Litigation Funding 2021

Contributing editors
Steven Friel and Jonathan Barnes

LEXOLOGY®
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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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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South Korea

Beomsu Kim, Bhushan Satish and Hyungwon Nahm
KL Partners

REGULATION

Overview

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

There is no specific legal prohibition or regulation of third-party funding, whether in litigation or arbitration proceedings. Although third-party litigation funding is a relatively new concept in Korea and its legality has not yet come before Korean courts for determination, third-party funding for international arbitrations is gaining increasing traction among practitioners and clients in Korea. Given that Korean courts have not had a chance to opine on or endorse third-party litigation funding, we would recommend caution in securing third-party funding for litigation claims before Korean Courts, especially considering the issues addressed below.

Article 6 of the Trust Act expressly prohibits any trust, the purpose of which is for the trustee to proceed with litigation. The issue of whether third-party litigation funding could be construed as constituting a trust under the Trust Act is separate and would depend in large part on the structure and specific provisions of the litigation funding agreement. The Korean Supreme Court held in Judgment 2006Da463 dated 27 June 2006 that a transfer of credit, for the primary purpose of assigning a litigation case, was void because that transfer and assignment was deemed as creating a trust under the meaning of article 6 of the Trust Act. Therefore, although a funding arrangement may not be if and of itself viewed as constituting a trust that is prohibited under the Trust Act, if the arrangement in effect transfers credit to a third-party funder, then such an arrangement could be viewed as constituting a prohibited trust.

Further, article 34(1) of the Attorney-at-Law Act prohibits non-attorneys from introducing, referring, or enticing a party (engaged in an ongoing or potential litigation) to a specific attorney, in exchange for money or any other benefit. Moreover, under article 34(5) of the Attorney-at-Law Act, no fees or other profits earned through services provided by attorneys can be shared with any person who is not an attorney. In effect, those provisions bar the solicitation of clients by non-lawyers. In other words, third-party funders approaching clients for litigation funding and encouraging them to initiate litigation for the purpose of eventual sharing proceeds with them could be interpreted as falling within article 34(1) referred to above. The punishment for violation of article 34 of the Attorney-at-Law Act may involve imprisonment with labour up to seven years or fine not exceeding 50 million won. Further, any money or other benefit received by any person in violation of article 34 is liable to be confiscated.

Considering the provisions of the Trust Act and Attorney-at-Law Act discussed above, we expect Korean Courts to take a conservative approach toward third-party litigation funding given the lack of any specific legislation directly addressing its legality.

Restrictions on funding fees

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

No, there is no specific legal prescription on the *fees* a third-party funder may charge.

However, in the event the funding arrangement is structured as a loan that the client is liable to repay in the event of a successful outcome, then the *interest* component of that repayment could be subject to the Interest Limitation Act. Under the Interest Limitation Act, interest that may be charged is presently capped at 24 per cent per annum, and any amount exceeding that rate is null and void. Under the Act, any money that a creditor receives in connection with a loan including a deposit, rebate, fees, deduction, delay penalty or advance interest is deemed as interest for the purpose of applying the statutory interest rate ceiling.

Specific rules for litigation funding

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

Depending on how a litigation funding agreement is arranged or structured, it could be limited by the restrictions set forth under the Trust Act and the Attorney-at-Law Act.

Legal advice

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

Three provisions of the Attorney's Code of Ethics are apposite to third-party litigation funding. First, attorneys are prohibited from 'stirring up litigation', either by directly encouraging potential clients or by indirectly permitting a third party to do so. Second, attorneys are not allowed to conduct a joint business with clients or non-attorneys where proceeds received by way of attorney fees are distributed with non-attorneys. Lastly, attorneys may not 'take over' ongoing litigations from their clients, and all proceeds from litigations thus 'taken over' are deemed to be illegitimate regardless of their means and forms.

In consideration of these restrictions, Korean attorneys would be careful in introducing or advising clients in relation to third-party litigation funding.

Regulators

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

Not presently. However, if third-party funding becomes more common or prevalent in Korea, it is likely that the Ministry of Justice and financial authorities, as well as the Korean Bar Association would actively oversee third-party funding.

FUNDERS' RIGHTS

Choice of counsel

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

No definite answer can be found. However, in view of the stipulations provided in the Attorney-at-Law Act, third-party funders would probably be restricted in insisting on their choice of counsel.

Participation in proceedings

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

Yes. 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. Therefore, funders may *attend* court hearings.

In terms of *participation* in court hearings or court-administered settlement proceedings, all participants must have a legal interest in the proceedings to do so. The scope of who has a 'legal interest' varies across the nature of the dispute (eg, civil, criminal or administrative) at issue; but in general terms, it covers both parties to the dispute, and those parties whose rights or obligations are contingent on the outcome of the litigation (eg, article 71, Korean Civil Procedure Act; article 16, Korean Administrative Litigation Act. Funders' financial interest in the outcome of the litigation would not necessarily qualify as legal interest in the proceedings; for, if the funding arrangement provides funders qualifying legal interest, then such an arrangement would fall under the restrictions of the Trust Act or Attorney-at-Law Act. For arbitrations, third-party funders may be able to participate with mutual consent of the parties and with permission from the tribunal.

Veto of settlements

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

A funder's rights to approve or reject a proposed settlement may vary depending on the terms and conditions of the relevant funding arrangement. There are no specific restrictions that apply under Korean law. However, considering the restrictions above, we do not expect funders to have veto rights.

Termination of funding

9 | In what circumstances may a funder terminate funding?

The funder's right to terminate is a matter of contract to be addressed in the relevant funding agreement. There are no specific restrictions that apply under Korean 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?

In principle, assuming the funding arrangement complies with relevant laws, a funder's role would be limited to funding the cost of litigation. Due to restrictions on the role of non-attorneys in litigation, we would think funders would be neither expected nor required to take any active role in the litigation process.

On the other hand, since non-attorneys may take part in arbitrations, a funder's degree of involvement in the arbitral process would be for the relevant parties to negotiate under the funding arrangement to the extent permitted by applicable laws, including laws of the seat.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Yes, litigation lawyers may enter conditional or contingency fee arrangements for civil cases. Indeed, conditional or contingency fee arrangements have been widely accepted in the Korean legal community and business circles. However, if a dispute arises in connection with the fee arrangement, a court may reduce the agreed contingency fee if it finds that the contingent amount is unreasonably excessive and that it is inequitable and violates the principle of good faith. As for criminal cases, the Korean Supreme Court held in its Judgment 2015Da200111 dated 23 July 2015 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.

Although no similar funding options are available for arbitration, we understand the Korea Federation of Small and Medium Enterprises (SMEs) and the Korean Commercial Arbitration Board recently executed an MOU to provide funding to SMEs for arbitrations. The Korea Federation of SMEs is organised under the Small and Medium Enterprise Cooperatives Act and operates under the auspices of the Ministry of SMEs and Startups. The MOU was signed to provide financial aid to those SMEs who may find it financially burdensome to participate in arbitral proceedings. Under the MOU, SMEs may seek up to 50 per cent of their incurred counsel fees, capped at 15 million won. Separately, some insurance products cover a certain portion of litigation costs.

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?

Commercial claims in a civil lawsuit typically take between eight and 12 months from the filing of a complaint to final judgment at first instance.

Time frame for appeals

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

Overall, less than 10 percent of first-instance judgments are appealed. However, in cases heard before three-judge benches (ie, cases with claim amounts exceeding 200 million won), the appeal rate is over 40 per cent. Disposal of appeals usually takes between six months and one year; but an appeal may take longer depending on the nature and complexity of the case.

We note there is no appeal process against arbitral awards 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 is rendered.

Korean courts allow enforcement of foreign court judgments on a reciprocity basis. Also, courts are receptive to the recognition and enforcement of foreign arbitral awards, in particular, if the award falls under the enforcement regime of 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 at issue. Those include cases seeking damages under the Securities Related Class Action Act, and cases against an enterprise if it infringes directly on the rights and interests of consumers relating to their lives, bodies, or property and the infringement continues under the Framework Act on Consumers.

It bears mention that 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, then such persons may join in the lawsuit as co-litigants under the Korean Civil Procedure Act. However, only those participating in the lawsuit would be subject to the outcome of the case, and its benefits would not pass to any non-litigants.

Additionally, the Korean government recently announced that its decision to allow class actions, regardless of the type of claim, with the aim of providing efficient relief for collective losses. To that end, we understand the Korean government is in the process of taking necessary measures including introducing new legislations or amendment to existing laws.

Overall, 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 costs of the successful party in litigation. In calculating litigation costs, courts take guidance from the Supreme Court's Regulations that prescribe the methodology to be followed and stipulate limits thereon. In effect, courts typically award only a portion of attorneys' fees, and other items such as stamp duties. In line with this approach, courts are unlikely to order the unsuccessful party to pay all litigation funding costs of the successful party.

Liability for costs

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

Under the present regime for costs allocation, adverse cost orders can only be ordered against one of the litigating parties. Therefore, adverse costs are likely to be ordered against the unsuccessful party to the litigation, 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?)

No. However, where a plaintiff has no domicile, office or business place in Korea, or where it is recognised that furnishing security for the costs of a lawsuit is necessary because it is obvious that the claim is groundless based on the complaints, briefs or other records on a lawsuit, then the court may order the plaintiff to furnish security for the costs of lawsuit, upon request from a defendant. Further, even without request from the defendant, courts may ex officio order the plaintiff to furnish security for the costs of the lawsuit (article 117, Korean Civil Procedure Act).

Although courts may not be able to order a third-party funder to provide security for costs, there could be cases in which a funder is required to provide security on behalf of the plaintiff under the terms of the funding arrangement.

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 reported case-law on the matter, we do not believe third-party funding would influence the court's decision.

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 legislative or regulatory prohibition on ATE insurance in Korea. Insurance for attorneys' fees is offered by some insurers, but, in general, insurance related to litigation and legal disputes is quite a nascent market in Korea and is therefore yet to evolve fully.

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 specific legislation requires a litigant to disclose a litigation funding agreement.

Privileged communications

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

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

Considering the lack of systematic protection of attorney-client privilege, in June 2020, an amendment bill to the current Attorney-at-Law Act was placed before the National Assembly. The bill introduces certain protections as a matter of general rule and provides exceptions to such protections. Under the bill, all (1) correspondences exchanged between the client and the attorney in relation to their case, (2) documents or data (including electronic copies) submitted by the client to

the attorney in relation to his or her case, and (3) documents or data the attorney has produced in relation to his or her case, are exempted from disclosure and submission before the court. Evidence acquired in violation of those proposed stipulations would be excluded from judicial and quasi-judicial proceedings. Exceptions to this rule comprise of where (1) the client provides its consent, (2) disclosure is necessary in public interest, or (3) the relevant attorney requires disclosure in relation to any dispute with the client.

Since the present regime only accounts for communication between the attorney and client, we would think communications between the third-party funder and the client are not subject to protection by privilege.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

There have been few publicly reported disputes between litigants and their funders. The Korean Supreme Court Judgment 2013Da28728 dated 24 July 2014 is a rare example of a litigation between a 'funder' (management company of an apartment complex) and the litigant (the representative body of apartment residents). The dispute arose from the funder's request for reimbursement of its disbursements in facilitation of the litigant's separate litigation. The Supreme Court held that the funder's role in financing the litigation costs was in violation of article 109(1) of the Attorney-at-law Act and consisted a de facto 'representation' as an attorney, and additionally pointing out that the litigation costs were paid in return for a future contract award. Therefore, the court held that the underlying stipulation in relation to disbursements was null and void. The above case reflects that the Korean Supreme Court interprets 'representation by attorney-at-law' under the Attorney-at-law Act quite broadly to prevent potential misrepresentation.

Considering the above, we reiterate that the Korean judiciary takes a rather conservative and strict approach towards third-party litigation funding.

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 this point in time. However, this issue should be revisited when legislation and regulations regarding litigation funding are introduced.

UPDATE AND TRENDS

Current developments

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

Please see www.lexology.com/gtdt.

KL PARTNERS

Beomsu Kim
bkim@klpartners.com

Bhushan Satish
bhushan.satish@klpartners.com

Hyungwon Nahm
hwnahm@klpartners.com

17th Floor, East Wing
Signature Tower
100 Cheonggyecheon-ro
Jung-gu
Seoul 04542
Korea
Tel: +82 2 6226 7700
Fax: +82 2 6226 7800
www.klpartners.com

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?

The Seoul High Court recently issued an official directive encouraging each district court to hold video hearings to prevent further spread of covid-19. However, given the lack of any relevant law and regulation, virtual hearings are not yet common practice in Korea.

Separately, the Ministry of Land, Infrastructure and Transport recently formally encouraged construction contractors to explicitly stipulate 'coronavirus' or the 'covid-19' as a force majeure term in their contracts to better reflect conditions in which contractors would be allowed to seek relief under contracts for situations associated with covid-19.

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