

Litigation Funding 2021

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Woodsford

Lexology Getting The Deal Through is delighted to publish the fifth 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 Belgium, Canada, France, Russia and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford, for their continued assistance with this volume.



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Contents

Introduction	3	Israel	56
Steven Friel and Jonathan Barnes Woodsford		Yoav Navon and Steven Friel Woodsford	
Third-party funding in international arbitration	4	Italy	60
Zachary D Krug, Adam Erusalimsky, Charlie Morris and Helena Eatock Woodsford		Davide De Vido Fideal S.R.L	
Australia	7	Mauritius	64
Simon Morris, Martin del Gallego, Gordon Grieve and Greg Whyte Piper Alderman		Rishi Pursem and Taroon Ramtale Benoit Chambers	
Austria	18	New Zealand	68
Marcel Wegmüller and Jonathan Barnett Nivalion AG		Adina Thorn and Rohan Havelock Adina Thorn	
Belgium	22	Russia	76
Isabelle Berger Nivalion AG Hakim Boularbah Loyens & Loeff		Max Odenthal Aperio Intelligence	
Canada	27	South Korea	80
Ekin Cinar and Franca Ciambella Woodsford		Beomsu Kim, Bhushan Satish and Hyungwon Nahm KL Partners	
England & Wales	31	Switzerland	84
Steven Friel, Jonathan Barnes, Alex Hickson and Fred Bowman Woodsford		Marcel Wegmueller, Isabelle Berger and Franziska Studer Nivalion AG	
France	40	Thailand	90
Isabelle Berger Nivalion AG Marina Weiss Bredin Prat		Surasak Vajasit, Melisa Uremovic, Chotiwit Ngamsuwan and Supawadee Vajasit R&T Asia (Thailand) Limited, a member firm of Rajah & Tann Asia	
Germany	45	United States – New York	94
Arndt Eversberg Omni Bridgeway		David G Liston, Alex G Patchen and Rebecca Rothkopf Liston Abramson LLP	
Hong Kong	50	United States – other key jurisdictions	101
Briana Young, Dominic Geiser, Priya Aswani and Simon Chapman Herbert Smith Freehills		Zachary D Krug, Robin M Davis, Alex Lempiner and Dan Kesack Woodsford	

Italy

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REGULATION

Overview

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

In Italy, third-party litigation funding is 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, which states 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 still largely unknown even if some legal market operators have established first relationships with litigation funds. In other words, this tool has also started to be used in Italy.

Restrictions on funding fees

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

No, since litigation funding agreements are an expression of the freedom of contract, setting of funding fees is a matter for free bargaining.

Generally, 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. This legal institution is governed by the general legal rules of contracts and by those governing certain types of contracts (eg, mortgage, insurance).

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 or other entity that has interests in third-party litigation funding.

FUNDERS' RIGHTS

Choice of counsel

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

Usually, parties requesting funding are free to select their own lawyer, and the funder does not impose one of their own.

Litigation financing agreements may in any case provide for acceptance or approval clauses of the lawyer chosen by the applicant. These clauses or indications could determine the granting or denial of litigation finance.

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?

Litigation funding contracts commonly include the provision that acceptance or rejection of a settlement agreement requires the funder's consent.

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?

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 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.

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.

At the end, in consideration that the involvement of a litigation funder is not disclosed to the court nor the counterparty, in the majority of the cases the funder's role within the litigation is very limited.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

In Italy, the stipulation of lawyer's fees is free: time-based agreements are allowed, on a lump sum basis, by agreement concerning one or more business, based on the performance and timing of provision of the service, by phases or services or for the entire activity, as a percentage of the value of the deal or how much the recipient of the service is expected to benefit from.

However, the lawyers' ethics code prohibits the 'quota lite' pact, which is the pact by which the lawyer receives as remuneration, in whole or in part, a portion of the object of the claim or of the litigious reason. In other words, in Italy contingency fee agreements are prohibited.

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?

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

- 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. This 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?

Unfortunately, Italy is in last place out of European countries for trial duration. According to European Commission surveys, the duration of the first instance trial is between 18 and 24 months.

Time frame for appeals

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

There are no official statistics available on the percentage of how many first-instance judgments are appeals.

The duration of an appeal judgment in Italy is variable and depends on the activity to be done and the number of hearings. It can be expected to last between 36 and 60 months.

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.

The enforcement of Italian judgments is governed by the Code of Civil Procedure.

A sentence rendered by an Italian court is, in general, immediately enforceable. There are also other judicial titles that can be declared enforceable by the court.

The court could suspend the enforceability of a sentence in the event of an appeal and for good reasons.

Italian civil enforceable proceedings have variable duration and costs.

COLLECTIVE ACTIONS

Funding of collective actions

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

Currently, in Italy, class actions are ruled by article 140 of the Italian Consumer Code.

In October 2020, the new regulation on class action will come into force. It has been strengthened and its field of application has been enlarged both from a subjective and objective point of view, that is, both as regards the subjects who can access it and the legal situations that can be asserted in court.

With a class action, it will be possible to act to protect subjective situations that have matured in the face of harmful conduct, for an assessment of responsibility and a sentence to compensation for damage and refunds.

It will be necessary to wait some months to understand how the new class action discipline will work and how it will be possible to fund 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?

According to article 91 of the Italian Civil Procedure Code, the judge, with the sentence that closes the trial, condemns the losing party to reimburse the expenses in favour of the other party and liquidates the amount together with the defense fees. These include court costs, expert costs (if ordered by the court), and the adverse costs in accordance with the Italian tariff system, but no costs beyond these.

As litigation financing is not yet commonly used in Italy and that litigation financing agreements are confidential and not disclosed, it is not possible for a court to order the losing party to pay the costs of the financing.

Liability for costs

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

No. Since judicial measures have effect only upon the parties to the case, the 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?)

In the Italian legal system, there is no general regulation of security for cost.

Special rules, particularly in precautionary proceedings, allow the judge to order the party, not third parties, 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?

No, the litigation funding agreement couldn't influence the court decision on security for costs because it is an agreement between the parties and it is not disclosed to a third party.

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 Italy. Although no legal or regulatory restrictions limit the respective product, there is currently no standard offering available.

By contrast, legal costs insurance is commonly used in Italy. It provides costs coverage to the extent of the specific policy but, usually, it is limited to certain types of claims.



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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 nor by jurisprudence. The litigation funding agreement is confidential and will not be disclosed to the opponent.

In any case, a litigant might have such an obligation to disclose litigation funding in domestic or international arbitration. For example, the new regulation of the Milan Arbitration Chamber provides that the litigant has specific obligations to disclose the financing agreement.

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?

No. To date, no disputes between litigants and their funders have been noted.

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 will certainly become a much more widespread practice in the near future.

UPDATE AND TRENDS**Current developments**

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

FiDeAL has recently launched in Italy an innovative formula of litigation funding designed to minimise the risks and costs commonly associated with commercial litigation.

The principal characteristic of this formula named Fee-DeAL by FiDeAL is that it creates a partnership between the claimant, lawyer and funder.

Using Fee-DeAL, the claimants have a significantly reduced and capped fees outlay, are protected from an adverse result in court, and can still receive a sizeable return upon a successful legal outcome.

Coronavirus

27 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Litigation financing is a very new trend in the Italian legal market and is not regulated.

For this reason, in this practice area, there are no emergency laws, relief programmes, or other specific initiatives related to the covid-19 emergency.

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