

Litigation Funding 2021

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Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

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First published 2016

Fifth edition

ISBN 978-1-83862-361-6

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



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Contributing editors**Steven Friel and Jonathan Barnes**

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.



London

November 2020

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This article was first published in December 2020

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Russia

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REGULATION

Overview

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

Third-party litigation funding is a relatively nascent concept in Russia compared to more established markets such as the UK and US. It is permitted and a small number of domestic funders have been established since the late 2010s. Uptake of funding remains limited, but appears to be growing: a 2019 survey of the Russian litigation market indicated that 8 per cent of respondents (including litigators, in-house counsel and end-clients) had worked with litigation funders in some capacity, up from 6 per cent in 2018. Topics related to litigation funding are now regularly on the agenda at major Russian panel events focusing on litigation and bankruptcy, particularly those aimed at an international audience.

There do not appear to have been any reported funded cases to date in which courts have commented on funders' involvement. The increasing number of cases backed by third-party funders will hopefully lead to further clarity on Russian courts' stance on the issue.

In addition, a working group including funders, lawyers and officials to develop the draft bill "On the financing of litigation costs by third parties" has been formed. The draft bill will aim to protect the rights of investors as well as litigants. Relevant public officials, such as Chairman of the Council of Judges of the Russian Federation Victor Momotov have spoken positively about litigation funding whilst the discussions of the draft bill have been ongoing.

Restrictions on funding fees

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

As litigation funding is currently unregulated, litigation funders are free to set their own terms. As such, there is no specific limit on fees or interest that funders can charge in Russia. The majority of funders operating in the Russian market charge a success fee of between 20 per cent and 40 per cent of recoveries.

Specific rules for litigation funding

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

Given the recent arrival of the concept of litigation funding in Russia, there is currently no legislation or regulation applying specifically to third-party litigation funding in Russia.

Legal advice

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

Qualified advocates advising their clients on litigation funding in Russia will need to abide by the Federal Law On Advocacy and the Bar in the Russian Federation and Russian Federal Bar Association's Code of Professional Ethics: for instance, they will need to ensure that they remain independent while giving this advice and that their communications with clients remain confidential. There are no professional or ethical rules regarding legal advice that specifically relate to, or prohibit, litigation funding.

Regulators

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

There is currently no public body that has specific oversight of litigation funding. Deputy Justice Minister Denis Novak has attended working groups on the draft law 'On the financing of litigation costs by third parties'.

FUNDERS' RIGHTS

Choice of counsel

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

Third-party funders are free to refuse to fund a case if a client's existing choice of counsel does not meet their criteria.

Participation in proceedings

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

The majority of Russian commercial (Arbitrazh) hearings are conducted in open court and as such third parties, including funders, are free to attend. Third-party funders' attendance at private hearings and confidential settlement discussions would be subject to the approval of the opposing party.

Veto of settlements

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

Funders have no special rights under Russian law, including over vetoes in respect of settlements. Target settlement amounts may be stipulated in their litigation funding agreements.

Termination of funding

9 | In what circumstances may a funder terminate funding?

As there are no specific laws regarding litigation funding, funders may terminate funding in accordance with the relevant provisions in their litigation funding agreements.

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?

There are no provisions in Russian law specifically allowing or requiring third-party funders to actively take part in court proceedings, which is the prerogative of qualified advocates. The amount of general strategic assistance provided by the funder will be subject to the litigation funding agreement.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

In March 2020, updates to the law 'On Advocacy and the Bar in the Russian Federation' came into force. These included specific legislation on contingency fee agreements for Russian advocates.

In particular, clause 4.1 of article 25 was updated to include the following:

In accordance with the rules established by the Council of the Federal Bar Association, the agreement on the provision of legal assistance may include a condition according to which the amount of remuneration paid by the client is made dependent on the result of the lawyer's rendering of legal assistance, with the exception of legal assistance in criminal cases and in cases regarding administrative offences.

Other funding options

12 | What other funding options are available to litigants?

Impecunious or vulnerable citizens, or both, may qualify for free legal assistance under the law 'On Free Legal Aid in the Russian Federation'. Litigation-related insurance products are not widely offered in Russia, although they are not specifically prohibited.

Other options litigants may consider include assignment of debts to another party, or the involvement of specialist equity investors who acquire a controlling interest in companies whose financial performance is directly related to the outcome of litigation or asset recovery efforts. Both of these options have been used by companies in financial distress in Russia as well as other countries of the former Soviet Union, and a number of regionally headquartered investors are able to support companies in this manner. Both of these options may be inferior to non-recourse litigation funding for solvent claimants who are looking to extract maximal value from a single claim whilst reducing the financial risk.

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 proceedings at the first instance varies widely between regions and depending on the complexity of the case. In addition, little official statistical analysis has been conducted on this matter. However, the standard time for proceedings in the first instance in Arbitrazh courts is six months according to the Russian Arbitrazh Procedure code. In particularly complex cases, this may be extended by up to nine months.

Time frame for appeals

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

There appears to be no recent statistical analysis of the proportion of first-instance judgments that are appealed or on their usual duration. According to the Russian supreme court's ruling 'On the application of the Arbitrazh Procedure Code Of the Russian Federation' when considering cases in the Arbitrazh court of appeal, appeals should take a maximum of between two and three months, depending on the circumstances.

Enforcement

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

There is no official data regarding the proportion of judgments that require contentious enforcement proceedings. While domestic judgments may be enforced in Russia, it is rare for foreign judgments to be successfully enforced via Russian courts. There is a well-known tradition of complex, international enforcement proceedings arising from large Russian court judgments and bankruptcies of the size that might typically be of interest to international litigation funders (ie, in the millions of US dollars). This has arisen in part due to the tendency of Russian businesses and high-net-worth individuals to structure their assets and transactions via complex ownership structures involving offshore jurisdictions. Given the cost of these enforcement proceedings and the international expertise required, this is an area where litigation funding is increasingly sought by Russian parties, including from non-Russian funders.

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 Russia under Federal Law No. 191-FZ of 18 June 2019, which came into force in October 2019. Prior to this, class actions required the involvement of certain categories of parties such as prosecutors, consumer protection agencies or local authorities. Since this law came into force a number of class actions have already taken place, some of which have been backed by litigation funders. This includes the first class action under the new law, against Fem Fatal Rus LLC, a seller of cosmetic products, initiated in 2019 with the support of domestic litigation funding platform Platforma. Since then, a number of other reported class actions have been supported by third-party litigation funders.

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 may order the unsuccessful party to pay the reasonable costs incurred by the successful party engaging their counsel. Recoverable costs were defined by the Russian Supreme Court as 'costs for the payment of a representative's services that are usually charged for similar services in comparable circumstances'. There are no specific provisions for the recovery of litigation funding costs, although it will be interesting to see in the next few years whether Russian courts will take an expansive approach to their definition of advocate costs by including litigation funding costs.

Liability for costs

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

Adverse costs orders will only apply to parties in the case. However, there are no specific rules prohibiting arrangements for litigation funders to cover adverse costs from being included in litigation funding agreements.

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?)

Russian courts do not order claimants or 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?

The involvement of a litigation funder does not affect the availability of 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?

Although insurance for litigation costs and similar products are not specifically prohibited in Russia, such insurance is not commonly used or offered.

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 specific obligation to disclose litigation funding to the opposing party or the court. We are not aware of any reported cases in which courts have ordered the disclosure of litigation funding agreements.



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Privileged communications

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

Under the Federal Law On Advocacy and the Bar in the Russian Federation, information related to the provision of services by qualified advocates (ie, lawyers admitted to the bar) to their clients, including related communications, is covered by advocate secrecy. However, such secrecy does not apply to litigants' in-house communications or communications between litigants and third parties such as funders. It should also be noted that many Russian lawyers are not qualified advocates and, as such, do not need to comply with Bar regulations on advocate secrecy.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No domestic disputes between litigants and their funders in Russia appear to have been reported. It should be noted that it is likely that at least some litigation funding agreements entered into by Russian parties will be governed by foreign law (eg, English law).

Other issues

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

There are currently no laws in Russia specific to litigation funding. As such, litigants and funders will need to ensure that their agreements comply with Russian law in general, but should be able to reach a litigation funding agreement that benefits both parties.

UPDATE AND TRENDS

Current developments

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

There are no additional developments that should be noted in particular. Litigation funding is a growing industry in Russia and there is an increase in both the number of domestic funders, and the number of

foreign funders interested in funding cases involving Russian parties. In our experience, foreign litigation funders are at present typically more interested in disputes involving Russian parties if they are to be heard primarily before courts outside Russia, particularly in Western Europe, the United States and common-law offshore jurisdictions, due to their greater familiarity with, and trust in, those courts.

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?

No new initiatives have been implemented specifically in relation to asset recovery or related litigation funding in light of the pandemic. Nonetheless, it appears likely that there will be an increased demand for asset recovery-related litigation in light of the pandemic: Standard and Poor's, for instance, has predicted that the ratio of non-performing loans in Russian banks may double to 15 per cent by the end of 2020. The CEO of PJSC National Bank Trust, Russia's state-owned 'bad bank', responsible for resolving problematic bank assets such as non-performing loans, has suggested that a specific fund should be created for the resolution of distressed debts arising from the covid-19 crisis.

To control financial risk associated with litigation and international asset recovery in the currently turbulent environment, it is advisable for clients to seek advice on options available for litigation funding, as well as to conduct thorough due diligence on the enforceability of claims (including by conducting asset tracing investigations) before pursuing them. Recovery of legacy judgment and arbitral award debts with the backing of a litigation funder may also present an attractive source of additional capital during this period.

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