisions apply to lawyers representing clients in class action proceedings. Lawyers may be entitled to a conditional or contingency fee only; however, the fee cannot exceed 20 per cent of the award. It is disputable whether these provisions only limit conditional and contingency fees, or the sum of the conditional or contingency fee and the court costs of the opinions of court-appointed experts and witnesses’ costs.

Other funding options

12 | What other funding options are available to litigants?

An alternative funding option available to litigants in domestic litigation is to apply to the court for legal aid by way of releasing the party from the duty to pay court costs and to appoint an attorney for the party whose fee would be paid by the state. Court costs include court fees, the costs of the opinions of court-appointed experts and witnesses’ costs. Providing the litigant with legal aid does not release the litigant from all costs. However, experience shows that courts are reluctant to provide the litigant with legal aid even if they are on the verge of insolvency. Even if a litigant was provided with legal aid, he or she may be liable for adverse costs if the opposite party wins the case.

The court will provide legal aid to a litigant who, as an individual, cannot bear court costs without affecting his or her ability to support himself or herself and his or her family or when incurring them will expose him or her to such situation. A litigant who is a legal person will be provided with legal aid if it has no sufficient funds to bear court costs. However, experience shows that courts are reluctant to provide entrepreneurs with legal aid even if they are on the verge of insolvency. As of 21 August 2019, a company running business activities will not be provided with legal aid if its shareholders have sufficient resources to cover costs of proceeding.

If legal aid is granted, the State Treasury will cover court costs and the attorney’s fee instead of the litigant. The fees of court-appointed attorneys are regulated by law. The adverse party will be ordered to reimburse the State Treasury if it loses the case.

Litigants cannot be granted legal aid in class action proceedings. However, if consumers bring a class action, they will not incur court costs if the consumers’ ombudsman agrees to join the proceedings on the side of consumers as the class representative. The body may decide to join the case at its own discretion. As the class representative, it may also be liable to pay adverse costs if the case is lost, and be ordered by the court to provide security for those costs.

Legal aid is not available to litigants in arbitration proceedings pursuant to rules of Court of Arbitration at the Polish Chamber of Commerce in Warsaw and Court of Arbitration at the Polish Confederation Lewiatan.

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 information published by the Polish Ministry of Justice, the average length of legal proceedings in commercial cases heard before district courts that ended in the first quarter of 2019 was 15 months. District courts generally adjudicate in cases exceeding 75,000 zlotys at the first instance; thus, a third-party funded case will most probably be heard by these courts. In 82.8 per cent of cases heard before district courts, it took no more than three years to reach a decision at first instance. This data does not include the duration of order for payment proceedings that usually precede the main proceedings. For payment proceedings, the court orders the defendant to pay the money sought by the claimant or to deny the claim within 14 days. The average duration for an order for payment proceedings is 1.8 months. As regards total length of time, an average commercial case before district courts takes 22.4 months to reach a decision at first instance.

The length of proceedings at first instance depends on the complexity of the case, the number of witnesses, and the number of court-appointed experts. The place where the case is heard may also have an impact on the duration of case. For example, because of the high number of cases heard by courts in Warsaw, proceedings before these courts are significantly longer. In the first half of 2019, the average duration of proceedings in commercial cases before the District Court in Warsaw was just under 26.3 months, and the average duration for an order for payment proceedings, which usually precedes the main proceedings, was 3.9 months. As regards total length of time, an average commercial case heard before this court took just over 30.1 months to reach a decision at first instance. (The averages presented above were calculated on the basis of data published by the District Court in Warsaw.)

Class action proceedings at first instance last longer because of the additional stages of these proceedings involving the verification of the admissibility of class action, and the summons of potential litigants to join the class action on the side of the class representative. These stages may delay the whole proceedings by two years or more.

Time frame for appeals

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

According to statistics published by the Polish Ministry of Justice, in the first half of 2019, district courts made decisions in 8,118 commercial cases at first instance, while 1,175 appeals were filed with appellate courts against the first-instance rulings of district courts. However, experience shows that in high-profile or high-value cases, a losing party even more often appeals against the ruling.

Calculations made on the basis of information published by the Appellate Court in Warsaw show that the average length of appellate proceedings before this court in commercial cases that ended in the first half of 2019 was 13.1 months.
Appellate proceedings last much longer if the court decides to take additional evidence. Moreover, in specific circumstances, the court may refer the case back for reconsideration to the court of first instance, which considerably lengthens the whole proceedings. For instance, in regard to appellate proceedings before the Appellate Court in Warsaw, which ended in the first half of 2019, less than 12.1 per cent of commercial cases were referred back to district courts for reconsideration pursuant to data published by this court.

Appeals in commercial cases quite often succeeded in the first half of 2019: Appellate courts dismissed or entirely rejected 57.5 per cent of appeals in commercial cases. The remaining appeals resulted in the court of first instance’s ruling being overruled, at least partially, or in the referral of the case back to the court of the first instance for reconsideration.

In specific situations, the party that loses appellate proceedings may appeal against the ruling of the appellate court to the Supreme Court. The appeal does not suspend the enforceability of the ruling unless the appellate court decides otherwise.

There is no publicly available detailed data for the duration of arbitration proceedings in Poland. According to the Polish Arbitration Survey 2019 carried out by Kocur & Partners law firm, in cooperation with Kozminiski University in Warsaw and the University of Economics in Katowice, 79 per cent of the respondents reported that in none of the cases, or in a minority of the cases, the proceeding took more than 24 months.

Enforcement

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

There is no official data as to what proportion of judgments made by Polish courts in domestic litigation require enforcement proceedings. Usually, solvent debtors pay the award voluntarily to avoid paying the costs of enforcement proceedings. Still, it is not uncommon for fraudulent debtors to dispose of or conceal assets. In all enforcement proceedings in 2017, bailiffs recovered 18.6 per cent of the sum of all awards to be enforced. There are no official statistics regarding the effectiveness of enforcement proceedings in commercial cases.

In respect to arbitral awards, according to the previous Polish Arbitration Survey of 2016, only 10 per cent of respondents indicated that the arbitral award was voluntarily complied with in all cases they were involved in, while 18 per cent of respondents claimed that it happened in the majority of cases. Twenty per cent of respondents indicated that the arbitral award was voluntarily complied with in around half of the cases. Some 22 per cent of participants admitted that the losing party voluntarily complied with the award in a minority of cases, while 15 per cent indicated that it happened in none of the cases. About 12 per cent of respondents answered that it is difficult to say, and 3 per cent indicated that no award was issued in any of the cases they were involved in.

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 Polish domestic litigation, the rule is that the court orders the losing party to pay the reasonable costs of proceedings the winning party incurs, including court cost, the costs of appearing in person before the court and the fee of one attorney. The losing party will be obliged to pay statutory interest for late payment (7 per cent in 2019) on the reasonable costs of proceedings calculated form the day when the award become final and binding (however not earlier then from the seventh day from the issuance of the award) until the day of payment. If the winning party’s costs of proceedings were exceptionally high, the court may award interest on these costs calculated from the day when the costs were incurred.

The reimbursement of an attorney’s fee is limited and usually does not correspond to the fees actually paid to that attorney. In cases exceeding 5 million zlotys, the court will order the losing party to pay from 25,000 zlotys to 150,000 zlotys to cover the opposing attorney’s fee for proceedings at the first instance. The limits to reimburse an attorney’s fee for appellate proceedings and proceedings before the Supreme Court are in the range of 50 per cent to 100 per cent of fees for first instance proceedings. The courts rarely order the losing party to pay more than the minimal rate, regardless of the fees actually paid (e.g., 25,000 zlotys in cases exceeding 5 million zlotys).

If a part of a claim is awarded, the court may order the losing party to pay a proportional part of the adverse costs or decide that each party has to pay its own costs. If only a minor part of the claim is denied, the losing party has to reimburse the adverse costs in full within the aforesaid limits. In certain justified circumstances, the court may order the losing party to pay only part of adverse costs or no adverse costs at all. The winning party may be ordered to pay adverse costs if the defendant accepts the claim in the first response addressed to the court and, simultaneously, did not give the claimant any reasons to file the statement of claim. If the summoned party fails to appear at the hearing or participate in other court activities, the court may, irrespectively of the outcome of the case, order this party to pay a part of the costs of the second party or even pay the costs in full.

Different rules apply in arbitration. According to the rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, the arbitral tribunal decides which party should cover the adverse costs, taking into account the outcome of the case and other relevant circumstances. The adverse costs include arbitration and registration fees, expenses incurred in relation to the arbitration proceedings and reasonable attorneys’ fees. The arbitral tribunal decides what fees are reasonable in each given case. The Court of Arbitration at the Confederation of Lewiatan has adopted similar rules.

Liability for costs

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

A third-party litigation funder may not be held liable for adverse costs.

COLLECTIVE ACTIONS

Funding of collective actions

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

Opt-in class actions are permitted in Poland in cases concerning product liability claims, unfair enrichment claims, disputes over breach of agreements and delicts, excluding in general claims for the protection of personal rights. Moreover, class actions are permitted in all cases concerning consumers’ claims.
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?)

In domestic litigation, the court orders the claimant to provide security for costs if the claimant comes from a country outside the European Union. Moreover, the court may order the class representative in class action proceedings to provide security for costs. The court cannot order a third party, including funders, to provide such security.

Upon the defendant’s motion, the court is obliged to order the claimant to provide security for costs if the claimant has its place of residence, ‘usual stay’ or a registered office outside the European Union. However, there are a number of cases in which a foreigner cannot be obliged to provide security. In particular, a foreigner cannot be ordered to provide security if it has assets in Poland sufficient to cover the costs of the proceedings, or the parties subject the case to the jurisdiction of Polish courts or the ruling of a Polish court in regard to costs is enforceable in the country where the claimant has its place of residence, ‘usual stay’ or registered office. In addition, Poland has entered into a number of treaties that release foreigners from the duty to provide security for costs (eg, with China and Russia).

The court calculates security taking into account the anticipated costs the defendant may incur in the first-instance proceedings and the appellate proceedings, except for the costs of counterclaim. The costs that may be incurred in proceedings before the Supreme Court should also be included if an appeal to the Supreme Court is permitted in a given case. Since the aim of the security is to ensure the enforcement of the claimant’s payment of adverse costs, the amount of security should in general correspond to the hypothetical amount of adverse costs that the court would order the claimant to pay if it loses the case. The security should be deposited in cash or by wire transfer to the designated bank account of the Polish Ministry of Finance, unless the court decides otherwise. If the security is not paid, the statement of claim will be rejected by the court.

In class action proceedings, upon the defendant’s motion, the court may order the class representative to provide security for costs. The security cannot exceed 20 per cent of the claim. The security should be provided in cash or by wire transfer within the term indicated by the court, which should be no shorter than one month.

The defendant seeking security has to convince the court that there is a high probability of the claim being dismissed and that the defendant most likely will not be able to enforce the reimbursement of its costs without the security. In arbitration proceedings before the leading courts of appeal in Poland, the Polish Chamber of Commerce in Warsaw, and Court of Arbitration at the Confederation of Lewiatan, the arbitral tribunal may not order a claimant to provide security for costs.

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

Third-party litigation funding is irrelevant for the court in respect of deciding on security for costs.

Insurance

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

ATE legal expense insurance is not used in Poland. It is disputable if Polish law even permits ATE insurances. There is a risk that they might be deemed as unenforceable or as an illegal wager. Before-the-event legal expenses insurances are permitted, but are not popular.
In domestic litigation, the court fee to file a lawsuit is generally 5 per cent of a claim. The fee for filing a lawsuit in class action proceedings is 2 per cent of the claim. The same fees apply for filing an appeal. Each fee cannot exceed 200,000 zlotys.

In arbitration proceedings before the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, if the claim exceeds 1 million zlotys, the arbitration fee equates to 62,200 zlotys plus 0.9 per cent of surplus over 1 million zlotys. This percentage of surplus being a part of fee is reduced to 0.6 per cent in regard to a surplus over 10 million zlotys, and to 0.3 per cent in regard to a surplus over 100 million zlotys. Arbitration fees at the Court of Arbitration at the Confederation of Lewiatan are similar.

**UPDATE AND TRENDS**

**Current developments**

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

In 2019 court fees were increased in the high-value cases. However, the fees are still relatively low. In any case a court fee for filing a lawsuit or an appeal cannot exceed 200,000 zlotys.

As of 2019, it will be more difficult for companies to obtain legal aid to cover the costs of proceedings. The company will have to prove that their shareholders do not have sufficient funds to cover the costs of proceedings.
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 Energia Inversora, SAU and Petersen Energia, 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 contact 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.

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.
Overview

In 2004, the Swiss Federal Supreme Court held that litigation funding by third-party funders is permissible in Switzerland if the funder acts independently of the client’s lawyer (decision BGE 131 I 223). The court stated that it could even be advantageous for a claimant to have his or her claim assessed by an independent expert who intends to cover the financial risk of the envisaged litigation process and who is thus complementing the claimant’s lawyer’s view (BGE 131 I 223 c. 4.6.3).

In 2014, the court expressly confirmed its earlier decision. It further concluded that, in the meantime, litigation funding has become common practice in Switzerland, and it held that it is part of the lawyer’s professional conduct as provided by the Federal Act on the Freedom of Movement for Lawyers (BGFA) to inform claimants about a potential litigation funding option as the circumstances require (Federal Supreme Court decision 2C_814/2014 c. 4.3.1).

Thus today, litigation funding in Switzerland is an accepted practice and has been judicially endorsed by the Federal Supreme Court twice in recent years. In light of its rather comprehensive and detailed legal analysis, the court established in Switzerland quite a clear and favourable environment for third-party litigation funding.

Nevertheless, third-party litigation funding is still not broadly used in Switzerland. The reasons for this might be the relatively late establishment of litigation funders in Switzerland compared with other jurisdictions and, notwithstanding the Swiss Federal Supreme Court’s verdicts, a certain reluctance for the option of third-party litigation funding on the part of some Swiss lawyers. Another reason why the relevance of third-party litigation funding is still relatively modest may have to do with the fact that class actions or other mechanisms of collective redress do currently not form part of Switzerland’s civil procedural law practice. However, with the envisaged partial revision of the Swiss Civil Procedure Code (CPC), as proposed in the Preliminary Draft, collective redress shall be strengthened so that group actions and collective settlement proceedings will become admissible procedural tools in Switzerland.

Specific rules for litigation funding

There are no specific provisions in the CPC or in any other Swiss legislation. However, the Federal Supreme Court held that a range of existing general provisions in various parts of the Swiss legislation (eg, article 27 of the Civil Code, article 19 of the Code of Obligations or article 8 of the Unfair Competition Act) would be applicable should a litigation funding agreement violate certain principles of Swiss law (BGE 131 I 223 c. 4.6.6).

With regard to regulatory provisions, the court explicitly stated that third-party litigation funding cannot be regarded as an insurance offering as defined by the Swiss Insurance Supervision Act (ISA, BGE 131 I 223 c. 4.7). Furthermore, the core offering of a funder does not, in general, fall under the Swiss financial market laws (eg, Banking and Insurance Acts, the Anti-Money Laundering Act and the Collective Investment Scheme Act). However, depending on the funding structure, funders might qualify as asset managers of collective investment schemes and must be authorised by the Swiss Financial Market Supervisory Authority (FINMA).

In light of the rules pertaining to lawyers’ professional conduct in Switzerland, which do not allow for lawyers to be paid on the basis of contingency fees only, it has to be kept in mind that any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer would violate the respective provisions.

Legal advice

The lawyer’s professional conduct in Switzerland is provided in article 12 of the BGFA. According to the Federal Supreme Court decisions mentioned in question 1, the lawyer’s independence in acting on behalf of the litigant is crucial; this also applies to cases involving a third-party funder. However, the court also stated that by a clear separation of the roles between the lawyer and the funder, a lawyer who advises his or her clients in relation to a funder has no conflict of interest in principle. In addition, the court held that it is part of the lawyer’s professional conduct to support his or her clients in negotiations with the funder; obviously, always advising in the interest of the client.

Restrictions on funding fees

In its legal analysis, the court cited a source who described a success fee of 50 per cent as ‘offending against good morals and thus illegal’, however, without confirming or even commenting on this opinion (BGE 131 I 223 c. 4.6.6).
Regulators

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

The Federal Supreme Court clarified this question with regard to the point that litigation funding is not deemed to be an insurance offering as defined by the ISA and is thus not regulated by FINMA (see question 3). As the core offering of a funder generally does not fall under the Swiss financial market laws, there is no known interest of the Swiss financial regulator to oversee litigation funding reported.

In its 2013 report on collective redress, the Swiss Federal Council suggested promoting litigation funding in Switzerland in general, without pointing at a specific need for regulation or oversight.

Funders' Rights

Choice of counsel

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

Independence in acting on behalf of the litigant (see question 4) is an important principle of the lawyer’s professional conduct in Switzerland. In light of the established third-party litigation funding concept, this means that, in general, the litigant’s lawyer must be able to act freely from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder’s right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that if the litigant intends to replace his or her lawyer, funding will only be further granted if the new lawyer will be accepted by the funder.

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

In domestic litigation, court hearings are generally public and funders can attend without having to obtain specific permission. On the other hand, settlement and organisational proceedings are conducted in private. However, if the counterparty does not object to it, a litigant might invite his or her funder to participate in such proceedings based on a respective clause in the funding agreement. This also applies to arbitration. While the respective hearings and proceedings are generally private, funders may participate if there is no objection by the counterparty.

However, it must be kept in mind that the majority of cases funded by third-party funders in Switzerland so far have been carried out without disclosing the funder’s engagement. As such, the relevance of the funder’s permission to attend or participate is limited.

Veto of settlements

Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in the funding agreement. This is generally permissible under the Swiss Code of Obligations and interferes with neither the independence of the litigant’s lawyer nor with any other provision of Swiss law. Moreover, it is quite usual that litigants and funders agree in advance on certain minimum and maximum amounts concerning the limitation of the funder’s veto right and his or her right to oblige the claimant to accept a particular settlement.

Termination of funding

In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. Usually, such circumstances fall into two categories. On the one hand, there are events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or authority decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown facts;
- a change in the case law that is decisive for the current litigation process;
- a loss of evidence or evidence that is accepted and tends to be negative; and
- a major change in the creditworthiness of the respondent.

In practice, a funder would, under such circumstances, terminate the funding agreement and bear any costs incurred or caused until the termination, as well as costs that occur as a result of the termination.

While these clauses prevent the funder from continuing to fund litigation processes that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such a case, the funder can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, given these circumstances, the litigant is usually obliged to reimburse the funder for its costs and expenses.

Other permitted activities

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?

As the Federal Supreme Court emphasised the independence of the claimant’s lawyer from the litigation funder, a direct approach of the funder in order to instruct the lawyer during the proceedings is not permissible. The lawyer would violate the professional conduct as provided by the BGFA if his or her actions were based on a funder’s, rather than on his or her client’s, instructions.

Therefore, any rights and actions the funder intends to exercise during the course of the litigation process have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation process and any rights to veto the actions a litigant is usually free to take.

In consequence, the litigant is usually obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written permission of the funder.

Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding (see question 3), funders only need to take an active role as provided by the litigation funding agreement. In addition, the involvement of a litigation funder is not disclosed to the court nor the counterparty in the majority of cases (at least as long as no international arbitration proceedings are concerned), which also considerably limits the funder’s role within the litigation process.
Time frame for first-instance decisions

In general, a commercial litigation before a court of first instance in Switzerland takes between one and 18 months to render a decision. Only a small proportion of these judgments are appealed before the Federal Supreme Court. An average appeal here usually takes less than one year.

Challenges to an arbitration award are heard exclusively by the Swiss Federal Supreme Court and are generally adjudicated within a time period of four to six months from the date of the challenge.

Enforcement

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective number seems to be rather low.

The enforcement of Swiss judgments is governed by the CPC and by the provisions of the Federal Debt Enforcement and Bankruptcy Act (DEBA). A judgment rendered by a Swiss court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement or if it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

In general, the enforcement of an enforceable judgment or arbitral award in Switzerland is not seen as particularly burdensome, expensive or unsecure. Also, it is important to note that an enforceable Swiss judgment allows for an attachment of known assets of the debtor located in Switzerland.

Collective actions

Funding of collective actions

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

As mentioned in question 1, class actions are not part of Switzerland’s civil procedural law practice. The only form of collective redress currently available under the CPC is the joinder of parties. Unlike class actions, the parties to the joinder may not seek damages on behalf of others who have not joined the proceedings. The funding of such litigation processes by a third party is comparable to the funding of individual claims, and is thus permissible without any restrictions.

In its 2013 report on collective redress, the Swiss Federal Council suggested a number of measures to support the effective and efficient procedural handling of a large number of identical claims against the same respondent or respondents and to allow for a facilitated enforcement of consumer rights in particular. The authors of the report also suggested the promotion of litigation funding by third parties to cover the costs of the envisaged collective redress proceedings.

On 2 March 2018, the Swiss Federal Council initiated the consultation phase regarding the Preliminary Draft of the revised CPC which proposes a number of collective redress mechanisms including group actions.

Costs and insurance

Award of costs

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?

As a general principle of the CPC, court fees as well as all other expenses arising from the litigation, including the opposing lawyer’s
fees, are borne by the losing party. If a party prevails only in part, the fees and expenses will be split proportionally between the parties. In the event of a settlement, the costs are charged to the parties according to the terms and conditions of the settlement agreement.

The Swiss courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before cantonal courts and the Swiss Federal Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party and there is little legal basis for such an argument in Swiss law, neither in the rules pertaining to material damages nor in those regarding procedural costs (eg, adverse costs). A potential ground for a respective decision could be seen in article 95(3a) of the CPC (‘necessary expenses’): where a claimant has turned to a litigation funder for reasons of dire financial necessity as a result of the defendant’s refusal to settle an outstanding invoice, one might argue that the counterparty should be liable for this involuntary financial situation since, if the claimant won the case, the counterparty was wrong not to pay the invoice in the first place. In the spirit of this argument, a claimant for which, financially speaking, the assistance of a litigation funder is the only way to receive what turns out to be rightfully his or hers, should have the funder’s share of the successful claim compensated by the counterparty – or at least a part, taking into account a deduction for the ‘risk-free’ character of proceedings when being funded compared to unfunded proceedings.

Liability for costs

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

The CPC does not provide for a basis for the court to order a third-party funder to pay adverse costs and to hold him or her liable for such costs. In the litigation funding concept developed and observed in Switzerland, the funder’s contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect.

In theory (provided that the litigation funding agreement stipulates an obligation of the funder to cover the adverse cost risk, which is common practice in Switzerland), there are two ways in which a litigation funder can be held liable for these costs by the prevailing respondent.

If the unsuccessful claimant assigns his or her claim against the funder to cover the adverse costs imposed on him or her by the court to the respondent (and the litigation funding agreement allows for such an assignment), the respondent can take the assigned claim against the funder to the competent court.

If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow for an assignment), then the respondent has to take legal action against the claimant. In practice, the Swiss courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the DEBA that govern the enforcement of a judgment related to the payment of money, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

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?)

There are two different types of security for costs that Swiss courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs based on the CPC. In addition, the claimant must advance the costs for taking the evidence he or she requested.

At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party’s costs if the claimant has no residence or registered office in Switzerland, appears to be insolvent, owes costs from prior proceedings, or if, for other reasons, there seems to be a considerable risk that compensation will not be paid. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Switzerland has entered into a treaty that excludes respective security bonds.

The CPC does not provide for a basis to request such security from the funder of a claim and there have been no cases reported where Swiss courts considered such a request.

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

In most of the state court cases funded so far by third-party funders in Switzerland, the funder’s engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts decided on advances and securities solely focusing on the claimant’s status (see question 19) and did not take the existence of the third-party funder into account.

In Swiss-based domestic and international arbitration proceedings, in contrast, the fact that the claimant is supported by a third-party funder may have an impact on the evaluation of a security-for-cost request.

Insurance

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

ATE litigation insurance is not common in Switzerland. Although no legal or regulatory restrictions limit the respective product, there is, currently, no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases.

By contrast, legal cost insurance is commonly used in Switzerland. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy, but usually only for certain types of claims.

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?

The CPC does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that he or she is supported by a third-party funder. It also does not provide a basis for a Swiss court to order a litigant to do so.

While some authors have argued that a litigant might have, under specific circumstances, such an obligation in domestic arbitration, there
have been no cases reported where a litigant had to disclose the litigaton funding agreement in a Swiss-based arbitration.

In Swiss-based international arbitration proceedings, on the other hand, the applicability of the IBA Guidelines on Conflicts of Interest in International Arbitration may require the disclosure of the existence of a funding agreement if there are any concerns with regard to a potential conflict of interest.

**Privileged communications**

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

While any legal advice given by a Swiss or non-Swiss lawyer to a litigant is privileged and does not have to be disclosed to the other party or the court, the communications between litigants or their lawyers and third-party funders do not fall within the legal privilege.

However, there have been no cases reported where such communications had to be disclosed by order of a Swiss court.

**DISPUTES AND OTHER ISSUES**

Disputes with funders

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

No disputes between litigants and funders have been recorded in Switzerland so far.

Other issues

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

No.

**UPDATE AND TRENDS**

Current developments

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

No updates at this time.
United Arab Emirates

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REGULATION

Overview

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

There are a number of judicial authorities within the United Arab Emirates and it is necessary to look at each separately when considering third-party funding.

Commercial disputes arising in the United Arab Emirates will be resolved by the local civil law courts unless the parties have opted into another jurisdiction or signed a valid arbitration agreement.

The United Arab Emirates consists of seven emirates. ‘Local courts’ or ‘onshore courts’ (see below) refer generically to the courts of the seven emirates.

In addition, the United Arab Emirates has a number of free zones where companies can set up and do business under the rules of the free zone. These rules are different from those that apply to companies doing business elsewhere in the United Arab Emirates. Businesses located in the free zones are commonly referred to as being in ‘offshore’ United Arab Emirates, with areas outside the free zones being known as ‘onshore’ United Arab Emirates.

Two free zones in the United Arab Emirates have their own courts, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). The rules of those courts determine the circumstances in which the courts have jurisdiction. Additionally, contracting parties, whether registered in these free zones, in onshore United Arab Emirates or outside the United Arab Emirates altogether, can agree that the DIFC or ADGM courts have jurisdiction to resolve their commercial disputes.

The DIFC and the ADGM also have their own common-law based laws. The DIFC’s laws are modelled closely on the principles of English common law. English common law is directly applicable in the ADGM, as are certain United Kingdom statutes.

Parties doing business in the United Arab Emirates also have the option to agree that disputes will be resolved by arbitration. Parties can choose between having the arbitration seated in onshore United Arab Emirates, in the DIFC or in the ADGM. In the case of an onshore seat, the arbitration will be governed by the recently enacted UAE Federal Arbitration Law (Law No. 6 of 2018). Arbitration seated in the DIFC will be subject to the DIFC Arbitration Law (DIFC Law No. 1 of 2008) while arbitration in the ADGM is governed by the ADGM Arbitration Regulations 2015.

There are no rules or laws that prohibit litigation funding in the United Arab Emirates. Indeed, there is a strong argument that litigation funding is consistent with the key jurisprudential principle in sharia law that a transaction should benefit public interest (maslaha) in the sense that funding can give parties of limited financial means a method of funding meritorious claims that they might otherwise be unable to pursue.

Case reporting of local court decisions is confined to important decisions of the Courts of Cassation and so the attitude of the local courts to third-party funding is difficult to discern. However, there has been no indication from reported cases that it is either discouraged or regarded unfavourably although it is still relatively uncommon in the local courts.

Some commentators have suggested that the sharia law prohibition on speculative or highly uncertain transactions (Gharar) may apply to third-party funding arrangements in onshore UAE. However, funders usually carry out extensive due diligence on the merits of a case before agreeing to funding, and in those circumstances it seems unlikely that the Gharar prohibition would apply. The risk can be further mitigated by careful drafting of the funding agreement, with the risks and benefits to both parties being clearly identified so that it is clear that neither party is taking excessive risk.

Third-party funding in the DIFC courts is permitted and the DIFC courts issued a Practice Direction on Third-Party Funding in March 2017. The rules in the DIFC Practice Direction largely mirror the position in England and Wales but they are not identical.

Third-party funding in the ADGM courts is permitted by Part 9 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (ADGM Courts Regulations), unless the matter relates to proceedings that cannot be the subject of an enforceable conditional fee agreement, or to any proceedings specifically prescribed by the Chief Justice.

Third-party funding is not addressed specifically in the arbitration laws applicable in onshore United Arab Emirates, the DIFC or the ADGM, but there is no reason to suppose that it would not be permitted under the general laws applicable in those jurisdictions. The fact that third-party funding is specifically permitted in litigation in the DIFC and ADGM courts is a good indicator that it would not be prohibited in arbitration seated in the DIFC or ADGM.

The reference to third-party funding in the draft new Dubai International Arbitration Centre (DIAC) Rules is another recognition of the legitimacy of third-party funding in an arbitration context.

The new Federal Arbitration Law in the United Arab Emirates is based on the 2006 United Nations Commission on International Trade Law (UNCITRAL) Model Law, with some adaptations to fit the local legal framework. The grounds for challenge of an arbitration award closely follow the equivalent provisions in the Model Law, with some additional grounds for challenge based on irregularities in the arbitral proceedings. Much will depend on how the new law is interpreted by the onshore courts, but the new law should generally lessen concerns over enforcement of onshore UAE-seated arbitration awards against assets in onshore United Arab Emirates. This should make the funding of arbitration in the United Arab Emirates a more attractive prospect than it was previously.
Restrictions on funding fees

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

There are no specific laws or rules that limit the fees that third-party funders can charge where the proceedings are in the onshore courts. Interest may be recoverable under onshore UAE law in certain specified circumstances, but compound interest will not be recoverable.

UAE law recognises the principle that parties are free to contract on the terms they wish. The courts have power to intervene in certain circumstances but these are unlikely to apply in a third-party funding context. Contracts in the United Arab Emirates must be performed in accordance with the requirements of good faith.

There are no limits in the DIFC Practice Direction on the fees and interest funders can charge. However, DIFC law is modelled on English law and so funders should be mindful of the English law rules of maintenance and champerty. Modern English law recognises that third-party funding does not of itself amount to either maintenance or champerty. However, if the funding agreement contains an element of impropriety, such as the exercise of disproportionate control or the recovery of excessive profit, it could breach the rules and be void.

The ADGM Courts Regulations provide that the sum to be paid by the funded party must consist of ‘any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder’s anticipated expenditure in funding the provision of services’ and ‘that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Chief Justice’. This suggests that damages-based payments to the funder will not be permitted.

The ADGM court applies English common law directly and so the comments regarding maintenance and champerty are also relevant.

The arbitration laws applicable in onshore United Arab Emirates, the DIFC and the ADGM do not specifically provide for third-party funding. However, for arbitrations with a DIFC or ADGM seat see the comments about maintenance and champerty above.

Specific rules for litigation funding

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

There is currently no legislation or regulation for third-party funding of cases in the onshore UAE courts.

The DIFC Practice Direction and the ADGM Courts Regulations referred to in question 1 provide for third-party funding.

The UAE Federal Arbitration Law, the DIFC Arbitration Law and the ADGM Arbitration Regulations are silent on third-party funding.

Legal advice

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

There are no specific rules applying to lawyers advising on third-party funding for cases in the onshore courts.

Expatriate lawyers who practise in the United Arab Emirates and are registered and regulated by professional supervisory authorities in their home countries may still be required to comply with their own relevant ethical rules.


No specific professional or ethical rules apply in relation to third-party funding in arbitration.

Regulators

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

There are currently no public bodies in the United Arab Emirates with a particular interest in or oversight over third-party funding. However, the Legal Affairs Department of the government of Dubai may have an interest in third-party funding to the extent that it relates to any issue failing within the (non-mandatory) Charter for the Conduct of Advocates and Legal Consultants in the Emirate of Dubai 2015.

The DIFC Authority was established to oversee the development, management and administration of the DIFC. The Authority may have an interest in third-party funding if it is likely to bring more cases before the DIFC courts but there is currently no specific oversight over third-party funding in either the DIFC or ADGM courts or in arbitration, although we anticipate that this may change as interest in third-party funding continues to grow.

FUNDERS’ RIGHTS

Choice of counsel

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

The quality of the lawyers conducting the litigation or arbitration will, as in other jurisdictions, be an important factor in the funding decision. However, funders will not generally insist on use of a particular counsel, consistently with the principle that litigation funders do not control the litigation.

Participation in proceedings

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

Proceedings in the onshore UAE courts are public so third-party funders are in principle free to attend the hearings. However, the proceedings are in Arabic and involve very little in the way of advocacy. Hearings are generally limited to the submission or exchange of written memoranda by or between the parties’ advocates.

The majority of hearings in the DIFC and ADGM courts are public (unless the court orders otherwise) and so there is no reason why funders could not attend, although participation would not generally be permitted. All hearings are conducted in English.

The extent to which a funder may be able to participate in settlement discussions will largely depend on the terms of the funding agreement. Funders must be careful to avoid exercising disproportionate control in order to avoid breaching the rules against maintenance and champerty referred to in question 2.

Arbitration hearings are private but if both parties agreed to the funder attending the hearing then this may be possible provided the tribunal did not have objections. It is very unlikely that the funder would be able to participate in hearings.

Veto of settlements

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

There are no specific rights to veto and the ability to do so would depend on the terms of the funding agreement. There is nothing in principle to prevent a funding agreement giving the funder the right to make continuance of funding conditional on acceptance of reasonable settlement proposals. However, where the funding agreement is subject to UAE law, the UAE Civil Code will require it to be performed in accordance with the requirements of good faith.
Termination of funding

9 | In what circumstances may a funder terminate funding?

The funding agreement is likely to confirm the circumstances in which it can be terminated by the funder. These circumstances will usually include changes in the prospects of success during the course of the proceedings.

If the funding agreement is subject to UAE law then the UAE Civil Code will apply to it. Article 267 provides that a contract can only be varied or cancelled ‘by mutual consent, or an order of the court, or under a provision of the law.’

It is advisable for the funding agreement to state expressly that agreement to the termination provisions constitutes ‘mutual consent’ for the purpose of article 267.

There are no specific provisions dealing with the termination of funding in DIFC or ADGM court proceedings or in arbitration. However, given that the DIFC and the ADGM courts are common law courts and follow (or apply) English law, it would be sensible to adopt termination provisions that are compliant with the Association of Litigation Funders’ Code of Conduct in 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?

The role a funder will take in the process will depend on the terms of the funding agreement. Most funding agreements will set out the due diligence process the funder will undertake before committing to funding, as well as the ongoing monitoring. It is important that funders do not reserve the right to control the proceedings (see question 2 regarding maintenance and champerty), but they will generally require to have input at key stages of the litigation process.

A funder will not be required under any law or regulation to take an active role in cases in the United Arab Emirates, whether in onshore or DIFC-ADGM litigation or in arbitration seated onshore or offshore in the United Arab Emirates.

Conditional fees

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

UAE law prohibits contingency or success fee arrangements between lawyers and clients (although this prohibition does not apply to any agreement between a funded party and the funder).

Contingency fee arrangements are generally prohibited in DIFC court proceedings, although conditional fee arrangements (CFAs) are permitted (where a lawyer receives an uplift in fees in the event of success but not a share in the proceeds).

CFAs are permitted in the ADGM provided they comply with the requirements in section 222 of the ADGM Courts Regulations. Damages based agreements are also permitted, subject to the requirements of section 224.

There are no provisions addressing the position in arbitral proceedings. However, given the position summarised above, it is likely that CFAs would be permitted in arbitration seated in the DIFC or ADGM (but not in onshore United Arab Emirates) and that contingency fee agreements would not be permitted wherever the UAE seat.

Other funding options

12 | What other funding options are available to litigants?

There is no developed system of state sponsored legal aid in the United Arab Emirates but both the Dubai Legal Affairs Department and the DIFC Academy of Law have well-organised pro bono schemes that can be available to potential claimants depending on their circumstances and the type of claim involved.

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance enforcement

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

It usually takes at least 12 months to get a decision from the court of first instance in the onshore UAE courts. The proceedings can last longer if the court decides to appoint one or more court experts to investigate technical issues.

In the DIFC and ADGM courts a claim is likely to take approximately 12 months to get to trial but this will depend on the complexity of the case and the court’s availability.

The ADGM court opened in December 2015 but the first claim was not issued until August 2017 and to date there have only been three judgments handed down by the ADGM court. It is therefore difficult to determine timelines. However, the ADGM courts have expressed their commitment to helping parties to resolve disputes in a timely manner.

Arbitration timelines depend on the availability of parties and the arbitrators, the complexity of the issues and the institutional rules or ad hoc procedures adopted by the parties. However, a time frame of 12 to 18 months from commencement to award would generally be realistic for arbitrations seated in the DIFC or ADGM.

Arbitrations seated in onshore United Arab Emirates are now subject to the new UAE Federal Arbitration Law, which has introduced a number of modernising and streamlining initiatives in line with the United Arab Emirates’ ambition to adopt best international arbitration practice. Disregarding other potential variables, arbitration in onshore United Arab Emirates is now likely to be comparable in terms of timescale to arbitration in either of the two offshore seats.

Time frame for appeals

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

In the onshore courts, appeals to the Court of Appeal and from there to the Court of Cassation are routine for larger value claims. Appeals can take up to one year before each appeal court.

There are no available statistics about the proportion of judgments of the DIFC and ADGM courts that are appealed. As at September 2018, the ADGM courts are yet to receive an appeal. Given the efficient case management procedures in both courts, appeals are likely to be dealt with quickly.

Awards in arbitrations seated in the DIFC or ADGM are final and cannot be appealed. The only recourse against an award is by an application for setting aside.

In arbitrations seated in onshore United Arab Emirates, the new Federal Arbitration Law provides that an arbitral award can only be challenged by an application for setting aside the award on the grounds specified in article 53 (see question 15).
Enforcement

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

There are no reported statistics but we would estimate that more than half of judgments issued by the onshore UAE courts require enforcement proceedings where the assets are located onshore in the United Arab Emirates.

Judgments cannot be enforced against assets and property that is owned by the United Arab Emirates or the governments of the seven emirates. Therefore, if a judgment is against a government (or quasi-government) entity then the creditor has to rely on voluntary payment.

Where the debtor is not a government entity then applications can be made to the local UAE execution courts to attach funds in the debtor’s bank accounts up to the value of the judgment, and have them paid to the creditor. Assets such as property, machines and vehicles can also be attached and sold at auction with the proceeds being paid to the creditor (after the courts’ expenses).

When assets cannot be located, an application can be made to the court for an arrest order against the manager of a company against which a judgment has been issued.

The conditions for the enforcement of foreign judgments in the onshore courts are listed under article 235 of the UAE Civil Procedure Law. It is likely to be difficult to enforce a foreign court judgment in the onshore courts unless there is a mutual recognition and enforcement treaty between the United Arab Emirates and the relevant foreign jurisdiction.

There are no reported statistics on the proportion of judgments requiring enforcement in the DIFC and ADGM courts.

The DIFC courts’ judgments are relatively easy to enforce in onshore Dubai under the Judicial Authority Law. The DIFC courts are categorised as courts of the United Arab Emirates and therefore benefit from the reciprocal enforcement treaties entered into by the United Arab Emirates, including those with the Gulf Cooperation Council, France and India. The court has also entered into memoranda with various countries, including England and Wales, Australia and Singapore to govern reciprocal enforcement. Overall, the DIFC courts have established robust enforcement procedures and they are favourably looked upon within the region.

The ADGM courts have also entered into various memoranda to aid the enforcement of judgments, including a memorandum of understanding with the Abu Dhabi Judicial Department and the Federal Ministry of Justice. This is expected to aid enforcement in onshore Abu Dhabi.

Enforcement of a DIFC or ADGM award can only be refused on the narrow grounds set out in the DIFC Arbitration Law and ADGM Arbitration Regulations. Decisions on enforcement are made by the DIFC and ADGM courts respectively and they can be expected to deal with matters expeditiously.

DIFC arbitration awards that have been recognised and enforced by the DIFC courts can be enforced and executed in onshore Dubai under the Judicial Authority Law. The ADGM court memorandum of understanding referred to above will assist with enforcement and execution of ADGM arbitration awards in onshore Abu Dhabi.

In arbitrations seated in onshore United Arab Emirates the new Federal Arbitration Law provides that enforcement of an award can only be challenged on the limited grounds specified in article 53, which broadly follow the equivalent provisions in the 2006 UNCITRAL Model Law, with some additional grounds for challenge based on irregularities in the arbitral proceedings. The Model Law provisions are themselves based on the recognition and enforcement grounds under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Applications to enforce awards are made directly to the Court of Appeal, with one appeal to the Court of Cassation. Applications must be dealt with by the Court of Appeal within 60 days.

COLLECTIVE ACTIONS

Funding of collective actions

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

The onshore UAE courts do not have a system for filing class or collective actions and all claims must be filed separately.

The DIFC courts permit representative party actions where more than one person has the same interest in a claim. However, certain types of claims are excluded from representative actions. In addition, the DIFC courts permit group litigation and the court may order the management of claims that give rise to common or related issues of fact or law. There is nothing in the DIFC Practice Direction on Third-Party Funding that suggests that such actions could not be funded by third parties.

The ADGM Court Procedure Rules provide for group litigation orders where there are common or related issues of fact or law. Provided the group action does not relate to a type of proceedings for which funding is not permitted by the ADGM Courts Regulations it may be funded by third parties.

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 onshore UAE courts only make nominal awards for costs. The award is not intended to compensate the winning party for the costs incurred in having won the claim.

The DIFC courts may order the unsuccessful party to pay the costs of the successful party. The DIFC Practice Direction on third-party funding does not make clear whether the litigation funding costs of the successful party will be recoverable from the unsuccessful party. We are not aware of any reported decision on this point.

The ADGM court may make such an order on costs as it considers just. The ADGM Courts Regulations provide that a costs order made in any proceedings may, subject to court procedure rules, include payment of any amount payable under a litigation funding agreement.

The DIFC Arbitration Law and the ADGM Arbitration Regulations require the arbitral tribunal to fix the costs of the arbitration in the award, though there is no express obligation to order payment of those costs by either of the parties. Arbitrators will normally do so though and costs are likely to be awarded to the successful party in the absence of unusual circumstances.

We are not aware of any DIFC or ADGM seated arbitrations in which the unsuccessful party was ordered to pay the litigation funding costs of the successful party.

However, the judgment of the English Commercial Court in Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm) addressed this issue, finding that the definition of ‘other costs’ in section 59(1) of the English Arbitration Act 1996 could include third-party funding costs. English court judgments have persuasive authority in the DIFC courts and the ADGM courts directly apply English common law, so it may well be that this judgment would be followed by the DIFC or ADGM courts depending on the interpretation given to the definitions of costs in the relevant arbitration law and regulations.

In arbitrations seated in onshore United Arab Emirates, the new UAE Federal Arbitration Law provides that the arbitral tribunal shall...
assess the costs of the arbitration and may order that any or all of the costs are to be borne by one of the parties. The Law provides that the costs of the arbitration shall comprise the fees and expenses of the tribunal and the costs of experts appointed by the tribunal. There is no express reference to legal costs (unlike in the arbitration laws and regulations of the DIFC and ADGM) and so it will be important to review the applicable arbitration rules and any agreement between the parties when considering the recoverability of legal costs.

**Liability for costs**

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

The onshore United Arab Emirates courts will not make costs orders against third parties.

The DIFC Practice Direction on third-party funding provides that the DIFC courts have inherent jurisdiction to make costs orders against third parties, including funders, where the court deems it appropriate.

We are not aware of any reported decisions that address this point. However, we would expect the DIFC courts’ positions to mirror that of the English courts, who have shown themselves willing in appropriate circumstances (such as the unsuccessful funded party being impecunious and unable to pay the other party’s costs) to hold a funder liable for costs, capped at the level of funding provided.

Part 9 of the ADGM Courts Regulations contains no express powers to make costs orders against third-party funders and there are no reported decisions in the ADGM courts that hold a funder liable for costs.

However, given that the ADGM court applies English law common law it is likely that the ADGM court would follow English case law and so may hold a funder liable for adverse costs in appropriate circumstances.

It is very unlikely that a funder in an arbitration case would be held liable for adverse costs as an arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement.

**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 onshore United Arab Emirates courts are civil law courts and do not order security for costs, which is predominantly a common law concept.

The Rules of the DIFC courts provide that security for costs orders may be made against claimants. They also provide that an order may be made against someone other than the claimant where the court deems it appropriate.

The DIFC Civil Procedure Rules provide that a defendant may apply for security for costs under the conditions set out in any relevant practice direction and such an application may seek an order against someone other than the claimant.

An arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement and so could not order a third-party funder to provide security for costs.

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

See question 19. The onshore UAE courts do not make orders for security for costs.

The DIFC Practice Direction on third-party funding provides that when a DIFC court is making decisions on security for costs it may take into account that a party has funding, but the fact that a party is funded shall not by itself be determinative.

The ADGM’s Practice Direction on security for costs sets out the factors for the court to consider and does not refer to the funding of the claim.

There are no express powers for arbitrators to award security for costs under the relevant arbitration laws and regulations.

**Insurance**

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

ATE insurance and other types of costs insurance are not commonly used in the United Arab Emirates, whether in litigation or arbitration.

ATE insurance would in principle be permitted, but the growth of an ATE market in the United Arab Emirates will depend on the availability of suitable products.

**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?

A litigation funding agreement does not need to be disclosed in onshore court proceedings and disclosure cannot be compelled.

The DIFC Practice Direction on third-party funding provides that a litigant must provide notice of the fact of funding to every other party and must disclose the identity of the funder, but not the funding agreement itself unless the court orders otherwise.

In the ADGM court a litigant who enters into a litigation funding agreement must put every other party on written notice of that fact but is not required to disclose the identity of the funder or the funding agreement.

There is no general requirement to disclose information about third-party funding in arbitration, although tribunals may be able to order disclosure, for example to avoid the risk of any potential conflict between the funder and any of the arbitrators.

**Privileged communications**

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

There is no concept of legal privilege in the onshore courts. There are however a number of relevant laws relating to confidentiality which may in practice have a similar effect, including Federal Law No. 23 of 1991 regarding the regulation of the legal profession.

The DIFC and ADGM courts recognise the concept that certain documents and correspondence will be privileged from disclosure.

A funder is likely to be given access to privileged material before deciding whether to fund the case. The litigant and the funder should therefore enter into a non-disclosure agreement before confidential and privileged material is disclosed. The NDA should specify that the litigant and the funder have a common interest giving rise to common interest privilege.
Privilege in communications between litigants and their lawyers is likely to be recognised by an arbitral tribunal in the United Arab Emirates whether the arbitration is seated on- or offshore.

**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

There have been no reported disputes in the onshore courts.

There was a case in the DIFC courts in 2014 (Claim No: CFI-036-2014) that involved Vannin Capital. Vannin had provided funding for claimants in litigation who subsequently discharged their lawyers without finalising a replacement payment receipt mechanism under the funding agreement. Vannin filed a claim with a DIFC court to protect and preserve its interest in the funding agreement. Vannin obtained an order for a sum of around US$11 million to be paid into court and held until the court’s further instruction as to who any payments should be made to and in what amount.

There have been no reported disputes in the ADGM. However, the courts only opened in December 2015.

**Other issues**

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

As a general point parties seeking funding should carry out adequate due diligence on prospective funders to satisfy themselves about their reputation, financial standing and values.

**UPDATE AND TRENDS**

**Current developments**

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

There are no updates at this time.

* This chapter was correct at the time of writing in November 2018.
Overview

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

In New York, third-party litigation funding is permitted, subject to a few caveats that will be discussed in the answers to the questions below. While it is still a relatively new concept in the United States compared with, for example, the United Kingdom, more and more claimants and their counsel are considering third-party litigation funding.

In the traditional third-party litigation funding model, the third-party litigation funder makes a non-recourse loan to the holder of a claim to cover legal fees or costs in exchange for a portion of the proceeds (whether through court action or settlement) arising from the holder’s enforcement of its claim. The acceptance of litigation funding can be seen through the case law mentioned below, which has, on the whole, protected claimant-funder disclosures, held funder participation not to constitute impermissible interference between lawyer and client, and held that funder’s returns do not constitute usury.

When addressing the related issue of third-party funding of law firms, New York Supreme Court Justice Shirley Kornreich extolled the value of ‘the sound public policy of making justice accessible to all regardless of wealth’ and recognised that the expense of litigation can otherwise deter litigation against ‘deep pocketed wrongdoers’. See Hamilton Capital VII LLC v Khorrami LLP, 48 Misc 3d (1223(A), 9 (NY Supreme Court 2015).

Restrictions on funding fees

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

There are no explicit limits on the fees and interest that a funder can charge. NY Banking Law section 14–a provides that interest on a loan cannot exceed 16 per cent. The permissible interest rate can go up to 25 per cent if the loan value is from US$250,000 to US$2.5 million, without any limit for loans in excess of US$2.5 million. However, since third-party litigation funding is generally provided on a non-recourse basis, the funding is treated as a purchase or assignment of the anticipated proceeds of the lawsuit, and therefore not subject to the usury statute and the limits on interest rates. See New York City Bar Association’s Committee on Professional Ethics (NYCBA) Formal Opinion 2011–2; Lynx Strategies LLC v Ferreira 957 NYS2d 636 (NY Sup Ct 2010) (third-party investment for share of proceeds is not usury), but see Echeverria v Estate of Lindner, 2005 NY Slip Op 50675(u), at *4–5 (NY Sup Ct 2005) (non-recourse agreement was a ‘loan’, not an investment, because recovery was certain under strict liability statute and interest rate was, therefore, usurious).

Specific rules for litigation funding

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

There are no statutes or regulations in New York directly applicable to third-party litigation funding, let alone any that expressly prohibit, or that would have the effect of prohibiting, third-party litigation funding.

One question that is often asked is if champerty prohibits third-party litigation funding. Since federal law does not address champerty, state law governs. There is significant variation between the states on this issue, with each state having its own definition of conduct that is champertous (although several states no longer prohibit, or never prohibited, champerty).

New York has laws, long on the books, which prohibit champerty. New York courts interpret champerty to occur when a party purchases a note, security, or claim ‘with the intent and for the primary purpose of bringing a lawsuit’. See Justinian Capital SPC v WestLB AG, 28 NY3d 160 (NY 2016); and Credit Agricole Corp v BDC Finance LLC, 2016 WL 6995892, 2016 NY Slip Op 32368(U) (NY Sup Ct 3D November 2016) (the champerty ‘statute does not bar a transfer or assignment when its goal is the collection of a legitimate claim’). The prohibition against champerty is ‘limited in scope’ and has historically been ‘directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs’. See Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp, 13 NY3d 190 (NY 2009).

No court in New York has found the traditional third-party litigation funding model to be champerty. The Court of Appeals of New York has analysed the champerty statute in the context of transactions in which a party acquires a note or security and then brings a lawsuit in its own name on the basis of that note or security. These cases help illustrate why third-party litigation funding is not champerty under New York law. The difference between champertous and non-champertous conduct turns on the party’s intent when entering into the transaction. Compare Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp (it was not champerty where the party purchased a note and brought an action as a way to enforce its rights under the note) and Justinian Capital SPC v WestLB AG (it was champerty where the sole purpose of acquiring the note was so the plaintiff could bring the action).

In both cases, the transactions were structured very differently from how a traditional third-party funding agreement is structured. For example, a third-party litigation funder does not acquire the asset itself, nor does it bring a lawsuit in its own name. Instead, the party whose lawsuit is being funded is, and remains to be, the original owner of the asset that is the subject of the litigation. Furthermore, the nature of the funder’s interest is to the proceeds of the litigation, not the underlying asset itself.

In the unlikely event a court was to consider third-party litigation funding to be champerty, the statute prohibiting champerty was
amended in 2004 to add a safe harbour provision (NY Judiciary Law 489[2]). The safe harbour provision exempts any transaction in excess of US$500,000 from the prohibition against champerty. See Justinian Capital SPC v WestLB AG. This would serve to protect just about any litigation funding arrangement from being prohibited as champerty.

Legal advice

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

In New York, a lawyer’s conduct is governed by the New York Rules of Professional Conduct (NYRPC). A lawyer who violates the NYRPC could be subject to disciplinary action, which could lead to his or her disbarment (rescindment of his or her right to practise law).

The NYRPC rules that a lawyer needs to consider in connection with third-party litigation funding relate to:

- the lawyer’s obligation to provide candid advice about the benefits and risks of litigation funding;
- avoiding conflicts of interest;
- maintaining client control over the proceeding; and
- the disclosure of information to the funder.

Rule 2.1 specifies that:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.

This means that a lawyer may not render advice based on the best interests of anyone other than his or her client. Accordingly, if a client is seeking litigation funding, a lawyer must ‘provide candid advice regarding whether the arrangement is in the client’s best interest’, and should discuss the costs and benefits, as well as alternatives. See NYCBA Formal Opinion 2011–2.

Where the third-party litigation funder is paying the client’s legal fees, the lawyer must ensure that the payment structure does not create a conflict of interest. The lawyer can meet his or her ethical obligations by obtaining informed consent from the client and ensuring that the funder does not interfere with the lawyer’s independent judgement or the client–lawyer relationship (NYRPC 1.8[f] [2]). The rules prohibit a lawyer from representing a client if, for whatever reason, there is a risk that the lawyer’s professional judgement will be adversely affected by the existence of the funder (NYRPC 1.7[a]).

At all times, it is the client who must control the litigation. While the client may permit the funder to be involved in the strategy or other aspects of the lawsuit (subject to any risks discussed throughout this chapter), such involvement is only allowed with the client’s explicit and informed consent (NYCBA Formal Opinion 2011–2). Except as authorised by law, a funder’s influence must never amount to interfering with, directing or regulating the lawyer’s judgement, or compromising his or her duty to maintain client confidences (NYRPC 5.4[c]).

Thus, regardless of the funder’s financial interest, a lawyer has a duty to abide by the client’s decision regarding litigation objectives and whether to settle a matter (NYRPC 1.2).

In addition, as is discussed in more detail in question 23, an attorney cannot disclose any information to any party, including a funder (or potential funder) without obtaining the client’s informed consent to disclose such information (NYRPC 1.6[a][1]).

Regulators

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

There are no governmental bodies that currently regulate or oversee third-party litigation funding in New York state.

Various lobbying organisations and legislative agencies in the US, and in New York, have suggested that further regulation is warranted, and have proposed that the Securities and Exchange Commission, Federal Trade Commission or even the Consumer Financial Protection Bureau would be well-placed to oversee third-party funders and ensure that third-party funders transact in a manner that protects the attorney–client relationship and the integrity of the judicial system and complies with the public interest. However, no such regulatory oversight has been enacted federally or in New York state.

FUNDERS’ RIGHTS

Choice of counsel

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

From a legal and ethical perspective, the client must select his or her own counsel and have control over the litigation (NYRPC 1.2). However, from a practical standpoint, the funder is deciding whether to enter into a contractual agreement with the client and if the funder does not approve of the attorneys that the client wishes to retain, the funder is fully within its rights to decline to fund the litigation.

The quality of the attorneys is a significant factor in a funder’s decision whether to fund the litigation. Thus, any client seeking litigation funding should expect that the funder will insist on counsel with expertise and a proven record of success.

Once the funding agreement is signed and the client has retained its lawyers, the client controls the engagement. If the funder becomes displeased with the client’s attorneys, the funder can speak with the client about its concerns, but the client decides whether, and with whom, to replace the attorneys. If the client does not follow the funder’s wishes, the funder’s only recourse will be governed by the terms of the funding agreement, which may allow the funder to cease funding the litigation.

Participation in proceedings

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

Court hearings in New York, and in the United States as a whole, are generally open to the public and anyone, including the funder, may attend as an observer. The funder is not considered a party and therefore would not be entitled to participate in any judicial proceeding or otherwise be represented at a hearing or other court appearance.

Settlement conferences normally only include the parties to the litigation. Courts generally want to encourage settlement and, for this reason, settlement communications are treated as confidential and not discoverable in future litigation or by other parties. The funder should have no expectation of being able to participate in these discussions, though both parties could presumably consent. Further, even though the funder does not get a seat at the negotiating table as a matter of right, nothing prohibits a client from consulting with its funder about a proposed settlement or the funder from offering his or her thoughts to the client and its lawyers regarding settlement.

In arbitration, the hearing and settlement proceedings are both confidential and, absent agreement of the parties, the funder would not be entitled to attend.
Veto of settlements
8 | Do funders have veto rights in respect of settlements?

There is no law in New York that directly addresses a funder’s veto rights in respect of settlement. In general, the funding agreement, including rights in respect of settlement, is defined by contract. As a matter of contract law, there is no reason why a client could not grant a funder the right to veto the client’s acceptance of a settlement agreement.

That being said, an attorney is ethically obligated to ‘abide by a client’s decision whether to settle a matter’ (NYRPC 1.2(a)). Thus, even if the funder was granted veto authority over settlement decisions, if the client wants to accept a settlement in the face of a funder’s exercise of its veto rights, the lawyer must follow the client’s instructions and accept the settlement. The New York City Bar has considered this question and noted that absent client consent, a lawyer is not permitted to allow anyone to direct or influence litigation strategy, including whether to settle (NYCBA Formal Opinion 2011–2).

Termination of funding
9 | In what circumstances may a funder terminate funding?

In general, the funding agreement, including the right to terminate, is defined by contract. If the terms of a contract call for continued funding, the funder has an obligation to continue funding, barring grounds for voiding that obligation. Such grounds may include fraudulent inducement or omission of material fact. A funder may also be excused from continued funding under the agreement if the contracting party materially breaches the agreement.

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?

Funders are not required to take an active role in the litigation process.

While not required to take an active role, in addition to providing the financial resources to support the litigation, there are many ways in which funders can serve as a valuable resource to counsel and to the client. By serving as an adviser or sounding board, the client (and the client’s lawyers) can draw on a funder’s broad experience and financial acumen to, among other things, consider the strategy and tactics as to the litigation, assess strengths and weaknesses in the case as the litigation proceeds and evaluate settlement proposals.

A funder can also review certain materials about the litigation and provide its thoughts to the client and the client’s lawyers. The materials that the funder can review, however, will likely be limited by a protective order in the litigation that will restrict access to the other side’s document production. The materials the funder can review may also be limited by concerns of potential waiver of attorney-client privilege or work product protection (see question 23).

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

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

Litigation lawyers may enter into contingency fee arrangements.

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

Litigants have a wide range of funding options available to them. In addition to a full litigation funding agreement, where the funder covers all costs and legal fees, the litigant can enter into a partial funding agreement, where the funder funds only a portion of the litigation and the litigant (or the litigant’s attorneys on a contingent basis) agrees to pay the rest of the costs and fees for the litigation. A litigant (or the litigant’s attorneys) may also obtain portfolio funding, whereby the funder provides capital on a non-recourse basis to the litigant (or the litigant’s attorneys), which is repaid from the proceeds of cases in that portfolio of cases.

A funder may also purchase an interest in the litigant (as well as certain rights to serve on the litigant’s board) in exchange for a percentage of any recovery, which may address certain concerns about waiver of attorney-client privilege and work product.

A litigant can, of course, seek to take a recourse loan, using the proceeds of the litigation as collateral that must be repaid regardless of the results of the action.

With respect to a law firm obtaining a non-recourse loan from a funder to be repaid from the law firm’s future legal fees, it is worth noting that the New York City Bar Association issued a recent advisory opinion that called into question the appropriateness of such arrangement. NYCBA Formal Opinion 2018–5. The NYCBA concluded that such arrangement is impermissible fee splitting. The NYCBA’s opinion is inconsistent with settled New York case law on this point (see Hamilton Capital VII LLC v Khorrami LLP, 48 Misc 3d 1223(A), 9 (NY Sup Ct 2015) (law firm financing is not impermissible fee splitting, and further it ‘promotes the sound public policy of making justice accessible to all, regardless of wealth.’)), and there has been widespread criticism of this non-binding advisory opinion. In any event, the NYCBA distinguished this from the traditional litigation funding model – whereby the client obtains funding itself – which the NYCBA had previously held to be acceptable. NYCBA Formal Opinion 2011–2.

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 the US District Court for the Southern District of New York, a commercial claim can be expected to take over 30 months from filing to a hearing on the merits of the case. Since many cases are resolved before trial through motion practice or settlement negotiations, the median length from filing to disposition of a case is 6.5 months. These statistics are available on the US Courts website.

For complex commercial claims, the timeline in New York state court would be similar. Most of these claims will be heard before the Commercial Division of the New York Supreme Court, which is a specialised division that focuses on creating uniformity and predictability in complex commercial disputes.

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

Approximately 10 per cent of filed cases are appealed. In cases that have gone to trial, nearly 40 per cent are appealed. See Eisenberg, Theodore, Appeal Rates and Outcomes in Tried and Non-tried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes (2004), Cornell Law Faculty Publications, Paper 359.
In the Court of Appeals for the Second Circuit, which encompasses New York, the median time from filing an appeal to disposition is 11 months.

**Enforcement**

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

In our experience, defendants generally satisfy a judgment against them without the need for enforcement, let alone contentious enforcement proceedings. However, if a defendant is unwilling to satisfy a judgment against it, both federal and New York courts have robust and well-established mechanisms to empower the plaintiff to locate, freeze, and seize the defendant’s assets to satisfy the judgment.

The ease or difficulty in enforcing a judgment is influenced by a myriad of factors, including:

- the judgment debtor’s willingness and resources to resist enforcement proceedings;
- the size of the judgment;
- the location of the judgment debtor’s assets;
- what, if any, steps the judgment debtor has taken to conceal its assets; and
- the extent to which the judgment creditor has mitigated against the risk of an unsatisfied judgment by careful selection of targets through pre-suit investigation and by learning as much as possible about the judgment debtor during discovery in the underlying litigation.

**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 and third parties may fund them. In fact, third parties have funded many of the larger class actions. See, for example, *Kaplan v SAC Capital Advisors LP*, No. 12–CV–9350–VM-KNF, 2015 WL 5730101 (SDNY 10 September 2015) (a securities class action on behalf of shareholders seeking over US$680 million arising from an insider trading scandal was funded by a third party). In 2017, the United States District Court for the Northern District of California issued a standing order that specifically requires the disclosure of a party funding a class action litigation (ND Cal Standing Order No. 19 (17 January 2017)). This rule does not apply to general civil litigation and there is no such rule directed specifically to disclosure of funders (as compared to those requiring general disclosure of anyone with a financial interest in the lawsuit) in any other courts, including those in New York.

**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 responding to this question, we think it best to distinguish between ‘costs’ (disbursements related to expenses other than legal fees) and ‘fees’ (legal fees). As a general rule, in US litigation, the losing party does not pay the attorneys’ fees of the prevailing party except in specific types of cases, or where otherwise required by a contract between the parties. For instance, consumer protection or civil rights lawsuits allow for the collection of attorneys’ fees, as do patent-related matters in exceptional cases. In addition, a court has the discretion to order the unsuccessful party (or its attorney) to pay to the prevailing party its attorneys’ fees or other financial sanctions, if the unsuccessful party engaged in frivolous conduct in connection with the litigation (22 NYCRR 130–1.1; see also Fed R Civ P 11). In 22 NYCRR 130–1.1(c), New York has defined conduct to be frivolous if:

1. it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
2. it is undertaken primarily to delay or prolong the resolution of the litigation . . . , or
3. it asserts material factual statements that are false.

Further, ‘costs’ are awarded to the prevailing party in both the New York state system and the federal system. In the state system, costs are set by statute and are a small and arbitrary amount based on factors such as timing and amount of resolution, with a maximum amount of a few hundred dollars. In federal court, however, awarded costs can be significant. Chargeable costs include some court and transcript fees, witness fees, and document copying costs (28 USC section 1920). Expert witness fees, which depending on the nature of the litigation can be large, are generally not chargeable beyond the small statutory daily attendance fee. In some cases, document copying costs have been held to include a portion of the prevailing party’s e-discovery costs, which can be substantial. See *Balance Point Divorce Funding LLC v Scranton*, 305 FRD 67 (SDNY 2015).

**Liability for costs**

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

No published case applying New York law has held a third-party litigation funder liable for adverse costs (including attorneys’ fees in applicable circumstances).

This does not mean that the terms of the funding agreement may not make the funder responsible for the payment of any adverse costs order. Best practices dictate that the funding agreement address whether the funder is or is not responsible for the payment of any adverse costs order (including any responsibility for attorneys’ fees).

**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?)

Courts do not order a party to provide security except if the party is seeking a preliminary injunction or a temporary restraining order in advance of the adjudication of the dispute on the merits. See, for example, NY CPLR section 6312(b); Fed R Civ P 65(c). The court will set the amount of security required to ‘an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained’ (Fed R Civ P 65(c)).

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

No. The applicable rules provide that the security should be calibrated to the amount of the potential damages that would be incurred if a party is wrongfully enjoined, not the resources of the party seeking an injunction.

Moreover, in many cases, the court would not necessarily be aware of the existence of third-party funding.
Insurance

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

ATE insurance indemnifies the client for legal costs in the event the client loses its case. ATE insurance, which is purchased after the dispute has arisen, can protect against paying the other side’s adverse costs and can reimburse the client for its own attorneys’ fees and out-of-pocket expenses.

There is no statute in New York that prohibits ATE insurance. That being said, as in most states, insurance in New York is, generally speaking, a heavily regulated field, with licensing and other rules that may affect who can issue or purchase ATE insurance.

In our experience, ATE insurance is not commonly used in New York. But as lawyers and clients in New York become more familiar with ATE insurance, we would expect interest in this product to grow, including with clients who may have the resources to pay legal fees and costs on their own, but want to offset fees and costs if they lose the case.

We are not aware of other types of insurance, in the context of fees or expenses, commonly used by claimants in New York. But as interest in litigation funding grows, we would not be surprised if interest in ATE insurance grows with insurance alternatives entering the market.

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 have been efforts to require the disclosure of the existence and identity of a litigation funder. For example, in the United States District Court for the Northern District of California, a party must disclose the identity of a funder in class action cases only (see question 16). The court rejected a broader order that would have required the explicit disclosure of the funder in all cases in that district. A recent decision in the United States District Court for New Jersey has similarly declined to require disclosure of third-party funders. See In re Valsartan N-Nitrosodimethylamine Contamination Product Liabilities Litigation, No. CV 19-2875 (RBK/JJS), 2019 WL 4485702 (DNJ 18 September 2019) (denying inquiry into the possibility that plaintiff was backed by a litigation funder on the grounds that such information is irrelevant where there is no evidence of any untoward behaviour). Currently, no New York court requires such disclosure.

Furthermore, there is no statutory obligation in New York requiring a party to disclose the existence of a litigation funder or a litigation funding agreement to the opposing party or to the court. However, an opposing party could compel the disclosure of a litigation funding agreement if the court determines that the agreement is relevant to the case and it is not otherwise protected from disclosure. New York courts that have addressed this issue have found that, in the cases presented, the funding agreements were not relevant and are not discoverable. See Kaplan v SAC Capital Advisors LP, No. 12-CV-9350-VM–KFN, 2015 WL 5730101 [SDNY 10 September 2015] (ruling that a funding agreement was not relevant to the lawyer’s adequacy as class counsel in a securities class action lawsuit and explicitly declining to address if disclosure of the agreement would be entitled to work product protection) and Benitez v Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167 [EDNY 14 March 2019] (denying defendant’s request to review plaintiff’s financing on the ground that it is not related to plaintiff’s credibility or relevant to any other claim or defence).

If a court determined that the funding agreement was relevant to the case, then a party would be required to disclose the funding agreement if it were not protected from disclosure by attorney-client privilege or work product protection (see question 23).

If deemed relevant, a client would likely be compelled to disclose at least some information about the identity of the third-party funder. See, for example, In re Nassau County Grand Jury Subpoena Duces Tecum, Dated 24 June 2003, at NY 3d 665, 678–79 (NY 2005) (information regarding the payment of fees by a third party is not protected as an attorney-client privileged communication).

New York courts have not addressed whether work product protection would protect against the disclosure of the funding agreement. They have, however, recognised that the terms of a joint defence agreement, which is an agreement to share information between multiple defendants to the same litigation, is considered work product. See RFM AS Inc v So, No. 6 Civ 13114 VM MHD, 2008 WL 465113 [SDNY 15 February 2008].

Privileged communications

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

In certain circumstances, the attorney-client privilege and the work product doctrine protect against the disclosure of communications and information shared between attorney, client and funder. There has been very limited analysis of these protections by New York courts as they relate to third-party litigation funding. We suspect that New York courts may find that attorney-client privilege will not protect communications with a funder from disclosure. Further, New York courts will likely find that work product protection will protect from disclosure certain communications and information provided to a funder.

Communications between an attorney and client for purposes of providing legal advice are privileged in all US jurisdictions, including New York. If attorney-client communications are disclosed to a third party, the privilege can be deemed to have been waived as to the communications themselves and even in some cases as to the subject matter of the communications. However, if the communications are shared with a third party with whom the client has a ‘common legal interest’, there is no waiver of the privilege.

In the context of third-party litigation funding, whether disclosure of communications with a funder waives attorney-client privilege turns on whether a client has a common legal interest with the funder. There has only been one decision in New York addressing this question and it did not extend the common interest doctrine to litigation funders. There the court declined to protect information shared with a litigation funder. In Cohen v Cohen, No. 09 CIV 10230 LAP, 2015 WL 745712, at *4 (SDNY 30 January 2015) it was noted that:

[Although] the two may have a common financial interest in the outcome of this litigation, that relationship does not fall into the narrow category primarily reserved for co-litigants pursuing a shared legal strategy.

So ruling, the court found that, since the litigation funder was not a party to the litigation and there was no suggestion that she had a legal claim against the defendant, there could not be a common legal interest. The work product doctrine is separate and distinct from attorney-client privilege.

The work product doctrine protects from disclosure documents prepared, and information collected, in anticipation of litigation. The work product doctrine seeks to prevent such documents and information from falling into the hands of the party’s adversary. Unlike attorney-client privilege, disclosing work product to a third party does not waive work product protection where such disclosure did not substantially increase the likelihood that the work product would fall into the hands
of an adversary in the litigation. See In Re Steinhardt Partners LP, 9 F3d 230 (Second Circuit 1993).

Since New York courts have not addressed the applicability of work product protection to the disclosure of information given to a third-party litigation funder, we look to other jurisdictions for guidance. Courts in those jurisdictions have generally found such information to be protected as work product. See Miller UK Ltd v Caterpillar Inc, 17 F Supp 3d 711, 736 (ND Ill 2014) (the disclosure of a memorandum describing the strengths and weaknesses of a case to a funder was protected as work product). This would specifically include documents prepared with the intention of disclosing to potential investors in future litigation. See Mondis Tech Ltd v LG Elecs Inc, No. 2:07–cv–565, 2011 WL 1714384, at *3 (ED Tex 4 May 2011) (documents prepared with the intention of disclosing to potential investors in aid of future litigation were protected); Lambeth Magnetic Structures LLC v Seagate Tech (US) Holdings, Inc, No. 16–cv–00538, 2018 WL 466045 (WD Pa 19 December 2017) (same). We expect, but are not certain, that New York courts will adopt the same reasoning and protect work product disclosed to third-party litigation funders.

In the end, a balance needs to be struck between obtaining sufficient information to make decisions about whether, or to what extent, to fund a case and the risk of waiver, which could lead to the disclosure of information that could harm the case, and the funder’s investment in it, by putting at risk the attorney-client privilege. Given the lack of definitive case law in New York on this issue, to avoid the risk of waiving attorney-client privilege, a funder should tread lightly in requesting communications between the client and attorney that would otherwise be protected as privileged communications.

On the other hand, work product protection will likely allow the client to disclose to the funder documents prepared in aid of the litigation that should be sufficient to allow a funder to make an informed funding decision and to remain apprised of key developments over the life of the case.

**DISPUTES AND OTHER ISSUES**

**Disputes with funders**

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

We are not aware of any reported disputes in New York between a litigant and a funder in cases where the funder has lent money to the holder of a claim to cover the legal fees and costs in exchange for a portion of the proceeds arising from the holder’s enforcement of its claim.

There may be several reasons why there have been no reported disputes in New York. Most funding agreements have strict confidentiality provisions. And since most funding agreements have arbitration clauses, if there is a dispute between a litigant and a funder, that dispute would be confidentially arbitrated.

It is worth noting that there have been several reported disputes in New York (or by courts applying New York law) in the context of consumer legal funding, where a consumer legal funder provides a nonrecourse advance to a plaintiff (commonly in a tort case) to cover the plaintiff’s living expenses during the pendency of the case in exchange for a portion of the proceeds from the case. See Lynx Strategies LLC v Ferreira, 957 NYS2d 636 (NY Sup Ct 2010) (confirming an arbitration award in favour of the funder where the plaintiff and plaintiff’s law firm did not pay the funder its share of the settlement proceeds); Obermayer Rebmann Maxwell & Hippel LLP v West, Civ No. 15–81, 2015 WL 9489791 (WD Pa 30 December 2015) (applying New York law and holding that failure to pay the funder’s share of the proceeds was breach of a funding agreement); and MoneyFor Lawsuits v LP v Rowe, No. 4:10–CV–11537, 2012 WL 1086171 (ED Mich 23 January 2012) (same).

**UPDATE AND TRENDS**

**Current developments**

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

The use of third-party funding is continuing to expand in civil litigation in New York and throughout the United States. Both small and large companies are increasingly seeking third-party funding. Such companies include those with the capital to self-fund, but which would rather offset some of the costs of the litigation to third parties. There are also accounting benefits for obtaining litigation funding compared to a company paying the costs itself.

The growth of litigation funding has led to many new funders entering the United States market. It has also increased the different types of funding available. From the traditional case-based funding model to portfolio financing, litigants can work with funders to obtain funding that is tailored to their particular needs.

Courts are increasingly amenable to third-party funding as well. Each year comes with additional decisions that reflect acceptance of
funding. Notable this year is a decision by a New Jersey US district court, *WAG Acquisition LLC v Multi Media LLC* (No. 14–2340–ES–MAH, DJ 190), in which the court found that the existence of a third-party funding agreement that did not give the funder further rights independent of its funding did not impact plaintiff's ownership of intellectual property, nor its ability to bring a lawsuit enforcing its rights to such property.
United States – other key jurisdictions

Zachary D Krug, Robin M Davis and Alex Lempiner
Woodsford Litigation Funding

The United States is a federal system, with overlapping federal and state jurisdictions, including 96 federal judicial districts and 50 individual US states. As such, attorneys and parties contemplating commercial litigation finance transactions here must pay particular attention to the many potential jurisdictions that may be implicated by a single particular transaction – including the governing law of the litigation finance agreement, the location of the parties, the venue of the particular litigation, and the jurisdiction in which a judgment may eventually need to be enforced. Further, because litigation finance remains relatively new, and the law is still in development, those considering a litigation funding transaction in one jurisdiction would be well advised to consider the applicability of precedents from other jurisdictions.

This brief addendum is not intended to be a comprehensive guide to litigation finance in the US outside of New York. Rather, it endeavours to highlight some of the notable rules and precedents in a few important jurisdictions beyond New York, which have developed recently as litigation finance has become more common in the US. The focus is largely on permissibility of commercial litigation finance generally, and any rules regarding disclosure of funding and the scope of protection afforded communication with funders; consumer litigation finance transactions may implicate other regulations that are beyond the scope of this addendum.

US Federal
Because litigation funding related issues typically involve state law matters (eg, state bar rules, contract law, status of champertory provision, etc) or procedural matters governed by local practice, some of which are discussed below in the state summaries, there is little purely federal law on funding. However, the US Congress reintroduced the Litigation Funding Transparency Act of 2019, which, if enacted, would require disclosure of funding (and a copy of the funding agreement) in any federal class action or federal multi-district litigation (MDL) proceeding. The proposed law was put forward without success in 2018, and reintroduced in early 2019. It is in consideration with the Senate Judiciary Committee, so it remains to be seen whether the law will eventually be amended or enacted.

California
In California, litigation finance is generally permitted by state law. Indeed, unlike many eastern states, the doctrines of champerty and maintenance were never adopted into the state’s laws. (See In re Cohen’s Estate, 152 P.2d 485 (Cal. Dist. Ct. App. 1944), Abbot Ford, Inc v Superior Court, 43 Cal. 3d 858, 885 n.26 (Cal. 1987) (‘California . . . has never adopted the common law doctrines of champerty and maintenance.’)

Practicing attorneys in California, as in all states, are guided by rules of professional conduct and, importantly, such rules do not prohibit litigation finance transactions. (See LA County Bar Association Ethics Committee Formal Opinion No. 500 (1999), discussing the permissibility of funding arrangement under California law and legal ethics regime.) Importantly, the California State Bar established a Task Force on Access Through Innovation of Legal Services, which recently published several alternate proposed revisions to the ethical rules that would, if adopted, either allow limited non-attorney ownership in law practices or largely do away with the traditional restrictions on fee-sharing. The proposed amendments remain subject to public comment and approval by the California Supreme Court. While it is still too early to predict whether either amendment will be adopted, it nevertheless suggests the state bar authorities recognise the important role litigation funding can play in promoting access to justice.

Regarding disclosure, there is no rule requiring disclosure of a party’s funded status. However, for class action litigation in the federal courts, the Northern District of California recently revised its Standing Orders to require the disclosure of ‘any person or entity that is funding the prosecution’ of ‘any proposed class, collective, or representative action.’ N.D. Cal. Standing Order No. 19 (Jan. 17, 2017). Accordingly, for class or collective matters in the Northern District, a party’s funded status should be disclosed at the initial stages pursuant to Rule 3-15, or, if arising later, in connection with a party’s Case Management Statement. For all other matters, there is no general obligation of affirmative disclosure under the local rules. (See, MLC Intellectual Prop, LLC v Micron Tech, Inc, No. 14–CV-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019), rejecting the argument that a funded plaintiff had failed to comply with local rules by failing to identify the litigation funder.)

Importantly, communications with a litigation funder have been shielded from disclosure and, where subject to a properly executed non-disclosure agreement, should not result in a waiver. This is consistent with the general trend in most US jurisdictions. (See Odyssey Wireless, Inc v Samsung Electronics Co., 2016 WL 7665898, at *5–*6 (S.D. Cal. Sept. 20, 2016); see also Space Data Corporation v Google LLC No. 16–CV–03260, 2018 WL 3054793, at *1 (N.D. Cal. June 11, 2018) (communications with potential funders are not relevant.).)

Delaware
Litigation finance is generally permitted in Delaware. However, the doctrines of champerty and maintenance remain applicable. See Charge Injection Technologies, Inc v El DuPont de Nemours and Co., 2016 WL 937400, at *3 (Del. Super. Ct. Mar. 9, 2016). As such, outright assignments of claims may be regarded as champertous and any funding transaction should be clear that the funding entity does not control the litigation. (See id at *4–*5.)

Regarding disclosure, there is no general rule requiring disclosure of a party’s funded status. Moreover, one Delaware federal court has
concluded that, in at least some contexts, litigation funding agreements are not relevant and potentially confusing and prejudicial. (See AVM Technologies LLC v Intel Corporation, 2017 WL 1787562, at *3 (D. Del. May 1, 2017).)

With regard to privilege, both state and federal courts in Delaware have held communications with litigation funders are protected from discovery. As Delaware’s Court of Chancery has remarked, there is “no persuasive reason . . . why litigants should lose work product protection simply because they lack the financial means to press their claims on their own.” (See Carlyle Investment Management v Moonmouth Co., 2015 WL 778846, at *9 (Del. Ch. Feb. 24, 2015); see also Walker Digital, LLC v Google, Inc, 2013 WL 960775, at *1 (D. Del. Feb. 12, 2013) (claimant and funder share a common (legal interest and communications are protected as both attorney client privilege and work product); but see Leader Technologies Inc v Facebook Inc., 719 F. Supp. 2d 373, 377 (D. Del. 2010) (no common interest inapplicable); Acceleration Bay v Activision Blizzard, 2018 WL 798731 (D. Del. 2018) (ordering disclosure where in the absence of signed non-disclosure agreement and using a ‘but for’ standard for work product).)

Texas

In general, Texas common law never incorporated the doctrine of champerty. See Bentinck v Franklin, 38 Tex. 458, 468 (1873). Texas courts have reviewed commercial litigation funding agreements and found them not to be champertous or otherwise a violation of public policy. See Anglo-Dutch Petroleum International v Haskell, 193 S.W.3d 87, 105 (Tex. App. 2006). However, the funding of certain categories of claims – for example malpractice actions – may present public policy issues. See id. Further, lawyers or law firms contemplating litigation funding transactions should be sure to ensure that the contemplated structure does not misalign incentives or undermine the primary duty to their clients. (See Texas Bar Opinion No. 576 (concluding that proposed arrangement was ‘tantamount to fee splitting’).)

Regarding privilege, several federal courts in Texas have concluded that litigation funding information should be protected as work product and a non-disclosure agreement obviates waiver. (See US v Ocwen Loan Servicing, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016); Mondis Technology Ltd v LG Electronics, Inc, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011).)

Further, while there is no rule requiring disclosure of a party’s funded status, one court has ordered the disclosure of the identity of a litigation funder, while simultaneously holding that communications with that funder remained confidential. (See US v Homeward Residential Inc, 2016 WL 1031154, at *5 (E.D. Tex. March 15, 2016).)

New Jersey

New Jersey courts have long rejected common law prohibitions on champerty and maintenance. See Schomp v Schenck, 40 N.J.L. 195, 206 (Sup. Ct. 1878). More recently, New Jersey’s state bar has offered guidance permitting plaintiff factoring of a contingent interest in a potential judgment, or otherwise. (See Clark v Cambria County Board of Assessment Appeals, 747 A.2d 1242, 1245 (Pa Cmwlth. 2000) saw champerty defined as a...
A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject to be recovered.

Under certain circumstances, litigation finance may not be permitted in Pennsylvania. For example in WFIC, LLC v LaBarre, 148 A.3d 812, 820 (Pa. Super. 2016), the court found that a funding agreement governed by Pennsylvania law was invalid because it met the requisite elements of champerty. (See Riffin v Consolidated Rail Corp., 363 F. Supp. 3d 569, 576 (E.D. Pa. 2019) (assignment of claims is invalid as champertous).)

Nevertheless, regarding disclosure, federal courts in Pennsylvania have concluded, consistent with other districts, that communications with a litigation funder are protected as work product. (See Lambeth Magnetic Structures, LLC v Seagate Technology (US) Holding, Inc, 16-CV-0538, 2018 WL 466045, at *5 (W.D. Pa. Jan. 18, 2018).)
Key Members of our Executive Team

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Ex ED&F Man

Steven Friel: Chief Executive Officer
Ex Brown Rudnick, DAC Beachcroft

Jonathan Barnes: Chief Operating Officer
Ex Lewis Silkin

Mark Spiteri: Finance and Commercial Director
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Charlie Morris: Chief Investment Officer, EMEA & APAC
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