

# Litigation Funding 2021

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# Litigation Funding 2021

**Contributing editors****Steven Friel and Jonathan Barnes**

Woodsford

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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](http://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.

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](http://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, for their continued assistance with this volume.



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# Thailand

Surasak Vajasit, Melisa Uremovic, Chotiwit Ngamsuwan and Supawadee Vajasit

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## REGULATION

### Overview

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

Although there is no statutory prohibition on third-party litigation funding, it could be inferred from past Supreme Court judgments that litigation funding by a third party who has no legitimate interest in the legal action in return for a share in the proceeds if the claim succeeds is likely to be considered by the Thai courts as being contrary to public policy and good morals; therefore, there is a risk that it could be void under Thai law.

### Restrictions on funding fees

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

Not applicable.

### Specific rules for litigation funding

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

There are no specific rules that prevent lawyers in Thailand from advising their clients on using third-party litigation funding.

The Lawyers Council Regulations on Lawyer Conduct B.E. 2529 (A.D. 1986) prohibits lawyers from taking any action that constitutes an instigation to litigate a groundless case or using deceptions to induce a client to entrust him or her with representation in court, such as deceiving the client into believing that the client will win the case when in fact the lawyer believes that the client will lose the case, boasting that he or she is more knowledgeable than other lawyers or boasting that he or she is well acquainted with any specific person so as to make the client believe that the lawyer is able to provide a special advantage to the client other than mere legal representation, or so as to deceive the client that such acquaintance would be induced to support the case in any manner. The Lawyers Council Regulations on Lawyer Conduct B.E. 2529 (A.D. 1986) only applies to 'lawyers' within the meaning of the Lawyers Act B.E. 2528 (A.D. 1985). Section 4 of the Lawyers Act B.E. 2528 (A.D. 1985) defines a 'lawyer' as a person with respect to whom the Lawyers Council of Thailand has accepted registration as a lawyer and issued a licence. Only Thai nationals are qualified to apply for a lawyer's licence.

### Legal advice

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

At present, we are not aware of any impending enactment of legislation or any particular interest that has been taken by a public body concerning litigation funding in Thailand.

### Regulators

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

Not applicable.

## FUNDERS' RIGHTS

### Choice of counsel

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

Not applicable.

### Participation in proceedings

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

Not applicable.

### Veto of settlements

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

Not applicable.

### Termination of funding

9 | In what circumstances may a funder terminate funding?

Not applicable.

### 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?

Not applicable.

## CONDITIONAL FEES AND OTHER FUNDING OPTIONS

### Conditional fees

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

Litigation lawyers cannot enter into conditional or contingency fee arrangements. Although there is no statutory prohibition on conditional or contingency fee agreements, there is a well-established line of past Supreme Court judgments that have ruled that a conditional or contingency fee arrangement is contrary to public order and good morals and is, therefore, void under Thai law. In those past cases that were adjudicated by the Supreme Court, the lawyers seeking to enforce the conditional or contingency fee arrangements argued that, because the arrangements are not prohibited under the Lawyers Act B.E. 2528 (A.D. 1985) and the Lawyers Council Regulations on Lawyer Conduct B.E. 2529 (A.D. 1986) (which are now still in force), they are valid and enforceable. The Supreme Court disagreed and ruled that, despite the fact that the Lawyers Act B.E. 2477 (A.D. 1934), which expressly prescribed that lawyers who enter into conditional or contingency fee arrangements may be subject to professional sanctions had been repealed and replaced, conditional or contingency fee arrangements are inconsistent with the ethical principles applicable to the legal profession and contrary to public order and good morals.

### Other funding options

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

We are of the view that a loan granted to a litigant to fund legal proceedings should not be considered by the Thai courts to be contrary to public policy, provided that the litigant's decision to commence legal action has not been at the instigation of the lender and there is no agreement for the lender to take a cut of any proceeds or recovery in the lawsuit.

## 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 the entire proceedings in the court of first instance is difficult to predict and would also depend on the complexity of the case and backlog of cases at that particular court. Based on our experience, it usually takes between six and 18 months for a judgment to be rendered by the court of first instance from the date of commencement of legal proceedings.

### Time frame for appeals

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

An appeal against a judgment of the court of first instance is required to be filed within one month from the date on which the judgment of the court of first instance is read.

Direct statistics on the proportion of first-instance judgments that are appealed is not available. Based on the statistics that are published by the Office of the Judiciary, in 2019 approximately 140,000 judgments on civil claims were rendered by the court of first instance, while approximately 8,000 appeals against judgments on civil claims were accepted for consideration by the Court of Appeal and approximately 940 appeals against judgments on civil claims were accepted for consideration by the Supreme Court. Therefore, it may be inferred from such

statistics that approximately 5–6 per cent of first-instance judgments on civil claims are appealed.

### Enforcement

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

There are no available statistics on the proportion of judgments that require contentious enforcement proceedings.

Enforcement of court judgments in Thailand can be a complicated and lengthy process. Proceedings for the enforcement of court judgments can only commence in the following cases:

- a court order for a stay of execution is not granted to the party who lost the case in the court of first instance or the Court of Appeal; or
- the case has become final because the party who lost the case did not appeal to the higher court within a specified time.

In practice, on the date of reading of the court judgment, the court will issue a decree for the performance of the relevant obligations by the judgment debtor within a specified time, which shall commence from the date on which the decree is acknowledged by the judgment debtor. Such decree shall be deemed to have been acknowledged by the judgment debtor on such date unless neither the judgment debtor, his or her lawyer nor any of their authorised person is present at the time of the issuance of the decree. In the latter case, in practice the decree will be served by means of a court summons and the date on which the decree is deemed to have been acknowledged by the judgment debtor is, therefore, a much later date.

If the judgment debtor fails to comply with the decree, the judgment creditor will have to file a motion to the court for a writ of execution. The execution of a court judgment may be by means of seizure and sale of the judgment debtor's assets, attachment of the judgment debtor's rights of claim against third parties, arrest and detention of the judgment debtor or other means. It is worth noting that execution of court judgments is carried out by an execution officer and any sale of assets must be carried out by the execution officer by means of public auction.

## COLLECTIVE ACTIONS

### Funding of collective actions

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

The Civil Procedure Code was amended in 2015 by the Act Amending the Civil Procedure Code (No. 26) B.E. 2558 (A.D. 2015) to allow class actions. For a claim to be eligible as a class action, such claim must be based on the same right arising out of the same common facts and the same provisions of law. The type of damage suffered by each class member does not have to be the same.

Claims that may be subject to class action includes tort claims, breach of contract claims, claims based on rights derived from other laws, such as environmental law, consumer protection law, labour law, securities and exchange law, and trade competition law.

Although the law does not specify the minimum number of class members required to file a class action claim, in deciding whether or not to grant permission for the class action to proceed, the court is required to consider whether the number of class members is so large that a normal lawsuit would be complicated and impractical. The court will have to also consider whether a class action would result in better justice and efficiency than a normal lawsuit, and whether the claimant (who must be a member of the class) and the claimant's counsel would be able to adequately and fairly protect the interests of the class.

Any potential class member who does not wish to be a class member must formally opt-out of the class action within the period prescribed by the court. In the case of opt-out, such individual will not be bound by the judgment and is entitled to pursue individual claims.

In a class action lawsuit, the counsel may be awarded a sum of money that is calculated based on the total monetary amount awarded to the class members in the event that the claim is successful. The court is provided with the discretion to award a sum of money to the claimant's counsel (payable by the defendant) as the court deems appropriate, taking into account the complexity of the case and the time, efforts and expenses that the claimant's counsel spent on the case, subject to a maximum limit of 30 per cent of the total monetary amount awarded to the class members.

Despite the said possibility of counsel being awarded a monetary sum by the court based on the success in the outcome of the lawsuit, third-party litigation funding agreements in respect of class actions are likely to be considered by the Thai courts to be contrary to public policy and, therefore, may be void and unenforceable under Thai 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 Thai courts have the discretion to allocate statutory costs between the successful party and the unsuccessful party. Statutory costs comprise of court fees, fees for taking evidence outside court, travel expenses, fees payable to particular individuals (such as witnesses), accommodation costs for witnesses, experts, translators and officers of the court, lawyer fees, expenses in relation to the court proceeding including fees or other expenses payable under the law. In general, the courts will order the unsuccessful party to pay the statutory costs of the successful party. However, the amount awarded by the courts may be nominal and is limited by the rates prescribed in the Schedule attached to the Civil Procedure Code. For cases with monetary claims, the amount of lawyer fees that the court of first instance may award is limited to 5 per cent of the total value of the monetary claims and the amount of expenses in relation to the court proceeding that the court of first instance may award is limited to 1 per cent of the total value of the monetary claims. For the Court of Appeal and the Supreme Court stages, the amount of lawyer fees that may be awarded is limited to 3 per cent of the total value of the monetary claims.

### Liability for costs

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

Not applicable.

### 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?)

Section 253 of the Civil Procedure Code provides that the defendant may file a motion to the court requesting the court to order the claimant to provide security for statutory costs and other expenses if (1) the claimant has no domicile or place of business in Thailand and has no assets that may be enforced in Thailand, or (2) there is a reason to believe that the claimant may not pay the statutory costs and other

expenses if the claimant loses the case. Such a motion can be filed with the court at any time before a judgment is rendered.

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

Not applicable.

### 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 not commonly used and we not aware of any reputable insurance companies that provide ATE in Thailand.

## 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?

Communications between litigants and their lawyers are protected by privilege. However, the lawyer-client privilege is not absolute in that the court may order disclosure in certain limited circumstances.

Although there is no clear and specific legal framework governing lawyer-client privilege, the duty of a lawyer to maintain confidentiality with respect to information and material that has been communicated to him or her by the client is enshrined in the Lawyers Council Regulations on Lawyer Conduct B.E. 2529 (A.D. 1986), which provide that a lawyer must not disclose confidential information that comes to his or her knowledge in the course of performing his or her duties as a lawyer, unless the client's consent has been obtained or the court has issued an order for disclosure.

A lawyer who is in breach of such duty may be subject to professional sanctions, such as a reprimand, suspension of practice for a period of not exceeding three years, or removal of his or her name from the register of lawyers.

The lawyer-client privilege is further reinforced by section 323 of the Criminal Code, which provides that if a person has come to know or acquires any confidential information of another person by reason of his or her profession as a doctor, a pharmacist, a druggist, a midwife, a nurse, a priest, an advocate, a lawyer or an auditor, or by reason of being an assistant in such profession, and discloses the confidential information in a manner likely to cause damage to any person, he or she shall be subject to imprisonment for a term not exceeding six months or a fine in the amount not exceeding 10,000 baht, or both. Unlike the Lawyers Council Regulations on Lawyer Conduct B.E. 2529 (A.D. 1986), which specifically only apply to Thai legal practitioners who have obtained a lawyer's licence, section 323 of the Criminal Code also applies generally to legal advisers and consultants.

## DISPUTES AND OTHER ISSUES

### Disputes with funders

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

We are aware of two Supreme Court judgments that held that a funding arrangement by a funder who does not have a legitimate interest in the case is contrary to public policy and good morals and is therefore void under Thai law. In those two Supreme Court cases, the funders were ordinary individuals and there appeared to be no facts indicating that they provided litigation funding in their ordinary course of business.

### 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 no other issues.

## UPDATE AND TRENDS

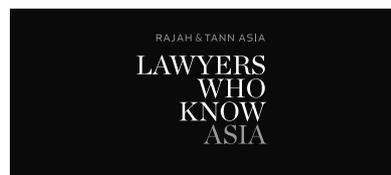
### Current developments

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

The Act amending the Civil Procedure Code (No.32) B.E. 2563 (A.D. 2020), which introduces a new legal provision allowing a party to a dispute to request an in-court civil mediation even before a complaint is filed with the court, will come into force on 7 November 2020.

The existing legal provision under the Civil Procedure Code only allows a party to civil proceedings to request an in-court civil mediation session during the course of the court proceedings. However, after the Act amending the Civil Procedure Code (No.32) B.E. 2563 (A.D. 2020) comes into force, a party may submit a motion with the court having territorial jurisdiction over such dispute to appoint a mediator to settle the dispute before a complaint is filed with the court. If the court accepts the motion, the court will seek consent from the opposing party. If the opposing party agrees to mediate, the court will subpoena the parties to attend a mediation session and appoint a mediator to conduct such a session. The parties are not required to be accompanied by their lawyers to the mediation session. In the event that the parties are able to reach a mutual agreement or compromise, the mediator will refer the matter to the court for determination. If the court finds that the agreement or compromise conforms with the parties' intention and the principle of good faith, and the agreement is fair and not contrary to the law, the court will allow the parties to sign the agreement or compromise. The parties may also request the court to render a judgement according to the settlement agreement. There is no right of appeal against a judgement issued according to a settlement agreement, unless there is an allegation of fraud against any party, or an allegation that the judgement infringes any legal provision involving public order or is not in accordance with the agreement or compromise between the parties.

If the prescription period (1) expires after the petition requesting the mediation is filed and the parties cannot reach a mutual agreement or compromise during the mediation, or (2) will expire within 60 days of the date on which the mediation ceased without agreement from the parties, the prescription period will be extended for a further 60 days from the date on which the mediation ceased.



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## 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?

As at 9 October 2020, the Thai courts are fully operational and there are no pandemic-specific measures currently in place. Where it is the case that a foreign witness, plaintiff or defendant is unable to travel to Thailand to attend proceedings in person, it has been the practice of the Thai courts to allow for an adjournment of proceedings.

Other measures have been implemented to postpone deadline in respect of tax filings and other corporate matters. As a measure to alleviate the impact of covid-19 on the ability of businesses to conduct meetings, the Emergency Decree on Meetings Via Electronic Media B.E. 2563 (A.D. 2020) came into force on 19 April 2020 allowing private limited companies in Thailand to conduct boards of directors' meetings via electronic means, whereby all the attendees may now attend the meeting from anywhere in the world, subject to compliance with certain conditions.

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