

# LITIGATION FUNDING

## Italy



# Litigation Funding

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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### Italy



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## REGULATION

### Overview

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

Third-party litigation funding is permitted in Italy 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, although some legal-market operators have established first relationships with litigation funds and started to use it in Italy.

*Law stated - 02 November 2021*

### Restrictions on funding fees

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

No. Since litigation funding agreements are an expression of the freedom of contract, the setting of funding fees is a matter of 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 determined in other manners (eg, as a multiple of sums invested, as a fixed fee, etc).

*Law stated - 02 November 2021*

### Specific rules for litigation funding

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 rules that govern certain types of contract (eg, mortgage contracts, insurance contracts).

There is an EU project for regulating this tool – European added value assessment (EAVA) accompanies a resolution based on a legislative initiative report prepared by the European Parliament's Committee on Legal Affairs (JURI), presenting recommendations to the European Commission on the responsible private funding of litigation. The main purpose of EAVA is to identify the possible gaps in European Union legislation. The various policy options to address this gap are then analysed and their potential costs and benefits are assessed.

*Law stated - 02 November 2021*

### Legal advice

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.

*Law stated - 02 November 2021*

## Regulators

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.

*Law stated - 02 November 2021*

## FUNDERS' RIGHTS

### Choice of counsel

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

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

However, litigation financing agreements may in any case provide for acceptance or approval clauses applicable to the lawyer chosen by the applicant. These clauses or indications could determine the granting or denial of litigation funding.

*Law stated - 02 November 2021*

### Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

The funder may freely attend the open court hearings and, provided the adverse party approves, the informal hearings. In neither case can the funder actively participate in proceedings.

*Law stated - 02 November 2021*

### Veto of settlements

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.

*Law stated - 02 November 2021*

## Termination of funding

## 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 up to the point of termination.

*Law stated - 02 November 2021*

## 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?

The funder cannot take an 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.

All in all, considering that the involvement of a litigation funder is not disclosed to the court or to the counterparty, in the majority of the cases the funder's role within the litigation is very limited.

*Law stated - 02 November 2021*

## CONDITIONAL FEES AND OTHER FUNDING OPTIONS

### Conditional fees

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.

*Law stated - 02 November 2021*

## Other funding options

### 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.

*Law stated - 02 November 2021*

## JUDGMENT, APPEAL AND ENFORCEMENT

### Time frame for first-instance decisions

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

Regarding the length of civil trial, Italy ranks lowest in the EU.

The Directorate-General for Statistics and Organisational Analysis of the Ministry of Justice reports that the average length of a first-instance civil trial is two and a half years.

*Law stated - 02 November 2021*

### Time frame for appeals

#### 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.

On the other hand, again according to the Directorate-General for Statistics and Organisational Analysis of the Ministry of Justice, the average length of appeal proceedings in Italy is about three and a half years.

*Law stated - 02 November 2021*

## 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.

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.

*Law stated - 02 November 2021*

## COLLECTIVE ACTIONS

### Funding of collective actions

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

Group actions are permitted in Italy and they can be funded by a third party. For example, several group actions against truck cartelists and group actions against the forced liquidation banks in the northeast area are pending.

Class actions are regulated by Law No. 31/2019, published in the Gazzetta Ufficiale No. 92 of 18 April 2019. The new rules did not enter into force immediately but did so on 19 May 2021. Therefore, the provisions of this Law are applicable to the illegal pipelines carried out after the date of its entry into force, while the illegal pipelines carried out before the date of its entry into force continue to be regulated by the Consumer Code.

In the near future, therefore, the class action could be a concrete financing opportunity for funders. Indeed, the first initiatives and the first requests for funding have already been recorded.

*Law stated - 02 November 2021*

## 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?

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 defence 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.

*Law stated - 02 November 2021*

## Liability for costs

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.

*Law stated - 02 November 2021*

## Security for costs

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.

*Law stated - 02 November 2021*

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.

*Law stated - 02 November 2021*

## Insurance

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

Despite the absence of legal or regulatory restrictions, currently there is no standard offering available on the Italian insurance market and after-the-event insurance is not used.

By contrast, legal costs insurance is used in Italy, although it is not common. This product provides costs coverage to the extent of the specific policy, but it is usually limited to certain types of claim.

*Law stated - 02 November 2021*

## 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?

No, the disclosure of litigation funding is not required by law or by jurisprudence. The litigation funding agreement is usually 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.

*Law stated - 02 November 2021*

### **Privileged communications**

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.

*Law stated - 02 November 2021*

## **DISPUTES AND OTHER ISSUES**

### **Disputes with funders**

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

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

*Law stated - 02 November 2021*

### **Other issues**

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, especially considering the planned justice reform which is aimed at cutting the length of lawsuits and increasing the predictability of their outcome.

*Law stated - 02 November 2021*

## **UPDATE AND TRENDS**

### **Current developments**

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

The reform of the Italian justice system stands at the very core of the Italian Restart and Resiliency National Plan (PNRR) – that is, the set of measures funded with the money coming from the Next Generation EU plan. One of the main goals of the justice reform is a 40 per cent cut in the length of civil lawsuits (which should be achieved by 2026), together with a general rationalisation of the system. On 21 September 2021, the Senate approved the part of the reform relating to civil justice.

This climate is likely to increase the appeal of litigation funding options, because it will lower or remove some of the

main obstacles that have historically discouraged major players from investing in the Italian system. In order to seize this opportunity, FiDeAL – the first Italian provider specialised in litigation investment solutions – has scaled up its efforts to penetrate the Italian market. It has recently partnered with 4cLegal to raise its legal tech profile, and is in talks with a number of major funds.

*Law stated - 02 November 2021*

## Jurisdictions

	<b>Australia</b>	Piper Alderman
	<b>Austria</b>	Nivalion AG
	<b>Belgium</b>	Nivalion AG
	<b>Canada</b>	Omni Bridgeway
	<b>France</b>	Nivalion AG
	<b>Germany</b>	Omni Bridgeway
	<b>Hong Kong</b>	Herbert Smith Freehills LLP
	<b>India</b>	Khaitan & Co
	<b>Israel</b>	Woodsford
	<b>Italy</b>	Fideal S.R.L
	<b>Japan</b>	Miura & Partners
	<b>Luxembourg</b>	Nivalion AG
	<b>Netherlands</b>	De Brauw Blackstone Westbroek
	<b>New Zealand</b>	Thorn Law Limited
	<b>Russia</b>	Aperio Intelligence
	<b>South Korea</b>	KL Partners
	<b>Spain</b>	Procurator Litigation Advisors
	<b>Sweden</b>	Nivalion AG
	<b>Switzerland</b>	Nivalion AG
	<b>Thailand</b>	Rajah & Tann Asia
	<b>United Kingdom - England &amp; Wales</b>	Woodsford
	<b>USA - New York</b>	Liston Abramson LLP