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When my phone rang one afternoon in February 2008 with a request from a lawyer at a major New York law firm for me to take on a role as a non-executive director on the listing on the Alternative Investment Market in London of a 'third party funder', all I could think to say was: ‘What is third party funding?’

Since then, with my partners at Calunius, I have raised hundreds of millions of pounds for three private funds that have successfully completed their investment periods, acted as Chairman of the Association of Litigation Funders of England and Wales (ALF) from its foundation in November 2011 until September 2019, been instrumental in the ALF’s intervention in the Court of Appeal’s leading case on third party litigation funding (TPF), known universally as *Excalibur*,¹ and have been one of the leaders in evidence before the Competition Appeals Tribunal in the Trucks Cartel case.

What a journey!

The essence of TPF remains the deployment of capital to fund the realisation of assets that are contingent on the resolution of some form of legal process. If the assets are sufficiently attractive, things other than (or instead of) legal costs can be funded, including corporate expenses.

Legal capital is (almost) invariably invested on the basis that the investor is without recourse, other than to the proceeds of the legal asset whose realisation is being pursued. The investor’s recovery is therefore limited to what can be realised in cash or kind from the legal asset itself. In the absence of breach, the funded party is not personally liable to the funder and therefore it would (almost) always be a major solecism ever to describe a TPF investment as a loan.

There are of course fundamental differences in approach between jurisdictions following the common law and those where civil law principles rule, but even within those two broadly distinct systems, there are a host of differences. In the United States alone there are 50 states each with a different approach to describing TPF and how it should be regulated (if at all).

In general, all common law jurisdictions are subject to the effects of the varying degrees to which the ancient doctrines of maintenance and champerty survive. Historically these prevented third parties from intervening in litigation in which they were not already directly involved as parties, although, having said that, maintenance and champerty have been abolished in Australia. On the other wing of opinion, TPF is absolutely forbidden in the Republic of Ireland, following the Supreme Court ruling in the *Persona Digital* case. It

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seems that, in the Republic, TPF must wait for the legislature to permit it. The civil law, on the other hand, has never held significant reservations about TPF in principle, although each jurisdiction, as will be clear from this book, has its own nuanced attitude.

Then there are a variety of controversies faced by TPF, which are generally resolved by individual jurisdictions in individual ways that suit them, thus defying any attempt to identify general principles that apply globally. Currently, those controversies tend to revolve around four issues: the regulation of TPF providers; whether a provider of TPF should be liable in unsuccessful cases to pay the costs of a victorious defendant or to give security for costs (and if so, in what circumstances and according to what principles); whether disclosure to the court or the arbitral tribunal of the fact of TPF being used by a party is required; and the issue of privilege and confidentiality with reference to documents that are disclosed to a funder by a party to funded litigation or arbitration.

TPF provides access to justice for those who could otherwise not afford to fight their claims and it brings access to rational commercial risk management for eminently solvent entities that do not wish to expose themselves to the significant cost risks of resolving their disputes from their own resources. TPF thus serves both those who are unable and those who are unwilling to fund the resolution of their disputes.

Demand grows as acceptance of TPF spreads. Acceptance spreads as law firms increasingly perceive that unless TPF becomes part of their offering, they will become less able to compete for valuable work from every kind of client.

This is a global phenomenon, but the resolution of every dispute by the principal international dispute resolution mechanisms of litigation and arbitration will be rooted in the law of a particular jurisdiction, and this is the landscape across which this book will travel. Enjoy your journey.

Leslie Perrin
Chairman
Calunius Capital LLP and Association of Litigation Funders of England and Wales
November 2019
Chapter 1

AUSTRALIA

Jason Geisker and Dirk Luff

I MARKET OVERVIEW

Australia is home to a sophisticated third-party litigation funding market. In 2015, the Australian litigation funding market was estimated to be worth around A$3 billion as compared with a total Australian litigation market of around A$21.1 billion. Industry estimates suggest a compounded annual growth rate of between 3 per cent and 11 per cent.2, 3

Traditionally third-party litigation funding in Australia was used to support insolvency litigation but has been increasingly utilised in a broad range of civil and commercial litigation and arbitration matters, including: tort, shareholder and investor, product liability, employment, consumer and environmental claims. A 2018 litigation finance survey of Australian lawyers and in-house counsel found that more than 70 per cent of survey respondents cited legal finance as a growing, essential new business tool for law firms, and were users of single-case funding.4

The increasing use of litigation funding for a broad range of class actions5 is another well-established trend of the Australian funding market. By 2017, almost half of all class actions filed in the Federal Court of Australia were supported by third-party litigation funders.6 Although this trend is to be contrasted with a more subdued use of third-party funding in class action filings in the state courts, where, for example, only 10 out of the 85 class actions filed in the Supreme Court of Victoria were funded.7 In 2018/2019, funded class actions commenced across all state and federal jurisdictions were reported to represent 72 per cent of all class actions issued.8

1 Jason Geisker is a principal and Dirk Luff is a senior associate at Maurice Blackburn Lawyers, the legal advisers to Claims Funding Australia Pty Ltd. The authors wish to thank and acknowledge the assistance received from Jenny Tallis and Jessica Xiao.
2 IMF Bentham Litigation Funding Masterclass October 2015 presentation, p. 8.
5 A class action is a procedure whereby a single representative can bring or conduct a claim on behalf of others in the same, similar or related circumstances (Part IVA Federal Court of Australia Act 1976 (Cth) Section 33C(1)).
Initially, the Australian litigation funding market was dominated by ASX-listed IMF Bentham Ltd, with an estimated market share of 69 per cent in 2015. IMF Bentham Ltd’s first mover advantage has since been significantly eroded in Australia as other domestic and international funders compete for business. The Australian Law Reform Commission (ALRC) now estimates there are approximately 25 litigation funders active in the Australian market.

II LEGAL AND REGULATORY FRAMEWORK

i The legal basis of third-party funding and limits on funding others

Prior to 2006, encouraging litigation and funding another’s claim for profit were prohibited in Australia by the common law doctrines of maintenance and champerty. These doctrines prevented the courts from being used for speculative business ventures. Maintenance and champerty were the foundation for numerous challenges to the legitimacy of litigation funding before being progressively abolished as crimes and torts. Even after the statutory abolition of maintenance and champerty in most states of Australia, courts could still intervene in funded litigation where funding contracts were considered to be contrary to the public policy considerations upon which the previous prohibitions were based at common law. More than 20 challenges to funding agreements were mounted in the eight years prior to the 2006 landmark decision of the High Court in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* (*Fostif*).

In a pivotal moment in the development of the Australian jurisprudence the High Court in *Fostif* held that third-party litigation funding of a class action was not an abuse of process or contrary to public policy. The Court stated that notions of maintenance and champerty could not be used to challenge proceedings simply because they were funded by a litigation funder. Since *Fostif*, litigation funding has become an entrenched part of the Australian legal system. It now plays a crucial role in providing greater access to the courts and bringing equality of arms to claims against often well-resourced respondents. However, challenges to litigation funding agreements still arise from time to time, predominantly in states where the torts of maintenance and champerty have not yet been abolished by statute.

9 IMF Bentham Litigation Funding Masterclass October 2015 presentation, p. 9.
11 Maintenance is assistance in prosecuting or defending a lawsuit by someone with no bona fide interest in the case. Champerty is an agreement to divide litigation proceeds between the owner and another party unrelated to the lawsuit who helps enforce the claim.
12 Civil Law (Wrongs) Act 2002 (ACT) Section 221; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW) Sections 3-4, 6; Criminal Law Consolidation Act 1935 (SA) Schedule 11 cl 1(3), 3; Wrongs Act 1958 (Vic) Section 32; and Crimes Act 1958 (Vic) Section 322A. The torts have not been abolished in Queensland, Western Australia, Tasmania or the Northern Territory.
13 For example, see Wrongs Act 1958 (Vic) Section 32(2).
17 ibid. at [84]–[86].
18 For a recent example, see *Murphy Operator Pty Ltd v. Gladstone Ports Corporation Ltd (No. 2)* [2019] QSC 12 at [33]–[38]; see also the 13 September 2019 decision in *Murphy Operator Pty Ltd v. Gladstone...
A further matter under review by regulators is whether lawyers should be restricted from funding claims in the way that third-party funders do. At present, Australian legal practitioners are prohibited from entering into any arrangement for payment of damages-based contingency fees, where fees are calculated by reference to a percentage of the amount recovered. Practitioners are entitled to enter into conditional billing arrangements whereby their ordinary fees are payable upon a successful outcome. These arrangements are known as no-win-no-fee agreements and sometimes permit an uplift of 25 per cent of the lawyer’s ordinary fees where a successful outcome is achieved. For obvious reasons, such no-win-no-fee agreements are often not commercially viable, particularly for larger or more complex claims such as class actions. Interestingly, in its 2017 report on Litigation Funding and Group Proceedings, the Victorian Law Reform Commission (VLRC) suggested that the damages-based contingency fee prohibition does not prevent lawyers from receiving a contingency fee via a common fund court order. It was considered that this might be achieved by approving a litigation service fee in the context of class actions conducted in the Supreme Court of Victoria. That proposition was sought to be tested in a class action brought against BHP, following the Fundão Dam collapse in 2015, considered to be Brazil’s worst environmental disaster. However, because of other case management rulings made in respect of the competing class actions, Moshinsky J did not ultimately determine whether a common fund order comprising a litigation services fee was permissible.

The extent to which a lawyer may be associated with the litigation funder has been extensively tested in Australia by a Melbourne-based solicitor, who was the sole director and shareholder of Melbourne City Investments Pty Ltd (MCI). In 2014, securities class actions were commenced by MCI, as the representative plaintiff, against ASX listed Treasury Wine Estates (TWE) and Leighton Holdings (LEI). At incorporation, MCI acquired shares in TWE and LEI and other small parcels of shares costing less than A$700 in various other ASX-listed companies. This same MCI director had also appointed himself as the legal representative for MCI, which was receiving litigation funding to conduct the claims.

In December 2014, the Victorian Court of Appeal allowed an appeal against a decision by the trial judge to refuse TWE’s application for a stay of the proceedings on abuse-of-process grounds. It was held on appeal that the class action was an abuse of process because it had been commenced with the predominant purpose of earning legal fees for the solicitor, rather than the fees being an incident or by-product of the vindication of legal rights, and the proceeding was therefore permanently stayed. In their majority judgment, Maxwell P and Nettle JA emphasised the importance of maintaining public confidence in the fairness of court processes; confidence that ‘would undoubtedly be shaken’ if the enrichment of a solicitor were held to be a legitimate purpose for bringing proceedings.

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19 See Section 183 of the Legal Profession Uniform Law 2015 (NSW).
20 See, for example, Section 182(2)(b) of the Legal Profession Uniform Law 2015 (NSW).
22 Impiombato v. BHP Billiton Limited (No. 2) [2018] FCA 2045 at [153].
Earlier in 2013, the same solicitor had trialled a different funding model for a class action brought against Banksia Securities. He again sought to act as the lead plaintiff’s solicitor, while also being a director and secretary of the litigation funder and holding an indirect shareholding in the funder. The litigation funding agreement entitled the litigation funder to 30 per cent of the amount received by way of an award or settlement of the proceeding, and to exercise control over the conduct of the proceeding. In November 2014, the Supreme Court of Victoria restrained the solicitor and senior counsel from acting for the lead plaintiff in the Banksia Securities class action owing to conflicts of interest. Justice Ferguson considered that the main risk arising from the solicitor’s pecuniary interest in the outcome of the class action was that he might not fulfil, or might not be perceived to fulfil, his duties to the court or be independent and objective. Her Honour found ‘it would be inimical to the appearance of justice for lawyers to skirt around the prohibition on contingency fees by this means; particularly where the legal practitioner’s interest in the funder is sizeable’.

ii Present regulation of litigation funding

As providers of financial services and credit facilities, litigation funders are subject to the consumer provisions of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act). The ASIC Act contains protections against unfair contract terms, unconscionable conduct, and misleading and deceptive conduct. These provisions provide avenues for redress against unfair or false and misleading terms or omissions in funding agreements.

There are no licensing requirements imposed on litigation funders by the Corporations Act 2001 (Cth) (the Corporations Act) requiring funders to hold an Australian Financial Services Licence (AFSL), or by the National Credit Code requiring them to hold an Australian credit licence. Consequently, litigation funders have no regulated capital adequacy requirements, nor are they required to comply with various related corporate and risk management regulatory requirements, which would ordinarily apply if they were licensed. This is not to suggest that the applicable regulation of litigation funding has been without challenge.

In 2009, the regulation of litigation funding became the subject of national debate as a result of the landmark case of Brookfield Multiplex Funds Management Pty Ltd v. International Litigation Funding Partners Pty Ltd (Multiplex), which determined that litigation funding agreements (including the funding agreement and retainer) in a funded class action constituted managed investment schemes within the meaning of Section 9 of the Corporations Act. Managed investment schemes were required to be registered and managed by an entity holding an AFSL. Failure to comply was an offence under the Corporations Act.

A second landmark case involved a dispute between a funder and client, which raised similar questions regarding the nature and regulation of funding arrangements. In Chameleon Mining NL (Receivers and Managers Appointed) (Chameleon) the litigant sought to rescind

24 Bolitho v. Banksia Securities Ltd (No. 4) [2014] VSC 582 at [53].
25 ibid. [53].
26 ibid. [51].
27 Australian Securities and Investments Commission Act 2001 (Cth), Sections 12BF–12BM, 12CA–12C, 12DA.
a funding agreement under Section 935A of the Corporations Act and thereby avoid payment of the funder’s commission.29 The funded client argued that the funding agreement was a financial product and that the funder did not hold an AFSL. The High Court concluded that the funding agreement was a ‘credit facility’ rather than a financial product and, while it did not need an AFSL, the funder did require an Australian credit licence.

In the aftermath of these two landmark cases the federal government intervened, announcing that it would protect funded class actions from too heavy a regulatory burden.30 In 2010, the Australian Securities and Investment Commission (ASIC) issued class orders granting transitional relief to the lawyers and litigation funders involved in funded class actions, exempting them from the managed investment regulatory obligations. ASIC subsequently granted transitional relief from financial product regulatory requirements of the Corporations Act.

The Multiplex and Chameleon cases also led to the introduction of a new conflict management regime. In 2012, regulations were enacted exempting litigation funders from the managed investment scheme provisions of the Corporations Act subject to compliance with new conflict management requirements.31 Litigation funders providing both single-party funding32 (litigation funding arrangements) and multiparty funding33 (litigation funding schemes) are now required to conduct reviews and maintain written procedures identifying and managing conflicts of interest.34

In April 2013, ASIC released a regulatory guide detailing how litigation funders may satisfy the obligations to manage conflicts of interest (the ASIC Guide).35 The ASIC Guide describes the actual, potential and present or future conflicts of interest that may arise in a litigation scheme because of a divergence of interests between the funder, lawyers and claimants. The ASIC Guide requires funders to have robust arrangements in place to identify and assess divergent interests and conflicts, and to respond as needed.36 The regulations require funders to design their own conflicts management policy suited to the nature, scale and complexity of the litigation schemes funded in recognition that funding operations differ greatly.37

iii  Government reviews into the regulation of litigation funding

Despite the introduction of the 2012 ‘conflict management’ procedures and the ASIC Guide in 2013, the regulation of litigation funding remained a heavily debated reform issue in the years that followed. In 2014, the Productivity Commission delivered a comprehensive report regarding access to justice, which favoured two major reforms that, if implemented, would

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31 Corporations Amendment Regulation 2012 (No. 6) (Cth).
32 Corporations Regulations 2001 (Cth), r 5C.11.01(d).
33 ibid. rr 5C.11.01(b)–5C.11.01(c).
34 ibid. r 7.6.01AB.
35 ASIC Regulatory Guide 248, ‘Litigation schemes and proof of debt schemes: Managing conflicts of interest’.
36 ibid. RG248.31.
37 Corporations Regulations 2001 (Cth) r 7.6.01AB(2)(a).
greatly impact litigation funding.\textsuperscript{38} The two proposed reforms were (1) the introduction of a licensing regime for litigation funders,\textsuperscript{39} and (2) the removal of the ban on lawyers charging damages based contingency fees, thereby introducing another funding option for clients.\textsuperscript{40} Both reforms (and an array of other proposals) have more recently received further consideration at state and federal level by the VLRC and the ALRC respectively.\textsuperscript{41}

\textbf{VLRC}

On 16 December 2016, the Victorian Attorney General, the Hon. Martin Pakula MP, commissioned the VLRC to report on litigation funding and the conduct of class actions, and to consider how regulators might better protect litigants from unfair risks or disproportionate costs burdens.\textsuperscript{42} The VLRC report, ‘Access to Justice: Litigation Funding and Group Proceedings’, tabled in the Victorian parliament on 19 June 2018 (VLRC Report), recommends that, subject to careful regulation, legal practitioners be permitted to charge contingency fees so as to provide another funding option for clients who are unable to bring proceedings without financial assistance in appropriate cases. The VLRC Report also supports industry-wide, national regulation of litigation funders and recommends that Victoria advocate for stronger national regulation through the Council of Australian Governments.\textsuperscript{43}

\textbf{ALRC}

The following year, on 11 December 2017, the then Federal Attorney General, the Hon. Mr George Brandis QC, announced that the ALRC would be asked to conduct a similar review at the federal level into litigation funding and the conduct of class actions. The ALRC Inquiry, led by the Hon. Justice Sarah Derrington QC, consulted broadly with judicial and expert panels, regulators, stakeholders and interested parties in the United Kingdom and Canada. A discussion paper released on 1 June 2018 (the ALRC Paper)\textsuperscript{44} attracted more than 70 formal submissions from a broad range of industry stakeholders, including: funders, law firms, insurers, industry super funds, non-government organisations, business lobby groups, and regulatory bodies and professional associations.


Consistent with the earlier recommendations of the VLRC and the Productivity Commission, the ALRC Report recommends that ‘percentage-based fee arrangements’

\textsuperscript{39} ibid. vol 2, p. 633, Recommendation 18.2.
\textsuperscript{40} ibid. vol 2, p. 619, Recommendation 18.1.
\textsuperscript{43} ibid. p. xvi, paras. 28–31.
or contingency fee arrangements for solicitors be permitted in Australian class action proceedings with some limitations. This would allow solicitors to receive a proportion of the sum recovered at settlement, subject to court approval, to ensure arrangements are reasonable and proportionate. The four key arguments advanced in favour of contingency fee arrangements are that they will: (1) increase access to justice for prospective group members of medium-sized class actions (between A$30 million and A$60 million); (2) promote competition; (3) increase returns for group members; and (4) provide clarity and certainty for group members. The recommended limitations to be placed on contingency fee arrangements include that the contingency fee be the one and only form of funding; the solicitors are precluded from also recovering any professional fees on a time-cost basis; and the solicitors bear the onus of paying for the disbursements and must account for these within the contingency fee.

In relation to the regulation of litigation funders, the ALRC Report does not recommend the introduction of a licensing regime (as initially proposed in the ALRC Paper), but instead recommends improved court oversight of litigation funders on a case-by-case basis. The ALRC considers this will ‘achieve at least the same level of consumer protection without the regulatory burden of a licensing regime’. The ALRC suggested a suite of amendments to the Federal Court of Australia Act 1976 (Cth) (the FCA Act) aimed at strengthening the Federal Court’s supervision of litigation funders, including to provide that litigation funding agreements for class action proceedings are enforceable only with the approval of the Court; expressly empowering the Court to award costs against litigation funders (and insurers) who fail to comply with the overarching purposes of the FCA Act (to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively, and efficiently as possible); and a statutory presumption that litigation funders who fund class action proceedings will provide security for costs in a form that is enforceable in Australia.

The ALRC Report also recommends that the ASIC Guide be strengthened to require that litigation funders who fund class action proceedings report annually to ASIC on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest. In recognition of the wide range of funding models that have emerged since the 2012 ‘conflict management’ procedures were introduced, the ALRC also recommends that the scope of Regulation 5C.11.01 of the Corporations Regulations 2001 (Cth) be amended to include ‘law firm financing’ and ‘portfolio financing’ within the definition of a ‘litigation funding scheme’, so that litigation funders who provide such funding are also required to implement conflict management procedures.

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45 Litigation Funders’ Report 134, p. 28, p. 205.
48 ibid. p. 163, para. 6.42.
49 ibid. p. 162, para. 6.37.
The VLRC and ALRC Reports are only one step in the process towards actual law reform. The next steps involve further industry consultation and feedback in light of the reports followed by consideration and implementation of some or all of the recommendations by the Victorian and federal governments.

III STRUCTURING THE AGREEMENT

i Typical structure

Funded litigation can involve a tripartite relationship between the litigation funder, the lawyer and the funded client, whereby the funder agrees to provide for all the client’s legal costs and disbursements in return for receiving a percentage of any damages recovered. This percentage typically ranges between 20 per cent and 45 per cent of the settlement proceeds depending on the risks and time involved and the type of funding required. The ALRC Report noted that the median commission rate for third-party litigation funding of Federal Court class actions between March 2017 and March 2018 was 30 per cent. However, in the context of insolvency litigation funding, commission rates can be considerably higher.

In class actions, the funder typically also assists with project management, administration and pre-claim investigation and sometimes also charges a project management fee. Litigation funders often agree to provide an indemnity to cover the risk of adverse costs orders in the event that the proceeding is unsuccessful. This may involve providing security for costs as agreed or ordered by the court.

As litigation funders do not act as the legal representatives for the funded litigant, clients generally enter into two agreements: (1) a standard retainer agreement with a lawyer recording the scope and terms under which the legal services are to be provided; and (2) a litigation funding agreement with the funder recording the terms on which litigation funding is to be provided. Commonly, the funder and lawyers have no direct contractual relationship, although clients often authorise their lawyers to report directly to the funder. Funders may agree to pay a proportion, or all, of the lawyer’s fees during the course of the claim. Where legal fees are partially deferred they are generally recovered from any resolution sum if a successful outcome is achieved. Sometimes the lawyer also agrees to assume some financial risk in respect of the legal fees in the event that the claim is not successful.

Funding agreements often allocate project management responsibilities and day-to-day administrative control over the litigation to the funder, allowing the funder the right to provide instructions and administrative support to the lawyers, subject to the client’s overriding instructions. In theory, the ultimate level of control given to the funder might be seen to give rise to potential conflicts between the interests of the client, in achieving

53 Victorian Law Reform Commission, ‘Access to Justice – Litigation Funding and Group Proceedings’ Consultation Paper, p. 115, para. 8.25. In securities class actions, commission rates have declined over recent years as competition in that sector has increased. The courts have considered these rates in the context of class actions settlement approvals: Kuterba v. Sirtex Medical Limited (No. 3) [2019] FCA 1374 at [7] to [16].


55 The funding fee in insolvency cases can exceed 50 per cent, and has been as high as 75 per cent: see Victorian Law Reform Commission, ‘Access to Justice – Litigation Funding and Group Proceedings’ Report (March 2018), p. 28, para. 2.74; Standing Committee of Attorneys-General, Litigation Funding in Australia, Discussion Paper (2006) p. 4.
the best possible outcome, and the interests of the funder, in resolving the claim for an acceptable return on its investment. In *Fostif* the Court of Appeal recognised that a high level of control by the funder is expected and permissible but cautioned that it would be contrary to public policy for the lawyers to fully abdicate to the funder the obligation to act for the representative party.\(^5\) Therefore, while it is permissible for a funder to maintain day-to-day control of a claim, the legal representatives are expected to consult with the client on key issues. In this regard funding agreements often preserve the right of the client to override the funder’s instructions. They also commonly include dispute resolution mechanisms to manage potential conflicts between the funder and client. Unresolved disputes between funders and clients can require the lawyers to brief a senior counsel to provide a final and binding opinion on areas of dispute, such as, for example, the reasonableness of a proposed settlement offer.

The funded client usually authorises the lawyer to receive any resolution sum on their behalf to be applied in accordance with an agreed priority for reimbursements and payments as set out in the funding agreement. Generally payments are prioritised by first reimbursing the lawyer for any deferred fees and the funder for legal costs and disbursements outlaid, before paying any funding commission and then distributing the balance (or pro rata share in the case of a class action) to the funded clients.

### ii Judicial intervention

Australian courts have recently shown some willingness to scrutinise the commercial terms of litigation funding agreements and, in some instances involving representative proceedings, intervene if they consider funding commissions to be excessive. In *Earglow Pty Ltd v. Newcrest Mining Ltd* Justice Murphy considered that the court had power to reduce a litigation funder’s commission rate when approving a class action settlement.\(^5\) His Honour held that the court was not limited to the binary choice of either approving or rejecting the settlement – instead, the court had power to approve the settlement, while at the same time varying, of its own motion, the amount payable to the funder (thus, in effect, overriding the contractual arrangements between the funder and group members).\(^5\) Justice Murphy considered that this power derived from a combination of Sections 23, 33V, 33Z and 33ZF of the FCA Act, and that it was, in many respects, analogous to the court’s power to fix the amount of costs payable to the lawyers.

In deciding whether to exercise that power in the context of a class action settlement approval, Australian courts have shown a willingness to review and consider not only funding commissions, but also: legal costs, the amount that funded litigants will receive ‘in hand’, the risks assumed by the funder, the amount of adverse costs exposure, and the sophistication and experience of funded litigants. Applying these principles to the *Newcrest* settlement approval application, Murphy J concluded that the aggregate funding commission of A$6.78 million, at rates of between 26 per cent and 30 per cent, was fair and reasonable. In reaching this

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57 *Earglow Pty Ltd v. Newcrest Mining Ltd* [2016] FCA 1433 at [7] and [157]. At [165] Murphy J stated that ‘the Court’s role to protect class members’ interests includes protecting them in relation to excessive litigation funding charges’.  
58 For contrast see *City of Swan v. McGraw-Hill Companies Inc* [2016] FCA 343; (2016) 112 ACSR 65 at 71 [30], where it was said that in an appropriate case the court may refuse settlement approval because a funding commission is so disproportionate to the risk and expense to which the funder was exposed in the proceedings that it provides a proper basis for the court to refuse approval.
conclusion, his Honour considered the published empirical research into the funding commission rates paid in Australian class actions, as well as a number of recent decisions in which settlements were approved, before concluding that those rates were at the lower end of the range. He also emphasised the need for transparency about matters relating to funding in judgments to allow proper benchmarking.

In the subsequent decision of Mitic v. OZ Minerals Ltd (No. 2), Justice Middleton agreed that the court had power to vary the amount payable to a litigation funder out of a settlement in a class action,59 but preferred to base that view on Section 33V(2) of the FCA Act, rather than on the other provisions referred to by Justice Murphy.60

This issue appears not to be settled though. In Liverpool City Council v. McGraw-Hill Financial Inc61 (now known as S&P Global Inc), Lee J approved a comparatively large funding commission of A$92 million out of a total settlement of A$215 million (about 43 per cent) through a funding equalisation order, but, in doing so, considered that Section 33V(2) of the FCA Act did not give the court the power to interfere with the amount of a funding commission to make a settlement reasonable, or to alter a ‘valid contract’ between parties (including a funding agreement).62 Lee J noted that there were no objections or applications to set aside the agreement and that a large portion of the class were sophisticated institutional investors. His Honour, did not ultimately decide on whether the court has an inherent power to alter a funding agreement,63 although his Honour did express significant doubt about the existence of such a power, which would allow the court to interfere and vary funding agreements in the context of a settlement by altering the contractual promises of group members to pay a commission.64 Therefore, the question (and extent) of judicial power to vary terms of litigation funding agreements remains somewhat controversial and unresolved in Australia.65

60 In Tamaya Resources [2017] FCA 650 at [105]–[106], Justice Wigney appeared to accept that the power existed, and so too did the Full Court in Melbourne City Investments Pty Ltd v. Treasury Wine Estates Ltd (2017) 252 FCR 1; [2017] FCAFC 98 at [90].
61 [2018] FCA 1289.
62 ibid. at [51].
63 ibid. at [52]–[58].
64 ibid. at [47].
65 See, for instance, observations of Justice MBJ Lee, ‘Varying Funding Agreements and Freedom of Contract: Some Observations’ 1 June 2017, IMF Bentham Class Actions Research Initiative with UNSW Law: Resolving Class Actions Effectively and Fairly, p. 7. In other instances, the Federal Court has indicated that under Section 33ZF of the Federal Court of Australia Act 1977 it has the power, for example, to effectively modify ‘any contractual bargain dealing with the funding commission payable out of any settlement proceeds’ in the course of a settlement approval: Blairgowrie Trading Ltd v. Alco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No. 3) (2017) 343 ALR 476, 504. See also Earglow Pty Ltd v. Newcrest Mining Ltd [2016] FCA 1433 at [133]–[134], [157]; Mitic v. OZ Minerals Ltd (No. 2) [2017] FCA 409 (21 April 2017) at [26]–[31].
More recently the courts have considered this question in a number of cases and have either declined to vary the commission rate\textsuperscript{66} or, in some cases, varied the commission rate.\textsuperscript{67} Looking ahead, the ALRC Report recommends that the Federal Court be given an express statutory power to reject, vary or amend the terms (such as the commission rate) of such litigation funding agreements and suggests a further requirement that litigation funding agreements (for class action proceedings in the Federal Court of Australia) are enforceable only with the approval of the Federal Court.\textsuperscript{68}

IV  DISCLOSURE

The Federal Court’s Class Action Practice Note requires the disclosure of legal costs and any litigation funding charges to current and potential clients in class actions, in clear terms, as soon as is possible.\textsuperscript{69} Broader disclosure to the court and other parties is also required in any class action.\textsuperscript{70} Funded applicants are entitled to redact these materials to conceal information that might confer a tactical advantage on another party.\textsuperscript{71} Commercial terms such as the litigation budget, the commission and costs structure are generally redacted whereas the court is given a complete version.\textsuperscript{72} On occasion the Federal Court has been prepared to order production of unredacted litigation funding agreements where relevant, for example, where funding rates were relevant to the respondent’s application to set aside the proceeding as an abuse of process,\textsuperscript{73} or where an application to de-class the proceeding on the ground that a closed class was said to be an abuse of process.\textsuperscript{74}

Conversely, parties have also successfully resisted production of funding agreements and documents associated with the funding relationship, such as investigative reports and correspondence between the funder and a funded party, on the ground of legal professional privilege under Section 119 of the Evidence Act 1995 (NSW) (the Evidence Act). In \textit{Hastie Group Ltd (in liq) v. Moore} the respondent successfully obtained orders at first instance for production of an expert report that had been provided to the prospective litigation funder.\textsuperscript{75} However, the NSW Court of Appeal overturned that decision and upheld a claim of legal professional privilege. It did so on the ground that the report was prepared for the dominant purpose of the provision of professional legal services in relation to proceedings or anticipated proceedings under Section 119 of the Evidence Act, having regard to the engagement letter

\textsuperscript{66} \textit{Clarke v. Sandhurst Trustees Ltd (No. 2)} [2018] FCA 511 at [26]–[27].
\textsuperscript{67} \textit{Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No. 3)} [2018] FCA 1842 at [5]–[16], although that reduction was in the context of a common fund order being made, [14], [75], [217]–[227].
\textsuperscript{69} Federal Court of Australia, Class Action Practice Note (GPN-CA) – General Practice Note 25 October 2016, p. 4, para. 5.3.
\textsuperscript{70} ibid. paras. 6.1, 6.4.
\textsuperscript{71} ibid. para. 6.4(b).
\textsuperscript{72} Federal Court of Australia, Class Action Practice Note (GPN-CA) – General Practice Note 25 October 2016, para. 6.1.
\textsuperscript{73} \textit{Spatialinfo Pty Ltd v. Telstra Corporation Ltd} [2005] FCA 455.
\textsuperscript{74} \textit{Dorajay Pty Limited v. Aristocrat Leisure Limited} [2005] FCA 588.
\textsuperscript{75} \textit{Hastie Group Ltd (in liq) v. Moore} [2016] NSWCA 305.
attached. Importantly, the Court of Appeal also held that the disclosure of the report to a litigation funder was not sufficient to waive privilege in circumstances where it was clear that the report was being provided on a confidential basis.\(^76\)

### V ADVERSE COSTS

Superior Australian courts generally have power to order costs against a non-party, including a third-party funder. In *Knight v. FP Special Assets Ltd* the High Court held that the relevant provisions of the Supreme Court Act 1867 (Qld) empowered the Court to award costs against a non-party where the party to the litigation is an insolvent person or ‘man of straw’ and the non-party has played an active part in the conduct of the litigation and has (or some person on whose behalf that non-party has been appointed has) an interest in the subject of the litigation.\(^77\)

Examples exist where a litigation funder did not provide any contractual indemnity against adverse costs and where the court subsequently refused to order that third-party funder to pay adverse costs. In *Jeffery & Katauskas Pty Ltd v. SST Consulting Pty Ltd (SST)* the High Court held that it was not an abuse of process where a plaintiff was unable to meet an adverse costs order simply because the funder had not assumed any liability for adverse costs.\(^78\) In that case the defendant had not sought adequate security for costs during the proceeding. The High Court clarified that a litigation funder does not always have to put the funded party in a position to meet any adverse costs order.\(^79\)

At the time, the High Court’s *SST* decision generated apprehension from some quarters, suggesting that funders might refuse to provide indemnities for adverse costs to the detriment of successful respondents. However, perhaps as a result of commercial realities and market competition, these fears have not materialised.\(^80\) In practice, litigation funders now routinely agree to indemnify funded clients against adverse costs exposure and provide security for costs that may be ordered. Representative applicants in funded class action claims will often not be prepared to assume personal liability for the costs of the class without such costs indemnities.\(^81\)

In *Domino’s Pizza Enterprises Limited v. Precision Tracking Pty Ltd (No. 2)* the funded party opposed a security for costs order being made on the grounds that there was no risk that a costs order would not be satisfied because of the combined effect of the litigation funding indemnity, an adverse costs insurance policy and proposed undertakings by Precision Tracking Pty Ltd to notify the parties of any relevant change of funding circumstances.\(^82\) However, the court ordered security for costs to be lodged, concluding that: (1) Precision Tracking did not have the capacity to meet an adverse costs order; (2) the funding agreement restricted the indemnity to a counterclaim in the proceedings; and (3) the adverse costs insurance

\(^{76}\) ibid. at [59]–[60].


\(^{78}\) *Jeffery & Katauskas Pty Ltd v. SST Consulting Pty Ltd* (2009) 239 CLR 75; [2009] HCA 43.

\(^{79}\) See also Grave, Adams and Betts, *Class Actions in Australia*, para. 17.1000.

\(^{80}\) ibid.

\(^{81}\) ibid.

\(^{82}\) *Domino’s Pizza Enterprises Limited v. Precision Tracking Pty Ltd (No. 2)* [2017] FCA 211.
was taken out for the primary claim. Additionally, the funder had an absolute discretion to terminate its funding arrangements with Precision Tracking at any time, including the adverse costs indemnity and the adverse costs insurance.

The adequacy of adverse costs insurance as a form of security was again tested in Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Ltd (Petersen). In that case Justice Yates accepted that, depending on the circumstances, ‘an appropriately worded ATE policy might be capable of providing sufficient security for an opponent’s costs’; but on the facts of Petersen concluded that the specific policy offered was not sufficient, noting the beneficiary of the policy was the applicant, not the respondents. His Honour also found that there was no mechanism by which the respondents could compel the applicant to sue on the policy if it were breached. Although this could potentially be overcome by direct proceedings against the insurer under the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW), there were other potential difficulties, including numerous policy exclusions that might be relied on, and a lack of evidence in relation to procurement of the policy that might have an impact on non-disclosure and avoidance rights.

VI THE YEAR IN REVIEW

i Competing funded class actions

Evidence suggests that competing or overlapping funded class actions against the same respondent arising out of substantially the same subject matter are becoming more prevalent. Professor Vince Morabito’s empirical report ‘Competing class actions and comparative perspectives on the volume of class action litigation in Australia’ concludes that, as at 30 June 2018, there had been 28 instances or sets of competing class actions in Australia.

The Federal Court of Australia is adopting a hands-on approach to case management and demonstrating a willingness to exercise its case management powers to prevent duplicative funded class actions. In McKay Super Solutions Pty Ltd (Trustee) v. Bellamy’s Australia Ltd (Bellamy’s) the Court scrutinised the funding packages offered by competing litigation funders in detail at the commencement of the case. Two securities class actions commenced on an open basis had been filed against Bellamy’s Australia Ltd, in McKay Super Solutions Pty Ltd (Trustee) v. Bellamy’s Australia Ltd (the McKay class action) and Basil v. Bellamy’s Australia Limited (the Basil class action). The respondent applied to the court to stay one of the class actions on the grounds that it would be oppressive and an abuse of process to defend two similar funded class actions. The pleadings and claim period in each class action were similar, each class action was of a similar size and claim value, and each had experienced class action solicitors on the record. The major point of difference was the litigation funding. The McKay

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84 ibid. at [92].
85 See Vince Morabito, ‘Competing class actions and comparative perspectives on the volume of class actions litigation in Australia’, An Evidence-Based Approach to Class Actions Reform in Australia (Monash Business School, 6th ed, 11 July 2018), p. 13 – of the 28 competing class action identified, 16 related to shareholder claims, five concerned product liability, four were investor, two were mass tort and one related to consumer protection.
86 McKay Super Solutions Pty Ltd (Trustee) v. Bellamy’s Australia Ltd [2017] FCA 947.
87 McKay Super Solutions Pty Ltd v. Bellamy’s Australia Limited (VID 163/2017); Basil v. Bellamy’s Australia Limited (VID 213/2017).
class action was funded by IMF Bentham. The Basil class action was funded by ICP Capital. Beach J held that neither class action should be stayed and that the IMF Bentham-funded class action should remain as an ‘open class’ and the ICP Capital-funded class action should remain on foot but become a closed class.88 Ultimately, the comparative financial position of IMF Bentham, the form of security provided and the standard terms of its funding agreement were key determinants in the court resolving which funded class action should proceed as an open class in Bellamy’s.

In Perera v. GetSwift Ltd89 (GetSwift class action) there were three competing class actions resulting in a carriage motion to determine which class action would proceed and which (if any) would be stayed. The court adopted a multi-factorial analysis to compare the competing class proceedings.90 Justice Lee considered that the court had the power to stay two of the proceedings and permit one to proceed on the basis that to allow two duplicative open class proceedings to proceed would perpetuate unnecessary multiplicity, would bring the administration of justice into disrepute and would amount to an abuse of the court’s process. Broadly, the main area of difference between the various GetSwift class actions identified by the court was in the approach to funding and costs. The class action selected to proceed (the Webb class action)91 was said to have an innovative, highly competitive funding model and novel proposed methods to reduce costs by involvement of court-appointed costs referees and joint experts.92 The funding model was calculated as the lesser of 20 per cent of the net settlement sum and a multiple of legal costs, increasing at various stages of the proceedings.93 Lee J considered the alignment of the reward of the funder with a multiple of legal costs was a significant attraction of the funding model because it recognises the reality that the risk of a funder (including for adverse costs) increases incrementally as legal costs increase and has the advantage of avoiding ‘windfalls’ that might be disproportionate to the risk and costs incurred.

Perhaps the most prominent example of competing or overlapping funded class actions in Australia involves one of Australia’s oldest funds managers, AMP Ltd. In 2018, the market value of AMP Ltd plummeted by about 11 per cent as a result of previously undisclosed revelations that emerged during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Five separately funded shareholder class actions were brought against AMP Ltd offering various types of funding packages. All the proceedings, except the Komlotex proceeding, involved a litigation funder – the Komlotex proceeding involved a no-win-no-fee model. Four of the proceedings were commenced in the Federal Court and one in the NSW Supreme Court. This led to conflicting applications in each court for the transfer of the proceedings to the other. All proceedings were ultimately transferred to the NSW Supreme Court, where a carriage motion was then conducted. Prior to the carriage motion hearing, the Fernbrook proceeding agreed to consolidate with the Komlotex proceeding, which left the NSW Supreme Court to determine which of the remaining four competing class proceedings should be permitted to proceed.

88 A closed class action is restricted to identified group members who have entered into a funding agreement with the funder. An open class action is a class action on behalf of both the funded group members and unfunded group members who fall within the group member definition.
90 ibid. [169].
91 ibid. [330].
92 ibid. [328].
93 ibid. [73].
Ward CJ in Eq adopted a multifactorial approach and determined that the consolidated *Komlotex/Fernbrook* proceeding should be permitted to proceed, and permanently stayed the remaining proceedings. The factor upon which Her Honour placed most weight was the no-win-no-fee model proposed by the *Komlotex/Fernbrook* proceeding, which involved no funding commission.94 The decision was appealed and the appeal dismissed. The NSW Court of Appeal held that there was no error of principle in the approach adopted by the primary judge and that the strong policy of the law is to avoid a multiplicity of proceedings.95 So it seems clear that the various attributes of competing litigation funding proposals and their projected returns to group members are likely to be factored in to any decision the Supreme Court makes when determining how to deal with competing or overlapping class actions.

Following the AMP class actions, the Federal Court has entered into protocols with the NSW Supreme Court and the Supreme Court of Victoria for dealing with competing class actions commenced in the respective Courts.96 These protocols provide that each Court will nominate a judge to implement the protocol and to confer and determine the appropriate management of the competing actions, which may include a joint case management hearing. The ALRC Report also recommends amendments to the FCA Act to give the Courts express statutory power to resolve competing class actions.97

**ii Common fund orders**

A significant evolutionary step in the Australian system has been the judicial approval of ‘common fund’ orders sought for the benefit of litigation funders in class actions. Common fund orders can provide for the legal costs of the proceedings and the commission charge of a litigation funder to be met by all members of a class who succeed in, or achieve a settlement in, a class action, irrespective of whether they have signed any legal retainer or funding agreement. Common fund orders have been made in a growing number of class actions, including: *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Ltd* (the *QBE* class action);98 *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No. 3)* (the *Allco* class action);99 *Camping Warehouse v. Downer EDI (Approval of Settlement)* (the *Downer EDI* class action);100 *Lenthal v. Westpac Life Insurance Services Limited*101 (the *Lenthal* class action); *Catherine Duck v. Airservices Australia*102 (the *Airservices* class action); and a range of other class actions discussed below.

A common fund order dealing with a litigation funding commission was first made by Murphy J in the *QBE* class action. The order was made at an early stage of the proceedings to assist group members in making an informed decision as to their participation in the class

94 Wigmans v. AMP Ltd [2019] NSWSC 603 at [354].  
95 Wigmans v. AMP Ltd [2019] NSWCA 243 at [51] and [91].  
100 [2016] VSC 784.  
101 [2018] FCA 1422 at [25].  
102 [2018] FCA 1541.
action prior to opting out. On 15 November 2016, the Full Court approved that common fund order saying that upon any successful settlement or judgment in the proceedings the applicant and class members must pay a reasonable court-approved funding commission from any monies received, prior to distribution of those monies.103 The Full Court declined to set the funding commission rate, preferring to determine that issue at a later stage, ‘when more probative and more complete information will be available to the Court, probably at the stage of settlement approval or the distribution of damages’. The applicant in the QBE class action had sought a rate of 30 per cent, which was less than the 32.5–35 per cent rate provided for in the pre-existing funding agreements.104 Largely in response to QBE’s principal argument that a common fund order would mean that class members would receive significantly less in hand than if a funding equalisation order were made, the Full Court also imposed a floor condition that class members could not be worse off under the common fund orders than they would be if the orders were not made.105 A further condition was also imposed that class members would be informed of the proposed (common fund) orders and the fact that they would have deducted from any settlement or judgment a reasonable funding commission at a court-approved rate before being required to choose whether or not to opt out. The Full Court considered that if class members were concerned about an obligation to pay a reasonable court-approved funding commission, they could opt out of the proceedings and bring their own case (either individually or collectively) with or without other funding arrangements.106

Subsequently, on 4 May 2018, Justice Murphy approved a A$132.5 million settlement of the QBE class action.107 In doing so His Honour approved the funder’s common fund commission at A$30.75 million or 23.208 per cent of the gross settlement sum. Although the commission was large, the Federal Court noted various reasons for concluding it was ‘fair and reasonable’, including: (1) that the funder took on substantial obligations and significant risks in agreeing to fund a large, complex and expensive proceeding, doing so at a time when the risks could not be accurately assessed and the outcome was far from certain; (2) a large number of sophisticated class members had agreed to funding rates significantly in excess of the 23.2 per cent funding rate proposed; (3) the proposed 23.2 per cent funding rate was substantially better for class members who signed litigation funding agreements than the 32.5 per cent or 35 per cent funding rates in place in those agreements; (4) the proposed 23.2 per cent funding rate was also substantially better for class members than the 30 per cent funding rate for which approval was sought in the application for the common fund orders made in 2016; (5) the proposed 23.2 per cent funding rate was arrived at as part of the settlement negotiations, and the funder further reduced the commission it had sought; (6) the aggregate funding commission satisfied the rider in the common fund orders made in 2016 that class members not be worse off than if the orders had not been made; and (7) a 23.2 per cent funding rate on the gross settlement (and 27.75 per cent of the net

104 ibid. at [11].
105 ibid. at [12].
106 ibid. at [13].
107 Money Max Int Pty Limited (Trustee) v. QBE Insurance Group Limited [2018] FCA 1030.
settlement) was within the broad parameters of the funding rates available in the market, and lower than many available funding rates. These considerations reflected factors identified earlier by the Full Court for determining a reasonable funding commission rate.

A number of common fund orders have been made since the QBE class action. In 2017, Justice Beach made a specific common fund order at the time of settlement approval of the Allco class action (prior to the QBE settlement approval), allowing the funder 30 per cent of the net settlement amount (i.e., after deduction of legal costs), which equated to about 22 per cent of the gross settlement amount of A$40 million. His Honour emphasised that the 30 per cent rate was reasonable and proportionate to the investment and risk undertaken by the funder in the context of the settlement and should not be seen as a precedent and that he would have set a lower rate had the settlement amount been substantially higher. He also stated that ‘a 30 per cent rate would be difficult to justify on a net settlement sum above A$50 million’, albeit with the caveat that ‘valuable services such as that which a funder provides have a commercial cost and if it can be justified, so be it’.

Similar orders were also made in the Downer EDI class action, setting the commission rate at 10 per cent. Although this rate was comparatively low, the circumstances of that case were quite unique, including that ‘the funder only provided adverse costs cover and security for costs’, with the lawyers acting on a no-win-no-fee basis and the total settlement amount being relatively modest (A$8.25 million).

Justice Lee made common fund orders for the payment of funding commission of the lesser of 20 per cent of the net settlement sum and a multiple of legal costs at the commencement of the proceedings in the GetSwift class action. His Honour considered it to be preferable to make the order at an early point, and noted that the order could be varied by the court at a later time if necessary. This decision was subsequently cited in Impiombato v. BHP Billiton Ltd in support of the making of an early common fund order, while retaining scope to vary or vacate the order. In the Lenthall class action, Justice Lee made orders similar to those in the GetSwift class action. The funding rate to be paid by the class in the Lenthall class action is the lesser of 25 per cent of the gross recovery and three times the total spend on legal costs and disbursements and adverse costs.

Australian courts have indicated that whether it is appropriate to provide for common fund orders with specific funding commission rates early in the proceedings will depend on the circumstances of the case. In the Airservices class action, Justice Bromwich held that it might distort decision-making and was not appropriate to make common fund orders early in that proceeding that fixed any commission rates, because there was a reasonable possibility that a separate question might end the proceeding or provide a platform for early settlement. Approximately 11 common fund orders in class actions have been made in the 12-month period since the Lenthall common fund order. Notably these include Hall v. Slater & Gordon, where a final common fund order authorised a funder commission of A$8 million,
representing 21.92 per cent of the gross settlement sum or 28.07 per cent of the net proceeds after costs, from a total settlement of A$36.5 million;115 *Southernwood v. Brambles Limited,*116 (in the context of consolidated competing class actions), where an unspecified percentage of aggregate resolution sums is yet to be determined by the court, but with the amount payable to be equally apportioned to each of the funders; *Hopkins v. Macmahon Holdings Limited,*117 where the court approved a funding commission of A$1.295 million, representing just over 19 per cent of the gross settlement sum and around 35 per cent of the net settlement sum. Perhaps of most notoriety was the settlement approval decision in *Petersen Superannuation Fund Pry Ltd v. Bank of Queensland Limited,*118 where Murphy J refused to approve a common fund commission rate of 25 per cent of the gross settlement (as sought by Vannin Capital Operations Limited). Instead the approved common fund order specified a total payment of A$5.98 million (all but A$1 million of which was in reimbursement of amounts Vannin had paid out), this being 13.7 per cent of the net settlement or 8.3 per cent of the gross settlement. Although a funding rate of 25 per cent of the gross settlement was considered to be within prevailing market rates at the time the case was commenced, in significantly reducing the funding commission, the Court noted that, 'Vannin did not assume the risks of adverse costs, passed on substantial costs to class members and was not obliged to pay most of the legal fees associated with the litigation'.119

During this period, the judicial power enabling common fund orders was directly challenged in a landmark series of cases involving the *Lenthall* class action and *Brewster v. BMW Australia Ltd (Brewster),*120 (another class action), where a separate question for determination as to the power to make common fund orders was referred directly to the NSW Court of Appeal. In a historic first joint sitting of the Full Federal Court of Australia (via *Lenthall*) and the NSW Court of Appeal (via *Brewster*), the Courts heard these challenges. On 1 March 2019, both Courts concluded that there is sufficient statutory power enabling common fund orders to be made. Allsop CJ, Middleton and Robertson JJ were unanimous in dismissing the *Lenthall* appeal, finding that Section 33ZF of the FCA Act (the basis for the general power of the courts to make orders appropriate or necessary to ensure that justice is done in the proceedings) enabled the courts to make such orders.121 Likewise, Meagher JA, Ward JA and Leeming JA agreed that common fund orders were authorised pursuant to Section 183 of the Civil Procedure Act 2005 (NSW) (CPA).122 It was held that the making of common fund orders was a proper exercise of judicial power and in no way contravened Chapter III of the Commonwealth Constitution.123 Further, it was held that there was no law that could be characterised as ‘an acquisition of property’ and that there was no compulsory acquisition of property because group members retained the right to opt out before any liability to pay the funder crystallised.124

117 [2018] FCA 2061.
118 [2018] FCA 1842.
119 ibid. at [257].
120 [2019] NSWCA 35.
121 Westpac Banking Corporation v. Lenthall [2019] FCAFC 34.
122 Brewster v. BMW Australia Ltd [2019] NSWCA 35 at [56]–[61], [64]–[67].
123 ibid. at [96]–[103].
124 ibid. at [104]–[110].
The High Court subsequently granted special leave to hear appeals in both the *Lenthall* and *Brewster* matters as to whether the Courts had erred in concluding that Section 183 of the CPA and Section 33ZF of the FCA Act validly enabled the making of common fund orders. Those hearings took place in August 2019, with various Attorney-Generals of the Commonwealth and the states of Queensland, Victoria and Western Australia intervening to be heard on the issue. The anticipated outcome of the High Court’s decision will finally determine whether the Federal Court and the NSW Supreme Court have power to make common fund orders.

**VII CONCLUSIONS AND OUTLOOK**

Litigation funding in Australia has evolved into a mature and sophisticated market. Common law and regulatory developments have steadily refined and clarified the regime’s requirements since the High Court’s seminal decision in *Fostif*. Market competition, spurred by new local and international funding entrants and law firms now offering to conduct traditional no-win-no-fee funding in competing class actions, is continuing to drive innovation and placing pressure on commission rates and funding terms.

Key issues for determination will be the High Court’s pending decisions in the *Lenthall* and *Brewster* matters as to the extent of judicial power available to make common fund orders in class actions. If the High Court allows these appeals, ending common fund orders in their present form, we can expect litigation funding in class actions to return to a focus on competitive client book-building at the early stage of a class action pending further regulatory intervention. Irrespective of the outcome, the adoption of the common fund doctrine in class actions over the past years since *Money Max* has arguably improved fairness and equity between class members and enabled funders to more efficiently consider the commercial viability of multiparty claims, while decreasing the need to engage in costly client book-building. Should the status quo be altered by the High Court, there will be a strong basis for regulatory change. Further limited regulatory changes and funder reporting requirements can also be expected following the VLRC and ALRC recommendations.

Clearly, an important next step in the evolution of litigation funding in Australia will be the introduction of damages-based contingency fees for lawyers, as recommended by the Productivity Commission, the VLRC and the ALRC. On this front it seems inevitable that litigation funders will soon be asked to compete directly with Australian lawyers in the funded class action segment of the market, which should further enhance consumer outcomes and provide even greater levels of access to justice.
Chapter 2

AUSTRIA

Marcel Wegmüller and Jonathan Barnett

I MARKET OVERVIEW

Compared to other jurisdictions, in Austria third party litigation funding is relatively new and has only started to become an established litigation tool over the past few years. Nevertheless, currently litigation funding in Austria is accepted practice and the Austrian courts have judicially endorsed it in recent years. While the courts have not yet comprehensively covered all aspects of litigation funding, they have at least created a stable and favourable environment for third party funding in Austria.

The aspect that has received the most exposure and that has substantially influenced the public opinion of third party funding in Austria is its contribution to the Austrian-style class action. While there is no specific collective redress provided under Austrian law apart from the joinder of parties, a class action mechanism has existed in Austria’s civil procedural law practice for over 10 years. This mechanism is based on a combination of several elements of the Austrian Code of Civil Procedure (ZPO) and is commonly referred to as the ‘Austrian-style class action’. It provides for the possibility of not only the original owner of a claim asserting that claim against the debtor, but also a third party to whom the claim has been assigned doing so. In addition, the Austrian-style class action allows a plaintiff seeking to assert several claims against the same defendant to bundle all these claims into a single litigation action. In addition, claim size restrictions do not apply to cases where the assignee and class action claimant are part of a specific association (e.g., a consumer organisation). This allows for all bundled claims to be brought before the Supreme Court regardless of the individual claim size. In a 2013 landmark decision, the Supreme Court explicitly confirmed the legality of third party funding of such Austrian-style class actions. Since then, third party funders have shown increasing interest in funding Austrian-style class actions, which have gained public interest. Cases include those against VW, the Trucks Cartel, GIS and AWD.

Third party funding in Austria has grown in recent years and now covers single-case funding both in litigation and arbitration for a broad variety of civil claims, and for corporations as well as for private individuals. Portfolio funding is also available for disputes of this kind and is gaining wider attention, in particular from corporate clients looking to manage their risk across their portfolio of disputes.

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2 See especially Sections 11, 187 and 227, ZPO.

3 However, the Austrian-style class action is based on the opt-in principle.

4 OGH, 27 February 2013, 6 Ob 224/12b.
Alternative funding options providing the same advantages as third party funding are scarce in the Austrian market: while legal costs insurance is widely available in Austria, the maximum coverage it provides and the types of dispute insured are quite limited, depending on the specific policy. Another disadvantage of legal costs insurance is that it has to be arranged before the occurrence of the event giving rise to a claim, that is before a possible claimant even becomes aware of the need to litigate.

On the other hand, after-the-event (ATE) litigation insurance is not commonly established in Austria, notwithstanding the absence of legal or regulatory restrictions. Nonetheless, at the time of writing there is no standard offering available. Only foreign insurance companies have been reported as making ATE insurance available in a few cases in Austria.

The third alternative consists of legal aid, for which a claimant is eligible if he or she lacks the financial resources to fund the proceedings and if the case does not seem devoid of any chance of success.5 Here, it is the judicial practice that limits the usefulness of this option, since Austrian courts handle both conditions in quite a strict way.6 If granted, legal aid can comprise one or a combination of the following measures: an exemption from the obligation to pay an advance on costs or to provide security (or both); an exemption from court costs; or the appointment of a lawyer by the court if judged necessary to protect the rights of the party receiving legal aid. Since 2013, legal aid is not only available to persons but also to companies that meet the two aforementioned conditions regarding the lack of financial resources and at least some chances of success.7 But, again, the number of claimants benefiting from legal aid is extremely small.

These circumstances together with the shortcomings of the other alternatives mentioned leave a sizeable market of third party funding opportunities and an interesting potential for growth. Currently, the Austrian market is mainly serviced by the local provider Advofin Prozessfinanzierung AG and Switzerland’s Nivalion AG (focusing on arbitration, commercial litigation and insolvency funding), as well as Germany’s Foris AG.8

II LEGAL AND REGULATORY FRAMEWORK

The question of the basic admissibility of third party funding for civil litigation and arbitration under Austrian law was favourably decided by the Supreme Court in a 2013 decision.9 This leading case has been prefixed by two decisions of the Vienna Commercial Court in 2004 and in 2012, which denied the respective defendants’ objections to third party funding.10

5 Sections 63–73, ZPO. Legal aid in Austria is called Verfahrenshilfe.
7 Section 63(2), ZPO; VfGH 5 October 2011, G 26/10.
9 See footnote 4 above. The first decision stating the admissibility of someone lending financial support in litigation against a share of the proceeds in Austria dates back to the 1980s and remained very isolated until the 2013 landmark decision: OGH 11 December 1984, 4 Ob358-365/83, Öbl 1985,71.
While third party funding has been endorsed by the courts, lawmakers have not yet seen the necessity to regulate or otherwise monitor it. Austrian legislation contains no specific provisions regarding third party funding. What is more, neither the Austrian financial regulator nor any other governmental body has so far taken any steps to install any oversight of reported litigation funding.

Therefore, a specific legal or regulatory framework concerning third party funding is absent in Austria. However, third party funders and their clients have to take into consideration the rules and regulations regarding the professional conduct of lawyers in Austria, since clients’ mandated lawyers do play a role in clients’ relationship with their litigation funder. In Austria, lawyers are prohibited from working on a contingency fee basis only.\footnote{Prohibition of the pactum de quota litis: Section 16(1), RAO and Section 879(2), ABGB.} The reasoning behind this relates to a lawyer’s independence: if a lawyer has a financial stake in a case that exceeds the basic compensation for his or her services (i.e., if the work is undertaken on a contingency fee basis), the assumption is that the lawyer would no longer have only the client’s interests in mind but might start to look out for his or her own (financial) interests. This, in turn, might conflict with the client’s interest, as a lawyer might insist on taking a case to court when the best advice for the client would be to settle the case.

The prohibition of a pure contingency fee remuneration for the client’s lawyers has to be taken into account when drafting the litigation funding agreement. Any stipulation therein that would – directly or indirectly – result in a pure contingency fee model regarding the remuneration of the client’s lawyers would be in violation of the above-mentioned legislative provisions in the Lawyer’s Ordinance (RAO) and the Austrian Civil Code (ABGB). However, if the lawyers charge a basic fee (flat or on an hourly basis) for their services that covers the actual costs of the lawyers’ practice, the fee arrangement could stipulate an additional remuneration in addition to the basic fee, such as a premium in the event of a successful outcome.\footnote{In contrast to the pactum de quota litis, the pactum de palmario is allowed in Austria, the difference being that the latter – while being dependent on a successful outcome – is not dependent on the extent of the success. See Marcel Pilshofer, ‘Grundlagen und Grenzen freier Honorarvereinbarungen im Anwaltsberuf’, doctor’s thesis Vienna 2010, p. 161 et seq., 292 et seq.; as well as Michael Kutzis, Das ‘pactum de quota litis’ in Österreich, in: Anwaltsrevue 2008/10, p. 457 et seq.} Within those limits, the litigation funding agreement can stipulate a remuneration model for the client’s lawyers that is partially responsive to the outcome of the case. What must be strictly avoided is a pure contingency-fee-based model – or any model that could be interpreted as such.

Furthermore, since lawyers’ independence is a crucial principle of the RAO,\footnote{cf. Section 9(1), RAO.} it is not sufficient to factor it in only regarding the financial aspects of the funder–lawyer relationship. It is equally important that the funder and the lawyers assume distinct roles, meaning that the funder provides a financial service while the lawyers advise their clients on all legal aspects – including the client’s relationship to the funder. Thus, any conflict of interest on the lawyers’ part can be prevented.

An additional point to consider is the prohibition of profiteering under Austrian law (i.e., exploitation of a person in need).\footnote{Section 1 of the Act against Profiteering.} In principle, there is no explicit limit on a funder’s
share of the proceeds and no definition of what constitutes acceptable compensation for the funder’s services, but any agreement under Austrian law, including a litigation funding agreement, must not constitute profiteering.

III STRUCTURING THE AGREEMENT

Normally, litigation funding agreements in Austria contain a standard clause regarding confidentiality and non-disclosure, basically prolonging the reciprocal obligation that the parties might have entered into under a non-disclosure agreement at the very start of their relationship. This standard clause usually concerns itself with protecting the litigant’s interest, but, since in Austria there is no duty to reveal a third party funder’s involvement, the confidentiality clause in the litigation funding agreement could also contain, for example, an obligation for the litigant not to disclose the funder’s involvement without the funder’s express written consent.

Another standard issue in litigation funding agreements in Austria is the funder’s exclusivity. The litigation funding agreement is usually conditional upon the funder’s extensive due diligence review. Normally, funders reserve the right to exclusively carry out this review within a period of a few weeks. By doing so, their interests are protected and they can be sure that, if their assessment of the case is positive, they will have the opportunity to fund the case. This manner of proceeding has become common practice in Austria, although there are slight differences between the third party funders regarding the identification and timing of this twofold step of due diligence review coupled with exclusivity – some funders prefer to make the litigation funding agreement conditional upon the achievement of this step, while others prefer to have a separate, earlier agreement that governs this aspect.

The principle of the lawyer’s independence in acting on behalf of the litigant, as described above, has to be taken into account when structuring the litigation funding agreement, to adhere to the regulations on lawyers’ professional conduct. In general, the litigant’s lawyer must be able to act without regard to any instructions from the third party funder, and only on behalf of the client. Nevertheless, a litigation funding agreement in Austria may very well stipulate a funder’s right to grant funding only for a specific lawyer accepted by the funder. These situations are part of the usual contractual negotiations between parties to a litigation funding agreement. In addition, a litigation funding agreement may provide that if the litigant intends to replace the lawyer handling the case, further funding will only be granted if the new lawyer is accepted by the funder, considering that the funder’s belief in the lawyer’s skills is an essential element when the former is assessing a case and concluding a litigation funding agreement. But these two special stipulations do not really concern the fundamental element of any client–lawyer relationship, namely the client’s right to instruct the lawyer. In this respect, the claimant’s lawyer has to stay independent from the third party funder. Thus, the funder must not instruct the lawyer during the proceedings.

Of course, in a normal working relationship the funder will express its opinion on the progress of the case and will mention any steps it thinks should be taken in the best interest of the case, but only the client has the right to instruct the lawyer, and the lawyer has the obligation to take instructions only from the client. If, instead, the lawyer acts upon instructions by the funder, the lawyer would violate the code of professional conduct provided in the RAO. Any rights and actions that the funder might intend to exercise during

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15 See Section IV.
the course of the litigation process must therefore have been agreed in the litigation funding agreement, to which the funder and the claimant, not the claimant’s lawyer, are parties. In this context, the parties have to consider any information rights, access to documents produced during the ongoing litigation and any rights for the funder to veto actions that a litigant is usually free to take – in particular, the offsetting mechanisms triggered if a litigant takes such actions against the funder’s preference. Often, these considerations lead to contract clauses stipulating the litigant’s obligation to obtain written permission from the funder before concluding or revoking any settlements; waiving any claims; initiating any additional proceedings in connection with the funded claim; adopting any legal remedies; expanding the claim; or otherwise disposing of the funded claim. By negotiating these terms beforehand and including them in the litigation funding agreement, the claimant’s rights to the claim are respected.

Clauses containing a veto right with respect to a potential settlement have been commonly included in Austrian funding agreements. Such a clause is permissible under the ABGB and does not violate the independence of the litigant’s lawyer nor any other stipulation of Austrian law. The litigant and funder often agree in advance on certain minimum and maximum amounts in the range of which the funder’s veto right apply, as well as the funder’s right to demand that the litigant accepts a particular settlement or sets the funder off against the benchmark of the proposed settlement. Such clauses have become frequent practice in Austria.

Regarding the right to terminate funding, litigants and funders can freely agree on various events or circumstances that trigger such a right. Habitually, these circumstances form two distinct categories. The first category includes events that are deemed to have a substantial effect on the risk of the proceedings, such as:

\[\begin{align*}
  a & \quad \text{court or authority decisions that result in a full or partial dismissal of the claim;} \\
  b & \quad \text{the disclosure of previously unknown facts that have a negative effect on the current litigation process;} \\
  c & \quad \text{a change in case law that has a negative effect on the current litigation process;} \\
  d & \quad \text{a loss of evidence or harmful evidence adduced by the respondent; and} \\
  e & \quad \text{a major change in the creditworthiness of the respondent.}
\end{align*}\]

When a funder exercises its right to terminate under such circumstances, in practice it would terminate the agreement and bear any costs incurred up until that moment, as well as costs incurred as a consequence of the termination.

These clauses lift the funder’s financing obligation in cases that appear reasonably unpromising, whereas the second category covers breaches of obligations under the funding agreement committed by the litigant. If the litigant breaches obligations under the agreement, usually the funder has the right to terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. Instead, the litigant usually has to reimburse the funder for its costs and expenses.
IV DISCLOSURE

In Austrian domestic litigation, court hearings are normally public, which allows funders to attend without needing special permission.\(^{16}\) In contrast, settlement and organisational proceedings are normally conducted in private.\(^{17}\) Nonetheless, if there exists a clause in the litigation funding agreement providing for the funder’s right to attend and if the counterparty does not object, a litigant can invite the funder to these proceedings.

Arbitration proceedings are generally private, but the same principle applies here: if the counterparty does not object, a funder may attend hearings and proceedings. However, most of the cases funded by third parties in Austria so far have taken place without disclosure of the funder’s involvement. As this is widespread practice in Austria, the question of permission for the funder to attend is not very relevant in practice.

The ZPO does not provide any obligation for a litigant to mandatorily disclose the support of a third party funder, or even the details of the litigation funding agreement. Nor does the ZPO provide a basis for an Austrian court to order a litigant to disclose potential third party funding. This means that the decision of whether to disclose the funder’s involvement rests fully with the litigant and can be used in any dispute strategy. While it has been argued that there should be a disclosure obligation for the litigant in international arbitration under specific circumstances,\(^{18}\) there have not been any reported Austria-based arbitrations in which such an obligation has been applied.

Regarding privilege, there is a distinction between the communications between litigant and lawyer and the communications between those two parties and a third party funder. While the former are privileged and do not have to be disclosed either to the opposing party or the court,\(^{19}\) the latter – between the funder and the litigant or the lawyer – are, as such, not covered by legal privilege. Notwithstanding this, there have not been any reported cases where this type of communication has had to be disclosed to the defendant or the court by way of a court order.

V COSTS

In Austria, court fees and all other expenses arising from the litigation, including the opposing lawyer’s fees, are borne by the losing party (in what is commonly referred to as the loser-pays principle), with a proportional split between the two parties if one party only partially prevails.\(^ {20}\) If the parties agree to settle the case, the costs are divided between the parties as provided by the settlement agreement.\(^ {21}\)

The Rules of Arbitration of the Vienna International Arbitral Centre\(^ {22}\) provide that the arbitral tribunal shall decide on the allocation of costs at its own discretion, unless the parties

\(^{16}\) Section 90 of the Austrian Constitution (B-VG), Section 171 et seq., ZPO.
\(^{17}\) Section 175, ZPO.
\(^{18}\) Third-party Funding in International Arbitration, ICC Dossier, Vol. 10, Paris 2013; pp. 95 et seq.
\(^{19}\) Section 9, RAO, Section 321, ZPO.
\(^{20}\) Sections 41 and 43, ZPO.
\(^{21}\) Section 47, ZPO.
\(^{22}\) The Vienna Rules 2018.
have agreed otherwise. The conduct of any or all parties as well as their representatives, and in particular their contribution to the conduct of efficient and cost-effective proceedings, may be taken into consideration by the tribunal.23

To determine and allocate court costs and party costs, the Austrian courts refer to the applicable tariff schedules. These tariff schedules often differ from the legal fees actually incurred (i.e., the incurred costs are higher than the courts’ allocation). The same holds true with regard to appellate proceedings before the state courts and the Supreme Court.24

The issue of a funder’s liability for adverse costs in Austria is quite straightforward, but there are a few nuances. In third party litigation funding, as practised and understood in Austria, a funder’s contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect. Furthermore, the ZPO does not stipulate that a court could order a third party funder to pay adverse costs. Therefore, in principle, a third party funder cannot be held liable for adverse costs unless it is so contractually obliged. If this contractual obligation exists, it can naturally be enforced by the funder’s contractual partner (the claimant). It is also possible to detect two ways in which the prevailing respondent or the bankruptcy estate administering the claimant’s assets could hold a third party funder liable for costs (i.e., for the adverse costs), although both require the litigation funding agreement to contain a contractual obligation for the funder to pay adverse costs to the claimant. First, if the claimant succumbs, the claim against the funder to cover the adverse costs could be assigned to the respondent – provided that the litigation funding agreement allows for such an assignment. The respondent can then take the assigned claim against the funder to court and force the funder to fulfil the obligation. Second, if the claimant does not assign the above-mentioned claim to the respondent (maybe because the funding agreement does not allow for an assignment) and at the same time refuses to pay the adverse costs, a funder could be forced to fulfil its obligation to cover adverse costs at the end of a long process of enforcement, namely if the respondent takes legal action against the claimant, the claimant is declared insolvent and the claim against the funder is realised as part of the bankruptcy assets. In practice, the prevailing respondent is granted recourse against the claimant to recover such costs in the courts’ judgments. The enforcement of a judgment is governed by the Austrian Enforcement Regulation,25 which provides that the successful respondent can request the competent debt collection office to issue a payment order against the claimant on the basis of the existing judgment,26 which, as described, grants the prevailing respondent recourse against the claimant. Once the payment order is handed to the claimant, if the amount due is not paid, the competent court will eventually declare the claimant insolvent.27 The claim against the funder to cover adverse costs will consequently become part of the bankruptcy assets. This constitutes the basis for the bankruptcy estate or, if specific circumstances apply, the relevant creditors to subsequently bring this claim against the funder before the competent court.

Regarding security for adverse costs,28 generally a claimant may be ordered to provide two distinct types of security for costs by Austrian courts. First, the courts can order the

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23 Rules of Arbitration by VIAC (www.viac.eu), Article 38(2).
24 Section 50, ZPO; Federal Law on Court Fees (GGG).
25 Law on Enforcement and Execution (EO).
26 Sections 1(1), 3(2) and 54, EO.
27 Sections 1, 66, 67, and 70 of the Federal Law on Insolvency.
28 Security for adverse costs is called aktorische Kaution in Austria.
claimant to provide security for the expected court costs, which the court calculates by using
tariff schedules that correspond mainly to the size of the claim. Second, the claimant can be
ordered to advance costs for the taking of evidence requested in the claimant’s submissions.

The claimant need only provide security for the potential compensation of the opposing
party’s costs if the respondent requests it and if the claimant has no residence or registered
office in Austria. If the claimant is domiciled in a country that has entered into a treaty
with Austria excluding relevant security bonds, then the claimant cannot be ordered to post
security for adverse costs even if the respondent requests it.

Therefore, while the claimant can be ordered to provide security for costs (a circumstance
that contributes to the need for third party funding), the ZPO does not contain a stipulation
regarding the third party funder of a claim. There have also been no reported cases in which
Austrian courts have considered a request for security from the third party funder of a claim.

As mentioned in Section IV, so far in most of the cases involving third party funders
in Austria, a funder’s involvement has not been disclosed to the court or to the respondent.
In the very few cases where it has been openly communicated that a third party is funding
the litigation, the courts concerned have taken only the claimant’s status into account when
deciding on advances and securities. The fact that the litigation was funded by a third party
did not influence the courts’ reasoning in those instances.

A final issue regarding costs is the potential recovery of the costs of securing third party
funding through a court order. To date, no Austrian court has ordered an unsuccessful party
to pay the litigation funding costs of the successful party. But, theoretically, Section 41 of the
ZPO provides a sound basis for a wide range of cost compensation in favour of the successful
party, potentially including recovery of litigation funding costs.

VI THE YEAR IN REVIEW

Some interesting developments have occurred in the past year or so regarding third party
funding in Austria. First, the share of third party funding in arbitration as opposed to civil
litigation has increased. Given Austria’s importance as an arbitration forum, this development
was long overdue, but it remains noteworthy nonetheless, as it only occurred recently.

29 Sections 6, 7(1), and 14, GGG, Sections 54–60 of the Law on Jurisdiction and Competence.
30 Section 365, ZPO.
31 Section 57, ZPO.
32 Section 57(1), ZPO. Thus, claimants domiciled in the European Union (cf. Article 6(1) of the EC
Treaty; case C-323/95 Hayes European Court Reports 1997 I-01711; and Article 51 of the Council
Regulation (EC) No. 44/2001 (Brussels I)) or in a country that is a party to the Lugano Convention of
30 October 2007 (Article 51 Lugano Convention) cannot be ordered by Austrian courts to provide security
for adverse costs.
33 Section 41(1), ZPO provides for the compensation of ‘necessary costs for the expedient and adequate
enforcement of one’s rights’ (author’s translation). What is decisive are considerations regarding usefulness
and prospects of success (Martin Mahrer, Zulässigkeit von ‘leeren’ Klageantwortungen?, in: AnwBl
2004/6, pp. 336-341, p. 339), which always have to be evaluated ex ante (Michael Bydlinski,
Kostenersatz im Zivilprozeß, Vienna 1992, p. 15). Further reflection on this matter could be informed by the following
aspects: certain pre-action costs, such as expert opinions and investigation costs. Some opinions in Austria
have stated that, depending on the exact circumstances, such costs could be claimed either as costs under
Section 41, ZPO or as separate damages (Alfred Tanczos, Konstantin Pochmarsi and Nicole Konrad,
Kosten und Nutzen des Privatgutachtens im Bauprozess, in: bauaktuell 2014/1, pp. 9–12, p.11 et seq.;
Clemens Thiele, Der Ersatz von Detektivkosten in Österreich, in: RdW 1999/12, pp. 796 et seq.).
Second, some third party funders have begun to offer a wider array of funding solutions, including offering sophisticated forms of funding in litigation finance. The most noteworthy of these novel forms of third party funding is the monetisation of claims for corporate litigants, which means that a third party funder would not only fund the costs of litigation or arbitration, as has traditionally been the case, but would also provide funds to be used by the litigant for general corporate purposes against the company's litigation or arbitration case as collateral. Third, the Austrian Supreme Court declared the sale of insolvency avoidance claims permissible, and thus overruled the view of scholars that has prevailed for decades in Austria. This opens up new possibilities for third party funders to finance avoidance claims in insolvency proceedings, and will give insolvency administrators a valid new option to pursue claims where previously this was not possible because of a lack of assets. The creditors in insolvency proceedings will ultimately benefit from this development.

VII CONCLUSIONS AND OUTLOOK

While third party litigation funding in Austria has only recently started to become an established litigation tool, it is accepted practice and judicially endorsed by the Austrian courts, which have created a stable and favourable environment for third party funding.

In addition, the Austrian market for third party litigation funding is slowly opening up to a broader array of circumstances in which funding is required, thus connecting claimants' needs with funders' resources.
Chapter 3

BRAZIL

Luiz Olavo Baptista and Adriane Nakagawa Baptista

I MARKET OVERVIEW

In 2016, the Brazilian chapter of Getting the Deal Through: Litigation Funding registered the status of third party funding (TPF) in Brazil as being nearly non-existent. In 2017, this situation changed as arbitration institutions reported TPF cases for the first time. In 2018 though, the number of cases being subject to funding substantially decreased, perhaps reflecting the hardships of the Brazilian economy and the fact that companies were avoiding litigation. In 2019, the situation reversed once again, with an increase in the number of funded cases.

There are currently two major participants in the market, LexFinance, a company seated in Peru, which claims to cover the Iberian Peninsula and Latin America, and Leste Investimentos, a proprietary investment fund created in 2014, which also happens to be the first provider of this type of service in Brazil.

Atelier Jurídico conducted a survey of the main arbitration institutions in Brazil for this edition of the Law Review. The research provided better results compared to those from previous years. Except for one of the surveyed institutions, all had dealt with at least one case that was funded by third parties, with a total of 15 funded cases this year so far. Some of the largest institutions not only reported the existence of funded cases, but also provided information regarding actual queries from the parties or procedural incidents relating to the participation of the funder.

The above-mentioned 15 cases were reported by five of the six institutions surveyed this year, namely the Center for Arbitration and Mediation of the Chamber of Commerce Brazil–Canada (CAM-CCBC), the Market Arbitration Chamber (CAM) of

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1 Luiz Olavo Baptista was the founding partner and Adriane Nakagawa Baptista is the director at Atelier Jurídico. The authors would like to thank Lucas de Medeiros Diniz for his help in drafting the questions for the firm’s survey, and Caique Bernardes Magalhães Queiroz for organising the results, reviewing, updating and offering valuable input.


3 The authors chose to focus on arbitral institutions as the issue of TPF did not appear in the case law research conducted through the website of the main Brazilian state courts. The following institutions were surveyed for this edition: the Center for Arbitration and Mediation of the Chamber of Commerce Brazil–Canada; the Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP; the Market Arbitration Chamber; the Business Arbitration Chamber; the FGV Mediation and Arbitration Chamber; and the Brazilian office of the Secretariat of the Court of Arbitration of the International Chamber of Commerce – Team 10.
the B3 – Brasil Bolsa Balcão SA (formerly BM&FBOVESPA), the Business Arbitration Chamber (CAMARB), the Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP (CMA CIESP/FIESP), and the Brazilian office of the Secretariat of the Court of Arbitration of the International Chamber of Commerce (ICC-Brazil). The FGV Mediation and Arbitration Chamber (FGV) reported no cases. Details of the reported cases are provided in the table below.

<table>
<thead>
<tr>
<th>Arbitration institution</th>
<th>Number of funded cases</th>
<th>Funded cases added value (reais)</th>
<th>Cases funded for claimant</th>
<th>Cases funded for respondent</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAM-CCBC</td>
<td>8</td>
<td>1,095,844,387.03</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>CAM</td>
<td>4</td>
<td>2,010,000,000.01</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>CMA CIESP/FIESP</td>
<td>1</td>
<td>12,269,170.00</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>CAMARB</td>
<td>1</td>
<td>33,000,000.00</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>ICC-Brazil</td>
<td>1</td>
<td>455,000.00</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>FGV</td>
<td>0</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>15</strong></td>
<td><strong>3,151,568,557.04</strong></td>
<td><strong>12</strong></td>
<td><strong>3</strong></td>
</tr>
</tbody>
</table>

As well as the number of funded cases, their added value and the party funded, the arbitration institutions were asked how they were made aware of the funding and whether any objection was made regarding the provision of funder information.

To the first of these two additional questions, most institutions answered that the funded party voluntarily disclosed the information, in some cases to allow assessment of the arbitral tribunal’s impartiality and independence in relation to the funder; in others, the information was disclosed voluntarily following administrative recommendations on third party funding issued by the arbitration institution. In one case, however, the arbitration institution was made aware of the funder by informal means: the matter was broached by the party’s attorney during a meeting in the arbitral proceedings. Later, the institution received payment for the arbitration costs from a third party, thus confirming the funder’s existence.

As to the second enquiry, most arbitration institutions reported that there were no objections or queries in relation to the funder and its role; the only two reported queries are contained in the table below.

<table>
<thead>
<tr>
<th>Arbitration institution</th>
<th>Objections or queries regarding funder participation</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAM-CCBC</td>
<td>By way of further information, the opposing party in one of the cases requested a report detailing (1) the qualifications of the third party funder; (2) the terms of the confidentiality agreement signed by the funder; (3) the terms of the financing contract concluded, to allow verification of the degree of influence of the funder in the procedure, the extent of the funder’s consideration and the extent of the financing granted.</td>
</tr>
<tr>
<td>CMA CIESP/FIESP</td>
<td>The TPF was not voluntarily reported by the party. A payment receipt indicated the participation of a funder and CMA CIESP/FIESP requested further clarification.</td>
</tr>
</tbody>
</table>

On a separate but relevant note, there are – apparently – a number of funded cases that have not been reported to arbitration institutions. The lack of regulation and the inherent difficulty in monitoring the participation of funders contribute to this situation.
Overall, Brazil has a huge potential for TPF, as there is a combined total of over 78.7 million lawsuits pending in all courts and instances, and approximately 200 new arbitration proceedings are initiated each year. This is a multibillion-dollar market and it is now starting to become acquainted with external funding methods and market participants.

II LEGAL AND REGULATORY FRAMEWORK

There is no specific legislation on third party funding in Brazil; in effect, the TPF regime is based on international guidelines that determine good practices in the use of this mechanism. Although the Brazilian Arbitration Act (BAA) has incorporated new procedural tools with the aim of promoting efficiency in commercial arbitration, this area remains unregulated. CAM-CCBC, however, through its Administrative Resolution No. 18/2016, has drafted guidelines for parties assisted by a funder. These guidelines outline a definition of TPF and provide recommendations on matters such as disclosure and submission of all relevant information regarding the funder’s identity.

Other than that, the legal framework for TPF may be understood as drawing on other provisions in the Brazilian Code of Civil Procedure (BCCP) and the Statute of the Legal Profession of the Brazilian Bar Association. The statutory rules on contingency fees and general rules governing the ethics of lawyers presumably apply as well. Either way, the courts will also have a role in defining limits in these areas.

Types of legal fees and related fee arrangements

Legal fees have an impact on how much a funder may collect at the end of court or arbitration proceedings. For this reason, a brief summary of these modalities is in order.

Peculiar to Brazilian law is the existence of a rule concerning the legal fees of the prevailing party, whereby lawyers receive a separate honorarium, or credit, arising from their work on the case, determined by the tribunal. It is incumbent upon the losing party to pay these fees.

If requested in court proceedings, the judge may order at every stage, cumulatively, the payment of the counterparty’s attorneys’ fees. The same applies to arbitration. Pursuant to this provision, the successful party’s attorneys must receive a percentage of the amount in dispute. In ordinary cases between private parties, the percentage ranges from 10 per cent to 20 per cent on average (the BCCP does not establish a reasonable range), whereas in cases involving public entities, the percentages decrease as the amount in dispute rises. In both cases, fees increase with subsequent appeals.

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6. *Honorários de sucumbência*; BCCP Section 85, Paragraph 11.
7. BCCP Section 85, Paragraph 1.
8. BCCP Section 85, Paragraph 3, I, II and III.
To avoid disputes, and especially if funders pay all costs (including legal fees), it is worth stating in the agreement whether the portion to be awarded under the heading of ‘honorariums’ is also within the limits of what the funder can collect, or whether reimbursed legal fees should be included (the latter is a highly questionable approach, as honorariums are owed to the attorneys, not the parties).

In this context, it is important to bear in mind that while parties may request the reimbursement of costs incurred through payment of their attorneys, such costs cannot be compounded with these honorariums. Whenever parties or funders are discussing an agreement, this distinction should be made clear from the outset.

As for contingency fees, the Brazilian Bar Association is not particularly supportive of conditional fee agreements or contingency arrangements, despite there being no prohibitions against this practice. This is also the position of the Federal Council of the Brazilian Bar Association.\(^9\) The Council declared that conditional fees – as is the case with *quota litis*, where attorneys receive a percentage of proceeds in exchange for service that is unpaid until the final decision is rendered – represent a potentially harmful practice, leading to the depreciation of the work of attorneys. To that effect, the Brazilian Bar Association stated that hourly fees – duly supported by the client throughout the litigation – are the rule, to which *quota litis* is the exception.

Since then, the Superior Court of Justice (STJ) has revised this position.\(^10\) According to the STJ’s recent interpretation, lawyers may receive a fixed percentage of the final amount collected by their clients, but this decision has not yet been confirmed in other Supreme Court cases.

In light of the foregoing, should limits on *quota litis* apply, chances are that the court or arbitral tribunal would at least consider an upper limit of 30 per cent, given the existence of a relevant precedent.\(^11\) In the case in question, an *ad exitum* of 50 per cent of the amount in dispute was deemed excessive by the Supreme Court on the grounds that this rate was not a reasonably proportionate amount between that of the *quota litis* agreement and the amount in dispute. Furthermore, the Court declared that the lawyer had taken advantage of the party’s desire to end the dispute, which also led to the conclusion that the percentage was unacceptable. This case is a good starting point for any funder looking into possible limitations in connection with recoverable percentages of proceeds.

### III STRUCTURING THE AGREEMENT

Typically, a funding agreement will contain provisions on the expected fee or percentage to be collected by the funder in the event of success. In arbitration, because of the nature of this dispute resolution mechanism and the risks involved, funders tend to prefer a percentage of the proceeds instead of a purchase of claims.

As for litigation, BCCP Section 109 allows the purchase of claims, with the third party’s participation conditional upon the counterparty’s consent.\(^12\) The BCCP legislator attempted

\(^9\) Consultation 2010.29.03728-01 of 2010: ‘However, it is important to note that the *quota litis* clause is exceptional, to be resorted to only when it is effectively verified with supporting documentation that the party is in a situation of irremediable financial impossibility to support procedural fees’.

\(^10\) STJ, REsp No. 805919 of October 2015.

\(^11\) STJ, REsp No. 1155200 of March 2011.

\(^12\) BCCP Section 109, Paragraph 1.
to prevent fraud and undue monetisation of adjudicated claims and rights, assuming that any change in the ownership of the claim must be notified to and accepted by all parties. Needless to say, this adds to the list of disadvantages of claim transfers in Brazil.

Below is a brief summary of the main issues and topics in funding agreements. A disclaimer is in order, as these agreements are subject to customisation.

i  **Parties**
Both claimants and respondents may be eligible for funding.

ii  **Coverage**
Agreements may provide for full or partial coverage of costs arising from the proceedings and legal fees in exchange for a percentage of the damages and other claims awarded. In terms of costs, parties are advised to take into account the considerations mentioned in Section V.

iii  **Non-achievement of contractual goals**
In the event of failure, parties are not liable for any costs or payments. Funding agreements are aleatory contracts and funders are normally aware of the risks.

iv  **Confidentiality**
As mentioned above, funders tend to treat confidentiality very seriously. For instance, one of the funding providers mentioned that not more than 10 people had access to each arbitration proceeding. Information may be disclosed either by virtue of a court request or if the client wishes to disclose the existence of the funding agreement. The terms and conditions of agreements are confidential at all times. However, some funders are more likely to prompt their clients to disclose the existence of the funding.

v  **Dispute resolution**
According to our research and practice, arbitration is funders’ preferred dispute resolution mechanism.

vi  **Funder liability for adverse costs and other indemnities**
It is not standard practice to insert any provisions on this issue.

vii  **Termination**
Not all funders require specific termination clauses and the general rule is that the provisions of the Brazilian Civil Code are applicable on termination as a fallback measure.

viii  **Payment events**
The trigger for payment is usually the issuance of the arbitral award or final decision.

IV  **DISCLOSURE**
BAA Section 14 provides good reasons for a thorough vetting of circumstances that may lead to conflicts of interest, as the BAA incorporates, by reference, BCCP Sections 144 and 145, which comprise standards of independence and impartiality applicable to judges.
BCCP Section 144 relates to the basic requirements of economic and professional independence, some of which are also found in the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines), in particular in the Non-Waivable Red List and the Orange List. BCCP Section 145 holds both impartiality and independence to a higher standard than the IBA Guidelines.

It is not necessary to consider here each and every condition, but notably Section 145, II of the BCCP refers to three different situations that may be indicative of partiality: (1) where the arbitrator receives any gifts from the parties either before or during the arbitration; (2) where the arbitrator provides legal advice on the subject matter in dispute; or (3) where the arbitrator provides the financial means for the parties to initiate or continue the proceedings.

In proscribing the provision of financial means, it is still not clear whether the law intended to prohibit only actual financial aid (which would constitute a rather blunt case of partiality and lack of independence) or also any recommendation arising from informal communication between parties and arbitrators on the role of an external funder.

As those specific provisions of the BCCP apply to arbitration under the BAA, and because some of the situations on the Waivable Red List and the Orange List are prohibited under Brazilian law, it is highly recommended that parties and chambers perform a detailed review of past and current relationships and facts with reference to the BCCP.

As for confidentiality standards, the BAA does not expressly impose confidentiality on all arbitration proceedings. BAA Section 13, Paragraph 6 mentions the duty of the arbitrators to remain independent and impartial, and to act diligently and in a discreet manner. By extending and analysing the meaning of the word ‘discreet’, one could possibly infer that confidentiality is an obligation of arbitral tribunals. Some of the most relevant arbitral institutions in Brazil have already incorporated confidentiality provisions in their arbitration rules. Among these, CAM-CCBC,13 CMA CIESP/FIESP,14 CAMARB,15 CAM,16 AMCHAM,17 FGV18 and CBMA19 have express provisions regarding the confidentiality of proceedings, documents presented therein and awards issued. Even ad hoc procedures are bound by confidentiality and it would not be too far-fetched to say this is a customary rule. The STJ, ruling on a competence issue at the enforcement stage, decided to remove an arbitral award from the dockets20 upon request from one of the parties.

In theory, there could be objections to the funder’s participation arising from confidentiality concerns. However, none of the arbitration institutions interviewed mentioned any concerns in this regard. This could be interpreted as a sign that parties are open to the presence of the funder and – at least for the time being – the lifting of the confidentiality veil for the funder.

As regards the client–attorney relationship, the Brazilian Bar Association’s Code of Ethics (EOAB) expressly establishes that communications between parties and their attorneys are privileged.21 Thus, information exchanged in the context of this professional relationship

13 Section 14.
14 Section 10.6.
15 Section 13.1.
16 Section 9.1.
17 Section 20.
18 Section 46.
19 Sections 11.2 and 17.1.
20 STJ, Conflito de Competência No. 122439 – RJ (2012/0091919-8).
21 Chapter VII, Article 36, Section No. 1.
is confidential. This does not mean that the very existence of funding should be kept secret. According to one of the funding companies interviewed, their clients are encouraged to disclose the funding at the beginning of the performance of the funding agreement.

V COSTS

In relation to costs, the BCCP, even after the amendments implemented by Law No. 13,105 of 16 March 2015, focuses on the role of parties and attorneys. Although the BAA does not refer to the BCCP (as it does with regard to the independence and impartiality of arbitrators), it cannot be denied that some elements of the BCCP with respect to costs and legal fees may be embedded in the legal culture of some arbitrators. The BAA refers very succinctly to costs in Section 27 and this provision has been reproduced in the vast majority of the Brazilian arbitral institutions’ rules, including those of CMA CIESP/FIESP, CAM-CCBC, CAMARB, AMCHAM and FGV.

As the BCCP is a subsidiary source of law in arbitration, its rules are also referenced. There are many intricacies practitioners must keep in mind, and only the most relevant will be mentioned here.

According to Section 82, Paragraph 2 of the BCCP, judges are entitled to order the unsuccessful party to pay the costs. If a party is only partially successful, the judge may apply what he or she deems a reasonable portion of costs pursuant to Section 86. One may apply the same rationale of proportional allocation of costs in multiparty procedures, as stipulated in Section 87 of the BCCP. If the final award, nonetheless, does not mention the portion attributable to each party, there is a presumption that parties are jointly liable for pending costs and fees.

However, the notion of proportion as stated in BCCP Section 86 is limited to a de minimis criterion. If a party loses only a minimum portion of its claims, then the ex adverso may be requested to pay the legal fees and costs in full.

Those costs consist of, according to BCCP Section 84, expenses arising from travel costs; procedural costs related to copies and notary or other charges; experts’ fees and accommodation expenses incurred with the transportation of witnesses. In arbitral procedures, the expenses arising from administrative costs, reservation of hearing rooms, arbitrators’ fees and transcripts are also covered by the award on costs.

Attorneys’ fees are not considered ‘costs’ according to the BCCP.

In the event of withdrawal – waiver of a right by one of the parties – the party responsible for the withdrawal will be liable for all costs incurred. This stems from the provisions of the BCCP whereby the lawmakers attempted to establish a sense of proportionality in defining costs. In contrast, when parties reach a settlement in litigation, in the absence of rules governing the division of costs, there should be an equal distribution of all costs.

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22 Article 15.6.
23 Article 10.4.1.
24 Article 10.6.
25 Article 17.5.
26 Article 39, Paragraph 2.
27 BCCP Sections 81 to 96.
28 BCCP Section 87, Paragraph 2.
29 BCCP Section 90, Paragraph 2.
As for arbitration, the tribunal enjoys some leeway in choosing the most appropriate balance and distribution of reimbursed costs among the parties. The circumstances of the case (i.e., specific claims on costs, complexity of the dispute and analysis of the conduct of the parties throughout the proceedings) may play a role in this equation. Parties, and especially funders, are advised to take into consideration the above-mentioned provisions, as most arbitrators come from a litigation background.

Funders seeking to recover the amount of their expenses should formulate specific provisions in the agreement regarding costs. To date, there have been no reported cases involving disputes over costs recovery, but it would not be unreasonable to assume that the fee (a percentage of the winnings) could, arguably, not cover those costs – if they were paid by the funder.

In addition, attorneys’ fees are tackled under a different heading\textsuperscript{30} in the BCCP. The arbitration rules of the main institutions place attorneys’ fees under the broad heading of costs, therefore arbitral tribunals could take different approaches to dealing with them. To be on the safe side, it is recommended that parties specifically request the reimbursement of legal fees – not to the party itself, but to the attorneys and, if applicable, to the funders themselves.

For tax purposes, the transfer of monies to the funder, upon enforcement of the arbitral award, may be subject to taxation, ranging from 15 per cent to approximately 20 per cent, on the accrued profit. Depending on how the funder and parties declare this transfer to the Brazilian Tax Authority, taxes may be fixed at a higher rate, so this is also a relevant factor when structuring the operation.

Another relevant aspect of the BCCP is the participation of public entities\textsuperscript{31} – now fully acknowledged by the BAA.\textsuperscript{32} The BAA lacks details on how to rule on costs in this regard. While theoretically costs would be left to the arbitral tribunal’s discretion, there is a thin line between the private nature of arbitration and public order and other legal standards applicable to public entities. The BCCP and other lex specialis in this context may offer some guidance.

\textbf{Security for costs}

Security for costs may be ordered by a state court or arbitral tribunal in cases where there is a significant reason for the case to be heard (\textit{fumus boni iuris}) and a risk (\textit{periculum in mora}) that, if the case proceeds, one of the parties may not have enough resources to meet its procedural financial commitments. Before the state courts, Section 83 of the BCCP regulates the situation where one of the litigating parties is foreign and does not have any assets in Brazil, in which case a court may order the collection of the funds corresponding approximately to the costs and attorneys’ fees. The STJ has revised this position\textsuperscript{33} by virtue of the principle of \textit{pas de nullité sans grief}, which means that unless there is actual damage for the opposing party, it is not mandatory to strictly observe Section 83 of the BCCP. There is another situation regarding security, but it is only applicable to the enforcement of the court decision. Before the changes implemented in Section 525 of the BCCP in 2015, a party seeking to challenge any of the findings of the decision at the enforcement stage had to provide security. However, this is no longer the case.

\begin{itemize}
\item Section 85.
\item Given the dispute has connection with \textit{acta jure gestionis}.
\item Section 1, Paragraph 1.
\item STJ, AgInt no REsp 1664304/SP Agravo Interno No Recurso Especial 20170070698-7.
\end{itemize}
In arbitration, BAA Sections 22-A and 22-B refer to interim measures to be issued both by state courts (if arbitration proceedings have not already been initiated) and arbitral tribunals. In the first case, the arbitral tribunal can, after a duly informed review, change, modify or extinguish the interim measure. There is no official database on how arbitral tribunals have decided, but our experience shows tribunals seldom grant this type of security, as the arbitrators tend to advance the proceedings before issuing orders on costs.

Finally, Sections 79 to 81 of the BCCP deal with a type of damages that can be awarded if a party litigates without legal grounds or factual grounds – in other words, when the party is not acting in good faith, which is also a breach of Article 34 of the EOAB. Although there are statutory provisions, courts or arbitral tribunals rarely grant damages stemming from bad-faith conduct.

VI THE YEAR IN REVIEW

Events in Brazil’s recent past have brought up discussions over the use of arbitration as a dispute settlement mechanism in cases of large-scale disasters. On 5 November 2015, a dam in Mariana in the state of Minas Gerais collapsed, causing catastrophic damage. Four years have passed and the environmental damage from the disaster remains, with an aftermath of 19 deaths, and lawsuits filed at the state and federal levels. An astonishing amount of dozens of public civil actions and more than 50,000 individual lawsuits remain before the judiciary pending trial. On 25 January 2019, another dam collapsed near Brumadinho, also in the state of Minas Gerais.

Learning from past mistakes (i.e., where all lawsuits arising from an incident were taken to state courts, consequently jamming the judicial system and possibly taking decades to settle all the cases), scholars began discussing the possibility of filing class arbitration proceedings to provide individuals with a faster, more efficient dispute settlement mechanism. At the end of 2018, the Court of Justice of São Paulo accepted a collective arbitration action. Shareholders of Petrobras (one of Brazil's main state-owned companies) decided to sue the company as a class after corruption scandals were revealed following the Federal Police’s Operation Car Wash. As a defence before the first instance court, Petrobras argued that the shareholders had signed contracts with arbitration clauses, thus removing the state courts’ jurisdiction over their claims. The shareholders replied that they had signed the clauses as individuals, not as a group. At the Court of Justice of São Paulo, the deciding judge ruled that as all members of the class had signed the arbitration clauses the arbitral tribunal had jurisdiction to adjudicate the claim, and therefore it would not be necessary for each individual to file an independent action. In this way, collective arbitration could proceed through class representation, reducing costs for the claimants. The Court of Justice thus upheld the decision of the first instance judge.

34 Section 80, I.
35 Section 80, II.
Although a cost-reducing solution for claimants, a class arbitration action should also be considered an attractive business proposition for funders, as the higher amount in dispute compared to that in most arbitration proceedings should lead to better funding deals, and to a higher success rate, since knowledge of the damage-causing act will already be widespread.

VII CONCLUSIONS AND OUTLOOK

Statistically, TPF has enjoyed a major breakthrough since 2016. Despite initial volatility, the increase in officially reported cases indicates that the funders in operation seem to have grasped the potential of the Brazilian market. In regulatory terms, the BCCP and the EOAB still remain the main sources of legal guidance regarding costs, conflicts of interest and cession of claims. At present, there is no applicable code of ethics nor the prospect of further rules on TPF on the horizon.
I MARKET OVERVIEW

Third party funding (TPF) has recently attracted significant attention in Canada. Whereas Canadian law previously imposed strict limits on the opportunity to fund litigation, it has evolved to provide greater scope and flexibility for these arrangements. As discussed in greater detail below, the law has confirmed the suitability of TPF in the context of both class proceedings and single-party commercial litigation, subject to certain requirements. As a result, the opportunities in the Canadian market for TPF are increasing.

International funders have taken note. The recent case law refers to a number of international litigation funders, including an Irish funder, Claims Funding International, a British funder, Redress, and an American funder, Galactic TH Litigation Funders LC. Australian funder Bentham IMF was the first to open a Canadian office in 2016, and expanded to Quebec (Canada’s only civil law jurisdiction) in 2018. To August 2019, it had received over 430 applications for funding.

The development of Canadian law and the Canadian legal market for TPF has been self-reinforcing. Increased funding opportunities have resulted in greater opportunities for the Canadian courts to scrutinise third party funding agreements (TPFAs), and in more sophisticated rules governing them. This exposure has brought the opportunity of funding to the fore. As one class actions lawyer recently noted, contingency fees are becoming increasingly insufficient to meet the costs of litigating a matter, and law firms are increasingly concerned with the risk involved in contingency fees: ‘it is now beyond the capacity of most firms to self-fund . . . they have to get funding’. Moreover, in one judgment involving a TPFA, the court noted that ‘anecdotal evidence suggests that indemnity agreements became more popular than resorting to the Class Proceedings Fund’. One reason for the popularity of TPF over the Class Proceedings Fund is that the latter does not provide compensation for legal fees and covers only limited disbursements during the proceedings.

1 Hugh A Meighen is a partner at Borden Ladner Gervais LLP. The author wishes to thank Paul Rand and Naomi Loewith of Bentham IMF Canada for their assistance in preparing this chapter.
4 ibid. at para. 31. The Class Proceedings Fund, which has been established by the Law Foundation of Ontario, ‘[p]rovides financial support to approved class action plaintiffs for legal disbursements’ and ‘[i]ndemnifies plaintiffs for costs that may be awarded against them in funded proceedings’. Class Proceedings Fund, 2017 Law Foundation of Ontario, online source: www.lawfoundation.on.ca/class-proceedings-fund.
The jurisprudence regarding TPF has been typically considered in the context of class proceedings, as courts in Canadian common law jurisdictions (all provinces aside from Quebec) must approve a funding agreement at the outset of the case for it to be binding on the class. At the same time, however, litigation funding for single-party commercial litigation is becoming more commonplace in Canada, as evidenced by cases such as Schenk v. Valeant Pharmaceuticals International Inc and Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc.6

II LEGAL AND REGULATORY FRAMEWORK
i Maintenance and champerty
For most of the twentieth century, the legal landscape regarding TPF was overshadowed by the common law doctrines of maintenance and champerty.7 The Court of Appeal of Ontario described these concepts in McIntyre Estate v. Ontario (Attorney General) as follows:8

[m]aintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation

The concept and prohibition of champerty has long been codified in the Act Respecting Champerty RSO (1897) (the Champerty Act), which states that:

1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
2. All champertous agreements are forbidden, and invalid.

As outlined in jurisprudence and the Act, the prohibition on maintenance and champerty is intended to discourage ‘unnecessary’ litigation9 in Canadian courts as a result of the ‘officious intermeddling’ of a third party. The law took a particularly dim view of an individual deriving a profit from this misconduct, so much so that champerty was criminalised in Canada until the mid-twentieth century.

Notwithstanding the prohibitions against maintenance and champerty, the concept left open the possibility of ‘proper’ forms of litigation support. More specifically, the courts’ early analysis of the issue in Newswander v. Giegerich emphasised the concern over a maintainer

5 2015 ONSC 3215.
6 2017 FC 826.
7 It is worth noting that ‘champerty’ is a common law concept and, as confirmed by the Quebec Court of Appeal in Montgrain v. Banque Nationale du Canada, 2006 QCCA 557, ‘the concept of champerty is inapplicable in Quebec civil law’ (para. 63).
(i.e., the third party that maintains the party with a direct interest in the claim) who is ‘stirring up strife’. In other words, the motive of an alleged maintainer was particularly important to determine if the act was, in fact, maintenance.

Champerty in Canada is a ‘subspecies’ of maintenance, as there cannot be champerty without maintenance. Accordingly, the concept of champerty in Canadian law similarly invokes the concept of proper and improper motives underpinning litigation funding. In *Goodman v. R*, Goodman was charged with champerty after agreeing to assist an improvident claimant injured by a streetcar in exchange for a share of any proceeds. Among the key facts in that case were that (1) Goodman’s assistance consisted of locating witnesses to the event and (2) the plaintiff had consulted a lawyer before Goodman became involved. In this regard, the facts of the case reflected those of *Newswander*: the plaintiff had already considered litigation and the contribution by Goodman was required to enable the litigation to proceed given the plaintiff’s financial circumstances. The Supreme Court of Canada (SCC) quashed Goodman’s conviction and held that his conduct did not amount to officious intermeddling as he had not stirred up strife. The relevance of motive in an assessment of maintenance and champerty was reaffirmed in the 1993 decision of *Buday v. Locator of Missing Heirs Inc* (1993).

Following *Newswander* and *Goodman*, maintenance and champerty were removed from the Criminal Code in 1953. However, under the Champerty Act, champerty remained a tort in common law jurisdictions and has typically had the effect of acting as a shield against the enforcement of champertous agreements (rather than serving as the basis of an action for damages, as in *Newswander*).

The prospect of TPF in Canada was significantly enhanced in the early 2000s when helpful jurisprudence developed in the context of contingency fee arrangements and class proceedings. Most notably, in 2002, the Ontario Court of Appeal found that the interests of justice can, in fact, be served by allowing third parties to fund litigation. In *McIntyre Estate v. Ontario (Attorney General)*, a plaintiff who intended to commence an action against Imperial Tobacco and Venturi Inc for wrongful death of her husband first sought a declaration from the Court that the contingency fee arrangement with her lawyers was not prohibited by the Champerty Act.

The Ontario Court of Appeal found that a determination of the proposed agreement as champertous depended on the outcome of the litigation. In making this finding, the Court of Appeal made the following observations:

\[a\] a person’s motive is a proper consideration and, indeed, determinative of the question of whether conduct or an arrangement constitutes maintenance or champerty;  

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10 *Newswander v. Giegerich* [1907] 39 SCR 354 (*Newswander*).
11 *McIntyre Estate v. Ontario (Attorney General)*, 61 OR (3d) 257; 218 DLR (4th) 193; [2002] OJ No. 3417 (QL); 116 ACWS (3d) 527; 164 OAC 37; 23 CPC (5th) 59, at para. 34.
12 [1939] SCR 446 (*Goodman*).
15 The Criminal Code was consolidated in 1953, at which time all common law offences were abolished.
16 61 OR (3d) 257; 218 DLR (4th) 193; [2002] OJ No. 3417 (QL); 116 ACWS (3d) 527; 164 OAC 37; 23 CPC (5th) 59 (Ont CA) (*McIntyre Estate*).
17 *McIntyre Estate*, at para. 27.
the courts have shaped the rules relating to champerty and maintenance to accommodate changing circumstances and the current requirements for the proper administration of justice;\(^\text{18}\)

whether a particular agreement is champertous is a fact-dependent determination, requiring the court to inquire into the circumstances and the terms of the agreement;\(^\text{19}\)

d this fact-based inquiring depends in part on the ‘reasonableness and fairness’ of the agreement.\(^\text{20}\)

In making these findings, it was clear that the Court was aware of increasing concerns over access to justice and the potentially beneficial role of contingency fee agreements in this regard. This evolution in the priorities of the Canadian justice system necessitated a more flexible understanding of champerty and applicability of the Champerty Act.

Shortly after McIntyre Estate, in 2004, Ontario passed Regulation 195/04 – Contingency Fee Agreements,\(^\text{21}\) setting out requirements of valid contingency fee arrangements between lawyers and their clients. While contingency fee agreements received specific attention in the early 2000s, no similar regulation or guideline was developed in respect of TPFAs. In this regard, the rules on TPFAs have had to rely on developments in the common law for further development and articulation.

### ii Class action funding

Class proceedings have provided a fruitful area for the development of Canadian jurisprudence regarding TPFAs. In the class action context, typically neither the representative plaintiff nor class counsel is prepared pay the disbursements or risk liability for an adverse costs order if the case is unsuccessful, making a costs indemnity and disbursement funding from a third party a potentially attractive funding arrangement.\(^\text{22}\) Much of the law has developed around this model in the class proceedings context, as TPFAs concluded between a representative plaintiff and a TPF are subject to the requirements of judicial review and approval.\(^\text{23}\)

In 2009, the courts considered the legality of TPFAs in Metzler Investments GMBH v. Gildan Activewear Inc in detail.\(^\text{24}\) In Metzler, a representative plaintiff moved for the approval of a costs indemnification agreement entered into with an Irish company whose main business is litigation funding in Europe. Relying upon the analysis of McIntyre, the court applied the existing law on contingency fee arrangements to third party involvement in litigation. It found that case law pointed to ‘two crucial elements’ that constitute a champertous agreement:\(^\text{25}\)

\[a\] the involvement must be spurred by some improper motive; and

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\(^{18}\) McIntyre Estate, at para. 32.

\(^{19}\) R Agarwal and D Fenton, ‘Beyond Access to Justice: Litigation Funding Agreement Outside the Class Actions Context’ 59 CBLJ 65 (Thompson Reuters), at p. 65.

\(^{20}\) McIntyre Estate, at paras. 79–80.

\(^{21}\) Contingency Fee Agreements, O Reg 195/04, http://canlii.ca/t/1lx, retrieved on 19 September 2017.

\(^{22}\) In addition to private funders, Ontario has a Class Proceedings Fund, a statutory body that will provide a costs indemnity and disbursement to cases selected by its Committee. See, www.lawfoundation.on.ca/class-proceedings-fund/, last visited 21 August 2019. A similar fund, Fonds d’aide aux actions collectives, exists in Quebec. See, www.faac.justice.gouv.qc.ca/, last visited 21 August 2019.

\(^{23}\) R Agarwal and D Fenton, ‘Beyond Access to Justice: Litigation Funding Agreement Outside the Class Actions Context’ 59 CBLJ 65 (Thompson Reuters), at p. 65.


\(^{25}\) ibid., at paras. 44–45.
the result of that involvement must enable the third party to possibly acquire some gain following the disposition of the litigation.

As a TPFA has, by its very nature, the purpose of gain for the third party following the disposition of the litigation, the first consideration was most vital to the assessment of champerty in the context of TPF. Metzler, therefore, confirmed that the principles of fairness and reasonableness in the motive underpinning the funding arrangement and the increasingly relaxed application of the Champerty Act – all of which was developed in the context of the McIntyre Estate analysis of contingency fee arrangements – could apply equally in the context of TPFA.

A further class proceeding provided the first instance of court approval of a TPFA. In Dugal v. Manulife Financial Corp, Strathy J approved a funding agreement, under which a third party agreed, inter alia, to indemnify the plaintiffs against their exposure to the defendants’ costs, in return for a 7 per cent share of the proceeds of any recovery in the litigation. The court built upon the principles articulated in McIntyre Estate and Metzler, and recognised that funding agreements had been approved in other provinces of Canada, albeit without reasons, as well as in other common law jurisdictions around the world. In accepting the role that TPFA can play in promoting access to justice, the court approved the funding agreement in Dugal.

From 2009 to 2018, the judicial review of funding agreements between funders and representative plaintiffs in class proceedings has provided useful guidance on the law applicable to TPFA. For example, the courts have provided useful commentary in the following cases:

a In Fehr v. Sun Life Assurance Company of Canada, the court discussed the law on litigation funding and reviewed the key judgments (identified as McIntyre Estate in 2002, Metzler in 2009 and Dugal in 2011). It concluded that TPFA is not categorically illegal on the grounds of champerty or maintenance, but a particular TPFA might be illegal as champertous or on some other basis, and that a plaintiff must obtain court approval to enter into a TPFA.

b In Labourers’ Pension Fund v. Sino-Forest, the representative plaintiffs moved for approval of a funding agreement that was described by the court as being nearly identical to the one approved by Justice Strathy in Dugal. The court nevertheless approved the funding agreement in Dugal.

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26 Dugal v. Manulife Financial Corp, 2011 ONSC 1785 (Ont SCJ), at paras. 16 and 37 (Dugal); see also, Dugal v. Manulife Financial Corp, 2011 ONSC 3147 (Ont SCJ), at para. 5.
27 ibid., at para. 1.
28 ibid., at paras. 19–20.
29 For example, MacQueen v. Sydney Steel Corp (19 October 2010), Action 218010 (NSSC), cited at ibid., at para. 22.
30 Dugal at para. 24.
31 As part of its approval, the court imposed the following requirements: (1) adequate security provided by the plaintiff; and (2) that there be some reasonable controls on the provision of information to the funder. It ultimately approved the funding agreement in Dugal v. Manulife Financial Corp, 2011 ONSC 3147 (Ont SCJ), at para. 5.
32 2012 ONSC 2715 (Fehr).
33 See, Labourers’ Pension Fund v. Sino-Forest, 2012 ONSC 2937, para. 11.
34 2012 ONSC 2937 (Labourers’ Pension Fund).
35 ibid., at para. 9. In fact, the funder in Labourers’ Pension was the same entity as had appeared in Metzler and Dugal.
identified individual key terms of the funding agreement, including the grounds of the funder’s agreement to pay the plaintiffs’ adverse costs orders and the terms of recovery on a settlement or judgment in favour of the plaintiffs. Upon doing so, the court approved the funding agreement.

c In Bayens v. Kinross Gold Corporation, the court noted that the ‘concept of third party funding is a work in progress’ and that ‘courts have been left to develop the approval criteria for third party funding largely on their own initiative, relying on common sense, knowledge of the problems of access to justice and of the administration of justice, and academic commentary’. While the court did not go into the same detail regarding the terms of the funding agreement, it nevertheless approved the agreement based on principles derived from the above-mentioned cases (and particularly, Fehr, Metzler and Dugal).

d In Stanway v. Wyeth Canada Inc, the court found that litigation funding agreements may be approved in British Columbia and the lack of any reference thereto in the Class Proceedings Act did not make them unavailable in that province. It also determined that, in that case, the TPFA was subject to legal privilege on matters relating to litigation strategy, litigation budget and other ‘highly sensitive’ aspects.

e In Houle v. St Jude Medical Inc, the Ontario Superior Court (ONSC) provided a thorough analysis of the law regarding approval of TPFA and specific terms contained therein. The ONSC once again confirmed that ‘deciding whether to approve a [TPFA] will depend upon the particular circumstances of each case’; however, it also opined that, based on the foregoing case law, the court must be satisfied of at least four criteria to approve a TPFA: (1) the agreement must be necessary to provide access to justice; (2) the access to justice facilitated by the TPFA must be substantively meaningful; (3) the agreement must be a fair and reasonable agreement and facilitate access to justice while protecting the interests of the defendants; and (4) the third party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching and champertous. In this case, the Court considered fees funding and noted that ‘the novelty of the hybrid retainer that combines a partial contingency fee with a fee-for-services retainer strikes me as a positive factor . . . This approach which partially protects the financial and human capital of class counsel may expand the roster of firms prepared to assume the risks of class action litigation’.

The ONSC then set out six factors in determining whether to approve a TPFA: (1) can a court scrutinise the TPFA; (2) is TPF necessary in the case; (3) will the funder make a meaningful contribution to access to justice or behaviour modification; (4) will the funder be overcompensated for its risks in the case; (5) is the lawyer–client relationship protected from interference; and (6) is the TPFA not illegal on some other grounds, independent of champerty and maintenance. On appeal, the ONSC Divisional

36 Kinross, at para. 37.
37 Kinross, at para. 41.
40 ibid. at para. 72.
41 ibid., at para. 63.
42 ibid., at paras. 73–100.
Court seemingly confirmed the above analysis by noting that the ONSC ‘applied the proper principles and provided a roadmap to the parties if they wish to proceed under the proposed type of arrangement’ and upheld the decision of the ONSC.

The law on TPF developed significantly in Quebec, Canada’s only civil law jurisdiction, in 2014. In Marcotte v. Bank of Montreal, a class action against chartered banks was funded by two third parties. Like the analysis of funding arrangements in common law provinces, the Superior Court of Quebec determined that, without funding from third parties, the plaintiffs could not have pursued the case and been reimbursed fees that had been illegally collected by the financial institutions and that funding provided a ‘path to justice’.

For further examples of court consideration of TPFAs, see Schneider v. Royal Crown Gold Reserve Inc, Berg v. Canadian Hockey League, and, most recently, David v. Loblaw and JB & M Walker v. TDL Group.

iii Single-party commercial litigation

Despite the above jurisprudence in the class proceedings context, as at 2015, the law on TPF in Canada remained relatively underdeveloped in the context of single-party commercial litigation. However, that year, the courts took a step forward in Schenk v. Valeant. In Schenk, the court case drew upon the jurisprudence in the class proceedings context and extended similar principles to single-party commercial litigation. Justice McEwen commented that ‘[t]ypically, such agreements have arisen in class proceedings. Counsel could not locate any cases in which third party funding has been extended to the context of commercial litigation. This being said, I see no reason why such funding would be inappropriate in the field of commercial litigation.’ However, as with jurisprudence arising in the class proceedings context, McEwen J also commented that ‘the statutory and common law prohibition on champerty and maintenance in the Province of Ontario must be considered.’

In applying this law to the facts of the particular TPFA at issue in Schenk, the ONSC declined to approve the agreement as it constituted maintenance and champerty. This conclusion was based on the fact that, in the absence of a cap, the agreement could result in the funder recovering over 50 per cent of the proceeds and could be construed to allow ‘open-ended exposure to Schenk that could result in the funder retaining the lion’s share of any proceeds’. The ONSC further opined that ‘such an agreement . . . does not provide access to justice to Schenk in a true sense, but rather provides an attractive business opportunity to Redress, who suffered no alleged wrong’.

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45 2016 SKQB 278.
46 2016 ONSC 4466.
47 2018 ONSC 6469.
48 JB & M Walker Ltd / 1523428 Ontario Inc. v. TDL Group, 2019 ONSC 999.
50 ibid., at para. 8.
51 ibid., at para. 8.
52 ibid., at para. 17.
53 ibid., at para. 17.
As with prior jurisprudence arising in the class proceedings context, and particularly *McIntyre Estate*, the ONSC in *Schenk* was concerned with the overarching principle of access to justice. However, the ruling does not include an express discussion of the proper or improper motive behind the funding, which has previously appeared in Canadian jurisprudence regarding champerty and maintenance. Other issues that have typically been considered in the process of judicial approval of a funding agreement, such as the termination provisions, were found to be reasonable and fair.

Ultimately, the ONSC in *Schenk* dismissed the motion for approval, but granted the plaintiff, Schenk, the opportunity to revise the agreement and bring a further motion for approval. In other words, there is no reason why TPF cannot exist in the single-party commercial litigation context; however, if brought before the courts for approval, the funding agreements must be based upon based reasonable and fair terms. In *Schenk*, the plaintiff and the funder revised the TPFA in accordance with the ONSC’s directions and resubmitted it to the Court. The agreement was approved and the litigation is currently ongoing.54

There have been further decisions in the single-party commercial context. For example, in *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc*,55 the court considered the enforcement of the plaintiff’s patent against an international pharmaceutical company. Seedlings needed financial help moving its litigation forward and Bentham IMF agreed to pay a portion of its legal fees and disbursements on a non-recourse basis. Seedlings sought approval of the agreement, but, as explained in Section IV .ii, the court ultimately concluded that it did not need to approve the funding agreement. This case demonstrates the growth of funding beyond the class action context, which, as discussed below, has contributed to an increasing divergence in the law applicable to TPFA in the class action context and those in the context of single-party litigation.

The developing common law has also been reflected in Quebec civil law. In a March 2018 decision, *Re 9354 9186 (formerly Bluberi Gaming Technologies Inc) and 9354 9178 (formerly Bluberi Group Inc)*,56 the Quebec Superior Court relied upon *Kinross* (cited above under class actions) and *Hayes v. City of Saint John*57 to find that TPFA ‘should be approved, subject to [certain] principles’ that reflect the considerations addressed in common law jurisprudence. This development speaks to a consolidated national approach to TPF in Canada, notwithstanding the different legal traditions reflected in the common law provinces of Canada and the civil law province of Quebec.

Despite this potential consolidation of case law, the appeal in *Bluberi* demonstrates that it is important to remain mindful of the special considerations that can exist in certain types of commercial disputes. *Bluberi* involves bankruptcy proceedings and, on appeal, the Quebec Court of Appeal set out certain important principles applicable to the treatment of TPFA in this setting.58 Notably, it ordered the TPFA to be submitted to the creditors for a vote as a plan of arrangement. This finding creates a divergence with single-party commercial litigation, in which there is authority to suggest that a TPFA does not require pre-approval by the courts.

54 This matter is currently scheduled for trial in April 2020.
55 2017 FC 826.
56 2018 QCCS 1040, 16 March 2018.
57 2016 NBBR 125.
58 This matter is proceeding under the rubric of the Companies’ Creditors Arrangement Act, with the courts having a broader approval and oversight role (as in class actions), which renders a different dynamic from that rendered in standard commercial disputes.

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It also creates a divergence from prior case law on TPFAs in bankruptcy proceedings,\(^59\) where the courts approved the TPFA without a vote of creditors. The decision of the Quebec Court of Appeal in Bluberi is stayed pending an appeal to the SCC, which is expected to hear the appeal in January 2020.

## III STRUCTURING THE AGREEMENT

### i Class actions

Canadian case law demonstrates that parties to a TPFA must conclude an agreement that the courts will approve as being reasonable and non-champertous. In this regard, the courts have focused on the following provisions of the TPFAs at issue in recent judgments, which are typical clauses in TPFAs in the Canadian market:

- \(a\) the terms on which the funder will pay legal fees, disbursements, security for costs (if ordered), costs assessed against the plaintiff and a portion of docketed time of counsel;
- \(b\) clauses governing the flow of information regarding the proceedings;
- \(c\) the agreement on the portion of the proceeds granted to the funder if the action is successful;
- \(d\) clauses regarding the conduct of proceedings and settlement, including confirming that counsel take instructions from the clients, not from the funder;
- \(e\) the representations and warranties of the claimants in respect of the claims and the pursuit thereof; and
- \(f\) the termination provisions, both in terms of the right to terminate the TPFA and the consequences thereof.

In construing the above terms and determining whether they are unfair or champertous (or both), the courts will rely upon judgments regarding similar terms captured in other TPFAs. For example, as set out in Section II.ii, the ONSC recognised that the TPFA at issue in Labourers' Pension Fund was materially the same agreement as had been approved in Dugal.\(^60\) The Court approved the TPFA in both cases. However, as funding arrangements expand beyond the costs-indemnity-plus-minimal-disbursements model seen in the early class action jurisprudence, comparisons to prior agreements may be more difficult to make. For example, in JB & M Walker, the funder agreed to pay all the legal fees and disbursements, in addition to covering any costs awards, so it was difficult to draw analogies to earlier cases.

As an example of the courts’ analysis of these provisions, in Stanway v. Wyeth Canada Inc,\(^61\) the British Columbia Supreme Court relied upon the Ontario jurisprudence to find that a funding agreement ‘must be fair and reasonable and provide the representative plaintiffs with access to judgment, without compromising the principles of independence of counsel, confidentiality agreements between the parties be observed and, not to the disadvantage of the representative plaintiffs’.\(^62\) The Court analysed the fees and lack of a commission cap in the agreement and favourably compared it to other caps that had been previously approved; it analysed the terms of the termination clause and the right to terminate the agreement following

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\(^60\) Labourer’s Pension, at para. 9.


\(^62\) ibid., at para. 17.
a decision to change counsel. The Court also addressed the concerns of the defendant over privacy and confidentiality arising under an access order applicable to documents originating from other jurisdictions. In doing so, it approved the funding agreement.

ii Single-party commercial litigation

While the courts have a broad supervisory role over class actions, consistent with the responsibility to protect the interest of class members, no such mandate exists in single-party litigation. If called upon to review a funding agreement, it appears that the courts will look to the three key criteria set out in *Schenk*: (1) the funder did not ‘stir up’ the litigation; (2) the funder cannot control the litigation; and (3) the funder’s return must be reasonable. In *Schenk*, the court drew guidance from Ontario’s Contingency Fee Regulations, which allow a return of up to 50 per cent of the litigation proceeds.

Aside from these factors, Canadian courts do not appear likely to delve into the details of an agreement reached between a properly advised individual plaintiff and a funder, particularly at the outset of litigation.

IV DISCLOSURE

Disclosure issues and the question of legal privilege have developed differently in the class proceedings setting compared to the single-party commercial litigation setting. In determining what may need to be disclosed, and what aspects of a TPFA may be privileged, the setting of the dispute is important.

i Class actions

The disclosure obligations vary by province. For example, in Alberta and Nova Scotia, the courts will approve an agreement on an *ex parte* basis. However, in New Brunswick, the defendants must be given notice, but are not provided with a copy of the TPFA and can therefore only address overall principles without application to the specific agreement.

Ontario and British Columbia require notice to the defendants, who must receive a copy of the agreement. As set out in *Kinross*, in the class proceedings context, ‘a TPFA must be promptly disclosed to the court, and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent, and it must be reviewed to ensure that there are no abuses or interference with the administration of justice. The TPFA is not itself a privileged document.’

The issue of privilege in a class proceeding context also arose in *Fehr*. In this case, the court reaffirmed that TPFAs are not privileged and even if they were, that privilege has either been rebutted or waived. Consequently, the court cautioned that ‘as a matter of best practices, an applicant for third party funding should not include extraneous and otherwise privileged information in a third party funding agreement’. Underscoring the importance

63 ibid., at para. 18–21.
64 See, e.g., *Hobshawn v. Atco Gas and Pipelines Ltd* (14 May 2009), case No. 0101-0499 (ABQB), cited in *Dugal* at para. 21.
66 *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, at para. 41; see also, *Fehr*, at paras. 89–90.
67 *Fehr* at para. 141.
68 *Fehr* at para. 142.
of disclosure, in *Davies v. The Corporation of the Municipality of Clarington*, the court refused to award loan interest as a properly recoverable disbursement in a costs decision following a class action proceeding on the basis that the loan agreements were not disclosed to the court. In making this finding, the court referred to *Kinross, Houle v. St Jude Medical Inc* and other TPF cases.

In *David v. Loblaw*, the court was confronted with an objection by defendants in a proposed class action over an undertaking for security for costs by Bentham IMF, arguing that the redaction of Bentham IMF’s cap on funding obligations raised concerns over the sufficiency of the undertaking. In response to the objection, the court confirmed that it had reviewed the unredacted version submitted to the court under seal and that it was satisfied that Bentham IMF’s obligations to fund the litigation would be sufficient to address any adverse costs award. Therefore, the parties may redact terms that provide insight into budget and strategy, as long as those terms are disclosed to the court.

ii Single-party commercial litigation

In the commercial litigation setting, the Federal Court has found that ‘there are no procedural requirements for the approval of a party’s funding agreement outside of class proceedings’ and that the question is strictly a matter of contract between the funder and the plaintiff. In *Seedlings Life Sciences Ventures LLC*, the Federal Court declined to approve the TPFA, ruling that ‘where the Plaintiff is asserting its own rights against the Defendant, th[e] Court has no jurisdiction to make any determination in respect of any funding agreement to which the Plaintiff is a party’. To the apparent benefit of funded litigants in the commercial litigation setting, the Court questioned why its approval would be necessary and confirmed that a ‘[d]efendant has no legitimate interest in enquiring into the reasonability, legality or validity of [the plaintiff’s] financial arrangements, its counsel’s fee structure or the manner in which [the plaintiff] chooses to allocate the risks and potential returns of the litigation’.

In both *Schenk* and *Seedlings*, the agreement came before the court because the funder and plaintiff chose to make the agreements subject to court approval. The finding in *Seedlings* appears to narrow the applicability of the champerty and maintenance issue to the funder and funded plaintiff only, rather than being a relevant consideration in the action between the funded plaintiff and defendant. While not yet conclusively resolved, this narrowing of the champerty issue seems to limit the need to disclose terms of a TPFA in the context of single-party commercial litigation (although clients and their funders may continue to voluntarily disclose their agreements in any event).

On the issue of privilege in the commercial litigation setting, the Federal Court has found that litigation privilege attaches to certain aspects of the TPFA at issue, particularly in respect of the details regarding the funding commitment and the temporal variables of the indemnity provisions, which, if disclosed, would provide a tactical advantage to the opposing party.
V COSTS

In Canada, costs awards typically ‘follow the event’, such that the successful party is entitled to recover a portion of its legal costs. In the litigation context, the recovery is determined on a partial, substantial or full indemnity basis. Substantial indemnity on costs is typically reserved for exceptional cases, particularly where there is reprehensible conduct by a party either in the circumstances giving rise to the claim or during the course of the proceedings.

In the context of TPFAs in class proceedings, the courts have required a funder to provide security for costs as a precondition for approving a TPFA75 or, more recently, an undertaking for security for costs.76 The issue of whether a defendant would be given a direct right against the security has also been raised, but not resolved.77

In arbitration, the issue of costs is determined at the discretion of the tribunal. Domestic arbitration statutes typically grant the tribunal the discretion to award costs. For example, in Ontario, the Arbitration Act 1991 further sets out factors, such as the value of a prior offer to settle, that may be taken into consideration by the tribunal when considering a costs award. The presence or absence of a funding agreement is not expressly included in the factors that a tribunal may consider when rendering a costs award.

International arbitration seated in common law jurisdictions of Canada are subject to the UNCITRAL Model Law, which is silent on the issue of costs. In this regard, the circumstances of the case and the procedural law selected by the parties would likely affect the tribunal’s exercise of discretion in respect of costs.

VI THE YEAR IN REVIEW

In October 2018, the ONSC Divisional Court released its judgment in Houle v. St Jude Medical Inc and remarked that “[t]he class action industry and the court have started down the road toward defining aspects of the funding relationship that can enhance access to justice in appropriate cases. . . . The common law will continue to evolve incrementally as each case comes forward.”78 This trend has undoubtedly continued in the past year, although the Court’s comment does not capture three notable divergences in the case law that crystallised in 2019, as follows.

The first divergence relates to the exact formulation of factors and principles that the courts will apply when deciding whether to approve a TPFA in the context of class actions. On the one hand, the courts have repeatedly considered the many factors listed in Kinross (i.e., the ‘Kinross factors’) to guide their assessment of TPFAs.79 On the other hand, the courts have also applied the four criteria set out in Houle v. St Jude Medical Inc as the guiding test.80 In practice,
this divergence may be formal rather than substantive, as the underlying principles captured in both frameworks are similar, as demonstrated by the ONSC’s reference to both Kinross and Houle in JB & M Walker Ltd / 1523428 Ontario Inc v. TDL Group. 81

The second divergence relates to the emergence of new common law applicable to TPFAs in the context of bankruptcy proceedings. While the Bluberi case appeared to consolidate the case law regarding TPFAs across common law and civil law jurisdictions within Canada, on appeal, the Quebec Court of Appeal introduced requirements for pre-approval of TPFAs from creditors, among others that are unique to bankruptcy proceedings. It remains to be seen how the SCC will treat these issues, having granted leave to appeal the Quebec Court of Appeal decision in August 2019.

The final divergence exists between class proceedings and single-party commercial litigation. Though 2019 has not provided any clear advancement in the law applicable to TPFAs in the context of single-party commercial litigation, it is worth reiterating that many of the courts’ oversight and approval powers in the context of class proceedings do not appear to apply in other commercial proceedings. Specifically, the distinction arose in 2018 as part of the reasoning set out in Bluberi and Seedlings. 82 Although the Bluberi decision was successfully appealed, the Federal Court has not indicated any reversal of its position that court approval of TPFAs is not required in the context of single-party commercial litigation. It is also noteworthy that Bluberi arises in the insolvency context, where the courts have broader supervisory powers than in other single-party commercial disputes.

VII CONCLUSIONS AND OUTLOOK

Overall, the law regarding TPFAs continues to develop favourably for the funding industry in Canada. There are further examples of successfully approved TPFAs (David v. Loblaw and JB & M Walker), which provide further clarity on the components of an acceptance of TPFAs in the context of class proceedings. The ONSC’s decision in Houle v. St Jude Medical Inc also provided confirmation that a TPFA that provides funding for legal fees and disbursements, in addition to an indemnification for an adverse costs award, is also acceptable under Ontario law.

These principles have begun to shift into different settings, including single-party commercial litigation and bankruptcy, although the process has raised some procedural questions regarding the requirements and jurisdiction of court approval of TPFAs. There is support from the Seedlings case to suggest that TPFAs do not require court approval at the outset of litigation, as they do in the class proceedings context, although some uncertainty remains. The procedural requirements applicable to bankruptcy proceedings are also unclear, as the Quebec Court of Appeal’s decision in Bluberi is currently stayed pending the appeal to the SCC. We would expect clarity on this issue in the coming year, once the SCC considers the issues in Bluberi.

Certain commentators have highlighted the lack of legislation or code of conduct to guide parties on the issue of TPF. 83 There is no regulation akin to Regulation 195/04 governing contingency fee agreements to govern TPFAs that transfer the litigation risk to

81 JB & M Walker Ltd / 1523428 Ontario Inc v. TDL Group, 2019 ONSC 999.
82 2018 QCCS 1040, 16 March 2018.
third parties rather than to solicitors. The first indication of codified treatment of TPFAs is found in Canadian laws relating to international arbitration. For example, the Comprehensive Economic and Trade Agreement between Canada and the European Union provides in Article 8.26 that, where TPF exists:

a the disputing party benefiting from it must disclose to the other disputing party and the tribunal the third party funder’s name and address; and

b the disclosure must be made at the time of the submission of a claim, or if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

Further, in the recently amended British Columbia International Commercial Arbitration Act RSBC 1996, c 233, which incorporates the UNCITRAL Model Law, the recognition and enforcement provisions of the Model Law have been modified to expressly confirm that ‘[f]or the purposes of subsection (1)(b)(ii), third party funding for an arbitration is not contrary to the public policy in British Columbia.’

The most significant progress towards codification of rules applicable to TPF is found in the Final Report of the Law Commission of Ontario released in July 2019 (the LCO Report). The LCO Report makes a number of recommendations for the amendment of the Class Proceedings Act to permit TPF, subject to certain rules, including: (1) the representative plaintiff must bring a motion seeking court approval of a funding agreement; (2) the court retains jurisdiction in an oversight capacity even after the agreement is approved; and (3) the court is entitled to see the full, unredacted agreement, with the extent of disclosure of the agreement to the defendant to be at the discretion of the judge. While many of these rules are already reflected in the common law, it will be interesting to see if the recommendations of the LCO Report are progressed by legislators in Ontario in 2020 and beyond.

Finally, we expect there will be increased interest in TPF from law firms and well-capitalised claimants in Canada who are interested in managing the cost and risk of their legal disputes. This interest will advance the law applicable to TPF in the context of class actions, single-party commercial litigation, bankruptcy and other legal proceedings. We also expect further interest in specialised arrangements with funders, including through ‘portfolio funding’. There is similarly no clear legislative direction regarding portfolio funding, although given the recent interest in this issue in other jurisdictions, we may expect some direction from authorities in the future, if portfolio funding takes root among funders and firms in Canada.

84 International Commercial Arbitration Act, RSBC 1996, c. 233, at s. 36(3). Subsection 36(1)(b)(ii) states that: ‘[r]ecognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only . . . if the court finds that . . . the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.’


86 For a description of portfolio funding, see ‘Beyond Single Cases: Litigation Funding for Law Firms’, 31 October 2017, online source: https://www.benthamimf ca/blog/blog-full-post/benthamcabinet/2017/10/30/beyond-single-cases-litigation-funding-for-law-firms.

87 See, for example, the NYC Bar Association Formal Opinion 2018-5: Litigation Funders’ Contingent Interest in Legal Fees.
Chapter 5

ENGLAND AND WALES

Leslie Perrin

I OVERVIEW

i Legal overview

In England and Wales, over the past three years, there was no decided case to rival the influence on third party funding (TPF) of the 18 November 2016 Court of Appeal decision in the costs appeal in *Excalibur Ventures LLC v. Texas Keystone Inc*, in which Lord Justice Tomlinson said: ‘Litigation Funding is an accepted and judicially sanctioned activity perceived to be in the public interest.’

However, on 28 November 2019, a judgment by the President of the Competition Appeals Tribunal (CAT) of potentially equal significance was handed down, dealing with the costs and funding issues involved in two Trucks Cartel cases in the CAT, cited on the CAT website as *UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and Others* and *Road Haulage Association Limited v. Man SE and Others* [2019] CAT 26.

The judgment contains an exhaustive review of the litigation funding agreements (LFAs) and after-the-event (ATE) insurance arrangements deployed by two different, independent funders in applications to the CAT for collective proceedings orders (CPOs), the first such review of any such arrangements by an English judge. This was in the context of the requirement for the CAT to assess the adequacy of the applicants’ funding arrangements, in respect of both their own costs and their ability to meet the other side’s costs, each of which was exhaustively challenged at the June 2019 hearing by the respondents’ counsel.

The judgment contained three main statements that were highly supportive of TPF.

First, in the overall context of collective proceedings in the CAT, the judge blessed TPF by saying that ‘The regime of collective proceedings introduced into the CA for competition claims by the Consumer Rights Act 2015 is dependent on TPF for its success, since there will be few cases where the class members will themselves be able to fund their claims.’ This echoed similar comments by the judge in his earlier judgment in *Merricks v. Mastercard Incorporated & Ors (Mastercard)*.

Second, the judge conferred a further degree of judicial approval of litigation funding: ‘TPF is a well-recognised feature of modern litigation and facilitates access to justice for those who otherwise may be unable to afford it.’

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1 Leslie Perrin is chairman of Calunius Capital LLP.
3 https://www.catribunal.org.uk/cases.
Finally, the judge adopted a markedly constructive and positive tone in relation to the Code of Conduct of the Association of Litigation Funders of England and Wales (the ALF Code) (see Section II).

On the admirably transparent CAT website, interested readers will find hearing transcripts, judgments, orders and a summary of the claim forms from those two cases. Readers will also find reference there to two more recent applications in funded cases for opt-out CPOs in *Michael O’Higgins FX Class Representative Limited v. Barclays Bank PLC and Others* and *Justin Gutmann v. London & South Eastern Railway Limited*.

I will return to funding issues arising in some of these cases and in the CAT generally later in this chapter.

ii  
**Market overview**

The significance of TPF in legal markets continues to grow. Use of TPF by both litigants with in-house advisers and those advised by outside counsel increases year on year.

This is against the background that England and Wales (effectively London for these purposes) is the most expensive and the riskiest litigation market in the world. The sheer expense of London High Court proceedings for the largest cases is driven by the combined effect of exhaustive pre-action procedures, exacting requirements for written pleadings, ever-increasing disclosure demands during discovery, the fervent belief of the judiciary in lengthy oral evidence and cross-examination, and the development of the £1,000-per-hour QC. All this complexity drives eye-watering expense, made worse by the absence of court-driven budgeting from the largest cases, which could be said to need it most, and by the absence of a fully functional contingent fee regime; however, some progress should now be made on contingent fees following the publication of the findings and recommendations of the Damages-Based Agreements Reform Project at Queen Mary College, which has effected a redrafting of the 2013 Damages-Based Agreements Regulations in an attempt to resolve the difficulties that arose under them.5

Then there are the risks contained within the adverse costs implications of losing a case in this jurisdiction, which can more than double the cost for claimants and funders of a case that is unsuccessful. This was graphically illustrated by the *Excalibur* case, where Excalibur’s various inexperienced funders were found to be jointly and severally liable for adverse costs of nearly £32 million, quite apart from the money they lost in funding the claimant, who was defeated.

Needless to say, these risks are invariably priced into the decision at the outset of whether to proceed, on both the part of the claimants, who wish to manage and hedge the expense and costs risks, and of the litigation funders, who are being asked to provide the capital to enable the management and hedging of those risks.

No wonder then that essentially all research into the factors that have led to the growth of TPF identifies the need to manage the financial risk of litigation. Costs management is an urgent issue both for litigants and for the lawyers advising them.

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5 The report and the documents produced and referred to in its production are to be found at https://www.qmul.ac.uk/law/research/impact/dbarp.
II LEGAL AND REGULATORY FRAMEWORK

i The London TPF market

The market for the funding of large-scale litigation and arbitration in England and Wales is still dominated by the 10 funder members of the Association of Litigation Funders of England and Wales (ALF). At the time of writing, the funder members of the ALF were Augusta Ventures, Balance Legal Capital, Burford Capital, Calunius Capital, Harbour Litigation Funding, Innsworth Litigation Funding, Redress Solutions, Therium Capital, Vannin Capital and Woodsford Litigation Funding.

Other funders are active in England and Wales, including global hedge funds, funders whose operations are based overseas, and family offices, all mostly on an opportunistic basis.

ii A historical perspective

The TPF industry aimed at the funding of litigation in England and Wales has developed within the context of the underlying common law on maintenance and champerty and the associated risks to which funders of litigation are exposed in delivering TPF to clients.

In the 2013 Harbour Litigation Funding Annual Keynote Address6 by Lord Neuberger of Abbotsbury, then president of the UK Supreme Court, there is an authoritative and comprehensive account of the history of maintenance and champerty and TPF’s gradual escape from their prohibitions in this jurisdiction.

In brief, the business model that currently operates for litigation funders in England and Wales began to be delineated following various Court of Appeal decisions from around 2002 until 20057 (which made it clear that, within certain boundaries, the provision of funding by third parties for litigation in England and Wales would not necessarily offend against maintenance and champerty), then the publication in January 2010 of Lord Justice Jackson’s immensely influential Review of Civil Litigation Costs (the Jackson Report),8 and subsequently the formation of the ALF.

The subject of TPF took up just eight pages of the Jackson Report in January 2010. However, that afforded Sir Rupert plenty of scope to bestow a generous blessing on litigation funding, which he saw as ‘beneficial’, because, in summary, it not only promoted access to justice without necessarily imposing financial burdens on defendants, but also filtered out unmeritorious cases.

iii Regulation in England and Wales

Today, in England and Wales, the ALF is the instrument by which the funding of litigation through TPF is subject to voluntary regulation. Voluntary regulation is a mechanism that is widely recognised by government and others as providing a viable regulatory framework as an alternative to statutory regulation, especially when, as in the case of TPF, no statutory body has ever put itself forward or been nominated for the purpose by government.

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classical model for voluntary regulation is that industry professionals, with sponsorship from
government entities, develop voluntary standards and codes of conduct to regulate standards,
subjecting themselves to a complaints procedure of demonstrable independence. Thus the
ALF delivers voluntary regulation of the TPF industry in England and Wales by means of the
ALF Code backed by an independent complaints procedure that is available to any person
or entity who has entered into an LFA with a funder member of the ALF. Copies of the
ALF Code and the ALF’s complaints procedure can be found on its website.9

iv  The ALF Code
The ALF Code provides various protections to litigants who contract with the ALF’s
funder members. The CAT in the Trucks Cartel case placed a marked degree of reliance
on the ALF Code, not only in judging the adequacy of a claimant’s ability to fund its own
costs, but also in assessing the effectiveness of the adverse costs protection offered in the
funding arrangements.

The ALF Code delivers on the Jackson Report’s desire to see ‘a fair balance’ between the
interests of funder and funded client by requiring funders to behave reasonably. It does so by
providing that funders must:

a  take reasonable steps to ensure that the funded party shall have received independent
    advice on the terms of the LFA;\(^\text{10}\)

b  not take any steps that cause or are likely to cause the funded party’s lawyers to act in
    breach of their professional duties;\(^\text{11}\)

c  not seek to influence the funded party’s lawyers to cede control or conduct of the
    dispute to the funder;\(^\text{12}\)

d  maintain adequate financial resources to meet their funding obligations;\(^\text{13}\)

e  not include in any LFAs a right to terminate the LFA at the pure discretion of the
    funder.\(^\text{14}\) The right for a funder to terminate an LFA as and when it pleases is seen as
    a potential short cut to control of the claim, control by the funder being the principal
    of the vestigial elements of maintenance and champerty that can still void an LFA;

f  behave reasonably in exercising rights to terminate for material breach of the LFA by
    the funded party or because the claim is no longer viable, if such rights are included in
    the LFA. This is achieved by requiring funders to give litigants the contractual option of
    going to an independent QC for a binding opinion if the reasonableness of the funder’s
    behaviour comes into question in the context of such terminations;\(^\text{15}\) and

g  in relation to approval of settlements, the LFA must state whether (and if so how) the
    funder may provide input to the funded party’s decisions in relation to settlements.
In practice, all funders will insert into their LFAs a right to be consulted about any
settlement opportunities that may arise during a funded case. This is part of the funder’s
need to ensure that funded claims are always conducted in an economically rational

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10 Para. 9.1.
11 Para. 9.2.
12 Para. 9.3.
13 Para. 9.4.
14 Para. 12.
15 Paras. 11–13.
manner. In the event that there is a dispute about a settlement, either party may take the dispute to an independent QC for an opinion that would bind both funder and funded party.

III STRUCTURING THE AGREEMENT

The essence of a typical LFA, beyond the terms required by the ALF Code, is a clear promise in writing by the funder to pay the claimant’s legal costs of its claim in return for a share of the proceeds, provided the case is successful. Each side gives undertakings to the other; the claimant gives warranties (e.g., that independent legal advice has been taken and all material facts have been disclosed) and undertakes duties, such as to pursue the claims ‘with the due care and diligence of a prudent business person’ and to produce, for example, monthly reports to the funder. The funder promises to pay the claimant’s legal costs up to the amount specified in the LFA and as particularised in a legal costs budget, which is usually scheduled to the LFA.

The funder may also promise to indemnify the claimant against any order for adverse costs to which the claimant may become subject. However, it is important to mention here that, as we shall see, in England and Wales, a funder may be liable for the adverse costs of a failed claim, whatever the LFA may say.

The LFA will often contain a period of exclusivity during which the funder can conduct its initial due diligence before exercising its rights contained in the LFA to elect to proceed with funding of the case or to withdraw.

A conventional LFA will be supported by a trust deed, often called a priorities agreement, which creates a cash waterfall governing the order in which parties to the transaction are entitled to be paid. The parties will include the funder and the claimant and, perhaps, an ATE insurer, if such insurance was taken to deal with the adverse costs risk, and the lawyers if they were on some form of contingent fee.

There may be a need for further collateral documents. If the funded party is corporate, then the funder might wish to take security, but only over the proceeds of the claim, bearing in mind that the transaction is non-recourse other than to the proceeds. The circumstances of some LFA transactions may also require a creditors’ and shareholders’ standstill agreement, at which point the transactional documents begin to have a corporate finance feel to them.

IV DISCLOSURE

A funder’s evaluation of a claim for funding will invariably involve comprehensive disclosure to the funder by the claimant’s legal team of the evidence in the case, including documents protected from disclosure to the defendants by legal advice or litigation privilege. From the points of view of both the funded party and the funder, it is essential to ensure that disclosure to the funder does not cause the loss of the protection from disclosure to the defendants that is conferred by the privileged status of the evidence.

There are a number of generally accepted principles at work in this difficult area that apply equally to litigation and arbitration.

First, it is absolutely essential for the funder and claimant to enter into a comprehensive non-disclosure agreement (NDA) at the outset of their discussions.
Second, the fact of the existence of an LFA and the identity of the funder will never in themselves be privileged information, although, subject to what is said later about the effect of the Rules of the Competition Appeals Tribunal 2015 (the CAT Rules 2015) on these issues, the detailed terms of the LFA will almost certainly include much content that would conventionally be regarded as privileged.

Third, the principle that a common interest exists between an insurer and its insured has been usefully imported to the world of TPF. If privileged evidence is disclosed to a third party, the evidence might cease to be confidential, and, if so, any privilege in it would normally be regarded as waived. However, where the person entitled to the privilege and the person to whom the evidence is disclosed have a common interest so that the sharing of the evidence is entirely consistent with its confidentiality, then privilege is unlikely to be regarded as having been waived. Establishment of the common interest in writing is one of the vital functions of the NDA between the claimant and the funder.

In England and Wales, there is little in the way of legal precedent on privilege specific to TPF but the law is widely regarded as well established, in accepting that claimants should be able to share evidence with funders, under an NDA that establishes a common interest, without waiving legal advice or litigation privilege.

Another aspect of confidentiality relevant here is disclosure of the fact that a claimant is funded, which in England and Wales is an area where practice differs between arbitration and litigation.

The principal (perhaps only) reason for the vigour of the debate in the arbitration community about disclosure of the existence of funding is the potential in arbitration for conflicts of interest between third party funders and arbitrators, particularly if an arbitrator has sat in a number of cases where the claimant has been funded by the same funder or if the funder is funding another case in which the funded claimant is represented by that arbitrator’s law firm. Funders are very much alive to the destructive potential of these conflicts and will normally do their utmost to avoid taking on cases where such conflicts might exist.

Issues of this kind could never arise in litigation in the civil justice system in England and Wales, so the controversy is confined to arbitration, where existing rules of the ICC, LCIA, SCC, ICSID, UNCITRAL and many others make up an alphabet soup of procedural requirements through which funders and funded parties alike must navigate their disclosures most carefully.

V COSTS

This is a preliminary word on the interrelationship between the principles relating to a funder’s direct liability for adverse costs and the courts’ practice when deciding security for costs applications.

There are two particular complications of the law in this area; the first is that, while the question of the nature and extent of liabilities of litigation funders for adverse costs is strictly applicable only at the stage when costs are ordered to be paid, its effect is often considered at a security for costs stage. Then in the context of funders’ involvement in security for costs, there is further complication involved in the interrelationship between, first, the statutory costs scheme under Section 51(3) of the Senior Courts Act 1981 and the related provisions of the Civil Procedure Rules and, second, the contractual arrangements on the claimant’s side between the funder and the claimant in the LFA itself and, in turn, the details of their contractual relationship with any adverse costs insurer.
The funder’s liability for adverse costs

In England and Wales, Section 51 of the Senior Courts Act 1981 provides that: ‘The court shall have full power to determine by whom and to what extent the costs are to be paid.’ This enables a court to order costs against a provider of TPF where it has funded litigation on behalf of the losing party. The early authorities established that the ultimate question is whether in all the circumstances it is just to make a non-party costs order.

In *Excalibur*, Lord Justice Tomlinson expressed the principle thus: ‘justice will usually require that, if the funded proceedings fail, the funder or funders must pay the successful party’s costs’.

In *Arkin* (cited above),16 Lord Phillips MR held that commercial funders should only be liable to pay the costs of opposing parties to the extent of the funding that they had provided: the ‘Arkin cap’. However, the part of his judgment that funders have (perhaps conveniently) forgotten went on to say that the *Arkin* cap would only apply where a commercial funder was just financing a part of the costs of the litigation.

In *Excalibur*, Lord Justice Tomlinson said of the *Arkin* decision: ‘I understand that some consider the solution thus adopted to be over-generous to commercial funders, but that is a debate for another day upon which I express no view.’ Others, including Sir Rupert Jackson in his report, have also voiced criticism of the *Arkin* cap. So the current meaning of the *Arkin* cap might be no more than the fact that when a funder invests in a case that goes all the way in the High Court in London the financial risk of loss will be at least twice the amount of the investment in claimant costs, because of adverse costs.

In *Excalibur*, Lord Justice Tomlinson also ruled that payments to the claimants towards their security for costs liability were a relevant expense when considering the extent of a non-party costs order. He declined, however, to rule on whether the adverse costs consequences of any funder’s insurance arrangements for security for costs should be measured by their value (e.g., the limit of indemnity under an adverse costs insurance policy) or by their costs (e.g., the amount of the premium paid for such insurance).

The Court of Appeal judgment in *Excalibur* is also authority for two important further propositions in this area:

a that a commercial funder will ordinarily be required to contribute to the defendants’ costs on the same basis as the funded claimant. Therefore, if a claimant has been ordered to pay costs on the indemnity rather than standard basis, the funder will be liable to indemnity costs irrespective of its own conduct, but, possibly, subject to the *Arkin* cap; and

b that an order for adverse costs may be made not only against the funder named in the LFA but also against a third party that provided those funds and stood to benefit in the event of success, in that case the funder’s parent company, thus providing the potential to pierce any funder’s corporate veil.

In arbitration, on the other hand, it is generally taken that an arbitral tribunal lacks jurisdiction to issue a costs order against a funder of the arbitration.17 This is because only the parties to the dispute being arbitrated are within the jurisdiction of the tribunal, normally by virtue of their being parties to a contract or through the terms of a treaty. This leads many respondents to arbitration to make applications for security for costs, as to which see below.

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16 See Section II.ii, footnote 6.
17 See Chapter 6, Principle C.4 of the ICCA-Queen Mary Report.
ii The question of security for costs

In the High Court, security can be ordered against a claimant if, in all the circumstances, it is just to make such an order, the claimant is resident out of the jurisdiction or there is any other reason to believe that the claimant, wherever situated, will be unable to pay the defendant’s costs if ordered to do so.

In funded cases where the claimant is insolvent, an adverse costs insurance policy with a sufficient level of indemnity is often advanced by claimants and their funders, whereupon defendants will often challenge the insurance policy as inadequate. The governing principle taken from *Premier Motorauctions v. PwC and another* 18 is that resolution of these issues is fact-sensitive. Currently, however, a pattern is emerging from the decisions subsequent to *Premier Motorauctions* as to two particular categories of objection to such insurance policies. First, there is the question of the extent of the rights of the insurer to avoid or otherwise to terminate the policy as a consequence of misrepresentation or non-disclosure, which has led to a general requirement for the insurance to contain suitable anti-avoidance provisions. Secondly, the defendant may wish the court to assess the risk to the defendant of not actually receiving the money, due, for example, to insolvency of the claimant or exclusion of the Contracts (Rights of Third Parties) Act 1999, considerations that may require assignments to be undertaken between the claimant, the funder, the insurer and the defendant.

These principles are subjected to an interesting practical analysis by the President of the CAT at Paragraphs 79–109 in his recent judgment in the Trucks Cartel case referred to above (see Section I).

An application may also be made for security for costs directly against a professional TPF provider as it was recently in *RBS Rights Issue Litigation* 19.

In the *RBS* case, the judge listed various factors that should be taken into account when deciding on whether security for costs should be ordered against a funder, such as whether its motivations were commercial or altruistic and whether there is a real risk of non-payment by the funder, such as that perceived by the judge as ‘deliberate reticence’ by one of the funders in that case, Hunnewell BVI. In the event, Hunnewell BVI was ordered to provide security for costs.

The judge also ordered RBS to give a cross-undertaking to pay the claimants’ costs of posting security in accordance with the order, saying, ‘though not commonplace or inevitable, I do not think it should be considered particularly exceptional for the court to require a cross-undertaking as the price of an order for security’.

In arbitration, applications for security for costs are generally decided on the basis of the party’s impecuniosity or its inability to pay if costs were to be awarded against it at the conclusion of the proceedings. 20

The impecunious claimant may then produce evidence of funding and submit to redacted disclosure of the LFA under which the TPF arrangements have been made. The attention of the tribunal and the respondent will be focused on the LFA’s provisions on the funder’s termination rights and the funder’s obligation to cover adverse costs. Disclosure orders are normally limited to those parts of the LFA.

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18 *Premier Motorauctions v. PwC and another* [2017] EWCA Civ 1872.
19 *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch).
20 See the ICCA-Queen Mary Report, Chapter 6, Principles D.1 to D.3.
If an arbitral tribunal decides that a security for costs order is warranted, it can order security for costs in various ways; by production of a funder indemnity or ATE insurance, or, in exceptional circumstances by way of a bank guarantee. The tribunal will normally order a defendant for whose benefit the security for costs is granted, to pay the costs reasonably incurred by the funded claimant in complying with the order for security in the event that the claimant eventually prevails.

VI THE YEAR IN REVIEW

**Collective proceedings under the Consumer Rights Act 2015 and the CAT Rules 2015**

On 1 October 2015, a class action regime was introduced to facilitate private actions against anticompetitive conduct, through a combination of the Consumer Rights Act 2015 and the supporting court rules of the CAT. The regime enables a representative claimant to act on behalf of a class of persons whose grievances share common issues of fact or law with the representative claimant.

The first two applications made for CPOs in the CAT under the new procedures both sought opt-out CPOs in follow-on damages claims – the first in relation to mobility scooters, and the second in relation to interchange fees on Mastercard credit cards. Each application was (in May and July 2017 respectively) refused by the CAT, in each case on the basis that it not persuaded that the claims were suitable to be brought in collective proceedings. Although the specific reasons were different in each case, the CAT’s essential objection on both occasions was that the methodology suggested by the applicants’ economic experts for calculating the losses incurred by members of the group was not appropriate. In other words, the applicant was unable to satisfy the CAT that it had a robust method for estimating (even broadly) the aggregate amount of damages owed by the defendants to the members of the class. The first instance judgment in *Mastercard*21 was successfully appealed at the Court of Appeal (with the substantive judgment on appeal to be found at *Merricks v. Mastercard Incorporated & Anor*).22 The Supreme Court has given leave for a further appeal and that appeal is now listed to be heard on 12 and 13 May 2020.

Readers will recall that, at the beginning of this chapter, reference was made to two applications to the CAT for CPOs in the context of the Trucks Cartel, for which the CAT’s judgment on their respective funding arrangements was handed down in November 2019. Those applications were originally made subsequent to the first instance judgment but prior to the Court of Appeal’s ruling. The determination of the substantive applications in both cases, covering issues beyond funding arrangements, stand adjourned because matters to be determined by the Supreme Court in *Mastercard* are likely to determine how the hearing of the Trucks Cartel CPO application will be conducted (for example, whether expert witnesses and others will be cross-examined), and the standard of proof the CAT should apply in determining other CPO applications.

During the hearings related to the funding issues in the Trucks Cartel cases, the funders concerned had to come to terms with the unique requirements of the CAT Rules 2015 and I make no apology for turning to the most basic provisions of those Rules to explain how they have changed the expectations of funders in this area, particularly regarding disclosure of issues relating to funding.

Under Rule 78(1) of the CAT Rules 2015, the CAT may authorise an applicant to act as the class representative in collective proceedings if the CAT considers it just and reasonable for the applicant to act as such.

Under Rule 78(2), in determining whether it is just and reasonable for the applicant to act as the class representative, the CAT shall consider, inter alia, whether the applicant would act fairly and adequately in the interests of the class members and would be able to pay the defendant’s recoverable costs if ordered to do so.

Under Rule 78(3), in determining whether the proposed class representative would act fairly and adequately as above, the CAT takes into account all the circumstances, including whether the proposed class representative has prepared a plan for the proceedings that satisfactorily includes, inter alia, any estimate and details of arrangements as to costs, fees or disbursements that the CAT orders that the proposed class representative shall provide.

It is now clear that these simple provisions require the disclosure of matters hitherto regarded by funders as privileged and confidential. Complete, unredacted copies of LFAs, their supporting documents and suites of ATE policies are now expected to be disclosed to the CAT so that it can determine whether to grant the CPO applications. Cartelists’ counsel can (and do) pick through the fine print and subject the funding arrangements to a level of potentially destructive scrutiny that would never be allowed in other courts in this or in other jurisdictions.

The results of the appeals and fresh applications in all cases before the CAT are eagerly awaited by litigation funders active in England and Wales in the knowledge that the level of transparency about funding imposed in the CAT may soon be the model for other courts in England and Wales and in other jurisdictions.

VII CONCLUSIONS AND OUTLOOK

The obvious conclusion from this chapter is that expansion of TPF in England and Wales is likely to continue, fuelled by more capital, growing awareness and greater uptake of the opportunities.

In general, the expansion prospects for TPF seem assured. There is certainly no shortage of well-resourced would-be investors, seeking access to experienced investment managers with a TPF track record. The investment class is non-correlated, with an increasingly convincing record of high returns for investors who are willing to tolerate its illiquid character.

The future of TPF in England and Wales still seems assured.
Chapter 6

GERMANY

Daniel Sharma

I MARKET OVERVIEW

In Germany, the market for third party funding of litigation and arbitration cases is relatively mature and well developed, even compared to that of other major economies. The first professional third party funding services were introduced around 1998. The German legal framework for funding agreements is relatively non-restrictive, which makes it easier for smaller funders to enter the market.

Looking at funders in a broader sense by applying the technical definition of third party funding, which is simply that a company finances the costs of legal proceedings as a service (originally not having a direct interest in the outcome of the dispute), there are very different kinds of funders on the German market today.

The German third party funder in a traditional sense is a company that specialises in funding large cases; these companies mostly stipulate a minimum claim value of between €25,000 and €100,000 as a requirement to even review a case for potential funding. These traditional funders typically fund a large variety of cases and do not restrict their offer to specific areas of law. One reason for this may be that there are only a limited number of cases on the German market that have a sufficiently high claim value to be of economic interest to funders and for which funding is sought. That being said, it is often stated that these third party funders reject about 90 per cent of the cases presented to them for review, usually (but not always) based on their assessment that the prospects of success are insufficient for the purposes of the funder.

One of the major funders is Foris AG, which originally pioneered the introduction of professional third party funding services on the German market in 1998. Moreover, several German insurance companies that initially only offered legal costs insurance as a product have in recent years extended their product portfolio to also cover the funding of cases in which a dispute has already arisen. These include Legial AG and Roland Prozessfinanz AG (which was acquired by the Dutch founder Omni Bridgeway in 2017). The Swiss funder Nivalion AG, founded in 2017, is present in the German market with an office in Munich; Nivalion AG also funds litigation cases but emphasises that its special focus lies on the funding of arbitration cases.

1 Daniel Sharma is partner at DLA Piper UK LLP.
3 It has often been stated that cases have a high claim value in this sense if the claim value exceeds €1 million.
4 Typical (before-the-event) legal costs insurance is characterised by the fact that, at the time the contract is concluded, a dispute has not yet arisen.
Last but not least, several Anglo-American and Australian companies have recently become increasingly present on the German market, including Burford Capital and the European branch of the Australian IMF Bentham Limited.

Apart from the aforementioned traditional third party funders, Germany has seen an increase of market participants that are technically litigation funders, but are better described as legal tech companies. These companies operate with a business model vastly different from that of the traditional funders described above. They do not specialise in funding complicated, high-risk cases involving a high claim value where the law firm involved is selected by the party that receives funding. Instead, these companies specialise in funding proceedings in relation to specific claims that have a relatively low claim value, and they are most often the first and primary point of contact for the client. Most often, a highly specialised partner law firm selected by the funder acts as the legal counsel to the party receiving the funding, but in many cases the law firm has little actual contact with the funded party (which, formally, is the firm’s own client). A prominent example of such a legal tech company (technically a case funder) is the company Flightright, which enables travellers to pursue claims against an airline based on a flight delay without an associated cost risk.

It may also be relevant for the purpose of an assessment of the German market for litigation funding that German law, in Section 114 et seq. of the German Code of Civil Procedure, provides for a request for legal aid in cases where a party lacks the funds required to participate in court proceedings (regardless of whether it is as claimant or respondent). This request can sometimes be a viable alternative to third party funding, and it is not restricted to natural persons; a legal entity can also file a request for legal aid. An important difference from real third party funding, however, is that the party receiving legal aid may, under specific circumstances, have to pay back the amounts received from the state. In contrast, in the vast majority of German third party funding agreements, the funder also assumes the duty to reimburse the opposing party for its legal costs in the proceedings if the funded party is ultimately unsuccessful with its claim. Normally, amounts paid by the funder during the proceedings will not have to be reimbursed if the claim is ultimately unsuccessful. In other words, most German third party funding agreements, in principle, provide for a ‘no-risk’ scenario for the funded party.

5 Recently, a growing number of these companies have also started to purchase claims directly, and these are not mere assignments of claims as security, but true and final purchases of claims to enable the alleged creditor to immediately and fully monetise an alleged claim. However, the mere funding of proceedings in which the party seeking funding for its case will receive the lion’s share of the expected returns remains the primary business model of most of these market participants for the time being.

6 For purposes of illustration, Flightright currently charges a fee of between 20 per cent and 30 per cent of the claim value (excluding VAT), which also covers the fee of the legal counsel involved, and the maximum value of the claim under the applicable EU regulation providing for the compensation claim is €600; it is therefore clear that a business model of this kind is only viable if the internal costs of the funder and the costs of the legal counsel combined will on average be far below €150 per case. Such a business model thus requires a highly automated handling of cases by both the funder and the legal counsel involved. As at September 2019, Flightright claims on its website that its service has been used 5.2 million times so far, with Flightright having successfully pursued claims exceeding €200 million.

7 The no-risk scenario for the funded party is subject to certain further requirements; for example, compensation claims may be asserted by the funder against the funded party if the funded party has violated its duties of full disclosure regarding all material facts in relation to the claim.
II LEGAL AND REGULATORY FRAMEWORK

When discussing the legal and regulatory framework for agreements in the area of third party funding, in German law it is particularly important to keep in mind that the funding agreement (the contract between the funded party and the funder) on the one hand, and the contract between the funded party and its legal counsel (engagement letter or fee agreement) on the other hand, are contracts of a different nature. Thus, they are subject to different regulatory frameworks.

i The funding agreement

Today, the majority of German legal literature takes the view that funding agreements are to be classified as German partnerships under civil law. This qualification of the funding agreement has a number of practical consequences for the content of the funding agreements. However, it is important to note that, so far, the highest German courts have not clearly confirmed this qualification. On the contrary, in 2006, at a time when the clear majority of German legal literature already favoured the qualification as a partnership under civil law, the District Court Bonn in one of its decisions addressed the question of the legal qualification of third party funding agreements in great detail and made explicit reference to the fact that the leading view in legal literature classified the funding agreement as a partnership under civil law, but then came to the conclusion that it did not share this view. In the decision in the appeal proceedings regarding the appeal filed against the cited decision of District Court Bonn, the court of next instance, the Higher Regional Court Cologne, left the question unanswered, but stated in an obiter dictum that it was inclined to agree with the ‘convincingly argued view of the District Court Bonn’.

In contrast, the Higher Regional Court Munich, in a decision in 2015, stated that a third party funding agreement was to be classified as an agreement of its own kind, but further stated that it was similar to the German partnership under civil law.

In more recent decisions, some courts have addressed the question, but ultimately left it open for debate, including, for example, the Higher Regional Court Frankfurt in a decision of August 2017, in which it merely stated that the question was still unresolved and that it was

8 See District Court Bonn (Landgericht Bonn), Decision dated 25 August 2006, Case 15 O 198/06, para. 73 et seq. Also see Higher Regional Court Frankfurt (Oberlandesgericht Frankfurt), Decision dated 22 August 2017, Case 16 U 253/16, para. 25.
9 District Court Bonn (Landgericht Bonn), Decision dated 28 August 2006, Case 15 O 198/06, para. 73 et seq.
10 While the District Court Bonn made clear in its decision that it did not view the third party funding agreement as a partnership under civil law, it did not present a clear alternative qualification. The Court merely stated that the third party funding agreement was to be classified as a contract for the exchange of performances in the form of a legal relationship where performance of one party is tied to the profit of the other. But this form of relationship does not in itself entail a clear qualification of the funding agreement as, for example, a loan or an insurance contract.
11 Higher Regional Court Cologne (Oberlandesgericht Köln), Decision dated 29 November 2007, Case 18 U 179/06.
12 Higher Regional Court Munich (Oberlandesgericht München), Decision dated 31 March 2015, Case 15 U 2227/14, para. 46.
debated whether a third party funding agreement could be classified as a loan agreement with the interest linked to the borrower’s profit, an insurance contract, a purchase of receivables or a partnership.13

Regarding a potential qualification as an insurance contract,14 the former German Federal Insurance Supervisory Office (BAV), which is now part of the German Federal Financial Supervisory Authority, decided in 199915 that the only third party funder existent in Germany at that time was not regulated by the BAV, since it was found not to operate a business that could be qualified as an insurance business.16

A qualification of the funding agreement as a purchase of receivables only seems justified in the case of full and final cession of claims, while most third party funding agreements used on the market to date only contain an assignment of claims as security.

While the legal nature of the third party funding agreement under German law has not yet been fully established, the potential forms include a partnership under civil law, as the majority of German legal literature suggests, a loan agreement with the interest linked to the borrower’s profit, or an agreement of its own kind, to which provisions regarding the partnership under civil law or loan agreements could be applicable.

ii Implications of the qualification of the funding agreement for the regulatory framework

As German law does not know a legal doctrine similar to the common law doctrines of champerty and maintenance, there are no special regulations or prohibitions applicable specifically to third party funding agreements.

A qualification of the funding agreement as a German partnership under civil law would, for practical purposes, mean that the regime applicable to the agreement would not be as strict as in cases of qualification as an insurance contract or a loan.

However, two potential restrictions in particular should be kept in mind. First, if the share of the proceeds that the funder receives in the event of success is particularly high, the funding agreement could be found to violate public policy, because a court could assume that the party seeking funding had no other option than to agree to unfair terms because of undue duress exerted by the funder (Section 138 of the German Civil Code). Few court decisions exist that could help to clarify which success fees can, in practice, be agreed. However, the Higher Regional Court of Munich, in a case in 201517 where the funder had started to fund the case only after the claimant had already lost at first instance, decided that a success fee of 50 per cent did not violate public policy. In its decision, the Court, inter alia, pointed to the fact that the first instance proceedings that had already taken place might have led to

13 Higher Regional Court Frankfurt (Oberlandesgericht Frankfurt), Decision dated 22 August 2017, Case 16 U 253/16, para. 25.
14 Regarding potential arguments for such a qualification, see Frische and Schmidt, ‘Eine neue Form der Versicherung!’ in: Neue Juristische Wochenschrift (NJW) 1999, page 2998 et seq.
16 For arguments against a qualification as an insurance contract, see also an article published in answer to the aforementioned article of Frische and Schmidt, written by two members of the board of directors of the funder Foris AG, Müller-Güldemeister and Rollmann, ‘Die Prozessfinanzierung der FORIS AG ist keine Versicherung’ in: Neue Juristische Wochenschrift (NJW) 1999, page 3,540.
17 Higher Regional Court Munich (Oberlandesgericht München), Decision dated 31 March 2015, Case 15 U 2227/14.
lower projected costs to be borne by the funder, since the funder did not have to fund the case at first instance; but the Court also pointed out that, on the other hand, the fact that the proceedings had already been lost at first instance meant that the projected overall chance of success might have been reduced. In another case, the Higher Regional Court of Munich in 2004 indicated that a share of the proceeds of more than 66 per cent attributed to the funder could possibly violate public policy.  

Second, it is still subject to debate whether standard contracts introduced by funders can be subject to judicial review regarding the provisions of German law applicable to standard terms (Section 305 et seq. of the German Civil Code). As regards cases in which the funding agreement is classified as an agreement providing for a partnership under civil law, Section 310, Paragraph 4 of the German Civil Code states that the judicial review of standard terms does not extend to agreements in the area of company law. Therefore, some scholars have argued that through this exception to the applicability of Section 305 et seq. of the German Civil Code – commonly referred to as a ‘block exemption’ – no judicial review based on the provisions of German law applicable to standard terms would take place. However, other scholars state that through a silent exception to the scope of Section 310, Paragraph 4 of the German Civil Code, such a judicial review would take place despite the provision's wording, based on the notion that the funding agreement, while in principle providing for a German partnership under civil law, also showed traits similar to those of contracts for the exchange of performances. A judicial review based on the provisions regarding standard terms will also take place if the funding agreement is classified as not providing for a German partnership under civil law, but as a different type of contract, regarding which there is no exemption from the judicial review stipulated in Section 310, Paragraph 4 of the German Civil Code.

iii Regulatory framework for the agreement between the funded party and its legal counsel, and implications for the funding agreement

As regards the agreement between the funded party and its legal counsel (engagement letter and fee agreement), the most important restriction imposed by the regime applicable to German lawyers is that German lawyers are, in principle, not allowed to agree a success fee (Section 49b of the German Federal Lawyer’s Act). A success fee can only be agreed if, in the individual case, the client would otherwise not be able to enforce or defend his or her rights in a proper manner for personal financial reasons (Section 4a of the German Law on the Remuneration of Lawyers). As is often highlighted in German legal literature, this provision

18 Higher Regional Court Munich (Oberlandesgericht München), Decision dated 13 October 2004, Case 7 U 3722/04, para. 28.

19 Until 30 June 2008, according to Section 49b, para. 2, sentence 1 of the German Federal Lawyer’s Act, German lawyers were generally not allowed to agree a success fee. However, on 12 December 2006, the German Supreme Court decided that a general prohibition of this kind, in not providing for exceptions in cases where the claimant has no access to financing for its case, was incompatible with and violated Article 12 of the German Constitution; see German Supreme Court (Bundesverfassungsgericht), Decision dated 12 December 2006, Case 1 BvR 2576/04. To comply with this Court decision, the provisions of the German Federal Lawyer’s Act and the Law on the Remuneration of Lawyers were amended; see in more detail Onderka and Schneider in AnwaltKommentar Rechtsanwaltsvergütungsgesetz, Section 4a Law on the Remuneration of Lawyers, para. 1 et seq.
in essence means that a German lawyer, in principle, is not allowed to fund a client’s case, no matter whether directly (through a payment) or indirectly (through waiving the legal counsel’s fees in the event of losing).

As the services provided by the funder under the funding agreement are not classified as a contract for legal advice, there is no similar restriction for the funder. The fact that German lawyers are, in principle, not allowed to agree a success fee should be kept in mind when drafting or negotiating the funding agreement. This means that the funding agreement should not stipulate that the funded party’s counsel will share a portion of the risk in relation to the outcome of the case by way of a reduced fee in the event of a loss or an increased fee in the event of success in the proceedings. Such a stipulation (barring cases of exceptional circumstances pursuant to Section 4a, Paragraph 1 of the Law on the Remuneration of Lawyers) could not be complied with when involving a German lawyer as counsel.

iv Relationship between the funder and the funded party’s legal counsel

Even though the legal counsel of the funded party is, in practice, an integral part of performances under the funding agreement, because of which the relationship between the funder, the funded party and the legal counsel of the funded party is often stated to be a triangular relationship,21 since the funded party’s legal counsel is legally only allowed to assume duties towards one client in the same matter, there will, in principle, not be a direct contractual link between the funded party’s lawyer and the funder.22 Instead, performances of the funder towards the funded party’s legal counsel (typically in the form of payment of legal fees) and performances of the funded party’s legal counsel towards the funder (typically in the form of the legal counsel informing the funder of relevant developments and coordinating strategy with the funder) will each be based on the funding agreement. For example, while the funder will of course pay the legal fees of the funded party’s legal counsel, with the ultimate goal of complying with its own duties towards the funded party, legally the funder is at the same time settling a debt of the funded party with regard to the funded party’s legal counsel.

III STRUCTURING THE AGREEMENT

In this section, an overview on the contractual provisions typically found in funding agreements will be given. For a more comprehensive picture, it is helpful to take a look at the standard contracts of the largest German funders.23 Agreements are typically structured as a financing of the claim (as opposed to a purchase of the claim); the agreements typically include additional clauses providing for an assignment of claims to the funder, but only in the form of a cession for security, not in the sense of an immediate monetisation of claims.

In the preamble of the funding agreement, the facts underlying the claim are introduced. The funding agreement then typically contains the following provisions.

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23 The German text of one of the standard contracts (standard contract of Legial AG) can be found in: Bonefeld/Kroiß/Tanck, Der Erbprozess, 5. Edition 2016, Section 15 para. 81.
i  **Representations by the claim holder (claimant)**

**Full rights to claims, power to transfer**

In this section, the funded party states that it holds the full rights to the claims and that the claims can legally be transferred to the funder without consent of a third party.

In the case of a claim subject to German law, it should be noted that German law, in principle, provides for the option of a cession without the consent of the debtor (Section 398 of the German Civil Code), but that, as an exception, consent of the debtor is required if an agreement between the creditor and the debtor so stipulates (Section 399 of the German Civil Code). A restriction of this kind can also be agreed in German standard terms. If consent is required because of such a contractual restriction, and the creditor still tries to assign the claim to a third party without the consent of the debtor, the assignment is void and has no effect.

**No undisclosed facts**

The funded party states that it has disclosed all relevant facts in relation to the claims that are known to the funded party, in particular, that the funded party is not aware of counterclaims, regarding which a set-off could potentially be declared by the debtor. From a practitioner's point of view, the funded party and its legal counsel should make any reasonable effort to make sure that there are no undisclosed material facts, because if previously undisclosed important facts surface later in the proceedings, this could give rise to termination rights and even damage claims of the funder against the funded party.

The funded party also states that no enforceable judgments against the funded party have been rendered that might give rise to insolvency proceedings against the funded party. The purpose of this provision is to reduce the risk of future clawback actions by an insolvency administrator.

ii  **Duties of the funded party to further the proceedings in which the claims are pursued**

This provision clarifies that it is the duty of the funded party to lead and support the proceedings against the debtor in a way that does not conflict with the interests of the funder. Apart from the general statements that the funded party shall always act with the required caution and that the most cost-efficient path has to be chosen if there are two options with an equal prospect of success, this section normally enumerates the following main duties:

a  The funded party releases its legal counsel from its duties of confidentiality regarding all facts relating to the pursued claims, and undertakes to inform the funder (via the funded party's legal counsel) of any new development, providing full copies of all relevant documents.

b  The funded party has to obtain the consent of the funder before incurring any costs.

c  The funded party may not conclude a final and binding settlement agreement with the debtor without the funder's consent, and may not discontinue the proceedings without the consent of the funder. Most funding agreements, however, provide for an option for the funded party to conclude a revocable settlement without the prior consent of the funder; if such a revocable settlement is concluded, it is the duty of the funded party to inform the funder of the settlement in time before the revocation period expires.
If the claims are pursued in arbitration proceedings, the funded party will use all tools available to ensure (if possible) that representatives of the funder can attend the oral hearing.24

iii Costs to be borne initially by the funder

Most importantly, it will be clarified whether the funder only bears the fees of the funded party’s legal counsel to the extent stipulated in the Law on the Remuneration of Lawyers. However, even if the funder, in principle, only bears the fees of the funded party’s legal counsel to the extent stipulated in the Law on the Remuneration of Lawyers, the funding agreement will typically stipulate25 that the funded party’s legal counsel will receive an additional remuneration (included as compensation for the time-consuming and complicated task of communicating with the funder), in the form of an additional 1.0 fee in accordance with provision No. VV 2300 of the Law on the Remuneration of Lawyers.26 In this regard, this section of the funding agreement does not in itself lead to a direct claim of the funded party’s legal counsel with regard to the funder, as the funded party’s legal counsel is not a party to the funding agreement. Therefore, the fee agreement between the funded party and its legal counsel has to reflect this provision by stipulating this additional fee. Furthermore, an interesting aspect of this provision is the question of who will ultimately bear the costs of this additional fee if the proceedings against the (alleged) debtor are successful; in this regard, see Section V.

If the funder is to bear fees of the funded party’s legal counsel that exceed the fees stipulated in the Law on the Remuneration of Lawyers (e.g., fees calculated on the basis of hourly rates), or if the claims are to be pursued in proceedings abroad, the fees to be borne by the funder are often specified in detail, sometimes in an annex to the funding agreement. This section will typically also clarify that costs in relation to any counterclaim or set-off declared by the debtor and the travel costs of the funded party will not be borne by the funder. It will also typically clarify that all payments by the funder will be made to the legal counsel of the funded party and not to the funded party itself, except in cases in which the funder reimburses the funded party for payments that have already been made by the funded party itself.

In the event that the funded party is unsuccessful with the claim, the funder will also reimburse the adverse party (the alleged debtor) for the costs that the court has set to be recoverable from the funded party. In German state court proceedings, the successful party can only claim legal fees from the other side to the extent that such legal fees are stipulated in the Law on the Remuneration of Lawyers. Therefore, the other side’s potential reimbursement claim can be calculated with some accuracy even before the proceedings are initiated.27

24 This provision typically refers only to arbitration proceedings because German state court proceedings are public proceedings; therefore, representatives of the funder can attend proceedings before a state court without the need for related requests to the court.
26 The fees stipulated in the Law on the Remuneration of Lawyers are calculated based on claim value; e.g., in the case of a claim value of €200,000, a 1.0 fee in accordance with provision No. VV 2300 of the Law on the Remuneration of Lawyers amounts to €2,013 (excluding VAT). In the case of a claim value of €500,000, a 1.0 fee in accordance with No. VV 2300 of the Law on the Remuneration of Lawyers amounts to €3,213 (excluding VAT).
27 Some uncertainties exist, however; for example, in relation to potential reimbursement claims covering costs relating to expert opinions or witnesses.
The agreements typically stipulate that value added tax shall only be paid by the funder insofar as the funded party cannot offset payments against its own tax liability.

**iv Review of the claim by the funder**

If the funder has not yet reviewed and accepted the claim for funding prior to the conclusion of the agreement, this section will set out the related duties of the funder. Typically, it will be stated that the funder will review the claims without any initial costs for the party that seeks to receive funding. It will be clarified that the review of claims is only conducted to enable the funder to assess whether or not it wants to fund the case, and in particular that the review of claims is not to be understood in any way as the funder acting as legal counsel with regard to the party that seeks funding. Finally, it will be stated that the funder has no duty to accept the case for funding, has no duty to provide any reasons for a rejection of funding and will not be liable towards the party that seeks funding based on such a rejection.

**v Distribution of costs and proceeds in cases in which the claim is successful**

The funding agreement will typically stipulate that, first, both parties will be reimbursed for their recoverable costs from the proceeds. Regarding the question of who will ultimately bear the costs of legal fees to the extent to which they exceed the statutory fees following the Law on the Remuneration of Lawyers in the event that the proceedings are successful, see Section V.

The remaining proceeds will be distributed following a specified percentage ratio. While the agreed percentage ratio in third party funding agreements varies, often the funder is assigned between 20 per cent and 30 per cent of the proceeds in cases in which a final award is rendered. While at the time the funding agreement is concluded the claim value will already be known, funding agreements often stipulate a staggered ratio (e.g., 30 per cent of proceeds assigned to the funder for proceeds below €500,000 and 20 per cent of proceeds exceeding €500,000), because at the time of signing the funding agreement, it is not yet known to what extent the claim will be successful. Some funding agreements stipulate a reduction of the funder’s fee in the case that the dispute with the debtor is resolved through a settlement before a final decision of the court is rendered.

**vi Assignment of all claims to the funder as security**

The standard contracts of most third party funders also stipulate that the claims are assigned to the funder, but only in the form of an assignment of claims as security. It is stipulated that the funded party may not notify the debtor of the assignment and that the funded party continues to hold claims, but only on the basis of trust in the funder, and that the funded party shall make sure that proceeds are not paid to the funded party, but only to its legal counsel. The detailed provisions addressing the assignment of claims will typically be found in an annex to the funding agreement.

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28 Costs that are part of the excluded costs that are not borne by the funder initially cannot be recovered in this way; e.g., the funded party will not be reimbursed up front for its travel costs or costs in relation to a counterclaim or set-off. Therefore, in practice, this provision will normally only enable the funder to recover costs before the remaining proceeds are distributed among the two parties to the funding agreement. This section will typically also clarify that costs in relation to any counterclaim or set-off declared by the debtor and the travel costs of the funded party will not be borne by the funder.
vii Termination rights of the funder

Clearly one of the most important provisions of the funding agreement is the provision stipulating under what circumstances the agreement may be terminated by the funder. From the perspective of the funded party, a termination by the funder may lead to catastrophic economic results if the funded party is not able to obtain other funding. The mere right of a funder to terminate the funding agreement, even if not exercised, might also lead to substantial economic pressure on the funded party to, for example, agree to a settlement with the debtor of the claims that it would not have otherwise agreed to.

Most standard funding agreements of German funders contain a large array of termination rights. However, the provisions vary substantially.

Usually, new developments or facts may under certain circumstances lead to a termination right of the funder. The standard contract of one German funder stipulates termination rights in the case of any new circumstances as a result of which the prospects of success are lower than at the time of entering into the funding agreement; in contrast, in the contract of another funder the requirement is that new circumstances lead to a situation where the chances of success regarding the claim become lower than 50 per cent.

The funding agreements typically also contain a paragraph listing examples of developments that lead to a termination right of the funder, often including loss of evidence, an indication provided by the court that suggests that the chances for success are lower than previously estimated, insolvency proceedings or impecuniosity of the debtor, and new jurisprudence of higher courts that leads to lower chances of success.

In addition, some funding agreements include a termination right, which is not subject to any other requirement, at the end of a court instance.

The funding agreements also stipulate the consequences of a termination by the funder. Typically, the funder bears all costs only up to the point of the termination taking effect, and as if the claim had been discontinued in the most cost-efficient manner (e.g., by withdrawing the claim). Typically, it is further stipulated that the funded party may continue the proceedings at its own cost and risk, and only if it succeeds does it have to reimburse the funder for its incurred costs. The funder, however, will not receive a percentage of the proceeds.

viii Termination rights of the funded party

The funding agreements normally stipulate that the funded party may terminate the agreement only for good cause; to this extent, the provision is purely declaratory, since in German law, the right to terminate an agreement for good cause cannot be excluded.

Some funding agreements define the term ‘good cause’ further, which in principle is possible in German law, stating, for example, that an improved financial situation of the funded party and new developments giving rise to improved chances of success regarding the claim do not constitute a good cause for termination and thus do not lead to a right of the funded party to terminate the agreement.

ix Settlement proposal

In the event of a settlement proposal by the opposing party or the court, the agreements stipulate that the funded party and the funder should first try to reach an agreement on whether to accept or reject the offer. In the event that only one party wishes to conclude the settlement, but the other party refuses to agree, the party that sought to accept the settlement is entitled to terminate the agreement, in which case the party that refused to accept the settlement has to pay the accepting party the amount it would have received if the settlement
had been concluded. The party refusing the settlement can then continue the proceedings at its own cost and risk and fully for its own benefits; since it is in some cases not feasible for the funder to lead proceedings itself in its own name (particularly considering that the cession for purposes of security will not have been disclosed to the debtor), the funder can demand that the funded party will resume the proceedings formally (but at the sole risk and costs of the funder), whereby the funder has to provide full indemnification regarding any and all future costs in relation to the continued proceedings.

The aforementioned provisions regarding settlements have drawn some criticism in German legal literature, because even though the provisions in principle provide for equal rights for both parties and thus in a sense can be called balanced, a practical difference in the position of the funder and the party seeking the funding may lie in the fact that the typically cash-strapped funded party will in many cases not have the funds to buy out the funder and then resume the proceedings at its own cost and risk, which may lead to economic pressure on the funded party to accept a settlement with terms that it would not normally have voluntarily agreed.

x  Confidentiality

German third party funding agreements normally contain a clause that even the mere fact that third party financing has been employed has to be kept confidential. As an exception to this rule, the funder is allowed to share information with lawyers or other experts that the funder utilises to review claims or events in the course of the proceedings against the debtor. Some third party funding agreements also contain exceptions allowing the funder to share information with other parties for the purpose of risk-sharing agreements with such third parties.

xi  Applicable law and jurisdiction clause

The funding agreements typically provide for the applicability of German law. Regarding the dispute resolution clause, agreements often vary. Not all funding agreements even contain a full dispute resolution clause. For example, the standard agreement of one funder contains a discussion clause and then a detailed mediation process but not a jurisdiction clause, and states that if mediation fails, the parties shall be entitled to commence legal proceedings. Some funders stipulate that the place of jurisdiction shall be a city in Germany. Some funding agreements even contain an arbitration clause.

IV  DISCLOSURE

Currently, there is neither a general obligation to disclose the existence of a third party funding agreement in German state court litigation cases, nor is there such a general obligation in arbitration cases derived from German procedural law or practice. However, in principle, it is conceivable that the existence of a third party funding agreement might in certain cases be relevant to the assessment of a request for security for costs, or that it might give rise to a conflict of interests, in which case a party could be at least indirectly forced to disclose the funding, if only to contest a statement by the other side.

29 For both these general notions and their background (not specifically relating to German procedural law), see, e.g., in more detail Maxi Scherer, 'Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?' in: ICC-Dossier Third-party Funding in International Arbitration, ICC Publication No. 752E, 2013, page 95 et seq.
V  COSTS

i  Recovery of costs for securing third party funding

With respect to German state court proceedings, in line with the majority view in legal literature, recent court decisions have held that costs for securing third party funding cannot be recovered through the system of recovery of costs in relation to the costs award (Section 91 et seq. of the German Code of Civil Procedure). The reason for this is that the German state court in its initial award only decides the ratio of each party’s obligation as to costs, while the specific amounts are only determined in a subsequent, separate procedure for the setting of costs reimbursement claims, in which there is no substantial new taking of evidence. If, however, the winning party could successfully claim in this subsequent procedure to have incurred costs in relation to the financing of its claim, this would in practice lead to the requirement that new evidence is assessed, which is not compatible with the nature of the procedure for the setting of costs reimbursement claims. Therefore, costs for securing third party funding will in any case not be recoverable as costs in the procedural sense (referring to provisions Section 91 et seq. of the German Code of Civil Procedure).

However, a different question is whether the funded party can demand reimbursement for such costs through a request as part of the substantive claim itself, based on a material law claim for reimbursement following Section 280 et seq. or Section 823 et seq. of the German Civil Code. In principle, costs for financing of a case, in particular, regarding interest paid by the claimant regarding a credit facility, can be claimed as part of the material law claim. However, for expenses to be classified as, or as being similar to, damage in the sense of Section 280 et seq. or Section 823 et seq. of the German Civil Code, the expenses must have been necessary to pursue the claim. In that sense, regarding specifically a success fee agreed in the course of third party funding, it has to be noted that as long as the claimant does not have his or her own funds available at all to finance the claim, he or she can file a request for legal aid as stipulated in Section 114 et seq. of the German Code of Civil Procedure, as described in Section I. If, however, such a request would not be successful


33  e.g., see Higher Regional Court Koblenz (Oberlandesgericht Koblenz), Decision dated 25 August 1987, Case 14 W 604/87, in: Zeitschrift für das Versicherungsrecht (VersR) 1988, page 972, and Higher Regional Court Munich (Oberlandesgericht München), Decision dated 14 September 1999, Case 11 W 2389/99, in: Monatschrift für Deutsches Recht (MDR) 1999, 1466, both stating that the two questions are to be seen separately and that such costs, if at all recoverable, have to be claimed as part of the claim itself.

because the claimant still has funds at his or her disposal, it may be argued that the funds obtained through the funding agreement are then not required to pursue the claim. With a similar line of argument, the District Court Aachen held in 2009, specifically in a case where the claimant had claimed costs in relation to third party funding of its case as part of the claim (based on a material law claim relating to Sections 280 et seq. and 249 et seq. of the German Civil Code), that such costs could not be recovered from the other side. In a decision of the Higher Regional Court Koblenz in 2006, the Court similarly implied in an obiter dictum that a reimbursement of funding costs cannot not be sought if a request for legal aid in the sense of Section 114 et seq. of the German Code of Civil Procedure was not filed, despite its legal requirements being met.

In German arbitration proceedings, since the arbitral tribunal, in practice, has more leeway when it comes to the basis for the costs award (compared with German state court proceedings), it is, in principle, conceivable that an arbitral tribunal might order the unsuccessful party to reimburse the adverse party for its costs in relation to the financing of the case. If a claim for reimbursement for these costs is planned, it should be considered at an early stage whether the claim shall be raised as part of the costs award or as part of the material claim itself; the difference might be even more decisive if the law of the seat of the arbitration and the law applicable to material law damage claims are different.

ii Liability of a funder for adverse costs

Funders do not have an obligation with regard to the adverse party to reimburse it for costs of the proceedings initiated by and in the name of the funded party. However, as explained in Section III, a German funding agreement typically contains a duty of the funder with regard to the funded party to hold the funded party harmless of claims for reimbursement of costs that are brought by the adverse party as a result of the funded party being unsuccessful in the proceedings.

iii Security for adverse costs

German state court decisions ordering a party to provide security for adverse costs are very rare. While Section 110 of the German Code of Civil Procedure in principle provides for an opportunity to file a request for security for adverse costs, Paragraph 1 of the provision stipulates that it only extends to requests filed by a respondent in relation to a claimant that is based in a country that is not a Member State of the European Union. Paragraph 2 of the provision limits its applicability even further, stipulating a number of exceptions where even a request for security for adverse costs in relation to a claimant based in a country outside the European Union will not be successful. In any case, the mere fact that it appears doubtful whether a party will be able to reimburse the adverse party for its costs in the event of a defeat in the proceedings is not sufficient for a successful request for security for adverse costs in German state court proceedings, as the associated risks are, in principle, deemed part of the ordinary risks of life.

35 District Court Aachen (Landgericht Aachen), Decision dated 22 December 2009, Case 10 O 277/09.
36 Higher Regional Court Koblenz (Oberlandesgericht Koblenz), Decision dated 4 January 2006, Case 14 W 810/05.
In arbitration proceedings where German law is the law of the seat of the arbitration, Section 110 of the German Code of Civil Procedure will already not be applicable as long as the seat of the claimant is a country that is a Member State of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as a costs award rendered by the arbitral tribunal could in any case be enforced against the claimant on the basis of a treaty in the sense of Section 110 Paragraph 2 No. 2 of the German Code of Civil Procedure.37 A request based on the rules of the arbitral institution (e.g., a request for interim relief pursuant to Section 20.1 of the Rules of the German Institution of Arbitration) is, in principle, conceivable in exceptional cases where a substantial risk exists that the adverse party will not be able to reimburse the other party for its costs following a costs award and if this risk has only arisen after the arbitration agreement was signed;38 however, in practice, such a request will only rarely be successful.

iv Other issues regarding costs

In German state court proceedings, the successful party, in principle, will be able to recover its costs from the adverse party.39 However, specifically regarding legal fees paid by the successful party to its legal counsel, the unsuccessful party only has to reimburse the successful party to the extent of the statutory fees stipulated in the Law on the Remuneration of Lawyers.40 As a consequence, in practice, in complex proceedings, the winning party will usually only be able to recover a part of the legal fees that it paid to its counsel.

Therefore, in the case of a claim successfully pursued in state court proceedings, for any legal fees initially borne by the funder that exceed the fees stipulated in the Law on the Remuneration of Lawyers, the funder will have to be reimbursed from the proceeds relating to the main claim, which means that the funded party will bear a substantial part of these fees indirectly (through receiving a smaller overall amount from the proceeds, since the amount that is distributed between the funder and the funded party according to the agreed percentage ratio has already been reduced through the initial reimbursement of costs).

This effect also extends to the additional 1.0 fee calculated on the basis of No. VV 2300 of Law on the Remuneration of Lawyers, as mentioned in Section III, which is typically stipulated in the funding agreement as an additional fee in the case that the funded party’s legal counsel is remunerated following the provisions of the Law on the Remuneration of Lawyers. In German state court proceedings, it is likely that the additional 1.0-fee cannot be recovered from the other side. This means that since the funder will be reimbursed for its expenses before the remaining proceeds are distributed between the parties, the funded party will end up bearing a large portion of the additional fee itself, even in the case that the proceedings against the debtor are won.

39 Section 91 para. 1 of the German Code of Civil Procedure (Zivilprozessordnung).
40 Section 91 para. 2 sentence 1 of the German Code of Civil Procedure (Zivilprozessordnung); Schulz, in: Münchener Kommentar zur Zivilprozessordnung, 5. Edition 2016, Section 91 ZPO para. 61. The mechanism just described also means that the legal fees for which the other side will potentially have to be reimbursed can be calculated up front in German statutory proceedings (based on claim value).
In arbitration proceedings in which German procedural law is the law of the seat of the arbitration, in practice, the costs award will usually allow the successful party to recover the full legal fees paid to its counsel, even if calculated on an hourly basis; but only to the extent that the fees were reasonable, which will be reviewed on a case-by-case basis by the tribunal rendering the costs award. While it is also conceivable that an arbitral tribunal might decide that the legal fees to be reimbursed should be capped in accordance with the statutory fees stipulated in the Law on the Remuneration of Lawyers (considering German law is the law of the seat of the arbitration), in practice, this will happen only very rarely.

VI THE YEAR IN REVIEW

The past year has seen some change in the German market for third party funding. While the period 2016 to 2018 saw both new major participants entering the German market and funders introducing new products to the German market, several of the key events most talked about in the German third party funding scene in the past year were international events outside the German market, or concerned the procedural framework for civil litigation in Germany as a whole rather than specifically the business of funders.

News on the German market for third party funders is still predominantly centred on the effects of the introduction of the model declaratory action to the German Code of Civil Procedure in 2018. As at September 2019, about 430,000 claimants have registered their claim in the model declaratory action filed against Volkswagen AG in connection with the diesel investigations. However, the German media have also reported extensively on the weaknesses of the new instrument, most notably the fact that only certain consumer and similar organisations can file a model claim of this kind, and that only declaratory relief can be sought.

For its business year 2018, the major German funder Foris AG reported a decrease of its effective return per share, but stated that this was due to two unscheduled depreciations, including a re-evaluation of the book value of Foris AG’s subsidiary ‘Go Ahead’ (which offers shelf companies and is not active in case funding). Conversely, Foris AG stated that in the year 2018, the economic situation of its funding activities had actually materially improved,

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since the total number of funded cases had increased considerably. More specifically, Foris AG reported that its acquired option volume,\(^{49}\) which Foris AG defines as its theoretical total maximum (future) revenue share in all funded cases combined, was actually 10 times as high in 2018 as the amount for 2017; considering that a funded case has typically required three to four years to resolve, this means that Foris AG's revenue would increase in the future.\(^{50}\)

In early 2019, a new litigation funder, Profin, was created. As at September 2019, Profin places special emphasis on funding claims filed against automobile manufacturers in the wake of the diesel investigations, but states that it also offers funding for other claims.

In February 2019, the funder Nivalion AG (with offices in Switzerland and Germany) reported that it focuses on, inter alia, Germany and the Nordic countries, as well as other continental European regions.

In a widely reported decision of the German Federal Court in late 2018,\(^{51}\) the Court decided that third party funding in actions for confiscation of profits pursuant to Section 10 of the German Act Against Unfair Competition\(^{52}\) was inadmissible. The Court based its decision on the notion that the legislature had intentionally limited the organisations able to file a claim of this kind to consumer and similar organisations, which was incompatible with claims filed on the basis of financial motives such as those of a litigation funder. The Court rendered this decision despite the fact that the German Federal Office of Justice\(^{53}\) had approved the funding agreement.

In a decision of the District Court Stuttgart in February 2019\(^{54}\) in litigation following in the wake of the 'Trucks Cartel'\(^{55}\) decision of the European Commission of 19 July 2016, the Court decided on a case where the original creditors of the alleged antitrust damage claims had assigned the claims to a special purpose vehicle, which then initiated and led the proceedings against the defendant (a major international manufacturer of trucks) in its own name. The funding agreement did not provide for any purchase price for the assignment of the claims, but instead stipulated that the original creditors would receive 60 per cent of the proceeds from the litigation. However, the special purpose vehicle had not been registered as a provider of legal services within the meaning of the German Legal Services Act\(^{56}\) and the Court rejected the claim as inadmissible, because the articles of association of the special purpose vehicle were legally invalid pursuant to Paragraph 134 of the German Civil Code; the Court stated that this was due to the claimant offering legal services without being authorised to do so, which violated the German Legal Services Act. The Stuttgart District Court's decision follows similar earlier decisions of the German Federal Court,\(^{57}\) but it was still widely discussed in the litigation funding scene, because the case exemplifies once again

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49 Akquiriertes Optionsvolumen.  
50 cf. the annual report of the funder Foris AG for the year 2018 (Geschäftsbericht der Foris AG zum 31. Dezember 2018) in German language, pages 10–11.  
51 German Federal Court (Bundesgerichtshof), Decision dated 13 September 2018, Case I ZR 26/17.  
52 Gesetz gegen den unlauteren Wettbewerb.  
53 Bundesamt für Justiz.  
54 District Court Stuttgart (Landgericht Stuttgart), Decision dated 18 February 2019, Case 30 O 72/18.  
55 ‘Lkw-Kartell’.  
56 Rechtsdienstleistungsgesetz.  
57 German Federal Court (Bundesgerichtshof), Decision dated 11 June 2013, Case II ZR 246/11; German Federal Court (Bundesgerichtshof), Decision dated 15 February 2017, Case IV ZR 373/13.
that the assignment of claims of multiple creditors to a special purpose vehicle for a more
effective legal pursuit of claims is subject to several important restrictions in the German
jurisdiction, and these continue to be a challenge for funders and legal tech companies alike.

VII  CONCLUSIONS AND OUTLOOK

Even though the German market for third party funding is relatively mature and developed,
the legal qualification of third party funding agreements is still subject to debate. The same
can be said about the question of whether a funding agreement can be subject to judicial
review on the basis of the provisions of German law regarding general terms and conditions.
Both points may in some cases lead to a degree of uncertainty when assessing the validity of
a certain provision in a funding agreement.

However, it should be noted that the regulatory framework regarding third party
funding agreements in German law is relatively non-restrictive. German law does not know
special regulations specifically addressing third party funding agreements and does not know
doctrines like the common law doctrines of champerty and maintenance.

German lawyers are, in principle, not allowed to agree success fees with their clients;
exceptions exist, inter alia, in cases in which the client would otherwise not be able to enforce
or defend his or her rights in a proper manner for personal financial reasons, but these
exceptions are handled in a strict way by the courts. However, there is no limitation regarding
success fees for the funder in a third party funding agreement under German law, which is
why German funding agreements in almost all cases stipulate a success fee for the funder.

The standard contracts of the largest German funders mostly contain relatively
similar clauses.

Typically, the funder will cover all costs of the proceedings, including the adverse party’s
cost, but excluding internal costs of the funded party such as travel fees for representatives of
the funded party. However, in the case of German state court litigation proceedings, since the
legal counsel fees recoverable from the other side are capped at the statutory fees stipulated in
the Law on the Remuneration of Lawyers, the portion of the legal counsel fees of the funded
party that exceeds the statutory fees stipulated in the Law on the Remuneration of Lawyers
cannot be recovered from the other side, even in the case of success in the claim proceedings.
Thus, the funder who initially bears these fees will first recover these amounts as recoverable
costs directly from the proceeds before the remaining proceeds are, in a second step,
distributed between the funder and the funded party following the agreed ratio. Thus, the
funded party will end up bearing a large portion of the legal fees that exceed the statutory fees
in cases in which the claim is successful. In arbitration proceedings, however, the situation is
different as the fees for the funded party’s legal counsel can typically already be fully recovered
from the other side (provided the fees were reasonable).

Typically, German funding agreements will provide for a cession of the claim
(assignment of the claim to the funder), but only in the form of a (silent) cession for purposes
of security and not in the sense of a full monetisation and full and final purchase of the claim.
The latter, an immediate monetisation of a claim, is a relatively new phenomenon on the
German market.

From the practical standpoint of the legal counsel, the provisions in the funding
agreement containing the description of the claim and the related facts and available evidence,
as well as the related disclosures are very important, because if it should later surface that the
funded party did not disclose important facts that it was aware of, not only may the funder
terminate the agreement, the funded party will potentially even be liable for damages. Also particularly important are the provisions containing the termination rights of the funder and the provisions that stipulate the legal consequences for the situation that only one of the parties to the funding agreement votes in favour of agreeing a proposed settlement with the adverse party (the debtor).

It is likely (and desirable) that the German courts will at some point in the future provide a more detailed assessment regarding the views that have been voiced in Germany’s legal literature on the legal qualification of third party funding agreements and its implication for the legal framework applicable to such agreements. Currently, there are no indications for upcoming legislation specifically addressing third party funding agreements.
I MARKET OVERVIEW

While other common law systems have for years abolished the common law doctrines of champerty and maintenance, Hong Kong has, to date, held on to these two doctrines and, as a result, has arguably lagged behind in its development of a third party funding regime. It was only in 2017 that Hong Kong opened up arbitration and mediation to third party funding, legalising actions that would previously have attracted the tortious or criminal liability of champerty or maintenance. Apart from some narrow exceptions, the rules for court litigation, which might be able to benefit from third party funding, have largely remained unchanged: any third party funding in court proceedings may still attract the potential tortious, or even criminal, liability of champerty or maintenance.

The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017 (the Amendment Ordinance) was passed by the Legislative Council on 14 June 2017. Most parts of the legislation came into force on 23 June 2017, legalising third party funding in arbitration and mediation in Hong Kong. The remaining parts of the Amendment Ordinance (apart from Section 4 of the Amendment Ordinance) came into effect on 1 February 2019 and, on the same date, the Hong Kong Government published the Code of Practice of Third Party Funding of Arbitration (the Code).

To facilitate these welcome developments, the Hong Kong International Arbitration Centre published a new version of its Administered Arbitration Rules in 2018 (the HKIAC Rules). These amended Rules came into force on 1 November 2018, expressly recognising third party funders and funding agreements.

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2 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (the Amendment Ordinance).


II LEGAL AND REGULATORY FRAMEWORK

Under Hong Kong's own mini constitution, the Basic Law, all the laws previously in force in Hong Kong before the handover have been maintained unless they contravened the Basic Law or have subsequently been amended by the legislature. Accordingly, Hong Kong inherited the common law principles that existed before the handover, including the maintenance and champerty doctrines.

Maintenance is 'directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse'.\(^5\) Champerty has been described as 'a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute'.\(^6\)

While the United Kingdom has abolished the torts and crimes of maintenance (unless unlawful) and champerty, Hong Kong has chosen to preserve these two doctrines. As a result of which, Hong Kong had a long-standing general ban (with limited exceptions) on third party funding in litigation.

i Third party funding in court litigation

Third party funding in the court litigation context, apart from the three express exceptions mentioned below, will still attract potential tortious or criminal liability. The Amendment Ordinance, discussed further below, only allows for third party funding in arbitration and mediation to be exempted from criminal and tortious liability.

Courts are aware of the cost of litigation and the need to make court access available to all. Cases have developed exceptions to the doctrines of champerty and maintenance, allowing third party funding in litigation in three narrow areas: (1) where the third party has a legitimate common interest in the litigation; (2) where there are access-to-justice considerations; and (3) in insolvency proceedings.\(^7\)

In the first exception, certain relationships already pre-existing between the claimant and the would-be third party funder, where the funder has legitimate interest in the action such as groups or associations funding their members’ actions, are open to third party funding. The second exception, access to justice, is one recognised judicially to help claimants who have meritorious claims but do not have the resources to fund litigation services. The Supplementary Legal Aid Scheme in Hong Kong is a major actor in this area, helping potential claimants who lack funds to seek justice. Finally, in insolvency proceedings, there are a handful of cases pushing the boundaries on the ban against third party funding in the insolvency proceedings context. The case of *Akai Holdings Ltd (in compulsory liquidation) & Ors v. Ho Wing On Christopher & Ors*\(^8\) is one of the earlier cases where liquidators received court approval for third party funders to fund the insolvency proceedings. The court of first instance decision in *Re Cyberworks Audio Video Technology Ltd*\(^9\) further confirmed that a party can seek third

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9 [2010] 2 HKLRD 1137.
party funding to fund proceedings in insolvency cases. There is also case law suggesting that the Hong Kong courts will allow for litigation funding in the insolvency context where there is a ‘legitimate commercial purpose’ (Re Po Yuen (Tös) Machine Factory Ltd).\textsuperscript{10}

However, apart from the three categories discussed above, there has been no indication at all from the Hong Kong courts that third party funding can be allowed in other areas of court litigation. On the contrary, the Hong Kong Court of First Instance in \textit{Raafat Imam v. Life (China) Co Ltd}\textsuperscript{11} refused to expand the exceptions to other areas. The Court stated that since the plaintiff was essentially seeking a declaration of non-criminality from a civil court and failed to show that his case fell into the category of exceptional cases, it would be inappropriate for the Court to approve the plaintiff’s third party funding agreement.\textsuperscript{12}

\section*{ii Third party funding in arbitration}

Unlike in litigation, judicial attitudes towards third party funding in arbitration have been and continue to be more open. Prior to the statutory amendment to the Arbitration Ordinance, the courts did not come to a definitive view on whether champerty and maintenance actually apply to arbitration: Kaplan J in \textit{Cannonway Consultants Limited v. Kenworth Engineering Limited}\textsuperscript{13} has said that third party funding is allowed in arbitration. However, in \textit{Unruh v. Seeway}, the Court of Final Appeal expressly left open the question on whether maintenance and champerty should be applied to arbitration in Hong Kong,\textsuperscript{14} thereby casting doubt as to whether third party funding is appropriate in arbitration. The Court of Final Appeal stated expressly that this is an issue that requires ‘serious legislative attention’.\textsuperscript{15}

As stated above, legislative attention was first given to this issue when the Commission began its consultation in 2013. Following the consultation, the Commission came up with a set of recommendations for the Legislative Council, and subsequently the Legislative Council passed the Amendment Ordinance to amend various provisions in the Arbitration Ordinance and the Mediation Ordinance on 14 June 2017. Most of the amendments to the Arbitration Ordinance (and the Mediation Ordinance as discussed below) came into operation on 23 June 2017, with the remaining amendments with respect to arbitration coming into effect on 1 February 2019.

The main change ushered in by the Amendment Ordinance is a declaration that third party funding is allowed in arbitration, including proceedings before emergency arbitrators and ancillary court proceedings.\textsuperscript{16} The Amendment Ordinance defines third party funding of arbitration to mean a ‘provision of arbitration funding for an arbitration (1) under a funding agreement; (2) to a funded party; (3) by a third party funder; and (4) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement’.\textsuperscript{17} A third party funder is someone ‘(a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b) who does not have an interest recognized by law in the arbitration other than

\begin{itemize}
  \item \textsuperscript{10} [2012] 2 HKLRD 752.
  \item \textsuperscript{11} [2018] HKCFI 1852.
  \item \textsuperscript{12} ibid. [98].
  \item \textsuperscript{13} [1995] 2 HKLR 475.
  \item \textsuperscript{14} \textit{Unruh} (n.4) [123].
  \item \textsuperscript{15} \textit{Unruh} (n.4) [119].
  \item \textsuperscript{16} Amendment Ordinance, Sections 98K and 98 L.
  \item \textsuperscript{17} Arbitration Ordinance Cap 609, Sections 98F and 98G (the Arbitration Ordinance).
\end{itemize}
under the funding agreement’. With the remaining parts of the amendments having come into effect, it is now clear that third party funding of arbitration is not prohibited by the civil and criminal common law doctrines of maintenance and champerty.

To accommodate the legalisation of third party funding for arbitration, the Hong Kong International Arbitration Centre introduced the amendments to the HKIAC Rules on 1 November 2018. The changes were initially proposed on 11 July 2018 for public consultation. The revised HKIAC Rules expressly recognise third party funders and in particular, require a funded party to disclose promptly the existence of a funding agreement, the identity of the funder and any subsequent changes to this information. These requirements supplement the provisions in Division 5 of the Arbitration Ordinance. The HKIAC Rules also expressly permit an arbitral tribunal to consider any third party funding arrangement in fixing and apportioning the costs of arbitration. Importantly, a funded party is allowed to disclose arbitration-related information to its existing and potential funders.

### Third party funding in mediation

The Commission also recommended that third party funding be allowed in mediation and the Amendment Ordinance amends the Mediation Ordinance to allow for third party funding in mediation.

Part 3 of the Amendment Ordinance provides that the provisions for third party funding in arbitration apply equally to mediation with some slight amendments, thereby expanding third party funding to both mediation and arbitration equally.

However, while the provisions relating to arbitration under the Amendment Ordinance are now in force, Section 4 of the Amendment Ordinance, which relates to amending the Mediation Ordinance, is not yet in force at the time of writing. This has been postponed and will be brought into force following further deliberation by the Steering Committee on Mediation, on a date to be appointed by the Secretary of Justice.

### Self-regulation of third party funding

During the consultation process, the Commission indicated that it envisioned a code of practice being issued by a body under the Arbitration Ordinance to promote best practice in the initial three-year period. This is a common approach in Hong Kong to ensure

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18 Arbitration Ordinance, Sections 98F and 98J(1)(a) and (b).
21 HKIAC Rules, Article 44.
22 HKIAC Rules, Article 34.4.
23 HKIAC Rules, Article 45.3(e).
25 Amendment Ordinance, Section 1(3)(b).
27 Arbitration Ordinance, Section 98P.
accountability among the relevant industries. This also reflects the trend in other common law jurisdictions that a ‘light touch’ or self-regulating approach towards third party funding in arbitration is often preferred.

On 7 December 2018, the Code was issued, expressly setting out the practices and standards with which third party funders of arbitration are ordinarily expected to comply. Prior to the execution of a funding agreement, the Code requires the third party funder (including each of the third party funder’s subsidiaries and associated entities and investment advisers acting as its agents) to ensure its promotional materials are not misleading and to take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice before entering into the funding agreement. According to the Code, the third party is subject to duties to maintain capital adequacy requirements (1) to pay all debts when they become due and payable; and (2) to cover aggregate funding liabilities under all its funding agreements for a minimum period of 36 months. The third party must also maintain access to a minimum of HK$20 million of capital.

The Code also states that the third party funder must undertake that (1) the third party funder will not seek to influence the funded party or the funded party’s legal representative to give control or conduct of the arbitration or mediation to the third party funder except to the extent permitted by law; and (2) the third party funder will not take any steps that cause or are likely to cause the funded party’s legal representative to act in breach of professional duties, addressing the issue mentioned by Stone J in Akai Holdings Ltd v. Ho Wing On Christopher.

The Code also includes a dispute resolution mechanism for disputes over the funding agreement, a complaints procedure and a requirement for an annual return. The Code is not formal legislation and so failure to comply with the Code will not attract any legal consequences. However, the Amendment Ordinance does give the Code some teeth: while failure to comply does not make a person liable to civil or criminal liabilities, it can be used as evidence in court and may be taken into account in court proceedings if it is relevant to the matter at hand. The Code should be read in conjunction with the Arbitration Ordinance.

29 Code, para. 2.1.
30 Code, paras. 2.2 and 2.3.
31 Code, para. 2.5(1).
32 Code, para. 2.5(2).
33 Code, para. 2.9.
34 [2009] HKCU 172. Stone J expressed the criticism that, in practice, funders often appear to exercise more control over proceedings than is proper.
35 Code, paras. 2.17–2.19.
36 Amendment Ordinance, Section 98S(1).
37 Amendment Ordinance, Section 98S(2).
Contingency fee rules

Unlike other jurisdictions, Hong Kong law does not permit Hong Kong solicitors or barristers to charge conditional or contingency fees. While the Commission conducted a consultation on conditional fees in 2005, it concluded that reform in this area was unnecessary, as the Commission was of the view that it would be against the public interest to allow Hong Kong lawyers to charge conditional fees and contingency fees.

A solicitor, barrister or registered foreign lawyer seeking to be a third party funder in an arbitration where he or she is serving, will serve or has previously served as counsel to a party, may be committing the crime and tort of champerty or maintenance. It leaves open the possibility of Hong Kong law firms that do not represent any party in arbitration being third party funders.

The Amendment Ordinance does make clear that third party funding is not available to lawyers acting for parties in the arbitration but it does not prohibit providers of legal services or persons practising law from being third party funders.

III STRUCTURING THE AGREEMENT

The Amendment Ordinance does not specify any particular requirements as to the funding agreement, but defines a funding agreement to mean ‘an agreement for third party funding of arbitration that is (a) in writing; (b) made between a funded party and a third party funder; and (c) made on or after the commencement date of Division 3’ (namely 1 February 2019).

The Code requires that a third party funder must set out and explain clearly in the funding agreement all the key features, risks and terms of the proposed funding, provide a Hong Kong address for service, and set out the name and contact details of the advisory body responsible for monitoring and reviewing the operation of third party funding. While the inclusion of such terms is not compulsory, it is seen as best practice to include those terms as they are incorporated in the Code. Notably, the Code came into effect prior to Division 3 and applies to any funding agreement commenced or entered into on or after 7 December 2018.

The Code also requires the funding agreement to state whether a third party funder can terminate the funding agreement when it ‘(1) reasonably ceases to be satisfied about the merits of the arbitration; (2) reasonably believes that there has been a material adverse change of prospects to the funded party’s success in the arbitration or recovery on success; or (3) reasonably believes that the funded party has committed a material breach of the funding agreement’. The funding agreement must provide that if the third party funder terminates the funding agreement, the third party funder is to remain liable for all funding obligations accrued to the date of termination, unless the termination is due to a material breach.

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38 Law Reform Commission Report, para 3.36; Legal Practitioners Ordinance Cap 159 Section 64(1); Law Society of Hong Kong, Guide to Professional Conduct Vol. 1, Rule 4.17; Bar Association, Code of Conduct, para. 124.
39 Amendment Ordinance, Section 98F and Section 98O.
40 Amendment Ordinance, Section 98H.
41 Code, para. 2.3.
42 Code, para. 2.13.
43 Code, para. 2.15.
IV DISCLOSURE

i Disclosure to third party funders

Arbitration proceedings in Hong Kong generally abide by strict confidentiality rules. Section 18 of the Arbitration Ordinance prohibits any disclosure of information relating to the existence of any arbitration proceedings and any subsequent awards made pursuant to the arbitration proceedings. However, with the development of a third party funding regime for arbitration, there is a need to balance the right to confidentiality of the party not seeking third party funding and the need of information for the third party funder. Section 98T of the Amendment Ordinance carves out an exception to the confidentiality obligation and allows disclosure by a party to another person for the purpose of having or seeking third party funding from the person.44

Section 98T provides that despite the restriction under Section 18, a funded party can communicate information relating to the arbitral proceedings to a third party funder and the subsequent awards made for the purpose of having or seeking funding. However, no information may be further communicated unless the information is made ‘to protect a legal right or interest and enforce or challenge an arbitration award’,45 ‘to any government body, regulatory body, court or tribunal and the person is obliged by law to make the communication’46 or ‘to a professional adviser of the person for the purpose of obtaining advice in connection with the third party funding or arbitration’.47 The Code reaffirms the duty for the third party funders to observe the confidentiality of the arbitration.48 Similarly, the HKIAC Rules also allow parties to make necessary publication and disclosure to a person for the purposes of having or seeking third party funding for arbitration.49

ii Disclosure to the other party

To protect the party not seeking funding, the funded party must give written notice of the fact that a funding agreement has been made and the identity of the third party funder.50 The notice must be given on or before the commencement of the arbitration, or, for a funding agreement made after the commencement of the arbitration, within 15 days of the funding agreement being made.51 Notice must be given to all parties to the arbitration and the arbitral tribunal (or an emergency arbitrator if there is one).52 Where there is no arbitral tribunal set up at the time the notice is served, the notice must instead be given to the arbitration tribunal immediately after one is set up for the arbitration.53 There should also be disclosure about the end of third party funding.54 The Code reaffirms the funded party’s duty to disclose information about the third party funding arrangement.55

44 Amendment Ordinance, Section 98U.
45 Amendment Ordinance, Section 98T(2)(a).
46 Amendment Ordinance, Section 98T(2)(b).
47 Amendment Ordinance, Section 98T(2)(c).
48 Code, para. 2.8.
49 HKIAC Rules, Article 45.4(e).
50 Amendment Ordinance, Section 98U(1).
51 Amendment Ordinance, Section 98U(2).
52 Amendment Ordinance, Section 98U(3).
53 Amendment Ordinance, Section 98U(4).
54 Amendment Ordinance, Section 98V.
55 Code, paras. 2.10–2.11.
The HKIAC Rules also require parties to disclose (1) the existence of any funding agreement; and (2) the identity of the third party, as soon as practicable after the funding agreement is made, or in the Notice of Arbitration or the Answer to the Notice of Arbitration, whichever event is earlier.\(^\text{56}\)

V \hspace{1em} COSTS

i \hspace{1em} Adverse costs against third party funders

Adverse costs are generally ‘an order of a Tribunal or of a Court requiring a party to an arbitration or court proceedings to pay all or some of the costs of the other party or parties involved’\(^\text{57}\) and the Commission has recommended that it was not necessary to put in a power to award adverse costs against third party funders in the draft of the Amendment Ordinance. By contrast, there are already such powers available in the litigation regime.\(^\text{58}\)

The Commission has expressed that it thinks in principle an arbitral tribunal should be given power under the Arbitration Ordinance to award costs against a third party funder where the appropriate circumstances arise and after due process is given. However, there are technical issues that need to be overcome, such as how a third party funder can be ordered to pay adverse costs if it is not a party to the arbitration agreement between the parties. Since arbitration agreements operate on the basis of consent from all the relevant parties, it would be difficult to order a third party who is not a party to the arbitration agreement to pay costs. Because of this technical issue, as well as the prematurity of this development in arbitration, the Commission decided not to incorporate any such power in the Amendment Ordinance,\(^\text{59}\) but will review this matter after the initial three years of the Amendment Ordinance coming into effect. After the initial three-year period of implementation, the advisory body will consider whether it is appropriate to empower the arbitrator or tribunal to make such orders.\(^\text{60}\) It is worth noting that the government responded in agreement with the Commission’s view and mentioned that it would look into the developments made by the international arbitration community such as the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration.\(^\text{61}\)

Although the Amendment Ordinance does not give arbitral tribunals powers to make adverse costs orders against third party funders, the Code requires that a funding agreement state whether (and if so, to what extent) a third party funder, a subsidiary or an associated entity should be liable to the funded party to: ‘(1) meet any liability for adverse costs; (2) pay any premium (including insurance premium tax) to obtain costs insurance; (3) provide security for costs; and (4) meet any other financial liability.’\(^\text{62}\)

\(^{56}\) HKIAC Rules, Article 44.


\(^{58}\) Rules of the High Court Cap 4A, Ord 62, r 6A; High Court Ordinance Cap 4, Sections 52A and 52B.

\(^{59}\) Law Reform Commission Report, paras. 2.11(1) and 7.31(1).

\(^{60}\) Law Reform Commission Report, paras. 2.11(2) and 7.31(2).


\(^{62}\) Code, para. 2.12.
In contrast to the Amendment Ordinance, the HKIAC Rules move further and give arbitral tribunals power to take into account any third party funding arrangement in apportioning all or part of the costs of the arbitration.63

ii Security for adverse costs against third party funders
The Commission’s view is that a power to make an order awarding security for adverse costs is not necessary for arbitrators. The main reason is that the arbitrator or tribunal already has the power under the existing Arbitration Ordinance regime to make an order for security for costs against a party, thereby offering adequate protection to the respondent.64 Hong Kong’s third party funding regime will therefore place a greater emphasis on the funding agreement, which, as detailed above, should cover the responsibility for adverse costs, as well as security for costs.

VI THE YEAR IN REVIEW
There have been a number of new developments in third party funding in Hong Kong in 2018–2019. On one hand, the courts have continued to refuse to expand the existing exceptions to allow third party funding in other areas of court litigation. On the other hand, however, the regulatory regime for third party funding in arbitration has developed in the direction taken by other leading arbitration seats, such as London and regional rival Singapore. First, the issuance of the Code is a further step in opening up the availability of third party funding in arbitration and mediation. The Code clearly sets out the standards and practices with which third party funders are expected to comply in carrying on activities in connection with third party funding of arbitration in Hong Kong. Second, the Hong Kong International Arbitration Centre acknowledged the need to accommodate the legalisation of third party funding arrangements and hence published the new HKIAC Rules in late 2018. The HKIAC Rules recognise third party funders and third party funding agreements. They set out disclosure standards for parties seeking third party funding and also give arbitral tribunals the power to order costs against third party funders.

The final rollout by the Secretary of Justice of Division 3 and Division 5 of the Arbitration Ordinance in February 2019 saw all the Commission’s recommendations and Legislative Council’s adoptions in relation to arbitration come fully into force.

VII CONCLUSIONS AND OUTLOOK
While third party funding in Hong Kong has seen new developments this year, at present, there is limited guidance on how third party funding has and will continue to affect arbitration in Hong Kong. Guidance from the Commission, the Amendment Ordinance and the Code indicates that Hong Kong envisions its third party funding regime as being similar to that of other arbitration-friendly jurisdictions. The developments in 2018–2019 were important for Hong Kong to maintain its competitiveness as a leading arbitral seat. The intention behind these developments is to see more claims pursued with Hong Kong arbitration as the desired dispute resolution mechanism.

63 HKIAC Rules, Article 34.4.
64 Law Reform Commission Report, paras. 2.11(3) and 8.15.
Third party funding is self-regulated, with disclosure requirements imposed on the third party funder and the funded party. There are carve-outs made against normal confidentiality requirements in arbitration. In addition to the statutory amendments and the HKIAC Rules, the best practice set out in the Code will hopefully provide transparency and clarity for funded parties.

Some things, however, will not change, such as the general ban on solicitors and barristers charging contingency or conditional fees. The future of the powers to award adverse costs and security for adverse costs remains to be seen. At present, the Commission does not see a need to empower any arbitrator or tribunal with the ability to award security for adverse costs, but, after the initial trial period, it may empower arbitrators or tribunals to do so.

The future for arbitration practitioners remains bright, and the future for third party funders, especially for third party funding law firms, is even brighter. While this area is relatively new, there will undoubtedly be many further developments in Hong Kong that will present various new opportunities to local and overseas arbitration professionals. It is hoped that, with the new developments now materialising in the legalisation of third party litigation in arbitration, Hong Kong will be able to capture the increasing demand for arbitration services in Asia.
I MARKET OVERVIEW

Third-party funding in litigation or arbitration proceedings in Indonesia is still undeveloped and unregulated, despite its significant popularity and wide usage in neighbouring countries (e.g., Singapore and Australia) in recent years. Although this can be one of the ways for disputing parties to manage financial risks, Indonesia is currently not that familiar with the practice of using third-party funding.

To date, there are no publicly available judicial precedents in Indonesian courts in relation to the use of third-party funding. There are also no associations or companies in Indonesia recorded as having a formal presence in the business of providing third-party funding for litigation or arbitration. The use of third-party funding is rare and not yet regarded as a commercial activity.

The opportunities and market for third-party funding in Indonesia are currently considered to be wide open, and yet it can be a high-risk prospect at the same time. In the absence of official statistics or media coverage on third-party funding in Indonesia, and as a way to fill this information gap in relation to these activities, this chapter will discuss the possible use of third-party funding for both court litigation and arbitration proceedings seated in Indonesia by drawing comparisons with practices in other countries.

II LEGAL AND REGULATORY FRAMEWORK

Third-party funders, as we know, provide funding for disputing parties (usually the plaintiffs or claimants) in litigation or arbitration proceedings to pursue meritorious claims in return for a share of the proceeds recovered in the proceedings or some other financial benefit. The underlying reasons for using a third-party funder go beyond impecuniosity and may include spreading risk throughout the course of the proceedings, as well as minimising cash flow disruptions. Use of such funding could even enable a party to pursue multiple claims at the same time.

Third-party funders conduct thorough due diligence on the potential funded party, its lawyer (if any) and the case, as they would naturally only be interested in financing claims that are likely to succeed. Further, proper assessment could align interests and strategies between the third-party funder, the funded party and the attorneys involved. For example,
it could be done to prevent a scenario where a plaintiff or claimant inflates the amount of damages claimed to maximise recovery since a portion of the proceeds would be provided to the third-party funder.

In numerous common law countries, encouraging litigation and funding another party’s claim for profit are prohibited by common law doctrines of maintenance and champerty. Hence, activities of this kind are considered torts, or prohibited, to counter frivolous or vexatious cases.

Indonesia does not have any regulatory framework on third-party funding for litigation or arbitration proceedings; it is neither permitted nor prohibited in Indonesia. Indonesian law also does not recognise the concept of champerty and maintenance.2

To provide some context, Indonesia is a civil law jurisdiction, which inherited the civil law system from the Netherlands. The sources of law under the Indonesian legal system are: (1) statutory law; (2) custom or unwritten law; (3) treaty; (4) precedent; and (5) legal doctrine.

As a rule of thumb, disputing parties are responsible for paying their own fees for litigation or arbitration in Indonesia. There are no disclosure obligations or restrictions on how parties finance their litigation or arbitration proceedings.

Under Law No. 18 Year 2003 regarding Advocates (the Advocates Law) and the Code of Ethics for Indonesian advocates, clients and advocates are free to agree on the arrangement or type of fees. There are also no regulations that prohibit a third party from paying the costs of another party’s case. The appointed judges or arbitrators are typically not in the position to question the source of the parties’ funds. Thus, there are no restrictions on third-party funding from a legal or ethical perspective.

**Courts**

The conduct and procedures of Indonesian general courts are regulated under: Law No. 2 Year 1986 regarding General Courts as last amended by Law No. 49 Year 2009; Law No. 48 Year 2009 regarding Judicial Power; and Law No. 14 Year 1985 regarding the Supreme Court as last amended by Law No. 3 Year 2009, and its implementing regulations. None of these existing regulations contain any prohibition on third-party funding.

Indonesian civil procedure law, which governs procedures for the examination of a statement of claim through proceedings until the enforcement of the relevant court’s decision, is also silent on financing of litigation. As a general rule, a party to a dispute cannot claim the costs for litigation from the opposing party.

Although other South East Asia countries such as Singapore3 and Hong Kong4 have expressly permitted the use of third-party funding, the scope of proceedings is limited to arbitration proceedings and only court proceedings that are related to such arbitration (e.g., mediation and enforcement proceedings).

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2 As a comparison, since 2017 Singapore has had a clear framework on third-party funding by passing legislation that abolished the common law torts of champerty and maintenance, and confirmed that third-party funding is not contrary to public policy or illegal where it is (1) provided by eligible parties (whose principal business is the funding of dispute resolution proceedings, and with paid-up capital of not less than US$5 million); and (2) in prescribed proceedings (i.e., Singapore-seated international arbitration proceedings and court litigation and mediation arising out of such proceedings).

3 The Civil Law (Amendment) Bill (Bill No. 38/2016) as the Civil Law (Amendment) Act 2017 (the Act) together with the Civil Law (Third Party Funding) Regulations 2017 (the Regulations).

4 The Arbitration and Mediation (Third Party Funding) (Amendment) Ordinance in 2017.
Despite these limitations, the Singapore High Court in 2018 had permitted third-party funding for liquidators on investigations and potential claims related to unpaid bonds against the Singapore subsidiaries of PT Trikomsel Oke Tbk, an Indonesian telecommunications company. Similarly, there are also a number of insolvency matters in Hong Kong that are financed by third-party funders. Furthermore, in practice, the use of third-party funding for claims arising out of insolvency is progressively increasing in Singapore and Hong Kong. Some of the most prominent third-party funding companies that have expanded their commercial presence to Singapore and Hong Kong include IMF Bentham, Burford Capital Ltd and Woodsford Litigation Funding.

Against that background, Indonesia could adapt its litigation landscape by weighing the possibility of expressly permitting the use of a third-party funding for civil proceedings and insolvency proceedings (i.e., suspension of payment and bankruptcy). In the latter proceedings, third-party funders are in a better position to predict the likelihood of the creditor’s success because the evidence required to prove the debtor’s bad debt would be straightforward under the applicable law. In any case, third-party funders could better anticipate, and thereby mitigate, the possible risks during both proceedings and the enforcement stage by engaging experienced Indonesian advocates, who understand the Indonesian legal framework.

On a related note, the opportunities for third-party funders to tap into the Indonesian market through the banking sector would also bear further assessment. The high number of non-performing loans (NPLs) is a critical issue in the Indonesian banking sector. In practice, banks could choose to sell their NPLs to third parties (e.g., companies) as a relatively quick solution to their credit problems and to clean up their balance sheets. In a sense, this could be viewed as an investment opportunity for third-party funders, because it could be repaid as an obligation or any payment form agreed upon by the parties. The terms of the third-party funding agreement might also specify the transfer mechanism of the NPL, which would most likely be in the form of a transfer of receivables (cession).

Other countries in Asia, namely Japan, South Korea and Thailand, share the same position as Indonesia in that there is no regulatory framework prohibiting the use of third-party funding. From a broader perspective, the practice of third-party funding is slowly growing in other civil law countries (which also have no regulatory framework), such as Brazil, Egypt and Ukraine.

Arbitration

In Indonesia, there are currently various arbitration institutions that administer arbitration proceedings in the country, but the relevant arbitration rules are silent on the use of third-party funding.

The use of third-party funding is more prevalent in international arbitration, particularly in light of the substantially higher costs of such arbitration. In view of this, in maintaining their reputation as arbitration hubs, Singapore and Hong Kong have stayed abreast of developments by amending their regulatory frameworks to accommodate third-party funding.

Both Hong Kong and Singapore require the third-party funder to have a sufficient amount of capital. The 2018 Administered Arbitration Rules of the Hong Kong International Arbitration Centre (the HKIAC Rules) provide for the disclosure of third-party funding,
Indonesia

namely its existence and the identity of the funder.\(^5\) Furthermore, arbitral tribunals are also permitted to take into account any third-party funding arrangement in determining all or part of the costs of the arbitration. The Singapore International Arbitration Centre (SIAC) issued a practice note in 2017\(^6\) requiring arbitrators to disclose any direct or indirect relationship with third-party funders that could impact their impartiality or independence. Under the HKIAC Rules and both the SIAC’s Arbitration Rules and its Investment Arbitration Rules (effective from 2017 (the SIAC IA Rules 2017)),\(^7\) arbitrators are empowered to order disclosure on the existence of third-party funding arrangement and identity of the funder.

A few steps behind Singapore and Hong Kong is Malaysia, which had proposed amending its present Arbitration Act 2005 (last amended in 2011) to similarly regulate the use of third-party funding for international arbitration and related court proceedings. However, lawyers are still currently prohibited from receiving contingency fees in Malaysia.

In contrast, arbitration in Indonesia is regulated under Law No. 30 Year 1999 regarding Arbitration and Alternative Dispute Resolution (the Arbitration Law), which contains no restrictions, or guidance, on the use of third-party funding for arbitration proceedings or for the enforcement of arbitral awards in Indonesia.

A third-party funder indisputably would not be a party to the arbitration agreement and would have no direct interest in the arbitration. In terms of coverage of funds, presumably the third-party funder would pay for the arbitral costs of the arbitration institution, the honorarium of the arbitrators, and the adverse costs (if any). Separately, the third-party funder would also cover the claimant’s legal costs. Subsequently, there would be no correlation between the funds allocated to the arbitral tribunal and the advocates through the third-party funding agreement.

As an attempt to become a preferred seat of arbitration, Indonesia could consider permitting the use of third-party funding through a possible amendment of the Arbitration Law. In any event, Indonesian legislators must bear in mind that the realisation of the proceeds from an arbitral award is dependent upon the award’s enforceability in the courts.

Indonesia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the context of enforcement, there are no statutory provisions under Indonesian law that prohibit or preclude an arbitral award creditor from having a funding arrangement with a third-party funder to finance the enforcement of an arbitral award in Indonesia.

If Indonesia were to enact legislation on third-party funding, it is likely that Indonesia, as a new market, would adopt a similar approach to Hong Kong and Singapore in specifying the scope of disclosure and qualification requirements for third-party funders, to maintain efficiency and the fairness of proceedings.

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5 Article 44, Article 4.3 letter (i), Article 5.1 letter (g), Article 27.6 (i), and Schedule 4 (Emergency Arbitration Procedures) of the Administered Arbitration Rules of the Hong Kong International Arbitration Centre.

6 SIAC Practice Note PN – 01/17 (31 March 2017) Administered Cases under the Arbitration Rules of the Singapore International Arbitration Centre on Arbitration Conduct in Cases involving External Funding.

7 Rule 24 letter (l) of the SIAC IA Rules.
iii Contingency fees

Contingency fee arrangements are not prohibited in Indonesia. Parties are permitted to engage advocates in Indonesia on a contingency basis and for honorarium payments to be based on the success of the case. Article 21 Paragraph 1 of the Advocates Law simply states that advocates are entitled to receive honorariums in return for legal services provided to their clients. The Code of Ethics provides that, in determining the fees, advocates or lawyers must take into consideration the client’s financial ability, and that unnecessary expenses must not be imposed on the clients.

Legally speaking, advocates and their clients are free to agree on their preferred payment terms by taking into account the circumstances and complexity of the case. The types of payment may be in the form of a contingency fee arrangement, hourly fee, lump sum or other arrangement. Hence, third-party funding for dispute resolution based solely on success fees should be permissible.

III STRUCTURING THE AGREEMENT

Third-party funding agreements for dispute resolution actions are neither regulated nor prohibited under Indonesian law. Indonesian contract law upholds the principles of freedom of contract and party autonomy. Funders and claimants are free to determine and structure the funding agreement, including choosing the governing law of the agreement.

Under Indonesian law, Article 1320 of the Indonesian Civil Code provides that a valid and binding agreement comes into existence when it meets all the following requirements:

- consent from the parties to be bound;
- sufficient legal capacity of the parties to enter into the agreement;
- a specific object; and
- a valid cause (not against applicable laws and regulations).

Based on the above, in principle, funders and claimants are free to structure the agreement as a purchase of the claim or financing of the claim. Notably, however, Indonesian law acknowledges that only the arbitral award or judgment creditor (the winning party in fact) has the right to enforce the arbitral award or judgment against the arbitral award or judgment debtor. Therefore, although the funder and the claimants or judgment or award creditor can contractually agree (between them) that the funder has an entitlement to the claim (either by way of purchase of the claim or assignment), the funder cannot have any right or legal standing (to act on behalf of the arbitral award or judgment creditor) to enforce the arbitral award or judgment in Indonesia.

In the absence of a regulatory framework, the parties have a relatively wide discretion in determining the terms and arrangements in the third-party funding agreement. The funder and the funded party may enter into an agreement that, among other things, specifies the former’s financial reward for funding the litigation or arbitration, and sets further details of other terms and conditions, including exclusivity, withdrawal, confidentiality, pricing, settlement and liability for costs.

Furthermore, from the perspective of compliance with mandatory provisions under Indonesian law, note that Article 31 of Indonesian Law No. 24 Year 2009 on Flag, Language and Symbol of State and National Anthem (the Indonesian Language Law) stipulates that the Indonesian language must be used in a contract involving an Indonesian party, and if the agreement or contract involves a foreign party, then the agreement or contract
may also be made in the national language of the foreign party or in the English language. The requirement is only for a contract to be made in the Bahasa Indonesia language. There is nothing that prevents a contract involving a foreign party from also being made in the English language (bilingual), and the English-language version having priority over the Indonesian-language version.

The requirements under the Indonesian Language Law cannot be ignored when a party enters into a contract with an Indonesian counterparty, even if the contract is not governed by Indonesian law. This applies to any type of contract, including third-party funding agreements. The provisions under the Indonesian Language Law would be particularly relevant during the enforcement stage wherein compliance with applicable laws and regulations would be examined. Moreover, it is also prudent to have the Bahasa Indonesia language version to ensure that the third-party funding agreement is not vulnerable to challenges by any other party; for example, it is possible for a party to file a petition requesting that an Indonesian court declare the third-party agreement null and void for violating the Indonesian Language Law.

To protect the interest of the plaintiff or claimant, third-party funding agreements must set clear boundaries on the limits of the third-party funder’s exercise of control over the strategic decisions that may be influenced by its interest in protecting its investment. At the same time, these boundaries could also protect the interest of the attorney in maintaining its position as the adviser and strategist for the case. To protect the interest of the funder, the third-party funding agreement could include a provision that requires the funded party to disclose information regarding its position, or other information that could impact the outcome of the case, whenever necessary.

IV DISCLOSURE

In addition to addressing the question of the permissibility of third-party funding, a question equally worthy of being addressed concerns the procedural means to ensure that the use of third-party funding is not compromised by conflicts of interest. Nowadays, it is common for individuals to switch hats as arbitrators and attorneys, especially given the relatively exclusive nature of the international arbitration community.

There is no requirement for disclosure of third-party funding (neither the existence of the agreement nor the funder’s identity) in both court and arbitration proceedings in Indonesia. However, judges and arbitrators are expected to be fully independent and impartial.

Indonesian law does not recognise the notion of discovery (commonly known as ‘fishing expeditions’), whereby a party may require the other party to produce any document in their possession. Hence, a party would not be able to compel this type of discovery to reveal the existence of a third-party funding agreement. Instead, the parties must present evidence that is relevant and material to substantiate their respective claims before the courts or arbitration tribunals.

For guidance on conflicts of interest in arbitration proceedings, parties and arbitrators may refer to the 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration. Most Indonesian legal practitioners are familiar with and respect this non-binding instrument.
V COSTS

With regards to the recoverability of legal costs, Indonesia does not adopt the ‘costs follow the event’ principle, whereby the losing party would be ordered to bear the winning party’s legal costs. Indonesian law does not expressly prohibit the inclusion of legal costs as a component of losses that could be recovered, and similarly there is no prohibition on claiming for compensation of legal costs. In practice, however, Indonesian courts tend to reject claims for compensation of legal costs, reasoning that it is not mandatory under Indonesian procedural law for parties to appoint an advocate for litigation or arbitration. Moreover, there is no regulatory provision for security for costs in Indonesia.

VI THE YEAR IN REVIEW

Based on the Supreme Court’s Annual Report in 2018, there were 5,514,996 cases submitted to Indonesian general courts, of which 5,507,953 were decided and 4,372 were revoked. The number of cases in Indonesian courts has shown an increasing trend. Overall, in 2018 the number of cases received by Indonesian courts has increased by 13.27 per cent since 2017 and the number of cases decided increased by 14.21 per cent in the same year. This presents a relatively large pool of cases for the third-party funding market.

Based on the most recent data published by the Indonesian National Board of Arbitration, the number of arbitration cases submitted since its establishment in 1977 shows an exponential increase. For instance, the number of cases tripled within 10 years: there were 215 cases up until 2006 and a total of 728 cases by 2016. Within the period 2014–2016, 42 per cent, or the majority, of cases submitted were completed within 90 days. To date, there have been three arbitral awards that are publicly known to have been annulled by the Supreme Court, in 2001, 2002 and 2007.

Cases in Indonesia, depending on their complexity, could be pursued through a number of available legal remedies, through appeals at the authorised High Court and cassation by the Supreme Court, or even other extraordinary legal remedies pursued against final and binding judgments. These tiered proceedings arguably could create more room for third-party funding. Nevertheless, this could extend the duration and substantial costs incurred from additional court proceedings, creating uncertainty for the retained third-party funder. With that in mind, any third-party agreement should also provide clear limitations on the scope of funding to prevent unwanted losses.

Additionally, the Supreme Court recently issued Regulation No. 1 Year 2019 regarding the Electronic Administration of Cases and Proceedings in Courts dated 6 August 2019. This new Regulation widens the scope of the previous Regulation No. 3 Year 2018 dated 4 April 2018, which covered electronic registration (including electronic filling of claims and electronic payment of court fees) and electronic summonses. Based on the technical guidelines in Supreme Court Decision No. 129/KMA/SK/VIII/2019 dated 13 August 2019, court proceedings can now be conducted electronically, including the exchange of court documents between disputing parties, and the pronouncement of judgments.

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8 2018 Annual Report of the Supreme Court of the Republic of Indonesia, pp. 72-74.
9 The Indonesian National Board of Arbitration (BANI) Brochure 2017, Figure 2: Case Submission, p. 2.
10 BANI Brochure 2017, Figure 1: Completion Time, p. 2.
11 BANI Brochure 2017, Figure 5: Successful Awards and Challenges, p. 6.
Indonesia’s devotion to the development of an electronic court system with the premise of faster and more effective court proceedings could be perceived as a unique selling point for third-party funders.

On 4 March 2019, Indonesia and Australia signed the Australia-Indonesia Comprehensive Economic Partnership Agreement (AI-CEPA) to dismantle trade barriers and expand investment. Chapter 14 of the AI-CEPA regarding investment acknowledges the increasing trend of using third-party funding for dispute resolution, and the significance of disclosure, which can be seen in Article 14.32:

1. If there is third party funding, the disputing investor benefiting from it shall notify to the disputing Party and to the tribunal, or where the tribunal is not established, to the Appointing Authority of the tribunal, the name and address of the third party funder.
2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as such agreement is concluded or the donation or grant is made.
3. If a disputing investor fails to disclose third party funding under this Article, the tribunal may order the suspension or termination of the proceedings.

This Article obliges investors to disclose any third-party funding, at the time of the claim, either to the Secretary General of the International Centre for Settlement of Investment Disputes (ICSID) or the Secretary General of the Permanent Court of Arbitration (for ICSID arbitration or UNCITRAL arbitration respectively) as the chosen forums.

Indonesia, as an ICSID contracting state that had faced seven claims as respondent,12 proposed an amendment of the ICSID Arbitration Rules to include a provision on the disclosure of third-party funding for nationals of a contracting state. In particular, Indonesia proposed that a disclosure obligation be imposed only in relation to investors (claimants) to prevent frivolous claims, noting that host states are unable to initiate a claim against investors who are nationals of another contracting state. Furthermore, Indonesia proposed that the scope of disclosure should reveal the details of the third-party funding arrangement, not merely its existence. The rationale behind this would be to allow identification of the entity with ownership and control over the claims and the likelihood of the third-party funder paying adverse costs if this were ordered against the claimant; this enhancement of the scope of disclosure would also be relevant to a consideration of an investment arbitration award’s substantial consequences for the public of the state.

In this context, and despite the absence of a third-party funding regime of its own, Indonesia has displayed extensive understanding of the mechanisms and potential risks of third-party funding.

VII CONCLUSIONS AND OUTLOOK

It is still unknown whether Indonesia will follow in the bold footsteps of neighbouring countries such as Singapore and Australia and decide to expressly permit third-party funding. In the event that Indonesia decides to enact legislation on third-party funding in the near future, one could presume that the country’s participation in investment agreements is one of the driving factors that would prompt such a decision.

For now, the prevailing regulatory conditions in Indonesia seem to be more supportive than discouraging in welcoming individuals or entities to develop the third-party funding market. The absence of a legal regime provides a sense of flexibility, allowing parties to pick and choose the terms of their third-party funding agreements, as long as these are in accordance with applicable Indonesian laws and regulations.

Third-party funders will, of course, take into account a handful of factors before making their decision to fund a plaintiff or a claimant in a dispute. Specifically, they are interested in being well informed on the merits of the claim to assess the likelihood of success, the opposing party’s ability to meet its claims and, undoubtedly, whether the country’s legal system is supportive and its ability to enforce judgments and arbitral awards. The last of these factors would be significant as funders will require certainty on the return of their investments from the proceeds arising from the judgments or arbitral awards.

That being the case, Indonesia is also tasked with consistently increasing the effectiveness and efficiency of its courts as part of its efforts in attracting investments in the form of third-party funding.
I MARKET OVERVIEW

The Italian legal system is still unfamiliar with litigation funding. Currently, there are neither national rules nor standards in this respect. Similarly, no cases involving litigation funding in Italy have yet been published at the time of writing. As a result, legal scholars have not yet properly addressed this phenomenon. Therefore, proceedings supported by a funder in Italy are still extremely rare.

The absence of prior experience concerning litigation funding on the Italian market is mainly attributable to the origin of the third party funding practice, which lies in the common law system. Moreover, Italian court proceedings have traditionally been considered time-consuming, and therefore inconsistent with the evident goals sought by investors. Furthermore, contingency fee arrangements between client and lawyer have traditionally been forbidden under the Italian legal system. As the recently passed review of the Italian Code of Professional Conduct for Lawyers currently stands, Italian lawyers cannot accept a share of the asset that is challenged in the case. Finally, there is a general lack of awareness on the part of potential users (i.e., prospective claimants) of litigation funding and of the opportunities connected to it. It flows from the above that over the past few years Italy has not provided the perfect environment to nurture litigation funding.

Against this background, the Italian legal system has recently undergone a radical change. Several initiatives have been implemented to increase the efficiency of the Italian legal system and speed up the average length of proceedings (see, for instance, Decree of the President of the Republic No. 123/2001 – Regulation regarding the use of IT and telematics instruments in civil proceedings, administrative proceedings and in proceedings before the Court of Audit, as amended by Law Decree No. 44/2011; Law No. 228/2012 (the 2013 budget law); and Decree No. 90/2014, which sets out, inter alia, that judicial proceedings shall be handled entirely electronically from the filing of pleadings and applications to the service and notification by the courts of hearings, documents and decisions). The result of all these changes is that the quality of Italian court proceedings is now closer to the EU average.

Other initiatives have enhanced access to justice in multiparty actions. First, the new Article 140 bis of the Consumer Code contemplates an opting-in collective actions for damages arising out of liability in connection with mass contracts, torts, unlawful commercial practice or anticompetitive behaviour or antitrust infringements). In addition, in implementing EU Directive 2014/104/EU, Legislative Decree No. 3/2017, introduced

1 Federico Banti is a partner and Eva de Götzen is an associate at Osborne Clarke.
2 Contingency fees were first allowed pursuant to Law Decree No. 223/2006. See Section II.
3 See Article 13, Law No. 247/2012, pactum de quota litis or contingency fee.
a series of new procedural rules that considerably simplified the possibility of obtaining compensation for damage caused by infringements of EU or national competition laws, by addressing both private claims and class actions.

Further elements favourable to third party litigation funding in Italy may be:

a the increasing number of Italian insolvency proceedings in relation to high-value claims for which claimants do not have sufficient resources to start proceedings or pursue the claims to an economically efficient conclusion. In this respect, it cannot be overlooked that, under the recently passed ‘Business Crisis and Insolvency Code’, the insolvency trustee will be expected not only to draw up a list of all possible claims to be brought and related costs, but also to bring related actions in the following six months. Furthermore, under the Code, the trustee will also be entitled to terminate the judicial winding-up in the event of ongoing litigation, as it is now possible to effect a supplementary division of assets after the termination of the procedure and once the court proceedings have reached a final judgment;

b the fact that any judgment delivered by the lower courts is immediately enforceable in Italy, regardless of the fact that it has been appealed; and

c only a very small percentage of possible claims are eligible for financial assistance funded by the government (i.e., legal aid) under the Italian legal system. Currently, a legal aid applicant must have, together with that of cohabiting dependant family members, a total annual gross taxable income lower than €11,528.41.5

All the above-mentioned circumstances are playing a role in making Italy more attractive and suitable for litigation funding, by de facto increasing the number of parties entitled to bring a high-value claim. Thus third party funding may well find its market in Italy. This is borne out by the fact that several professional litigation funders at international level have reportedly shown interest in financing claims in Italy. Similarly, in pursuing their high-value claims abroad, some liquidators in Italian insolvency proceedings have started evaluating the merits of requesting support from litigation funders. Finally, a few Italian litigation funders have started operating in the domestic market in the past year.

II LEGAL AND REGULATORY FRAMEWORK

Although Italy still lacks any specific procedural and substantive rules governing litigation funding, the Italian legal system does not forbid the practice. Funding solutions aimed at removing the financial risk associated with litigation are in principle consistent with the Italian legal system, and do not conflict with the body of principles that underpin the Italian legal systems (public policy, as identified over time by national case law, which encompasses, inter alia, Article 6 of the European Convention on Human Rights). It is therefore worth investigating how and to what extent this practice could be approached from the Italian standpoint.

Generally speaking, the Italian legal system expressly governs a number of contracts, and party autonomy is the cornerstone of this system. More precisely, under the first paragraph of Article 1322 of the Italian Civil Code, parties are allowed to create their own contractual framework, always within the limits imposed by the law. In other words, the Italian legal

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5 See Article 74 of Presidential Decree No. 115 dated 30 May 2002.
system entitles parties to create a bespoke contractual relationship for their commercial transaction, by adapting the ‘typical’ contracts ruled by Italian law to the interests at stake and the relevant circumstances.

According to Paragraph 2 of Article 1322, parties are free to enter into other kinds of agreement that differ from those provided by Italian law, provided that such non-traditional agreements (atypical contracts) seek interests worthy of protection under Italian law. In other words, the parties are free to deviate from the typical forms of contract specifically provided for in law and to validly enter into atypical contracts, provided that the aims pursued by the parties deserve protection.6

As is well known, third party litigation funding means that a funder – otherwise unconnected with a legal action – bears all or part of a claimant’s legal costs (including those of lawyers and qualified experts). Traditionally, the costs and complexity of certain cases can discourage many meritorious claimants from seeking redress before the national courts. Instead, litigation funding aims at enabling claimants with an excellent claim to bring litigation that might otherwise stall, as well as avoiding unfair settlements because of an intervening lack of funds. As such, the funder supports a party to be involved in litigation who wishes to remove any of the costs or risks associated with litigation, or both. If the case succeeds, the funder recovers the costs it has borne and takes an additional agreed success fee. If the case fails, the funder loses its investment and is not entitled to receive any payment. In essence, the aim of the litigation funding is twofold: (1) moving to the funder the cost and (financial) risk involved in pursuing justice; and (2) enhancing access to justice for meritorious claimants.

It follows that a litigation funding agreement may comply with Article 1322 of the Italian Civil Code.

To the extent that a litigation funding relationship may turn out to be an effective means of easing the path to litigation, by both redressing the balance of legal claims between litigating parties in favour of disempowered parties and mitigating the detrimental effect of lengthy or complex claims on cash flow regardless of the financial position of the concerned claimant, this relationship can be all the more consistent with the Italian legal system.

As far as characterisation is concerned, a litigation funding agreement should be regarded as an atypical contract, because no rules are provided by the Italian legal system in this respect. The authors believe that the relationship should be considered synallagmatic, as the parties issue reciprocal undertakings, and aleatory, as one of the actions must be performed only on the occurrence of an uncertain event.

A relationship that is extremely close to the litigation funding is the ‘association in participation’ contract – which is similar to a joint venture – which is a contract whereby the associate attributes to the associating party the share of the proceeds of its business or the proceeds from the conduct of one of more deals in consideration for a specific contribution from the other associating party.7 Third parties acquire rights and obligations only towards the associating party.8 The management of the business is only carried out by the associating party and the contract must provide what type of rights of control are granted to the associate. Unless otherwise agreed, the associate shares in the losses to the same extent as its shares

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6 Articles 1322 and 1325 et seq., Italian Civil Code.
7 Article 2549, Italian Civil Code.
8 Article 2552, Italian Civil Code.
in the profits, but the losses that affect the associate cannot exceed the value of its initial contribution.\footnote{Article 2553, Italian Civil Code.} By way of analogy, the funder could be considered as an associate and the claimant as the associating party.

A litigation funding agreement cannot be characterised as a loan agreement under the Italian legal system. According to Article 1813 of the Italian Civil Code, a loan agreement is the contract through which the lender delivers to the borrower a specific amount of money or other fungible assets and the borrower undertakes to return the same amount of money or the same amount of fungible assets of the same quality, plus interest (as consideration). In particular, in principle there has to be a qualitative and quantitative identity between the delivered assets and those that are returned. Moreover, according to Article 1814 of the Italian Civil Code, the borrower acquires the ownership of the assets given as a loan, although this is subject to the payment of interest arising during the period of the loan that he or she will be obliged to pay even when, because of force majeure, he or she cannot actually use the sum lent. The key aspects of third party funding that make it different to a loan are:

\begin{itemize}
  \item[a] the claimant is not obliged to pay anything if the case fails; and
  \item[b] in the event of success, the return will be a multiple or a percentage of the award or settlement (the return is never equal to the investment made by the fund).
\end{itemize}

Therefore, a funder is similar to an investor rather than a financing entity. In fact, the return on the investment is uncertain and is paid out of damages or out-of-court settlements.

All the foregoing considerations further plead for the admissibility of litigation funding in Italy.

A litigation funding agreement should also be acceptable under the Italian legal system from the contingency fee standpoint. According to Paragraph 1(a) of Article 2 of Law Decree No. 223/2006, on condition that the lawsuit was successful or settled favourably out of court, the successful lawyer could be paid a percentage of the damages recovered by its client instead of, or as a discount on, a traditional fee; this Article overcame the former prohibition on contingency fee agreements set out by Italian law to safeguard the independence and impartiality of the role of the lawyer. Therefore, from 2006 onwards, such agreements were allowed in Italy. As proof of this, in the context of bankruptcy proceedings, Italian lawyers were expressly allowed to be paid with a percentage of the recovery as an alternative to the application of the tariff system provided for by the law, provided that the claim aimed at collecting sums or other assets.\footnote{See the consolidated version of Milan Court Circular No. 2/2010, bankruptcy section, dated 23 March 2010 and integrated pursuant to Circular No. 4/2010 dated 29 September 2010, point H.15(o).} However, as mentioned above, the changes introduced to the Italian Code of Professional Conduct for Lawyers by Law No. 247/2012 changed this situation and prohibited contingency fee arrangements while allowing success fees. Consequently, since 2012 counsel have been unable to accept a return share of the recovery or out-of-court settlement instead of fees for services should the action succeed, since an agreement of this kind could amount to a breach of professional duty or ethical rules of professional conduct. As a result, Italian counsel are expected to request fees to be calculated in relation to both the amount in dispute and the tariff system provided by the law, although room is left in relation to success fees. However, third party funding is different from contingency fee arrangements,
as the funder is not a lawyer. Moreover, the relevant contract is entered into by the funder directly with the disputant and not with the lawyers. This leads us to conclude that a funder is not affected by any limit set by Italian law in relation to contingency fees.

Finally, it is worth adding that, notwithstanding the above-mentioned Law No. 247/2012, the Italian practice allows contingency fees to be limited to bankruptcy proceedings, provided that the contingency fee agreement is entered into by and between the lawyer and the bankrupt entity that does not have sufficient resources to start proceedings.

Nonetheless, other aspects may affect the admissibility of third party funding in Italy, such as the limits to the possibilities of a transfer of claim under the Italian legal system.

Notably, pursuant to Article 1260 of the Italian Civil Code, a creditor may assign any and all of its receivables without the debtor’s consent, subject to certain limitations deriving from the specific characteristics of the receivables or depending on the fact that the assignment is banned by national law. More precisely, under Article 1261 of the Italian Civil Code, a lawyer cannot be assigned a legal claim so as to seek a judgment in court. The same is true for judges, bailiffs, court officers and notaries. Therefore, to the extent that it is a different entity from a lawyer or law firm, a funder may be assigned a legal claim under Italian law without being affected by the limits set out therein.

However, according to case law of the lower courts concerning the exercise of an organised business purchasing damages claims in correlation with advancing the repair costs for vehicles damaged in road accidents, professional claims collection must be regarded as a ‘financial business’, thus falling within the meaning of Article 106 of the Consolidated Law on Banking. As a consequence, a claim assignee operating such a business would be expected to be expressly authorised by the Bank of Italy. Otherwise, if the assignee were not registered in the relevant roll held by the Bank of Italy and did not hold the relevant authorisations, the assignment of the claim would be null and void as it would be contrary to Italian mandatory rules. The Italian Supreme Court, however, has recently set aside the above-mentioned legal ruling of the lower courts, by stating that, according to Article 1260 et seq. of the Italian Civil Code, the claim for damages arising from a road accident can be assigned by the damaged party to the mechanic in payment for the repair works carried out. The assignment in question is lawful since it is not a financial transaction, merely a means of payment whereby the assignor pays for the mechanic’s services, which are carried out by the assignee (in this case, the mechanic).

This leads us to conclude that the Italian legal system leaves room for a funder to be assigned a legal claim by the claimant.

For the sake of completeness, it is worth adding that the Italian legal system allows the parties to choose the law applicable to a cross-border contract. Both the 1980 Rome Convention and Articles 3 and 9 of Regulation (EC) No. 593/2008 allow freedom of choice of the law governing a contract, provided that certain safeguards concerning weak parties (consumers, assureds, employees) are guaranteed and relevant overriding mandatory provisions are given effect. According to scholars, rules concerning financial activities can be regarded as overriding mandatory provisions. As a result, the principle of party autonomy is

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13 Article 1418 of the Italian Civil Code and Articles 106 and 132 of Italian Legislative Decree No. 385/1993.
expected to foster access to the Italian market by foreign funders, by allowing them to choose a law applicable to the third party agreement that is most familiar to the funder, provided that certain conditions are met.

III  STRUCTURING THE AGREEMENT

In the absence of any specific rules, no common practice has yet been developed in Italy.

Insofar as we are aware, the funder usually aims at entering into a litigation funding agreement directly with the claimants that is governed by the law and the jurisdiction of the funder state.

In cases where a litigation funding agreement is entered into before starting litigation, the effect of the contract (and therefore the undertaking to bear the costs and expenses of the proceedings) is subject to the conclusion of satisfactory due diligence. Generally speaking, the criteria for satisfactory due diligence are:

a  legal merits of the claim;
b  likelihood of success;
c  quantum of damages likely to be awarded (higher than a certain threshold amount);
d  accuracy of costs estimate;
e  claimant’s solvency; and
f  defendant’s solvency and prospects of recovering the damages awarded.

The main clauses of the contract relate to, inter alia:

a  particulars of the parties, among which are a funder’s financial ability to provide the pledged funding;
b  scope of the agreement, setting out the boundaries of the funder’s financial support;
c  conditions and obligations of the parties as to payment of the claimant’s legal costs;
d  the claimant’s duties as to the conduct of proceedings, including the duty to conduct the proceedings on his or her own, or to manage relations with the counsel;
e  consequences in the event of breach of the claimant’s duties, such as in cases where the claimant has a diminished interest in participating in the prosecution of the case;
f  duty of confidentiality towards third parties and possible impact of the relevant (procedural) law;
g  payment of the funder fee in the event of success in the proceedings or in the case of interim or partial recoveries (provision can also be made for the management of any settlement negotiations);
h  obligations of the funder in the event of counterclaims;
i  amounts to be received by the claimant;
j  parties’ obligations in the event of no success in the proceedings;
k  conditions for termination;
l  accrual of interest;
m  tax impact; and
n  the right to share (totally or partially) the risk with co-funders.

However, the final content of the contract will depend on the parties’ position and their reciprocal interests or need for protection in the case in question. For instance, a third party agreement may involve a weaker party, such as a consumer, and the funding agreement should therefore be tailored accordingly.
IV DISCLOSURE

To the extent that a litigation funding agreement implies the assignment (or transfer) of the intended claim from the possible claimant to the funder, thus enabling the latter to take an active role and bring a claim, it is the funder that has legal standing and its existence is by no means a secret for the counterparty.

Otherwise, if the litigation funding agreement does not imply a transfer in the ownership of a credit, with the role of the funder being relatively passive, there is no obligation to disclose the existence of the funder. Needless to say, in the absence of any obligation, funders prefer not to disclose to the market the existence of the funding agreement. Therefore, the existence and terms and conditions of a litigation funding agreement should be treated as confidential information by the parties and the appointed lawyers.

As the Italian procedural rules currently stand, there is no obligation to disclose the litigation funding agreement to file a claim or to appear before an Italian court. However, providing that certain requirements are met, an Italian judge can issue a disclosure order for any such agreement.

Notably, under Article 210 of the Italian Code of Civil Procedure (which regulates orders for the production of evidence or documents in proceedings by mirroring Article 118 of the same Code), upon the request of a party, the production of a document may be ordered at the discretion of a judge, provided that:

a its production will not cause serious harm to the party or the third party, and will not require them to violate any of the secrecy obligations provided in Articles 200 and 201 of the Italian Code of Civil Procedure (on professional and official secrecy);

b proof of the relevant fact cannot be obtained from any other source; and

c the order to produce a document relates to documents that are necessary or at least very important for the judge’s ability to decide the case.

Since it is most unlikely that a third party agreement would constitute a ‘necessary and essential’ element in proceedings financed by the fund concerned, it is equally unlikely that the above conditions would be met. Therefore, in circumstances such as these it seems reasonable to conclude that an order for exhibition of the funding agreement pursuant to Article 210 of the Italian Code of Civil Procedure would not be issued.

Likewise, in relation to arbitration proceedings, there is no general duty to disclose the existence of any litigation funding agreement. It also seems possible to exclude the risk, at least in principle, that a funder may influence the choice of the arbitrators. Therefore any disclosure obligations in that sense seem unlikely.

However, in light of the arbitrators’ obligations of impartiality and independence (in both national\textsuperscript{14} and international\textsuperscript{15} proceedings), the existence of a third party funding agreement might be relevant for the purpose of evaluating any possible conflicts of interest on the part of the arbitrators. Therefore, a duty to disclose may be raised in the context of such an evaluation.

\textsuperscript{14} See, for instance, Article 18 of the Regulations of the Milan Chamber of Arbitration.

\textsuperscript{15} Namely, the Internaional Bar Association Guidelines on Conflicts of Interest in International Arbitration.
V COSTS

The Italian procedural system is based on the loser-pays principle and according to Article 91 of the Italian Code of Civil Procedure (i.e., the judge orders the losing party to pay the legal fees and expenses of the successful party).

More precisely, these costs, which encompass court administrative expenses and lawyers’ fees, are calculated on a scale according to the amount in dispute. It goes without saying that this system can provide a high level of predictability for all parties to litigation.

To calculate lawyers’ fees, Ministerial Decree No. 55/2014 (the Ministerial Decree) applies. The Ministerial Decree sets out parameters and criteria for the calculation of fees based on, inter alia, the value of the proceedings, their complexity and the number of parties involved. For instance, by applying the scale contained in the Ministerial Decree, if the value of the case is €10 billion, the lawyers’ fees are capped at €150,303. If the value of the case is €20 billion, the lawyers’ fees are capped at €195,397.

This amount should be added to the court administrative costs and legal charges (subject to value added tax, which is currently 22 per cent) together with a mandatory contribution (currently 4 per cent) to the Italian social security pension fund for lawyers.

As litigation funding in Italy is still underdeveloped, no issues have yet arisen or been addressed by courts concerning how the costs associated with a litigation funding agreement would be treated under Article 91 of the Italian Code of Civil Procedure.

VI CONCLUSIONS AND OUTLOOK

In light of the foregoing considerations, it is reasonable to conclude that, even though it is still hard to say whether and when third party funding will be successful in Italy, currently there are no rules preventing it. Accordingly, the Italian legal system leaves room for third party funding.

In this connection, the third party funding may cover several fields. Firstly, bankruptcy proceedings. The funder’s support might allow and enhance bankruptcy proceedings to pursue a complex and time-consuming claim without any risk of incurring relevant costs that may reduce the (usually restricted) assets available to the creditors.

Another relevant field may be debt collection. For instance, bankrupt entities could sell debts for collection to third parties as part of the court-supervised bankruptcy process, so that the debt purchaser can pursue the debt collection process against debtors who failed to pay the due amount instead of the bankrupt entities.

Finally, funders may play a role in the area of antitrust claims. Most cartel damages claims are follow-on actions from a European Commission finding of liability. In this context, the funder may help claimants in overcoming obstacles to class actions, including the length and cost of the entire process and the risks related to the passing-on defence.

In essence, even though not yet common, third party funding may represent a shift towards increased access to justice, private enforcement of law and equality of arms in the Italian legal system.

Chapter 10

JAPAN

Daniel Allen and Yuko Kanamaru

I MARKET OVERVIEW

Japan is a frontier market for third party funding. With its massive economy and sophisticated financial sector, it is a sleeping giant. Uncertainty about the local regulatory position, coupled with relatively low rates of adversarial dispute settlement in the domestic courts, has caused it to be overlooked. But there is also deep, untapped potential.

Although contingency fee arrangements for attorney’s fees have long been a staple of the Japanese litigation market, third party funding of litigation had until recently seen virtually no use in Japan, with no publicly reported cases of third party funding ever having been used in domestic Japanese litigation or Japan-seated arbitration. However, that landscape has now begun to shift, with multiple major Japanese companies now working with Japanese lawyers on funded international investment treaty arbitration brought under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). That first step, alongside the recent opening of the Singapore and Hong Kong markets, has sparked considerable discussion in Japan about what might come next.

That said, the market remains partially gated by a lack of certainty as to whether and in what circumstances third party funding is permissible within Japan. While, unlike Singapore and Hong Kong, Japan is not encumbered by vestigial prohibitions in the mould of the common law doctrines of champerty and maintenance, the lack of explicit official approval of third party funding leads some to the view that its use might sometimes not be permissible. In particular, it is not currently clear to what degree the rules applicable to Japanese lawyers (and foreign lawyers in Japan) restrict their capacity to participate in funded cases and other activities relating to third party funding. Many are therefore reluctant to test the waters.

More generally, an important background feature of the Japanese market for third party funding is Japan’s relatively low costs for litigants and low levels of adversarial dispute settlement. These factors may have held back the development of Japan’s third party funding market. However, there is reason to believe that increased awareness of (and comfort with) third party funding might help to address some of the practical reasons why Japanese companies are more reluctant than others to seek vindication of their legal rights. While the reasons for Japan’s low rates of adversarial dispute settlement are complex and a full exploration would be beyond the scope of this chapter, these authors would posit that at least part of the explanation can be found in how Japanese companies evaluate potential risk in
legal disputes, and how they budget for legal expenditures. Third party funding may address these issues and therefore bring out beneficial change by helping Japanese companies to bring meritorious claims.

Despite Japan’s highly sophisticated financial sector, there are no Japanese third party funders active at the moment (operating inside or outside Japan). But there are numerous non-Japanese funders exploring the market and, as mentioned above, several are funding cases outside Japan for Japanese companies.

II LEGAL AND REGULATORY FRAMEWORK

As a threshold matter, the authors would like to emphasise that third party funding has recently become a topic of serious discussion within the Japanese legal community, in part because of recent developments in other Asian jurisdictions, such as Singapore and Hong Kong. In other cutting-edge areas of finance, such as cryptocurrency, Japanese regulators have not hesitated to regulate, both reactively and proactively. In light of this experience, the possibility of material new regulatory developments in this space should be considered to be high. Potential users of third party funding in Japan (be they funders, litigants, or lawyers) should be mindful of the possibility that the information provided in this chapter is subject to change.

With that caveat, our view is that it is likely that any regulatory changes in Japan with respect to third party funding would tend to make it more clear that third party funding is permitted, and to clarify whatever exceptions there may be to that general position. While it is not impossible that significant regulatory restrictions to third party funding could be put in place, there is no current indication that Japanese authorities are minded to take that approach.

We turn then to the current state of play.

By way of background, lawyers and clients in Japan generally enjoy flexibility in structuring payment for legal services. Contingency fee structures are permissible in Japan and see frequent use. The few restrictions on contingency fees that do exist are not significant. In principle, the amount of a lawyer’s payment can be derived from the amount recovered by the litigant in a successful litigation.

That said, Japanese rules on contingency fee arrangements have been determined by the Japan Federation of Bar Associations as a self-regulatory apparatus. Regulation of third party funding, on the other hand, would probably be carried out by law or regulation. It cannot be expected that the approach taken by the Japanese government would draw significant guidance from the Japanese Bar’s approach to self-regulation of the legal profession.

At present, then, the situation remains unclear, with no rules aimed at addressing third party funding – no law explicitly permits it, but no law directly prohibits it. Below we discuss, in turn, several provisions of Japanese law that may bear on the topic of third party funding.

The first of these is Article 73 of the Attorneys Act, which provides that: ‘No person shall engage in the business of obtaining the rights of others by assignment and enforcing such rights through lawsuits, mediation, conciliation or any other method.’

The key feature of this provision reducing its applicability to the case of third party funding is that it focuses narrowly on assignments of rights, which are then enforced by the assignee, in the assignee’s own capacity. As typical third party funding arrangements do not
involve an assignment of rights, instead imposing obligations with respect to the disposition of funds received as proceeds, it is unlikely that a typical third party funding agreement would be understood to violate this provision.

That said, some atypical investment structures could run into difficulty with this provision. Parties to funding agreements in Japan should be careful to avoid arrangements that appear in name or in substance to be claim assignments, such as by including limitations on the amount of control that the funder may exert over the claim. It should be emphasised that, whatever the scope of its restriction might be, Article 73 of the Attorneys Act applies not just to domestic court proceedings, but also ‘any other method’ of enforcing ‘rights’. Arbitration would be one such method.

Another provision directly relevant to the business of third party funding is Article 72 of the Attorney Act, which provides that:

No person other than an attorney or a Legal Professional Corporation may, for the purpose of obtaining compensation, engage in the business of providing legal advice or representation, handling arbitration matters, aiding in conciliation, or providing other legal services in connection with any lawsuits, non-contentious cases, or objections, requesting for re-examination, appeals and other petitions against administrative agencies, etc., or other general legal services, or acting as an intermediary in such matters; provided, however, that the foregoing shall not apply if otherwise specified in this Act or other laws.

This provision is also unlikely to prohibit the core business activities of third party funders, as it is generally the case that third party funding agreements strictly delineate the respective roles of legal counsel and funder, with the latter clearly identified as not acting as legal adviser or representative. Moreover, third party funders rarely engage in activities that could be interpreted as the provision of legal advice or services to the claimholder. However, the restrictions of this provision should be kept in mind and funders should avoid expressing views on claims or potential claims in a way that could be construed as legal advice.

Looking more closely at the wording of this Article, the term ‘other legal services’, could be interpreted to encompass third party funding. Because this term appears in a list that also includes ‘providing legal advice or representation’, it could be seen to refer to a broader set of activities – read broadly enough, that set might extend to financial services that relate to litigation. However, the inclusion in both instances of the adjective ‘legal’ makes that reading challenging. It is highly likely that a court would limit the scope of this term to services substantially similar to the provision of legal advice or representation, and not to extend it to financial services that have a connection to legal proceedings.

A further provision relevant to the business of third party funding is Article 10 of the Trust Act, which provides that: ‘No Trust is allowed to be created for the primary purpose of having another person conduct any procedural act.’

This provision prohibits the assignment of rights for trust only for the purpose of handling litigation. As discussed above in the context of Article 73 of the Attorneys Act, this provision would appear not to apply to a typical investment structure not involving an assignment of rights.

Of course, we cannot avoid noting that our view that these provisions do not substantially restrict typical third party funding arrangements may not be universal.

However, it does not appear to be the case that there is any specific prohibition on a third party receiving, in exchange for providing the sole service of financial assistance with
legal costs, a fee calculated with reference to the amount of the eventual proceeds in the litigation. As stated above, it is not likely that Article 73 of the Attorneys Act would be read to include such a prohibition, as the narrow focus of Article 73 is to prevent those who are not legally qualified from charging fees for the types of services that can and should only be provided by those with legal qualifications.

As a matter of practice, the fact that multiple Japanese companies are using third party funding for ICSID claims means that, in each instance, several sophisticated parties with considerable interests at stake were able to reach a satisfactory arrangement. Moreover, while the validity of the agreements in those cases has not been tested in the Japanese courts, the revelation of their existence has not occasioned any official intervention from the Japanese authorities, and there does not seem to have emerged any view among Japanese legal professionals and commentators that the agreements might be invalid. Of course, the precise terms and conditions of those funding arrangements are not public, rendering this analysis speculative; for now, the most one can say is that there has been no blanket rejection of the concept of third party funding.

Beyond the funding relationship itself, one should consider the lawyer’s potential role in helping a client to enter into a third party funding arrangement. The more prudent view is that, under Article 72 of the Attorneys Act, lawyers in Japan are not permitted to accept fees for brokering third party funding deals (either from a client or from a funder). Otherwise, there do not appear to be restrictions on attorneys’ freedoms to assist in the arrangement of third party funding (such as by providing a client with a list of potential funders).

### III  STRUCTURING THE AGREEMENT

Third party funding arrangements can take a variety of forms and the legal instruments through which they are implemented are usually bespoke products of negotiation.

While, as discussed above, there are no general rules prohibiting third party funding as a concept, it is possible that certain types of contractual arrangements might not be acceptable from the perspective of Japanese law.

Most importantly, under Article 72 of the Attorney Act, lawyers are prohibited from sharing their fees with non-lawyers; it is therefore important that any third party funding deal be structured so as to maintain a distinction between the funder’s payment and the satisfaction of the fees due to legal counsel.

In a similar vein, Japan does have laws against usury. In general, under the Interest Rate Restriction Act, the maximum allowable rate for loans above ¥1 million is 15 per cent on an annual basis, with interest charged in excess of that rate to be considered void. Usury rules apply only to loans (or transactions that are, in substance, equivalent to loans). Moreover, moneylending is a highly regulated industry in Japan, with strict licensing requirements under the Money Lending Business Act. It is therefore important to structure the funding agreement so as not to create a secured loan, with the potential proceeds of a claim as mere collateral.

Stepping back from regulatory concerns, there are some practical considerations that should be borne in mind when negotiating funding arrangements in Japan, as compared to other jurisdictions.

First, Japanese companies can be unusually deliberate when making major decisions and, for most Japanese companies, the institution of adversarial proceedings is a particularly difficult decision to take. It would therefore be prudent to expect that a Japanese company
would need more time to decide whether to bring a claim than a company of similar size and sophistication elsewhere in the world. Funders that are keen to make investments in Japan should bear this point in mind.

Second, Japanese parties are accustomed to negotiated settlement of disputes, often in terms that focus on future opportunities rather than lump-sum cash payments. Moreover, Japanese dispute resolution proceedings (not only Japanese court litigation, but also domestic Japanese arbitration) often incorporate active intervention by the decision-maker to encourage the parties to reach a settlement of the dispute that can preserve a harmonious future relationship between them. For a funder seeking to invest in Japanese litigation or domestic arbitration, or even in an international arbitration claim to be brought by a Japanese company, it would be advisable to pay particularly close attention to the contractual provisions that govern what is to happen in the event of a settlement. At the same time, funders should be aware that Japanese companies are particularly averse to the idea of restrictions on their discretion to settle a case and may categorically resist the inclusion of such terms.

Third, where funders might consider portfolio arrangements with law firms (whereby law firms offer clients an effective contingency fee arrangement), lawyers based in Japan must be extremely cautious to avoid structures that could be interpreted as the sharing of fees for legal services between a law firm and non-lawyers, as that is clearly prohibited under Article 72 of the Attorneys Act. It may be permissible for lawyers based outside Japan to fund their offering of legal services to Japanese clients through a portfolio arrangement of this type, but care in structuring such an arrangement is also highly advisable in that context.

IV  DISCLOSURE

There are no specific rules requiring disclosure of funding agreements, as there are not yet any specific rules on third party funding more generally. Moreover, in Japanese litigation, there are no procedural rules that might otherwise require disclosure of fee arrangements. Nor is there any such rule in the Japanese Arbitration Law, or in the rules of the Japan Commercial Arbitration Association (currently Japan's most popular domestic arbitration institution).

Although lawyers have a duty of confidentiality, the concept of legal privilege does not exist in Japan. Courts have considerable powers to order disclosure of documents if they deem it necessary to do so. Having said that, fee arrangements between lawyer and client may not be subject to disclosure under these powers, as fee arrangements are seldom likely to be relevant to underlying litigation.

V  COSTS

The general rule in Japan is that parties bear their own costs. It would therefore be highly unusual for a party to be ordered to provide security for costs in Japanese court proceedings.

As the Japanese courts have not yet had occasion to examine the question of how the above analysis might differ if the losing party were to have used third party funding, no definitive answer is available. However, at present there is no reason to expect that special rules would apply.

The Japanese Arbitration Act closely tracks the UNCITRAL Model Law and does not include any special provisions relating to security for costs or that might otherwise lead to a different result in Japan-seated arbitration.
VI THE YEAR IN REVIEW

The past 12 months have seen the Japanese market for third party funding take several important steps forward. In particular, a major Japanese business daily featured an article on the use of third party funding by Japanese corporates, including favourable quotations from several well-known Japanese lawyers, as well as a third party litigation funder that is funding an active case. This article was especially notable in that it made public the fact that these Japanese lawyers were participating in funded ICSID cases.

In addition, several events that addressed the issue of third party funding were held during the course of the year and discussion of the topic among leading figures in the Japanese Bar has become commonplace. It is to be expected that the conversations beginning today will lead to concrete action to clarify the situation in the near future.

VII CONCLUSIONS AND OUTLOOK

There is reason to believe that third party funding has turned a corner in Japan. It is no longer a topic relegated to the fringe or addressed in hypothetical terms. Recent developments have demonstrated that third party funding is becoming a serious option for Japanese companies that are considering potential claims. While the principal focus for the development of the third party funding market in Japan remains foreign-seated international arbitration, it can be expected that increased familiarity with the concept and the processes involved will lead to increased consideration of its use in other applications.

Legally, while the position remains formally unclear, the most defensible view is that there is no blanket impediment to the use of third party funding in Japan. Some types of arrangements may be restricted, but the most common forms of arrangements used by third party funders are likely to be considered permissible. It is particularly important to avoid creating the appearance of a claim assignment and, as is the case in many jurisdictions, funders should remain careful to avoid appearing to offer legal services to litigants. Because of the general lack of legal infrastructure around third party funding, there are no specific rules regarding disclosure or adverse costs.

With the growing popularity of third party funding in Asia, and the growing conversation within Japan about the use of third party funding by Japanese companies and lawyers, it is likely that the topic soon will be addressed and clarified in an official way. These authors, however, are optimistic that the official response will be positive and that, once clarified, the market will be well-situated for further expansion.
I MARKET OVERVIEW

The Dutch market for third party litigation funding is developing rapidly. Still a relatively unknown phenomenon a few years ago, today many Dutch lawyers will tell you it is the flavour of the day. That being said, litigation finance in the Netherlands is still not nearly as common as it is in Australia or the United Kingdom. It is hard to determine potential market size for litigation funding based on publicly available figures but it seems safe to assume that litigation funding in the Netherlands is not yet halfway to reaching its full potential.

Based on the available information from other funders, published cases and our own experience, in terms of number of claims, consumers in the context of class actions and small and medium-sized companies (SMEs) lacking the means to litigate a bigger opponent are among the most frequent users of litigation finance in the Netherlands. Securities of companies going through some kind of turmoil of their own doing and complex financial products, such as investment insurance products and interest swaps, have been the focal point of a number of (partially) funded Dutch class actions. Another type of class action for which the Netherlands has proven to be a popular jurisdiction is follow-on damages claims in anti-cartel cases.

Owing to a large presence of international holding companies, the recognition of judgments across the European Union pursuant to Regulation (EU) No. 1215/2012 and a relatively effective class action settlement mechanism, the Netherlands has become a favoured jurisdiction for the litigation and settlement of securities class actions. A notable event in this arena took place on 13 July 2018, when the Court of Appeal of Amsterdam approved a €1.3 billion settlement between Ageas (formerly known as Fortis) and institutional and retail investor regarding claims stemming from Fortis’ 2007 acquisition of ABN AMRO Bank. Even more recently, the Amsterdam Court assumed jurisdiction in the Petrobras securities class action. US firms such as Bernstein Litowitz Berger & Grossmann and Grant Eisenhofer have had permanent feet on the ground in the Netherlands since Dutch courts appeared to be willing to approve US class action settlements for non-US investors in Converium in 2012.

1 Rein Philips is managing director and co-founder of Redbreast Associates NV.
2 There is no public data available on the actual use of litigation funding in the Netherlands, hence this overview is to a large extent based on the author’s subjective experience and analysis of relevant published events.
Dutch insolvency administrators and supervisory judges in insolvencies are only just starting to discover the benefits of litigation finance. Based on the widespread use of litigation finance in insolvency in countries such as Australia, Germany and the United Kingdom, and the obvious benefits that litigation finance offers to insolvent estates lacking the funds to prosecute valid claims, there is potential for further development in this area.

So far, there are no signs that general counsel and the chief finance officers of large Dutch companies are embracing litigation finance as an alternative form of corporate finance. The concept seems to be compelling: a company obtains non-recourse financing against its disputed claim portfolio that would otherwise be sitting dead on its balance sheet while the litigation expenses burden its working capital and profit margins. Depending on how the deal is structured, the financing provided by a litigation funder may be accounted for as income.

However, there are reasons why large corporations might be hesitant to explore this particular type of financing. First, in recent years large corporations have not suffered from a lack of capital supply from more common sources, whereas the concept of litigation finance is relatively new and untested. Another reason may be a natural inclination of large corporations to view litigation funders as potential opponents rather than as potential partners. A general counsel of a large company is more likely to hear about third party funding in the context of a funded action directed against his or her company or its peers, than as a helpful finance solution for its own business. In this context it is noteworthy that the American Chamber of Commerce, a powerful US lobby for big corporations, has set up office in the Netherlands to warn against the widening of the scope of Dutch class action legislation and, in its wake, the perceived threat third party funding poses to businesses that are on the receiving end of such actions.

Notable market participants

Liesker procesfinanciering, founded in 2011, has successfully introduced litigation finance to the broader public of private individuals and SMEs. Liesker procesfinanciering will finance claims starting from €150,000. In recent years it has successfully financed its growth through crowdfunding. Other litigation finance outfits with a similar focus have opened shops in the past few years, most notably Capaz.

Redbreast Litigation Finance, founded in 2015, finances claims exceeding a value of €5 million and focuses on commercial litigation, bankruptcy claims and, selectively, class actions. In addition to providing regular third party litigation finance to its clients, in some cases Redbreast will also take on a role as project manager and book builder.

Omnibridgeway is a firm that built an international reputation for its capability to enforce judgments and awards in difficult areas of the world long before the litigation finance boom. More recently, it has also been active in the funding of anti-cartel class actions and high-value litigation and arbitration.

Finally, a number of individuals, organisations and law firms have built a reputation for organising or conducting funded consumer class actions. To mention just a few here: Adriaan de Gier of De Gier Business Law, Pieter Lijesen and ConsumentenClaim.
II LEGAL AND REGULATORY FRAMEWORK

i Funding of individual claims

Dutch law does not put particular restrictions on litigation funding or the degree of control that a third party litigation funder can assume in the funded lawsuit. Common law doctrines of maintenance and champerty did not find their way into the Dutch Civil Code (DCC), therefore a funding agreement will be governed by the general rules of contract, meaning that parties are generally free to shape their funding agreement as they like as long as their agreement does not result in a violation of public policy (including due process).

ii Funding of class actions

For the purpose of this discussion we distinguish two general types of class action:

a class actions in which a Dutch special purpose foundation or association represents all claimants of a certain class, whether or not the claimants have signed up or are actively involved in any other way (opt-out actions); and

b class actions in which the claim entity only represents claimants with which it has entered into an agreement to that effect (opt-in actions).

305a class actions

The first type of Dutch class action is based on Article 3:305a of the DCC. This provision allows a Dutch foundation or association that meets certain requirements, to represent all claimants (active and non-active) that suffered damage as a result of a certain event or product (a 305a Organisation). At the time of writing, a 305a Organisation can still only file a claim for the determination of liability on behalf of its class members, and cannot bring a claim for compensation. In the event that, either before or after liability has been established by a court, the 305a Organisation and the defendants reach an agreement regarding damages, a settlement known as a 305a Settlement can be approved by the court and declared binding on the entire class, including inactive claimants, who must be provided with an opt-out period of at least three months. If, after determination of liability, no settlement is reached, individual claimants will have to sue for damage compensation in separate proceedings. 305a Organisations have been particularly successful in securities class actions, with notable examples including Shell’s Oil Reserves, Converium and Fortis/ Ageas. In 2018, Dutch district courts assumed jurisdiction in international securities class actions brought by 305a Organisations in Petrobras and Steinhoff (still the subject of litigation).

A long-awaited and much debated bill, which has been passed by Parliament and is currently pending enactment, will enable 305a Organisations to also sue for compensation in the form of damages after liability has been determined (the Bill). Together with this new feature, the Bill will to a large extent enact existing non-binding guidelines for 305a Organisations drafted by a commission of experts and representatives of claimants’ organisations and entitled the Claimcode.

As a result of heavy opposition to the Bill by the international business lobby, a last-minute amendment has been introduced, blurring the simple rule of international private law that a company can be sued where it has its corporate seat. It was added to the Bill that, in addition, ‘there must be a sufficient connection to the Dutch legal sphere’. The explanatory notes to the Bill show that the Dutch government felt this was necessary to provide comfort to international businesses that use the Netherlands in their international
tax structures; it is explained that the fact that a company is seated in the Netherlands merely for fiscal reasons is itself not a sufficient connection to the Dutch legal sphere to constitute a basis for action.

The Bill introduces the appointment of an ‘exclusive representative’, who will act as a kind of lead plaintiff. Finally, pursuant to the Bill, claimants located outside the Netherlands will not be included in the collective action on an opt-out basis, but instead on an opt-in basis.

From a funding perspective, it is relevant that the Bill stipulates that to qualify as a 305a Organisation the entity must have sufficient financial means to bring the claim and must have a professional board whose members do not have a direct or indirect financial interest in the outcome of the lawsuit. This means that the board members must be compensated independently from the outcome of the lawsuit and, presumably, cannot be representatives of a third party litigation funder financing the suit, although it will be allowed to appoint a representative of the funder to the supervisory board. The aim is to prevent the litigation funder from exercising control over the lawsuit when funding the claims of a 305a Organisation (in accordance with the Claimcode guidelines).

A further restriction on control by the litigation funder is implied by the legislature in the explanatory memorandum to the Bill. According to the legislature, a court has the means to review the funding structure if it is concerned that the third party funder is in a position to adversely affect the interests of the claimants. The legislature provides the notable example of a litigation funder having complete power over the decision to accept a settlement proposal. Although the explanatory memorandum has no force of law, it is an important guideline for the court’s interpretation of the law.

The Fortis/Ageas settlement showed that the court, when asked to confirm a settlement by a 305a Organisation, may critically review the compensation received under the settlement by the claimants’ organisations, and that this may be cause to deny the confirmation. Although, after some amendments, the settlement was eventually confirmed, this affair, together with impracticalities and uncertainties associated with the Claimcode and the Bill (only partially discussed above), has caused some practitioners and funders to question the viability of the use of 305a Organisations. As always, the proof of the pudding will be in the eating and it will be interesting to see how the market responds when the Bill is implemented, possibly this year or early in 2020.

**Regular class actions**

The second category of class actions is organised by limited liability companies or foundations that bundle claims strictly on an opt-in basis (i.e., not making use of Article 3:305a DCC). Claimants affected by a particular event, such as a cartel in a specific industry (a recent example being the Trucks Cartel cases) may assign their claims to a special purpose vehicle incorporated and managed by a litigation funder or provide it with a power of attorney to bring the claim on their behalf. The funder and the claimants are, in principle, free to structure the agreement that forms the basis for such an assignment or granting of a power of attorney as they see fit. In general, the parties agree that the special purpose vehicle will prosecute the claim and, once realised, will transfer the proceeds of the claim to the claimant after deduction of costs and a success fee for the funder consisting of a percentage of the upside. Thus, while lacking the possibility of binding non-active claimants in a settlement, these transactions are not burdened with the formal requirements and uncertainties surrounding the 305a Organisation, making it the preferred option whenever the class members are relatively easy to identify and not too numerous.
Contingency fees

In the Netherlands, lawyers are prohibited from working for a purely contingent fee. Alternative fee arrangements, including limited upside percentage sharing, are, however, allowed as long as the lawyer also receives a salary sufficient to cover his or her costs independent from the outcome.

III STRUCTURING THE AGREEMENT

This section will focus on the funding agreement regarding an individual claim. There are no industry models or generally accepted best practice for the types of agreements used by Dutch litigation funders. The following is therefore based primarily on the types of agreements the authors use, which may be more or less representative for the industry.

There are two types of agreements: a services agreement, whereby we not only fund but also manage the claim, and a plain funding agreement, where we only provide capital to the claimant for the prosecution of the claim. If the deal is structured as a services agreement, the funder acts as a kind of general contractor who contracts to prosecute the claim, including the management of litigation, on behalf of the client for a 100 per cent contingency fee. In this structure, the funder agrees to manage the case and pay for all related costs, including lawyers’ and experts’ fees at its own risk, in return for a share of the proceeds actually realised. Litigation counsel is engaged by the funder directly and will enter into a client–attorney relationship with both the funder and the claimant based on their joint interest.

In the event of a plain funding agreement, the funder agrees to pay for litigation expenses, usually up to a certain maximum amount, in exchange for a share of the proceeds. In this structure the claimant remains in control of the suit and the instruction of counsel.

In both structures, the nature of the agreement is most closely related to a venture capital or joint venture agreement. In this analogy the claimant is the owner of a promising venture (i.e., the claim) that requires risk capital to realise its value. The litigation funder can be compared to the venture capitalist that provides capital and, sometimes, know-how and management services to the claimant in return for a minority stake in the enterprise. The final settlement of the claim or the final judgment in respect of the claim is analogous to the hoped-for exit in a venture capital transaction. It follows that most provisions in the funding agreement are typical of any type of investment agreement, most importantly:

- The amount of funding to be provided and conditions for payment – the litigation funder will usually provide the funding through the direct payment of invoices for attorneys’ fees and other costs incurred in the litigation.
- Compensation or return to the funder – the compensation of the funder usually amounts to 20 per cent to 40 per cent of the actually realised proceeds after subtraction of costs. Alternative compensation schemes may include a preferred return out of the proceeds of two or three times the investment or a preferred cumulative interest on the committed capital.
- Information sharing – in the Netherlands information exchanged between claimant and funder is not discoverable in the proceedings. In general, the litigation funding agreement will therefore stipulate that the funder is provided with all information regarding the dispute without limitation and is kept fully up to date by litigation counsel on all material progress in the case and any settlement discussions.
- Governance and control – the litigation funder will demand some kind of control over important decisions such as the acceptance of a settlement offer, the filing of an appeal or the replacement of litigation counsel. Usually the claimant will not be allowed to
take such decisions without the consent of the litigation funder and vice versa. The
agreement may provide for the appointment of an independent third party adviser or
exit, or both, in the event of a deadlock.

e  Representations – the most important representations made by the claimant regard the
accuracy and completeness of the information provided in the due diligence process
preceding the agreement. Important representations of the funder include the absence
of conflicts of interest and the availability of the committed capital.

f  Exit or termination – the agreement will usually allow the funder to terminate the
agreement in the event of breach by the claimant or a material adverse change, such as
surfacing of new facts that materially impact the chances of success.

g  Counterclaims and costs orders – the costs of defence against possible counterclaims
and liability for costs orders may or may not be covered by the funding agreement.
The Netherlands has a loser-pays rule. However, outside litigation regarding the
infringement of intellectual property rights, where the costs order is based on actual
litigation expenses, costs orders are based on fixed tariffs that are usually less than
10 per cent of the actual costs of litigation.

IV DISCLOSURE

Outside third party funding of 305a Organisations, the disclosure of the funding agreement
is not a real concern in the Netherlands. Dutch procedural law does not provide for
a discovery process in which a claimant or a funder could be forced to disclose the funding
agreement or other information exchanged between them, except perhaps in very exceptional
circumstances where the defendant has evidence that the funding agreement itself would
constitute a wrongful act against it. Hence the claimant’s decision to disclose the fact that he
or she is being backed by a litigation funder is a strategic rather than legal concern.

305a Organisations are an exception to this general rule, particularly as the Bill is
being implemented into law. The Bill stipulates that to qualify as a 305a Organisation the
entity must, among other things, have sufficient financial means to bring the claim and in its
organisation the interests of the claimants must be sufficiently safeguarded. We mentioned
above that, according to the Dutch legislature, these requirements imply that the court may
review the funding structure if it is concerned that the 305a Organisation does not have
sufficient financial means to prosecute the claim or if the court is concerned that the funder
is in a position to adversely affect the interests of the claimants. This has triggered a debate
among practitioners as to whether this also implies that the defendant should be allowed to
review the funding agreement or the financial means of the 305a Organisation. Defendants’
atorneys in class actions argue that they should be allowed full insight into the finances and
funding arrangements of the 305a Organisation, as it provides them with a potential angle
to argue the inadmissibility of the claim. Neither the Bill nor the legislature’s explanatory
memorandum provides any guidance as to the chances of success of this argument so it will
be up to the court to resolve this debate. We have already seen, in the context of the class
action settlement proceedings in the Fortis/Achmea case, a court demonstrate that it is not shy
about using its power to review the agreed distribution scheme, which, at least in part, will
also reflect the funding structure.
V COSTS

Outside intellectual property infringement litigation, costs orders in the Netherlands are based on fixed tariffs and usually amount to only a fraction of the actual litigation expenses of the parties. Whether or not the third party funder assumes liability for an adverse costs order against the claimant is a matter of agreement and negotiation between the funder and the claimant. It is not common to obtain after-the-event insurance for costs orders in the Netherlands.

VI CONCLUSIONS AND OUTLOOK

Litigation finance is on the rise in the Netherlands. Consumers and SMEs lacking the means to litigate claims against bigger opponents are finding their way to an ever increasing number of providers of third party litigation funding. Securities and complex financial products, such as investment insurance products and interest swaps, have been the focal point of a number of major class actions that were in part funded by third parties. Another type of class action typically funded by third parties and for which the Netherlands has proven to be a popular jurisdiction is follow-on damages claims in anti-cartel cases.

The providers of third party funding in the Netherlands are generally professional parties with a solid background in law practice and so far have caused little legal or public turmoil. The exception to this general rule is class actions brought by 305a Organisations. These organisations have the power to represent all claimants in a certain class independent from their active participation (opt-out actions). A new law will be enacted by the end of 2019 or early 2020 that will extend the scope of action of 305a Organisations to claims for actual damage compensation, but will simultaneously raise the threshold for being recognised as a 305a Organisation. This law and the increase in claims brought by 305a Organisations have triggered a debate that includes the issue of the way that these organisations are funded. Although it is generally recognised that third party litigation funding can play a positive role in bringing well-founded class actions to fruition, restrictions are imposed on the degree of control a third party funder can exercise in these types of cases and the fee it charges for its services can be subject to scrutiny by the courts. In the coming years it will become apparent whether these developments will affect the viability of 305a Organisations, as some fear.
I MARKET OVERVIEW

Funded litigation in New Zealand is not as common as in comparable common law jurisdictions such as the United Kingdom and Australia, but it is undoubtedly on the rise.\(^1\) There are several local and overseas litigation funders operating. The local funders include LPF Group Ltd, Litigation Funding Ltd, Tempest Litigation Funders, and Earthquake Services Ltd. The overseas funders include Harbour Litigation Funding (United Kingdom) and Litigation Lending (Australia).

In recent years, a variety of proceedings funded by third parties have been brought involving allegations in relation to losses on share investments caused by misleading statements in a share prospectus,\(^3\) building products,\(^4\) losses resulting from kiwi fruit being affected by the entry of disease into the country,\(^5\) illegitimate fees charged to consumers by banks,\(^6\) insurance claims arising out of earthquakes\(^7\) and breaches of directors’ duties owed to companies.\(^8\)

The existing legal and regulatory framework is antiquated and, while permitting funded litigation, is not attuned to its dynamics. Reform is very likely within the next few years, with the Law Commission (an independent law reform agency established by statute) having in May 2108 announced plans to review and recommend reform on both litigation funding and class action procedure generally.

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1 Adina Thorn is a principal and Rohan Havelock a consultant at Adina Thorn Lawyers.
2 Statistics on the number of funded civil proceedings are not available. In 2016, 2,602 new civil proceedings were filed and 2,352 proceedings disposed. In 2017, 2,653 civil proceedings were filed and 2,306 proceedings disposed. In 2018, 2,346 new civil proceedings were filed and 2,266 proceedings disposed. This data was taken from Annual Statistics for the High Court to 31 December 2018: see https://www.courts.govt.nz/the-courts/high-court/31-december-2018/annual-statistics-for-the-high-court-31-december-2018.
6 Cooper v. ANZ [2013] NZHC 2827.
II LEGAL AND REGULATORY FRAMEWORK

There is no specific legislation in New Zealand governing litigation funding, or even class actions. Instead, the applicable principles have been developed by the courts in the context of the existing rules of civil procedure that do not specifically govern litigation funding or class actions. These existing rules have necessarily been applied in a flexible and liberal way to cater for the modern style of group litigation.

i Attitude and role of the courts

The recent attitude of the New Zealand courts to litigation funding can be described as cautiously permissive, and perhaps increasingly receptive. Although the common law torts of maintenance (support of litigation by a stranger without just cause) and champerty (an aggravated form of maintenance involving such support in return for a share of the proceeds) have technically not been abolished in New Zealand and their role is not necessarily abrogated, the general approach taken to these torts is a relaxed one. This minimises their potential application to funding arrangements.

The Supreme Court of New Zealand has made it clear that it is not the role of the courts to act as general regulators of litigation funding arrangements or to give prior approval to such arrangements, outside their supervisory role in ‘representative’ proceedings under Rule 4.24 of the High Court Rules. Instead, the role of the courts is to adjudicate on any applications brought before them to which the existence and terms of a litigation funding arrangement may be relevant.

The Supreme Court has accepted that some measure of control by a third party funder is ‘inevitable’ to enable a litigation funder to protect its investment. The main grounds for intervention (for example, by imposing a stay of proceedings) are:

a Where there is a manifestation of an abuse of process on traditional grounds, such as where proceedings deceive the court, are fictitious or a mere sham, use the process of the court in an unfair or dishonest way or for some ulterior or improper purpose or in an improper way, are manifestly groundless, without foundation or serve no useful purpose, and are vexatious or oppressive.

b Where a funding arrangement amounts to an assignment of a bare cause of action to a third party funder in circumstances where this is not permissible (i.e., the exceptions to maintenance and champerty do not apply). In assessing whether litigation funding

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9 Similarly, there are also no industry associations or codes of conduct.
10 High Court Rules 2016 (part of the Senior Courts Act 2016).
11 See PricewaterhouseCoopers v. Walker [2017] NZSC 151 at [121] per Elias CJ.
12 This procedure, inherited from England as developed in the 17th and 18th centuries, allows one or more persons to sue on behalf of or for the benefit of all persons with the same interest in the subject matter. This requires either (1) consent of the other persons who have the ‘same interest’ (meaning a common issue of fact or law of significance for each member of the class represented), or (2) a court direction on an application made by a party or intending party to the proceeding.
15 PricewaterhouseCoopers v. Walker [2016] NZCA 338 at [14(e)].
New Zealand

arrangements amount to an assignment that is not permitted, the court will have regard
to the level of legal (rather than de facto) control able to be exercised by the funder, the
profit share of the funder and the role of the lawyers acting.\textsuperscript{16}

Where a representative action has been promoted to prospective litigants using
misleading statements, the court may also intervene, either by refusing a direction
under Rule 4.24(b), or to correct the harm done by the distribution of the material\textsuperscript{17}

Even where concerns such as these arise, the provision of appropriate undertakings by a funder
may be effective to allay them. In one notable case,\textsuperscript{18} a funding agreement was in place
between the plaintiff company (in liquidation) and the litigation funder (SPF No. 10 Ltd),
in conjunction with an assignment under a security agreement to the funder of the plaintiff’s
right of action against the defendant (this being its only valuable asset). The defendant argued
that this arrangement was an impermissible assignment of a bare cause of action to the funder,
which amounted to an abuse of process. The majority of the Supreme Court held that the
belated provision of undertakings given by the funder to the Court (1) not to rely on clauses
in the security agreement giving it greater control than it had under the funding agreement,
and (2) to pay a proportion of proceeds of a successful claim for the benefit of unsecured
creditors (where the funder was otherwise entitled to all these under the security agreement)
satisfied concerns as to the permissibility of the assignment.

\textbf{ii} Regulation of litigation funders

As providers of financial services and products in trade, litigation funders are subject to
the provisions of the Fair Trading Act 1986.\textsuperscript{19} This contains consumer protections against
misleading and deceptive conduct, unsubstantiated representations and false or misleading
representations. The legislation provides redress against such conduct by funders in, for
example, marketing funding, negotiating with prospective plaintiffs, or in relation to acts
or omissions while a funding arrangement is in place. The Consumer Guarantees Act 1993,
which imposes statutory guarantees in relation to services, may also have application.

Funders with a place of business in New Zealand, and who provide a ‘financial service’
typically, this is because they act as a creditor under a credit contract),\textsuperscript{20} must register as
a financial service provider (FSP). Those providing services to ‘retail clients’\textsuperscript{21} must also
belong to a dispute resolution scheme. All FSPs are subject to the fair-dealing provisions
in the Financial Markets Conduct Act 2013, which prohibit misleading conduct, false
or misleading representations and unsubstantiated representations in relation to financial


\textsuperscript{17} Southern Response Earthquake Services Ltd v. Southern Response Unresolved Claims Group [2017] NZCA 489
at [78] and [82].

\textsuperscript{18} PricewaterhouseCoopers v. Walker [2017] NZSC 151 at [77]–[91].

\textsuperscript{19} And also the Consumer Guarantees Act 1993, which imposes certain statutory guarantees in relation to
goods and services, with a more limited set of remedies available.

\textsuperscript{20} As defined in Section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act.

\textsuperscript{21} As defined in Section 49 of the Financial Service Providers (Registration and Dispute Resolution) Act.
products and services. The regulatory authority, the Financial Markets Authority, can take civil action against FSPs whose conduct breaches these provisions. Possible civil orders include declarations of contravention, pecuniary penalties and compensatory orders.

ii Level of funder recovery

There are no limits prescribed by either legislation or the common law. In the context of a non-representative funded action, the Supreme Court has said that it is not the role of the courts to assess the fairness of any bargain between a funder and a plaintiff, presumably including the matter of funder remuneration. In the context of a representative funded action, the High Court was not persuaded that the terms of the funding agreement (including an entitlement to terminate the funding agreement without cause on five days’ notice and a power to veto in relation to settlement) were inappropriate for a representative action.

This said, in assessing whether litigation funding arrangements amount to an impermissible assignment, the courts will have regard to the profit share to be taken by the funder (see above).

While there is no regulation of the nature and extent of recovery by litigation funders, lawyers in New Zealand may utilise only a certain type of contingency fee. The fee must:

- amount to the normal fee that would have been charged for the services provided; or
- amount to the normal fee accompanied by a premium that:
  - compensates counsel for the risk of not being paid at all;
  - compensates counsel for waiting to be paid until proceedings have been concluded; or
  - is not calculated as a proportion of the amount recovered by the proceedings.

However, conditional fee agreements are prohibited for criminal proceedings, immigration proceedings and family law proceedings.

Conditional or contingency fee agreements that fall outside this statutory permission may be illegal or unenforceable, especially where the payable fee is calculated as a proportion of the amount recovered (and is therefore champertous).

iii Validity of settlement veto rights

The courts take a generally liberal and non-interventionist approach to the inclusion of veto rights in a funding agreement. In the leading case considering this issue, the High Court was not persuaded that the existence of a power of veto in relation to settlement was inappropriate for a representative action. This was for the following reasons:

- in most scenarios, the claimants and the funder should continue to have aligned interests in relation to what would constitute an acceptable settlement;
- to the extent the action requires positive input from all the claimants, the funder will need to maintain their goodwill to carry on with the action; and
- where the funding agreement contemplates the involvement of independent third parties with appropriate expertise to resolve disputes, this will provide a fetter on the funder’s ability to act unreasonably.

iv Validity of termination rights (with or without cause)

The courts take a similarly liberal and non-interventionist approach to the inclusion of express termination rights (with or without cause) in a funding agreement.

In the unusual event that the funding agreement does not make express provision for termination, Part 2 of Subpart 3 of the Contract and Commercial Law Act 2017 will apply by default. A funder would be able to cancel (prospectively) a funding agreement in the following circumstances:

a for misrepresentation by the plaintiffs prior to the agreement that has induced the funder to enter the agreement;
b if a term of the funding agreement is broken by the plaintiffs; or
c if it is clear that a term in the funding agreement will be broken by the plaintiffs.

In all these situations, the funder may exercise the right to cancel if, and only if:

a the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the funder; or
b the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be:
   • substantially to reduce the benefit of the contract to the funder;
   • substantially to increase the burden of the funder under the contract; or
   • in relation to the funder, to make the benefit or burden of the contract substantially different from that represented or contracted for.

IV DISCLOSURE

On the issue of any funded proceedings, a litigant must disclose the following matters to the other party or parties:28

a the fact there is a litigation funder and the funder’s identity;
b the amenability of the funder to the jurisdiction of the New Zealand courts; and
c the terms of withdrawal of funding, if those terms in some way give legal control over the proceedings to the funder (for example, the ability to withdraw funding if the funded party refuses to obey instructions given).

The litigation funding agreement itself must be disclosed to the opposing party and the court where an application is made to which the terms of the agreement could be relevant, such as applications for a stay on the basis of abuse of process, applications for third party costs orders and applications for security for costs.29 In relation to the latter type of application, the Supreme Court has said that it is ‘strongly arguable’ that the courts have power to order disclosure of at least the existence of a litigation funder and the relevant terms of the funding agreement.30

Disclosure to the opposing party is subject to appropriate redactions being made to preserve confidentiality and protect litigation-sensitive matters and privilege.

In this regard, confidentiality is protected by a combination of the common law and the Evidence Act 2006. Legal privilege in proceedings is protected by the Evidence Act 2006. This extends to communications, information and any opinions formed based on the communication or information. There is privilege for communications with legal advisers, privilege for preparatory materials for proceedings and privilege for settlement negotiations or mediations. The legislation does not specifically address communications exchanged between legal advisers and litigation funders, or materials prepared for or by litigation funders for prospective legal proceedings. Such communications or materials would ordinarily be encompassed within the privilege over preparatory materials for proceedings.

In domestic arbitrations, an arbitral tribunal may order the discovery and production of documents or materials within the possession or power of a party. This is broad enough to extend to a litigation funding agreement, although an arbitral tribunal would be cognisant of the need to protect confidentiality and privilege.

V COSTS

In any civil proceeding, a court may order the unsuccessful party to pay the costs (and certain disbursements) of the successful party in the litigation. All matters of costs are at the discretion of the High Court, but one of the default principles is that the party that fails with respect to a proceeding or an interlocutory application should pay (scale) costs to the party who succeeds.

i Level of costs

Generally, costs are assessed by applying a notional daily recovery rate (normally, two-thirds of the daily rate considered reasonable for each step of the proceeding) to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application. A court may award increased costs, or even indemnity costs, in specified circumstances (generally involving fault by one party).

Litigation funding costs, or the costs of securing third party funding, do not constitute either costs or disbursements within the meaning of the costs regime. The only basis on which the High Court might order the unsuccessful party to pay such costs or disbursements would be on the basis of its inherent jurisdiction; this would be exceptional and we are not aware of any precedent for this.

31 Sections 68–70.
32 Sections 53–67.
33 Section 54.
34 Section 56.
35 Section 57.
36 Section 56. In particular, Section 56(2)(b) (‘a communication between the party’s legal adviser and any other person’) and (d) (‘information compiled or prepared at the request of the party, or the party’s legal adviser, by any other person’).
38 Rule 14.1.
39 Rule 14.2(a).
40 Rule 14.2(c) and (d).
41 Rule 14.6(3).
42 Rule 14.6(4).
ii Liability of funders for adverse costs

In exceptional circumstances, funders may be liable for adverse costs as non-parties, even in the absence of any abuse of process or impropriety. Further, the level of such costs is not limited to the amount of funding provided.

According to the leading case on costs against non-parties:

Where . . . the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes.

In this case, a non-party had funded unsuccessful litigation by an insolvent company. The Privy Council did not have litigation funding specifically in contemplation. Given that a litigation funder always stands to benefit financially from the proceedings and will ordinarily exercise at least some control over the proceedings, the above proposition must be read down.

It seems likely, therefore, that for a funder to be liable for adverse costs, something more is required. One situation might be where the funder exercises control over the proceedings to the effective exclusion of the plaintiffs. Another might be where the funder withdraws funding part way through the litigation, leaving the defendants to face a plaintiff who is impecunious or insolvent. A third might be where it was clear at the time of filing that the funded claim is simply not tenable and litigation should have been avoided.

Indemnity or increased costs will not be awarded merely because a litigation funder with a profit motive stands behind the losing party.

iii Security for adverse costs

On application by a defendant, a court may order the giving of security for costs if:

a a plaintiff is resident out of New Zealand;
b a plaintiff is a corporation incorporated outside New Zealand;
c a plaintiff is a subsidiary of a corporation incorporated outside New Zealand; or
d there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff’s proceeding.

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Conversely, this discretion would not be exercised against a ‘pure funder’ (meaning a party without any personal interest in the litigation, who does not stand to benefit from it, was not funding it as a matter of business, and who did not seek to control its course: Hamilton v. Al-Fayed [2002] EWCA Civ 665, [2003] QB 1174 at [40]).

47 See Poh v. Cousins & Associates (HC Christchurch, CIV 2010-409-2654, 4 February 2011) at [61]; compare Capital + Merchant Finance Ltd (in rec and in liq) v. Vision Securities Ltd (in rec) [2011] NZCA 657 at [17]–[18]. This will be very rare in the context of funded litigation, since the funder will ordinarily have conducted thorough due diligence on the merits of the claim and its prospects of success.
49 Rule 5.45.
Funders may be ordered to provide security, and have been so ordered. The evolving practice is for funders of funded representative actions to provide security for costs that tend to be quantified on a relatively generous basis in favour of defendants.⁵⁰ Calculation of the sum is a matter for the court to assess in all the circumstances. Those include the:

- amount or nature of the relief claimed;
- nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of interlocutory procedures;
- estimated duration of trial; and
- the probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant’s estimated actual (i.e., solicitor and client) costs.

Insofar as past awards of security are a legitimate guide, they generally represent some discount on the likely award of default scale costs.

The sum ordered must either be paid into court, or security for that sum must be given to the satisfaction of the judge or registrar. Where the litigation funder is overseas, an appropriate form of security will be a bank bond or guarantee unconditionally enforceable by the defendant on demand, or additional commitments made by the funder and an after-the-event insurer.⁵¹

The involvement of a funder does influence the court’s decision to award security and may justify increased security for costs. In the leading case,⁵² the Court of Appeal stated:

[The fact a party is supported by a litigation funder] may justify increased security on the ground that courts should be readier to order security where a non-party who stands to benefit from the litigation is not interested in having rights vindicated but rather is acting in pursuit of profit. Security allows the court to hold the funder more directly accountable for costs. It is consistent with the Court’s jurisdiction to award costs against a non-party which is sufficiently interested in the litigation. Security is all the more appropriate where the funder can avoid liability for future costs by terminating the funding agreement by notice before the litigation concludes.

In that case, the Court of Appeal ordered security (for the appeal) in the sum of NZ$100,000 (increased from NZ$86,000) because the overseas litigation funder retained the right to terminate its indemnity to the representative plaintiff for costs on notice and the scale costs of the proceeding were unusually high.

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⁵² Houghton v. Saunders [2015] NZCA 141 at [11]. The High Court had previously held that the fact the plaintiff is funded is a ground for the order of security: Highgate on Broadway Ltd v. Devine [2013] NZHC 2288, [2013] NZAR 1017 at [22(d)].

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VI THE YEAR IN REVIEW

In light of the recent increase in funded litigation, a number of practitioners, judges and commentators have expressed concern that the absence of a regulatory regime for litigation funding (and class actions) is creating inefficiencies in the court system and uncertainty for litigants. On 10 May 2018, the Law Commission (an independent law reform agency established by statute)\textsuperscript{53} announced that it is to review the law relating to class actions and litigation funding, with a view to making reform recommendations to the Minister of Justice.\textsuperscript{54}

The task of the Law Commission is ‘to assess whether the potential benefits of class actions and litigation funding can be realised in a manner that outweighs any costs and disadvantages they might give rise to’.\textsuperscript{55}

As at September 2019, the Law Commission is working towards finalising terms of reference. After this has been done, the Law Commission will engage with interested parties in both the public and private sector during the review and will carry out a public consultation process. An expert advisory group to provide technical expertise and advice representing a range of perspectives will also be established.

The draft terms of reference for the review include the following issues in relation to litigation funding:\textsuperscript{56}

\begin{enumerate}
\item the extent to which the courts should have a role in supervising, managing or approving class actions and third party funding arrangements;
\item whether any regulatory requirements should be imposed on third party funders;
\item issues relating to costs and settlement in class actions and other third party funded proceedings; and
\item assessment and payment of claims at the conclusion of a class action.
\end{enumerate}

Ultimately, the Law Commission makes recommendations in a final report to the Minister of Justice. As at the time of writing, no final completion date for the review has been set.

This report is tabled in Parliament and the government responds by deciding whether to accept or reject some or all the recommendations. If some or all are accepted and legislation is required, then a bill is prepared and introduced to Parliament in the ordinary way. Unless urgency is required, this can take several Parliamentary sessions over one or more years.

It should be noted that a previous attempt to achieve reform in New Zealand did not come to fruition. In 2008, the Rules Committee (a statutory body with responsibility for procedural rules in the courts) released a draft Class Actions Bill or High Court Amendment (Class Actions) Rules for consultation. This contained a new procedure to enable true class action proceedings in New Zealand.

\begin{itemize}
\item Law Commission Act 1985 Sections 4 and 5(3). Two principal functions of the Law Commission are (1) to take and keep under review in a systematic way the law of New Zealand, and (2) to make recommendations for the reform and development of the law in New Zealand.
\item ibid. at [52].
\item ibid. at page 14.
\end{itemize}
A final draft was sent to the Secretary for Justice in 2009. In October 2011, following an inquiry into major finance company failures in New Zealand, the Commerce Committee recommended that priority be given to progressing legislation on class actions during the term of the 50th Parliament and that such legislation include guidelines for the operation of commercial third-party funders of litigation. In March 2012, the government issued a response to the report. In relation to the recommendations quoted, this stated that further policy work was required before the Bill could be introduced to the House and that this was expected to occur in 2012. The Bill subsequently received no further political consideration and has now almost certainly been overtaken by the pending Law Commission review.

In relation to the existing procedural rules, a significant development in 2019 was the judgment of the Court of Appeal in *Ross v. Southern Earthquake Services Ltd* recognising the ability of the Court to make an ‘opt-out order’ as part of a direction under Rule 4.24 of the High Court Rules, and that this should be the default position. Such an order means all members of the relevant class are automatically included in the action, unless they expressly opt out. Where actions are tried in two stages (a trial on liability followed by a trial on quantum), class members will still have to opt in at the quantum stage, to have an opportunity to prove their loss and enjoy a share of recovery.

This marks a significant change to the New Zealand law relating to representative actions, enabling funded actions to be brought more easily. It remains to be seen whether and to what extent the New Zealand courts will grant ‘common fund’ orders or ‘equalisation’ orders for the benefit of funders, as occurs in Australia.

**VII CONCLUSIONS AND OUTLOOK**

Litigation funding is undoubtedly on the rise in New Zealand, not least because group-style litigation is also on the rise. The recent recognition of opt-out representative actions will only add to this and is also likely to create greater competition among funders. In this sense, it is a growth market. In the absence of any legislation specifically governing these matters, the courts have been content to adopt a permissive approach, generally interfering with a funding arrangement only where it raises an issue of abuse of process or amounts to an impermissible assignment. The scope for such interference is greater in the case of representative actions, which are governed by the High Court Rules and that do involve supervision by the High Court.

Funders are generally at liberty to include any terms they wish in funding agreements, which are ordinarily structured as financing of the claim. Agreements tend to be comprehensive in regulating all relevant matters, including as to recovery levels, veto rights over settlements and termination provisions.

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On the issue of any funded proceedings, a litigant must disclose certain matters to the other party or parties (the fact that there is a litigation funder and the funder’s identity, the amenability of the funder to the jurisdiction of the New Zealand courts, and the terms of withdrawal of funding). The litigation funding agreement itself must be disclosed where an application is made to which the terms of the agreement could be relevant.

Costs in civil proceedings are at the discretion of the court. The default rule is that the unsuccessful party pays at least the scale costs of the successful party. Funders may be liable to pay adverse costs and also to provide security for costs, which tend to be quantified generously.

The Law Commission has announced a review into litigation funding and class actions, after which it may recommend reform to the government. The time frame for this process has not been finalised. It is also not yet known how any reform will affect the business of litigation funding in New Zealand.
Chapter 13

NIGERIA

Justina Ibebunjo, Iheanyichukwu Dick and Pascal Ememonu

I MARKET OVERVIEW

Nigeria has a population of over 180 million people. The country is organised under the federal Constitution, which creates court systems at the federal and state level and recognises arbitration and other dispute resolution processes such as expert determination, mediation and negotiation.

The Constitution grants every citizen the right to air his or her grievances before a court of law or arbitration when he or she feels his or her civil rights (which includes commercial rights) have been breached or are likely to be breached. However, litigation or arbitration does not come cheap. As such, a large number of people who cannot afford to fund their cases in court or arbitration seek other means of expressing their grievances. This includes customary settlement of disputes, mediation, negotiation and sometimes self-help.

Some individuals or organisations may enter into agreements to sponsor or fund litigation or arbitration with the intention of sharing the proceeds of the case. This is known as third party funding.

Third party funding of litigation can be defined as an arrangement whereby a person who ordinarily is not concerned with the outcome of a suit bears the costs of the action for one who is concerned, to share the proceeds of the action or suit, if any. In other words, the third party funder has no previous interest in the lawsuit but finances it as an investment, with a view to sharing the proceeds of the suit if the suit succeeds, as a return on his or her investment. Such an investment arrangement may arise for various reasons, all of which, basically, revolve around the fact that a direct party to a lawsuit, whether a named claimant or a defendant, cannot fund the prosecution or defence of the suit and a third party was required to provide the named party with the funds, on the agreement or understanding that the third party would share from the proceeds of the case, if any.

It is acknowledged that, as in other jurisdictions, there are some lawyers or not-for-profit organisations who as third parties take up certain matters pro bono or fund some cases on behalf of indigent people. In most cases, the lawyers or not-for-profit organisations take up the matter without anticipating sharing in the proceeds of the case. However, this chapter will be restricted to the system of third party funding agreements as defined above and will consider the legality of such agreements under Nigerian law.

Nigeria has diverse economic and sociopolitical interests that are usually the subject of judicial discourse.

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The systems of land use, free-market economy, politics and marriage, and the natural resources and ethnic and religious differences existing in Nigeria make the jurisdiction a hotspot for disputes. In the commercial sphere, the country is among the major producers of crude oil and is also a major importer of refined oil products and other commodities. Real estate transactions, trade, consultancy, banking, construction and telecommunications are among Nigeria's active economic sectors, as well as being the major sources of commercial litigation and arbitration in the country.

The activities and interests that prevail in the country often attract foreign direct investment. Consequently, entities often enter into commercial agreements with individuals, government agencies, multinational companies or other small-scale companies. Invariably, a large number of these commercial agreements often contain dispute resolution clauses that are either by means of arbitration or litigation.

Litigation in Nigeria (dispute resolution) is essentially adversarial and sometimes requires huge funds for effective utilisation by the disputing parties. The costs for legal representation, filing processes, compiling exhibits and mobilising witnesses to court have substantially increased over time, particularly in view of the recent economic recession in Nigeria, thereby making it increasingly difficult for aggrieved parties to afford the costs of litigation. They may thus need to resort to third party funders for assistance.

It is important to note that, under Nigerian law, third party funding of litigation is generally regarded as champertous if it involves a third party's election to maintain and bear the costs of an action for another to share the proceeds of the action or suit.

In Nigeria, parties to civil actions are usually responsible for their litigation costs. There are instances, however, where the claims may be sponsored by third parties with no prior connection to the suit either for pecuniary, financial or proprietary interests. For instance, in most class actions that are often used to pursue claims for oil spillages, pollution and communal land matters, there is the likelihood that some of the claims are funded by independent third parties in view of the pecuniosity of the litigants. Also, in some election petition cases or pre-election matters, the suits are usually funded by the political parties even though they may not be direct parties to the suit. This is because the practice of independent candidacy is not allowed in Nigeria, as a candidate must contest an election on the platform of a political party and the party will either fail or lose if the candidate fails or loses the suit. In some maritime cases too, particularly matters involving ships and vessels, some litigation is insured or funded by insurance companies or finance houses.

Parties to potential or ongoing litigation or arbitration in the commercial sectors such as oil and gas, construction, concession, debt portfolio management and international trade require huge financial assistance from third parties to prosecute the motley of litigation that arises from transactions. They resort to informal sources such as family, friends and loan sharks (who are not ordinarily or directly affected by the subject matter or outcome of the lawsuits or arbitral proceedings) for financial assistance in prosecuting their suits in courts or before arbitral tribunals.
II LEGAL AND REGULATORY FRAMEWORK

Litigation funding is not currently prevalent in Nigeria; as a result, there is no clearly defined legal framework for third party funding to operate within the country.

One of the main sources of law recognised in the Nigerian legal system is ‘common law and equity’. The principles of common law and equity are applied in every aspect of the law except where a statute has been enacted by the Nigerian legislature to cover the same subject matter or cause of action. However, in areas where there are no local enactments, the principles of common law and equity still hold sway. A practice that is closely related to third party funding is the common law principle of champerty and maintenance. At common law, champerty is a form of maintenance and occurs when the party maintaining another person demands a share of the proceeds of the action or suit or other contentious proceeding where property is in dispute.3

Champerty is defined by Black’s Law Dictionary as:

[A] bargain between a stranger and a party to a lawsuit by which the stranger pursues the party’s claim in consideration of receiving part of any judgment proceeds. It is one type of maintenance.4

Maintenance, on the other hand, is defined as:

[A]n officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party with money or otherwise to prosecute or defend the litigation.5

In Oyo v. Mercantile Bank (Nig) Ltd,6 the Court of Appeal defined maintenance as:

Improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.

There is no legislative provision or rule that expressly prohibits third party funding in Nigeria. While in some cases champerty and contingency fee arrangements may have been considered by the Nigerian courts, there appears not to have been any express judicial pronouncements as to third party funding of litigation.

The Nigerian legal system adopted the common law stance on champerty and maintenance to the effect that lawyers were prohibited from funding their clients’ cases. Thus, in Oloko v. Ube, the Court of Appeal held that:

[A]n agreement by a solicitor to provide funds for litigation or without charge to conduct litigation in consideration of a share of the proceeds is champertous. The solicitor cannot recover from his client his own costs or even his out of pocket expenses.

In the case of Oyo v. Mercantile Bank (Nig) Ltd, the Court of Appeal tried to distinguish between contingency fee arrangements and champerty and maintenance. The Court defined contingency fee arrangement as fees to be earned by a solicitor only if he or she wins the

litigation, while champerty was described as the bedrock of maintenance and is usually regarded as having a reprehensible basis. Both contingency fee arrangements and champerty and maintenance were prohibited in Nigeria under common law. In the above case, the Court explained that the rationale behind the prohibition of such an arrangement was that it fires the solicitor’s interest beyond his or her mere professional commitment and may render the whole transaction unethical. In the case at hand, the appellant, a legal practitioner, entered into a contingency agreement with the respondent to recover debts from his debtors and to be remunerated with a certain percentage of the total debts recovered. The appellant took steps necessary to recover the debts – he wrote several letters to the debtor, instituted court actions and filed several motions in court. However, while the matter was still pending and before a judgment could be delivered, the respondent negotiated with the debtors and had the money paid. The respondent then asked the appellant to withdraw the matter from court. The appellant, having withdrawn the case, submitted a bill of charges to the respondent that covered the agreed percentage of the total amount of debts involved or, in the alternative, reasonable or substantial quantum meruit. The bill was not honoured by the respondent. The appellant sued the respondent for failure to honour the bill of charges. One of the issues raised by the respondent in Court was whether the appellant was guilty of champerty when he agreed with the respondent to receive a certain percentage of the amount recovered in consequence of litigation. The Court held that merely agreeing to receive a percentage of the proceeds of litigation to be conducted by a solicitor does not amount to champerty. It is a contingency fee agreement that could be regarded as contrary to public policy. The Court described such agreement as an unprofessional agreement that is unenforceable in law.7

Adopting the decision of Lord Denning MR in Re Trepca Mines Ltd,8 the Court, gave the rationale for prohibiting champerty as follows:

"The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated, but, be that so or not, the law for centuries has declared champerty to be unlawful and we cannot do otherwise than to enforce it."

However, following the enactment of the Rules of Professional Conduct for Legal Practitioners 2007, pursuant to the Legal Practitioners Act, this legal position has been amended somewhat. To a large extent, the Rules relaxed the practice or norm prohibiting a legal practitioner from funding litigation. In this context, Rules 50 and 51 are applicable and provide as follows:

50. (1) A lawyer may enter into a contract with his client for a contingent fee in respect of a civil matter undertaken for a client whether contentious or non-contentious. Provided that –

(a) the contract is reasonable in all the circumstances of the case including the risk and uncertainty of the compensation;

(b) the contract is not –

(i) vitiated by fraud, mistake or undue influence; or

(ii) contrary to public policy.

7 See pages 228–230 of the report.
8 Re Trepca Mines Ltd (No. 2) (1963)1 Chapter 199 at 219.
(5) In this rule, ‘contingent fee’ means fee paid or agreed to be paid for the lawyer’s legal services under an arrangement whereby compensation, contingent in whole or in part upon the successful accomplishment or deposition of the subject matter of the agreement, is to be of an amount which is either fixed or is to be determined under a formula.

51. A lawyer shall not enter into an agreement to pay for, or bear the expenses of, his client’s litigation, but the lawyer may, in good faith, advance expenses –

(a) as a matter of convenience; and
(b) subject to reimbursement.

From the above provisions, while a lawyer is allowed to enter into a contingency fee agreement, he or she is not allowed to bear the expenses or costs of litigation. There are, however, exceptions to the general rule – a lawyer may be allowed to advance the cost of litigation as a matter of convenience and subject to reimbursement.

In the more recent case of *Kessington Egbor*, the Court of Appeal was confronted with the issue of whether agreement for a contingency fee arrangement or commission payable upon recovery of indebtedness is champertous. A summary of the facts of the case is that Kessington Egbor and a company he had an interest in (Eskol Paint Nigeria Ltd) (the appellants) engaged the services of Peter O Ogbebor (the respondent), a chartered accountant, to give an expert opinion on their behalf in an action for the recovery of a debt owed to them by Union Bank of Nigeria Plc (UBN). The appellants alleged that they had agreed to pay the respondent the sum of 100,000 naira for his services. While agreeing that his services were secured for a fee, the respondent contended that the agreement was that he would be entitled to 15 per cent of the amount to be recovered in the event it was recovered. According to the respondent, it was on these terms that he agreed to assist the appellants in the recovery by giving evidence in court as an expert witness.

At the conclusion of the debt recovery proceedings, UBN eventually paid the appellants the sum of 65 million naira, for which the respondent demanded that he be paid the sum of 9.7 million naira, which was 15 per cent of the amount. The appellants contested the respondent’s demand on the grounds that the money paid by UBN was by virtue of the judgment of the court. To recover his entitlement, the respondent instituted an action at the High Court of Edo State, Benin, wherein he sought, among other reliefs, his 15 per cent entitlement and other ancillary reliefs. At the end of trial, the Court found in favour of the respondent and ordered the appellants to pay the respondent his 15 per cent entitlement. The Court further awarded the sum of 30,000 naira to the respondent as costs and 5 per cent interest on his entitlement calculated over a period. Aggrieved by this decision, the appellants appealed to the Court of Appeal, Benin Judicial Division.

Among the issues determined by the Court of Appeal was whether the respondent’s action was competent and maintainable at law – in other words, whether the agreement the appellants had with the respondent was champertous.

The appellants argued that the respondent was not entitled to the sum claimed by him under the agreement he had with the appellants because the agreement was champertous. As such, it was against public policy for the respondent to seek to recover a percentage of proceeds of litigation in which he testified as a witness. In response, the respondent argued that the facts and circumstances of the case did not constitute or fall within the purview of a champertous agreement, as he (the respondent) acted within the scope of operation of his profession (as a chartered accountant) to recover debt for the appellants. He further argued that champerty applies to a situation where a lawyer maintains an action for account...
without fees, hoping to recover his fees from the proceeds of the trial, if successful, but that the respondent, not being a legal practitioner, acted as a chartered accountant and within the purview of the ethics of his own profession. In sum, the respondent maintained that what he did was consultancy and not champerty.

The Court of Appeal resolved the issue in favour of the respondent. In arriving at its decision, the Court noted that the appellants’ assertion that they merely wanted the respondent as an expert witness does not change the character of the case presented by the respondent, who had proved that he was engaged to recover the debt and not only to testify as a witness.

In considering whether the agreement between the parties amounted to champerty, the Court of Appeal held that it is settled law that a situation where a person elects to maintain and bear the costs of an action for another to share the proceeds of the action or suit is champertous. However, it expressed the view that the determination of whether a relationship is champertous or contrary to public policy is to be ascertained not on the basis of averments in the statement of defence, but on the basis of the assertions in the statement of claim, upon which facts the plaintiff founded his action. The Court further held that:

\[1\]n order for the action of the respondent to be champertous, the facts have to show that the respondent offered to maintain the action by bearing the costs of the litigation in order to be given a share of the proceeds.

According to the Court, the facts of this matter did not disclose that the respondent was maintaining the action with a view to getting proceeds of the action in payment.

From the statements above, it is apparent that for a contingency fee arrangement to be champertous there has to be some element of maintenance. This implies that a third party funding of litigation may not be champertous if the third party merely ‘bears the cost of an action for another’ without any intention of benefiting from the suit by way of sharing the proceeds of the action.

It is presumable that third party litigation funding is not limited to funding of claims or defences, but may include financing a counterclaim in an already instituted action. This implies that the services of a third party litigation funder are not limited to financing a claimant alone, but may also benefit a defender in deserving circumstances.

From the above, it is apparent that the practice and law of third party funding of litigation and arbitration has yet to develop in Nigeria. Unlike in other jurisdictions where there are recognised funding institutions or associations of litigation funders, there is neither a formal judicial pronouncement in favour of third party funding of litigation nor any organisation of third party litigation funders recognised by Nigerian law. Rather, what exists in Nigeria is an ad hoc, underground industry of third party litigation financers that is neither recognised nor regulated by Nigerian law.

III STRUCTURING THE AGREEMENT

There is no special statutory or case law requirement for structuring a third party litigation funding agreement in Nigeria. Thus, it depends on the circumstances of each case. As with all other commercial contracts under Nigerian law, parties to the third party litigation funding agreement would set the terms that govern their commercial relationship. It is unlikely that the Nigerian courts will intervene when a party complains of a bad bargain, as long as the
Parties’ relationship or transaction is legal and all ingredients for the formation of a contract are present. In these matters, Nigerian courts adopt the freedom-of-contract approach, to match the mercantilist nature of Nigerian society. It follows that Nigerian courts will enforce a third party litigation funding agreement if it clearly expresses the parties’ voluntary terms of agreement and is not champertous or otherwise offensive to public policy.9

A typical funding agreement will include methods for calculating the maximum amount of money the funder will contribute to the legal representation, the percentage of the proceeds of the case that the funder will expect to receive upon success, and the maximum adverse costs award that the funder would pay, if any, in the event that the client loses the case. The agreement between the funder and the funded party may also include the funder paying the legal fees of another party or parties to the suit in the event that the funded party loses the suit, or where the judge or arbitrator orders the funded party to pay the attorney fees of another party. Clauses imposing duty of non-disclosure of confidential information released in the process of negotiation may also be inserted in the agreement, to avoid either party disclosing privileged or confidential information.

In arbitration, the party seeking third party funding may be asked by the funders to provide detailed information about the transaction. The information may be confidential or privileged under applicable law. The funder will evaluate the information to determine the strengths and weaknesses, the likelihood of success and the ability to recover from the losing party. If acceptable, the parties would negotiate a funding agreement that may cover the costs of the funded party’s arbitration and the other party’s attorney.10

IV DISCLOSURE

The liability of a third party funder with respect to the award of costs depends largely on the circumstances of the case and the provisions of the third party funding agreement between the parties. Where it is found that the identity of the funder is necessary for the purposes of the payment, the funded party may be asked to disclose the identity of the funder. However, with respect to an order of court in an application for security for costs, it is doubtful whether the issue of the identity of any litigation funder may be considered by the court, as security for costs is usually either a form of bond or order to be paid into the account of the registry of the court. With that being done, the identity of the funder may not be necessary. With respect to arbitration, however, whether the identity of the funder will be disclosed will depend on the circumstances of the case.

V COSTS

Under Nigerian law, the issue of award of costs is discretionary. Costs are awarded at the discretion of the court but the discretion has to be exercised judicially and judiciously. Issues relating to costs are usually regulated by the rules of the court. In accordance with these rules, in fixing the amount of costs, the court or tribunal takes into account all the surrounding

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9 The attitude of Nigerian courts in relation to contractual relationships mimics the attitude of courts in the United Kingdom, to the effect that provided that there is voluntary consent, the fairness of the parties’ contract terms is a matter for the parties themselves.

10 Professor Paul Obo Idornigie. Third Party Funding of International Arbitration. A presentation at the Professorial Symposium Marking the 35th Year Anniversary: 14 March 2014.
circumstances of the case. Thus, it is usually said that costs follow the event. The principle to be observed is that the party that is in the right is to be indemnified for the expenses borne by him or her in the proceedings, as well as compensation for his or her time and effort in coming to court.\footnote{See the case of Nigerian Society of Engineers v. Ozah (2015) 6 NWLR (Pt,1454) 76.}

With respect to arbitration, the Arbitration and Conciliation Act\footnote{Cap A18, Laws of the Federation of Nigeria 2004, Section 49.} provides that the arbitral tribunal shall fix the costs of arbitration in its award. The arbitration costs usually include:

\begin{itemize}
\item \textit{a} the fees of the arbitral tribunal;
\item \textit{b} travel and other expenses incurred by the arbitrators;
\item \textit{c} costs of experts’ advice;
\item \textit{d} administrative costs of the tribunal; and
\item \textit{e} costs of legal representation of the successful party if the costs were claimed during the arbitral process, and only to the extent that the arbitral tribunal determines that the amount of the costs is reasonable.
\end{itemize}

The fees of the arbitral tribunal should be reasonable, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case. In ad hoc arbitration, the arbitral tribunal determines the fees and in institutional arbitration the arbitral institution determines the administrative charges and the arbitrators’ fees while the arbitral tribunal fixes the costs of arbitration. Fees can be based on the amount in dispute or on a daily or hourly rate.\footnote{Professor Paul Obo Idornigie (see footnote 9).}

\section{THE YEAR IN REVIEW}

As indicated above, litigation involving institutions, companies and qualified legal persons does not often require funding from specialised third parties. Individuals usually bear the costs of prosecuting their claims themselves. The implication of this is that a person who cannot afford the cost of litigation or arbitration, even though he or she has a valid claim, may be denied access to court because of lack of funds. However, there are some institutions established by government that have the duty to prosecute the legal rights of indigent persons. These institutions include the Legal Aid Council set up by the federal government of Nigeria and the Office of the Public Defender set up by the Lagos state government. Also, lawyers are permitted to prosecute matters pro bono when a person is indigent and cannot afford legal fees. It appears, however, that these established institutions and the pro bono lawyers often operate in human rights abuse cases and not in commercial disputes. Moreover, these institutions are not third party funding institutions and do not benefit from the proceeds of the cases they prosecute or defend.

Nigeria is gradually moving towards recognising third party funding of litigation, although there are no recognised government or public third party funding institutions in Nigeria as this activity is not currently commercialised. Some private legal entities are springing up as third party funding institutions. One such entity is aetasLF, a private legal funding initiative focused on Nigeria.

\footnotesize
\begin{tabular}{ll}
11 & See the case of Nigerian Society of Engineers v. Ozah (2015) 6 NWLR (Pt,1454) 76. \\
12 & Cap A18, Laws of the Federation of Nigeria 2004, Section 49. \\
13 & Professor Paul Obo Idornigie (see footnote 9). \\
\end{tabular}
VII CONCLUSIONS AND OUTLOOK

With the enactment of the Rules of Professional Conduct for Legal Practitioners 2007, and the more flexible interpretation of champerty by the Court of Appeal in the Kessington Egbor case above, it appears that Nigerian law is slowly moving away from the rigid application of the common law doctrine of champerty and maintenance that has, over the years, made the recognition of third party funding of litigation virtually impossible. It is believed that, to grant more people access to justice, there is need for more flexibility with respect to third party funding. The existence of third party funding will create a form of equality among the parties in dispute and better access to justice for all parties. However, it has to be properly regulated to avoid abuse.
I MARKET OVERVIEW

Although third party litigation funding is still an uncommon concept in Norway, recent years have seen increased momentum in the market. Several pending claims are publicly known to be backed by third parties and, in June 2018, a Norwegian court of first instance handed down Norway’s first-ever court judgment in a funded matter.

As at September 2019, there is only one professional provider of third party funding services based in Norway: Therium Nordic. The company, which is partly owned and funded by UK-based Therium Capital Management, was established in 2016. Since the Norwegian third party funding market is largely unregulated, Therium Nordic instead proclaims its commitment to the Code of Conduct developed by the Association of Litigation Funders of England and Wales. In addition to Therium Nordic, a number of foreign-based funders are said to be assessing Norwegian cases.

While an increasing number of Norwegian legal practitioners are advertising the benefits of third party funding to their clients, many still appear sceptical to the concept. Moreover, a study published in 2018 reported that Norwegian buyers of legal services are less likely to resort to third party litigation funding in the near future than their Danish, Finnish and Swedish colleagues. These perceptions may change as third party funding arrangements become more common in Norway and elsewhere in the Nordic countries.

Claims purchase arrangements are less rare than third party financing arrangements and are widely accepted throughout the Norwegian legal industry.

II LEGAL AND REGULATORY FRAMEWORK

There is no legislation or other mandatory rules in Norway explicitly regulating third party funding. The issue of third party funding is neither addressed in the procedural law governing civil litigation, nor in the most common procedural rules of arbitration. In addition, there is no case law discussing regulatory issues or the legality of third party funding arrangements.

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1 Andreas Nordby is a partner and Eivind Tandrevold and Jan Olav Aabo are senior lawyers at Arntzen de Besche Advokatfirma AS.
2 ‘Third party funding’ will be used as an umbrella term for any arrangements where a party to a dispute seeks financing by non-parties to the dispute.
3 Roschier Disputes Index 2018, available at www.roschier.com. The survey was based on feedback from 143 of the largest companies operating in Sweden, Finland, Norway and Denmark.
Because of the lack of regulation, claim owners and funders are generally free to negotiate the particulars of their contractual relationship. The same applies for transfer agreements between claim owners and claims purchasers. Parties need to be mindful, however, of general principles set out in statutory law and case law that would apply to all types of commercial agreements governed by Norwegian law. For instance, as further explained in Section III, courts and tribunals may revise or even set aside unreasonable terms of an agreement.

Regulators have not yet subjected professional third party funders to licensing or other types of scrutiny, but that may change as the market for third party funding increases in size. Lawyers acting in funded matters, however, have to take extra care to comply with the Norwegian Bar Association’s Code of Conduct for Lawyers (the Code of Conduct). In the following – as all the legal and ethical dilemmas that may arise in relation to third party funding cannot be addressed within the scope of this chapter – we will discuss the most practical issues.

First, one of the main principles of the Code of Conduct is that a lawyer cannot undertake assignments in which he or she would risk breaching the duties of loyalty, confidentiality and independence towards his or her client. Consequently, a lawyer cannot act on behalf of both the funded party and the funder as there is a clear risk of these clients having conflicting interests in certain aspects of the case. Similarly, a lawyer representing a funded party must never allow the interests and influence of the third party funder to affect his or her advice to the client. As explained in Section III, the litigation funding agreement should be drafted with these principles in mind.

Second, the Code of Conduct prohibits lawyers from entering into contingency fee arrangements and, to a certain extent, conditional fee arrangements. Agreements where lawyers receive a percentage of the recovered amount are prohibited, as are any agreements where the lawyer’s personal economic interest in the outcome might conflict with his or her independence or the client’s best interests, or both. ‘No cure no pay’, ‘good cure good pay’ and similar arrangements are permitted as long as the fee structure is reasonable and does not render the lawyer conflicted or financially dependent on the outcome.

In summary, third party funding is a largely unregulated practice but requires extra prudence on the part of the lawyers involved. We believe that if the third party funding market sees increased activity, the likelihood of regulatory developments is high.

III STRUCTURING THE AGREEMENT

There is currently no standard market practice for how to structure a litigation funding agreement. As a starting point, claimants and funders are free to tailor the structure and the terms of their litigation funding agreement as they prefer. Still, parties need to observe several principles of Norwegian contract law when drafting their funding or transfer agreement. For instance, Section 36 of the Norwegian Contracts Act grants courts and tribunals the power to set aside or revise unreasonable contractual terms upon the motion of a party. The threshold for revising or setting aside an agreement is high, in particular between professional parties, and courts and tribunals require evidence of considerable contractual imbalance before doing so.

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4 Sections 2.1, 2.2, 2.3 and 3.2.1 of the Code of Conduct.
5 Sections 2.1.2, 3.3.2, 3.3.2 of the Code of Conduct.
Moreover, there exist no standard fee or fee uplift ranges in third party financing agreements governed by Norwegian law. We have seen fee structures ranging from multiples of three times the funder’s commitment, to percentages at around one-third of the recovered amount.

Owing to the legal ethics challenges outlined in Section II, parties involved in third party funding arrangements should be mindful of how the counsels’ role is set out in the agreement between the funded party and the funder. Drafters should place great emphasis on explaining and defining the lawyers’ involvement and obligations so that they do not interfere with the lawyers’ duties as set out in the Code of Conduct. To mitigate the risk of facing ethical dilemmas, lawyers should not be party to a litigation funding agreement and parties should place contractual responsibilities such as reporting on the funded party rather than on the funded party’s counsel.

IV DISCLOSURE

Norwegian law imposes no explicit obligation on a funded party to disclose the involvement or identity of a third party funder in a dispute – neither in arbitration proceedings nor in civil litigation proceedings.

Although there are no such explicit obligations, failing to disclose the existence and identify of a third party funder could pose serious legal and ethical challenges for the parties and lawyers involved. Failing to disclose can, among other things, lead to delays or to the judgment or award becoming void or unenforceable. Parties should therefore consider carefully whether choosing not to disclose the existence of a third party funder is worth the risk. The main argument in favour of disclosure is that it ensures that the identity of the funder poses no challenge to the independence and impartiality of the arbitral tribunal or ordinary court.

When acting in arbitration and litigation proceedings, judges and arbitrators have a duty to inform the parties or to recuse themselves when there are circumstances that might raise doubts as to their impartiality or independence.

In most arbitration proceedings, issues concerning impartiality and independence are governed by the Norwegian Arbitration Act. This is because the bulk of arbitration proceedings seated in Norway are ad hoc proceedings, meaning that they are not administered by an arbitral institution. Parties rarely adopt procedural rules that derogate from the Arbitration Act’s rules on impartiality and independence. Section 14 of the Arbitration Act provides that arbitrators have a duty to disclose ‘any circumstances likely to give rise to justifiable doubts about his [or her] impartiality or independence’. Thus, arbitrators should not assess whether they are in fact conflicted, but whether it might appear as if they are.

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6 The Norwegian Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration.

7 Section 14 of the Norwegian Arbitration Act is based on Article 12 of the UNCITRAL Model Law.

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When assessing their impartiality and independence, Norwegian arbitrators frequently refer to the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines). Since 2014, the IBA Guidelines has contained the following provision:

*If one of the parties is a legal entity, any legal or physical person having . . . a direct economic interest in, or a duty to indemnify the party for, the award to be rendered in arbitration, may be considered to bear the identity of such a party.*

Therefore, when assessing their impartiality, arbitrators can deem third party funders to be comparable to the funded party to the arbitration proceedings. Arbitrators could very well consider themselves conflicted and thus incapable of acting if they have a relationship with the third party funder that could undermine the parties’ and others’ confidence in their impartiality.

The same general rule applies in civil litigation. Pursuant to Section 108 of the Courts of Justice Act, a person may not serve as a judge when circumstances exist that ‘are capable of undermining confidence’ in the judge’s impartiality. This assessment should not only take into account the judges’ relationships with the parties, but their relationships with anyone who would have an economic interest in the outcome of the particular dispute. While we have not seen Norwegian courts referencing the IBA Guidelines, the same general principles are relevant in the assessment of a judge’s impartiality under the Courts of Justice Act. On this background, if a judge has a relationship with the third party funder that could undermine one’s confidence in his or her impartiality, the judge should be disqualified.

Given the above-mentioned principles, judges and arbitrators would expect parties and counsels to let them know if any ‘unknown’ third parties have a direct economic interest in the outcome of the dispute that they preside over. If, for instance, an arbitrator is a partner at the law firm that advises the third party funder, or the presiding judge is a close relative of one of the funder’s key employees, they would likely recuse themselves.

Failing to disclose the existence and identity of a third party funder does not just entail the risk of delays owing to untimely recusals and reputational damage. In arbitration, if an award has been handed down and it is later discovered that an arbitrator was conflicted owing to the third party funder’s involvement, the award may be nullified by the ordinary courts or enforcement of the award may be refused. Similar rules apply in civil litigation proceedings, where decisions may be appealed or reopened on the basis that they were rendered by a legally incompetent judge. When a judgment rendered by a judge that should have been disqualified

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8 As supported by leading authorities, see for instance G Woxholth, *Voldgeff* [‘Arbitration’] (1st edn Gyldendal Norsk Forlag, Oslo 2013), p. 407.
9 General Standard 6(b) of the IBA Guidelines.
10 Pursuant to General Standard 7 of the IBA Guidelines, parties have a duty to inform the arbitrators of circumstances such as these.
11 Section 43 of the Arbitration Act.
is appealed in good time, the appeals court shall annul the judgment and the case must be retried. 13 If the deadline for appeal has passed, the judgment may still be re-opened and subsequently retried. 14

In summary, parties are under no explicit obligation to disclose the existence of funding and the identity of the funder, but parties that do not disclose this information risk being faced with several types of delays and objections, such as the removal of arbitrators or judges, the challenge or annulment of the judgment or award and the impossibility of enforcement.

On this basis, we believe that funded parties are best off disclosing the existence of their funding arrangement and the identity of the funder. In addition to mitigating the risk of facing obstacles during and after the proceedings, disclosing the fact of funding might also benefit the funded party’s claim directly, as it would demonstrate for the opposite party that an independent third party has faith in the merits of the claim. Furthermore, we believe that if even more funded parties disclosed the existence of their financial backing, it would serve the integrity of the market for third party funding.

Parties to Norwegian litigation and arbitration proceedings are obliged to share relevant documents, including those unhelpful to their case. The ordinary courts can compel anyone to make available evidence containing information that may be relevant to the factual basis for the ruling. An arbitral tribunal can only recommend that parties or third parties disclose such evidence, but does not have the power to enforce disclosure. However, if a party or third party fails to comply with a recommendation made by an arbitral tribunal, the requesting party might instead petition the ordinary courts to order disclosure.

Therefore, anyone – including funded parties and third party funders – can be compelled to disclose a litigation funding agreement provided that it contains information that may shed light on disputed matters.

However, the general duty to disclose evidence only comprises the parts of the evidence (such as sections of an agreement) that are relevant for the dispute in question. 15 If, for instance, a funded party claims compensation for its funding costs, the fee provisions of the funding agreement would be relevant while other provisions might not be. Similarly, if a claim purchaser needs to prove ownership of the claim that it pursues, the requested party would only need to disclose the parts of the requested documents that are sufficient to prove that the claims transfer was valid and binding. In other situations, where the funding agreement has no relevance for the disputed matters, requested parties may refuse to disclose it. It is important to note, however, that relevance assessments shall be based on the parties’ assertions without regard to their merits – meaning that a requesting party may ‘tailor’ its assertions in a manner that would be more likely to result in a duty to disclose.

There are several exemptions to the duty to disclose evidence. For instance, parties cannot be compelled to submit evidence protected by legal privilege, that is, confidential communications between lawyers and their clients made for the purpose of seeking or giving legal advice. Courts and tribunals may also exempt a party from its duty to disclose if the evidence cannot be made available without revealing trade or business secrets.

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13 Sections 29-21 and 29-12 of the Dispute Act.
14 Section 31-3 of the Dispute Act. A judgment shall not be reopened, however, if there is a reasonable probability that a new hearing of the case would not lead to an amendment of significance to the party; cf. Section 31-5 of the Dispute Act.
V COSTS

In civil litigation, a party that is successful in an action is entitled to full compensation for its ‘legal costs’ from the opposing party.\(^{16}\) Full compensation for these costs shall cover ‘all necessary costs incurred by the party in relation to the action’.\(^{17}\) Arbitrators generally apply the same principles in arbitration proceedings, although the Arbitration Act merely provides the arbitrators ‘with the power to order the losing party to pay all or part of the legal costs of the prevailing party ‘as it sees fit’.\(^{18}\)

Under the main rules outlined above, courts and tribunals classify lawyers’ fees, arbitrators’ and experts’ fees, and administrative fees and costs, as recoverable legal costs. In addition, a prevailing party can claim compensation for ‘its own work on the case if the work has been particularly extensive or would otherwise have had to be undertaken by counsel or other qualified assistant’.\(^{19}\) Any other type of losses and expenses, such as loss of revenue, lost goodwill, or increased interest expenses are, as a main rule, not recoverable.\(^{20}\)

As of September 2018, the only Norwegian case law discussing whether funding costs qualify as recoverable legal costs is a first-instance court judgment, \textit{Atlant v. Oslo municipality}.\(^{21}\) The claimant, Atlant, which had its case funded by Therium Nordic, claimed compensation for its funding costs. Atlant’s funding costs constituted approximately 50 per cent of the damages it was awarded in the main claim. The district court concluded, summarily, that funding costs did not constitute legal costs pursuant to the Dispute Act and rejected Atlant’s claim for compensation.

To our knowledge, no cost items similar to third party funding (for instance, claims for compensation of the added costs of borrowing money to cover legal fees) have been successfully recovered as legal costs under the Dispute Act or the Arbitration Act. This serves to support the district court’s conclusion in \textit{Atlant v. Oslo municipality}.

In addition, classifying funding costs as recoverable legal costs might conflict with the universal right of access to justice, as set out the Norwegian Constitution and the European Human Rights Convention. This is especially the case since holding a party responsible for the other party’s funding costs could multiply its costs exposure manifold.

Therefore, as things stand, we believe that Norwegian courts and tribunals are highly unlikely to award a funded party compensation for its funding costs under the main rules that we have described above.

In certain exceptional circumstances, however, arbitrators and courts could award compensation for funding costs as damages. Pursuant to case law from the Norwegian Supreme Court, a party can be held liable for other costs than legal costs in ‘abuse situations’.\(^{22}\) A typical abuse situation would exist if a party sets out or rejects claims despite knowing that its position has no merits. As an example, if a party is found to have rejected a claim that it knew was merited and that the rejection left the claimant with few other options but to seek funding to enforce its claim legally, a Norwegian court or tribunal court could award the

\(^{16}\) Section 20-2 subsection 1 of the Dispute Act.
\(^{17}\) Section 20-5 subsection 2 of the Dispute Act.
\(^{18}\) Section 40 subsection 2 of the Arbitration Act.
\(^{19}\) Section 20-2 subsection 1 of the Dispute Act.
\(^{21}\) \textit{Atlant Entreprenør Svs v. Oslo kommune} (Oslo District Court, 5 June 2018, case No. 16-094601TVI-OTIR/08).
\(^{22}\) Judgment reported in Supreme Court Reports (Rt.) 2015 on p. 385.
funded party compensation for its funding costs. The threshold for proving the grounds for such a claim would be high, however, and there are few examples of claims that have prevailed on these bases.

In summary, applying existing statutory and case law, claimants seeking to recover their funding costs from the other party would face an uphill battle. To be awarded compensation for such costs, a funded party would probably have to prove that its counterparty had abused the legal system by knowingly maintaining an untenable position, and that the added costs were incurred as a consequence of the ‘abusive’ party’s behaviour.

The loser-pays principle applies in most Norwegian litigation and arbitration proceedings. As a main rule, only direct parties to litigation or arbitration proceedings may be held liable for adverse costs. In most third party funding arrangements, the funder will not be a party to the arbitration or litigation proceedings. Hence, as a starting point, there are no legal grounds to hold a third party funder liable for adverse costs. When it comes to claims purchase arrangements, the company that owns the claim will be party to the proceedings. Thus, the claim purchaser would risk becoming liable for costs.

In terms of security for adverse costs, the rules differ between arbitration and litigation proceedings. In arbitration proceedings governed by the Arbitration Act, parties can only be requested to put up security for the arbitrators’ fees and not for adverse costs. In litigation proceedings, however, courts may order claimants to put up security for adverse costs if the claimant is registered in a country outside the European Economic Area.23

None of the above-mentioned main rules apply to third parties, even in cases where the claimant is in such a poor financial condition that it will be unable to pay the respondent’s legal fees and costs. As explained below, however, certain narrow exceptions exist and there are circumstances in which third parties risk becoming liable for adverse costs.

First, under non-statutory law, company representatives (such as board members) can be held personally liable for adverse costs provided that they instituted or continued the legal proceedings on behalf of an insolvent entity, while at the same time knowing that the chances for the claim to be successful were low.24 In civil litigation proceedings, parties may request the court to include the representatives to the proceedings by way of joinder.25

Second, while there is no statutory or case law on the issue, it is possible that courts and tribunals could award compensation for adverse costs from third parties in abuse situations similar to the one exemplified above. The same applies for claims against shareholders or effective beneficiaries of ‘claims vehicles’ that are unable to settle an award for adverse costs. Here, non-statutory rules could evolve with inspiration from recent case law from Sweden26 and Denmark.27

23 Section 20-11 subsection 1 of the Dispute Act.
25 Section 20-7 of the Dispute Act.
26 Deloitte AB v. MH and JL (Supreme Court of Sweden, 11 December 2014, reported in NJA 2014 p. 877).
27 Van der Boom Holding B.V. v. Danish Business Authority et al. (Supreme Court of Denmark, 19 January 2018, reported in UfR 2018 p. 1487).
VI  THE YEAR IN REVIEW

The past 18 months saw some interesting developments in the Norwegian market for third party funding.

In June 2018, in its first-ever case known to be funded by a third party, Oslo City Court found for a claimant backed by Therium Nordic.28 The claimant, the construction company Atlant, was awarded damages from a Norwegian municipality after being thrown out of a major construction project.

Atlant was always open about the fact that it had received funding to pursue its damages claim and it even tried to recover its funding costs from the respondent.29 Although the claim for compensation for funding costs was unsuccessful, the court did not appear to have any other issues with the concept of third party funding.

Several other Norwegian companies are also using third party funding to finance their claims. By way of example, Norwegian Energy Company ASA (Noreco), an oil and gas company listed on the Oslo Stock Exchange, received funding to pursue major claims against a group of insurers in Denmark. The Danish first-instance court awarded Noreco compensation of US$470 million including interest (of which, reportedly, US$200 million was payable to the funders).30 However, in May 2018, an appeals court overturned the decision and only awarded Noreco US$12.5 million plus interest.31 The Danish Appeals Permission Board declined to submit Noreco’s appeal to the Supreme Court in October 2018.

There are signs that these matters have contributed towards demystifying the concept of litigation funding in Norway. In May 2019, Therium Nordic reported that it receives between five and 10 requests for funding each month, which is a substantial increase from previous years.32

VII  CONCLUSIONS AND OUTLOOK

The Norwegian market for third party funding is still in its infancy. In recent years, however, the concept of litigation funding has slowly started moving towards becoming an established dispute resolution tool. Although the Norwegian market for third party funding is largely unregulated, parties involved in funded matters need to carefully observe applicable laws and be mindful of the risks they face.

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28 See footnote 20.
29 As explained in Section V.
32 Newsletter issued by Therium Nordic AS on 10 May 2019.
In the coming years, as the global litigation funding industry is predicted to expand, it is likely that the Norwegian market for third party funding will grow too. The Norwegian litigation and arbitration climate appears ripe for more funders to enter. Further to the high-value oil and energy-related disputes that continue to dominate the market, ‘funding-friendly’ claims such as cartel damages claims, patent infringement claims and class action lawsuits are becoming increasingly common. On this basis, there is definitely potential for the continued development of third party funding in Norway.
I MARKET OVERVIEW

Defining ‘third party litigation funding’ is crucial in light of the fact that the term is not defined under Polish law and is rarely seen as an economic activity category in the country. For the purpose of this chapter we use a broader definition of the phenomenon that includes claim financing *sensu stricto*, claim purchasing, as well as class action funding and insurance contracts. All these features must be addressed distinctly, since market recognition and assessment vary.

The market for third party litigation funding (understood as the financing of litigation, or arbitration, in exchange for a contingency fee) does not seem particularly well developed in Poland. While there are certain (mostly foreign) companies addressing their offers of litigation financing to legal and natural persons in Poland, there are no public records or statistics available showing the scale of their operations and results. Typically, it is not the sole activity of a company; rather, litigation financing is part of a company’s broader offer. Not many examples of litigation financing are thus in the public domain, although randomly surfacing records reach as far back as 1995. Accordingly, it is difficult to assess the strength of this market segment or assess its development, although it is worth mentioning that some new entities entered the market last year. It is fair to say, however, that it is not flourishing, and it is given literally no media coverage, marketing or any separate identification in official statistics. There are several reasons for this. In simple terms, the economic reasons for the existence and development of the industry are the high value and complexity of claims, which require extensive funding. Most frequently, these claims are associated with healthy, strong legal entities with large operations that can produce such funding without a struggle, whereas for individuals, state legal aid seems to be the remedy for limited funding resources. It is also worth mentioning that there are pro rata limits on the entry fee in relation to the value of the claims. The cap on the entry fee in common (state) courts has doubled following the latest amendment to the Code of Civil Procedure² and currently amounts to 200,000 zlotys.

The element of third party litigation funding is more common on the insurance market. However, at the end of the first quarter of 2019, of a total of 50,806,313 policies, legal expenses insurance policies numbered only 1,246,544.³ More importantly, only 1,581

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1 Zbigniew Kruczkowski is counsel at Linklaters C Wiśniewski i Wspólnicy Spółka Komandytowa.
2 The amendment was made by the Act of 4 July 2019, amending the Code of Civil Procedure and certain other acts of law. New rules on entry fees entered into force on 21 August 2019.
3 The number of legal expenses policies has grown slowly in the past few years (1,050,392 at the end of 2016 and 1,185,819 at the end of 2017), following the decrease by almost half from 1,906,642 at the end of 2015; Polish Financial Supervision Authority (KNF) statistics (www.knf.gov.pl/publikacje_i_opracowania).
claims were settled between January and March 2019 (at the end of 2018, the number of claims settled had reached 6,523). The data suggests a low level of legal awareness in Polish society or a lack of interesting insurance products, which leaves a broad field for development in this branch of insurance.

The most popular and the fastest growing ‘branch’ of the third party litigation funding industry seems to be claims purchasing. This kind of investment takes different forms on the Polish market, ranging from securitisation funds, through debt recovery entities, to claims purchasing replacing class actions. Currently, claims alienation seems to be of utmost importance for business entities facing a growing number of overdue receivables. According to a survey of the Conference of Financial Companies in Poland, Polish businesses deal with 25.6 per cent of overdue receivables on average, whereas 18.3 per cent of companies deal with at least 50 per cent of overdue receivables in their portfolio. The above conditions make Polish companies more and more likely to use the services of professional debt recovery entities of any kind.

As regards prospects for potential growth, there are different solutions for different market segments. The segment involving claims purchases, insurance and (considering its specifics) class action funding is developing and seems fairly mature. The segment that is lagging behind is claims financing, which is less popular and difficult to identify. When discussing the potential of the latter, we feel its use largely depends on a properly identified target. In general, it should not target individuals or corporates. However, small and medium-sized business entities may find the industry’s offer attractive, since they are often intimidated by the prospect of complex, challenging disputes with high-value claims and strong counterparties. They also tend to back off when faced with disputes with foreign entities in another jurisdiction. Also, the above-mentioned latest amendment to the Code of Civil Procedure and other acts of law may create new opportunities for claims financing entities, since the new legislation increased the maximum entry fee from 100,000 zlotys to 200,000 zlotys.

The attitude to carrying out disputes in Poland seems to be another inducement for the development of the market; court disputes and litigation in particular are frequent and, with the growth of the economy, higher-value claims are more and more common. In 2018, 9,442,891 cases were brought before Polish civil courts and 1,661,631 were brought before Polish commercial courts.

II LEGAL AND REGULATORY FRAMEWORK

Neither Polish statutory law nor the rules of two leading Polish arbitration courts (the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Court of Arbitration at the Confederation of Lewiatan) provide specific rules on third party litigation funding. Since the phenomenon of third party litigation funding, in terms of its core feature (i.e., claims financing), is not yet popular in Poland as a commercial activity, there are also no court precedents regarding the field. The industry thus operates under the general framework

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5 https://kpf.pl/badania-i-publikacje/raporty-cykliczne.
of freedom of economic activity, currently regulated (in addition to Poland’s Constitution) by the Act of 6 March 2018 – the Entrepreneurs Act. Agreements for claims financing are subject to the rules and principles of Polish private law (i.e., the Act of 23 April 1964 (the Civil Code)), which offers far-reaching flexibility for parties. In principle, no licences are required (see, however, the comments on securitisation funds below). According to the Civil Code’s regulations on contractual obligations, any agreement of this kind should therefore be considered on the basis of the general rule of freedom of contract, which means that its content or purpose shall not prejudice the nature of the relation, a statute or the ‘principles of community coexistence’. The aforementioned rule means that every litigation funding contract should be analysed within the scope of, at least, its possible non-compliance with the rules of community coexistence. In this context, for example, grossly excessive remuneration may constitute an infringement of these rules.

Apart from the minor limitations of a general nature mentioned above, there are certain restrictions on the conduct of litigation funding activities by Bar-admitted lawyers (i.e., legal counsellors and attorneys-at-law). These restrictions affect the opportunities available to Polish law firms in relation to offering services of this kind.

First, it is forbidden for professional lawyers to agree on remuneration consisting solely of a contingency fee. At least part of the lawyer’s remuneration should be fixed; however, it is not defined or specified how big the fixed part should be. As litigation funding is frequently based entirely on a success fee, this rule hinders litigation funding being provided by law firms. It should, however, be emphasised that, in general terms, the concept of a success fee is widely applied by Polish lawyers and is now becoming more common following clients’ growing demands.

Second, it is questionable whether litigation financing (or financial intermediation) is permissible in light of the codes of conduct of professional lawyers. According to the rules applicable to professional lawyers, it is forbidden to carry on any activity that can potentially give rise to doubts as to the impartiality of the lawyer. Financial services and financial intermediation, as well as intermediation in commercial transactions, are examples of activities that are considered likely to influence the impartiality of a lawyer; therefore, it is questionable whether professional lawyers are allowed to engage in cases of litigation funding. Furthermore, this may also raise doubts because a professional lawyer’s core duty is to act in the best interests of the client, which may prove controversial if funding is the key driver for a client’s involvement in a dispute.

Contrary to third party litigation funding, strictly speaking, claims purchasing is widely used and based on statutory regulations of a supplementary character. A claim purchase agreement itself may be concluded by anyone and no specific licence or permission is required to purchase a claim. More complex rules apply to securitisation funds, which are funds that issue investment certificates for the purpose of raising funds to acquire receivables. The fund is obliged to apply for a permit from the Polish Financial Supervisory Commission. The operation of the fund is also subject to the supervision of the Financial Supervisory Commission as well as the National Bank of Poland, the Inspector General for the Protection of Personal Data, the Inspector General of Financial Information or the Office for Competition and Consumer Protection.

Apart from the above, specific rules on insurance contracts are also worth mentioning. Polish regulation of legal expenses insurance policies is consistent with Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance, also known as
Solvency II. The act implementing the Solvency II Directive provides general rules on legal expenses insurance, such as the obligation of an insurance company to bear the costs of court proceedings and services directly related to the pursuit of the claim before a court or by extra-judicial settlements, or the right of a policy holder to freely choose a lawyer. Limitations on insurance contracts derive from the Civil Code. Although the market offers a wide range of legal expenses insurance, in Poland, contrary to many other jurisdictions, only before-the-event insurance is available. It is highly questionable whether after-the-event (ATE) insurance is permitted by Polish law since, according to the Civil Code, an insurance agreement concluded after the event being subject to the agreement occurred shall be ineffective. Therefore, concluding an ATE insurance agreement would involve a high risk of nullity of the contract.

In conclusion, taking into account the low level of market interest in third party litigation funding and the marginal number of cases of such funding, it is quite unlikely that this market will be regulated in the near future and, from the legal and regulatory framework perspective, the foregoing should be considered an inducement to potential investors.

III STRUCTURING THE AGREEMENT

Since cases of third party funding agreements (as regards claims funding only) are rarely accessible in the public domain on the Polish market, it is difficult to outline the typical structure and provisions of such agreements. Nevertheless, there are certain guidelines on critical stipulations.

First and most importantly, the parties generally indicate that the funding is to be reimbursed, and to what extent, only if the case is won. This may be a fairly straightforward agreement, or fairly sophisticated, for instance, by making it conditional on whether the case is won in full or in part. Accordingly, specific rules on the distribution of the award should be provided for. The parties can specify whether the funder gets a percentage of the award, costs incurred increased by a percentage of the award or a multiple of costs incurred. It seems indispensable to provide for the rules of settlement if the costs incurred exceed the award.

Since court proceedings, especially in complex cases involving significant capital, can take many years (sometimes more than 10), the parties should set out the maximum level of funding provided throughout the litigation. The parties to a contract should also bear in mind that Polish civil procedure consists of two instances and extraordinary review procedures. During the main proceedings some additional, interlocutory proceedings may also arise, along with proceedings resulting from the counterclaim of the other party to a process. All the aforementioned proceedings can considerably extend the duration of the main court proceedings, increase the costs incurred by the funder and therefore decrease the profitability of the funding; thus, these should be settled in the contract. The remuneration may also be structured as a lump sum without making the fee contingent upon the percentage of the value of the claim.

Second, the contract should stipulate the rules on exchanging information between the parties to a contract as well as the rules on disclosing information to third parties. The arrangements of the parties should cover the admissibility of disclosure of funding by any of the parties, specifying the information that shall remain confidential. Furthermore, the parties should be aware that the funder may come to possess information classified as a company secret and thus it is highly recommended to provide for rules of confidentiality.

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Third, it is recommended that the funder protect against any fraudulent misrepresentation or non-disclosure of any information or document important from the point of view of a risk assessment or a profit–loss analysis. In a case of such misrepresentation or non-disclosure, the funder should be allowed to withdraw from the contract and claim damages or contractual penalties, or both.

Finally, the parties should consider other minor issues such as who chooses the lawyer or whether (and, if so, under what conditions) the claimant is allowed to settle the dispute. In general, defining the scope of the funder’s interference in the proceedings needs to be determined, otherwise it opens the way to a potential dispute between the party and the funder over the trial’s handling and pursuing liability in the case of an unfavourable verdict.

In the case of claims purchasing, the agreement concluded by the parties usually constitutes a purchase agreement and an assignment. Hence, it should include elements typical for a purchase agreement, such as price and the timing of the passing of the claim, as well as related profits and burdens to the buyer, and provisions on the assignment.

In structuring the provisions on the assignment, the parties (particularly the purchaser) should focus on the responsibility of the seller for his or her entitlement to the claim and the possible insolvency of the debtor. Even though the responsibility of the seller for the entitlement to the claim is based on statutory provisions, it is in the purchaser’s best interest to verify whether the disposability of the claim was limited by the parties; hence, an agreement concluded contrary to a provision limiting disposability shall be ineffective. Contrary to the seller’s responsibility for his or her entitlement, the responsibility for the insolvency of the debtor does not arise from statutory provisions, and it should therefore be subject to the parties’ arrangements.

In addition, in respect of claims purchases, the parties to a claim purchase agreement should be aware that according to the statutory provisions, the performance of an obligation to the former creditor shall be effective towards the acquiring party until the alienating party notifies the debtor of the assignment. Therefore, the parties should consider whether to notify the debtor of the assignment, which party is responsible for notification and how to settle any payments made by the debtor between the conclusion of the contract and the notification of the debtor (if applicable).

It is important to note that as a result of a claim purchase agreement, the seller disposes of all of his or her rights towards the claim; thus, the seller will usually not have any interest in providing for rules on the choice of lawyer or the costs of proceedings arising in relation to the claim. Nevertheless, in every case the parties should consider concluding a non-disclosure agreement.

IV DISCLOSURE

In general terms, the obligation to pay the costs of litigation (or arbitration) is imposed on the party to the process. There are, however, no regulations preventing a third party from paying the costs on behalf of the party, as long as it is clear that the court cost was paid in the case in question. It is allowed under the Civil Code to pay someone's else dues. There are also no regulations imposing on the party the obligation to disclose the source of financing, any agreement in this regard or, for example, a contract with a lawyer (apart from in class action claims). The party to a process is free to organise its relationship with the funder in the most convenient way. It is also important to note that even if disclosed, the third party litigation funder is not a party to a process and cannot be held liable for adverse costs.
Furthermore, Bar-admitted lawyers are not only allowed, but are also under a duty, to keep confidential all information obtained in connection with their professional activities. A confidentiality obligation applies to all the information concerning his or her client disclosed to the lawyer by the client or obtained in any other way, regardless of the source or the form of the information. Legal privilege also applies to the documents created by the lawyer and any correspondence between the lawyer and the client. Legal privilege or a confidentiality obligation has no time limits. It is even disputable whether the client can release a lawyer from the obligation of preserving secrecy. On the basis of the confidentiality obligation, the lawyer is allowed to refuse to answer any questions concerning the information covered by the obligation.

The party to the process and the third party litigation funder are, therefore, quite able to keep the financing, and any circumstances related to the financing, secret.

The situation is entirely different when the funding consists in claims purchasing. In a case of this kind, the rules on legal privilege and confidentiality remain unaltered, whereas the seller and the purchaser of the claim, as well as the claim purchase agreement itself, shall be disclosed (at least before the court). The disclosure of the legal relationship between the purchaser and the seller is necessary to prove that the transaction took place and was valid. It is important to note that hearings are public in most cases. The court can order the hearing to be held in camera upon request by a party that is a business entity if information constituting a company secret may be revealed; however, there is no actual option to limit the access of another party to such information revealed during the hearing or included in the case file. Nevertheless, company secrets shall be protected on the basis of the Act on Fair Trading providing that disclosure or making use of someone else’s company secret constitutes an unfair trading practice, and as such subject to punitive measures.

V  COSTS

The main rule of costs distribution in Polish domestic litigation is that the ‘loser pays’. The losing party shall, upon the request of the winner, reimburse reasonable costs of the legal proceedings, which include court costs, the attorney’s or legal counsellor’s fee and the cost of the appearance of the party before the court.

As to court costs, in disputes involving proprietary rights, the court fee ranges from 30 to 1,000 zlotys in cases where the value of the object in dispute is less than 20,000 zlotys; and 5 per cent of the value of the object in dispute (up to a maximum of 200,000 zlotys) in cases where the value of the object in dispute is greater than 20,000 zlotys. The court costs are entirely reimbursed to the winning party. However, where only a part of the claim is awarded, costs shall be reciprocally exclusive or proportionally shared. The court may also require that one of the parties reimburse all costs if the other party loses only a minor part of its claim.

The rules of reimbursement of the fee of a professional lawyer constitute a more complex issue. According to general rules, a party may request reimbursement of a lawyer’s fee within the limits set out in the regulation on the fees for legal counsel’s activities; for example, a limit of 10,800 zlotys for cases where the value of the object in dispute is between 200,000 zlotys and 2 million zlotys, or 25,000 zlotys where the value of the object in dispute is greater than 5 million zlotys. A party may request multiples of the fee provided for in the regulation when it is justifiable in light of the required workload of the lawyer, the value in dispute or the complexity of the case. Nevertheless, the fee reimbursed by the losing party cannot exceed six
times the fee provided for in the regulation. The costs reimbursed are therefore detached from the costs actually incurred by the party, especially given the fact that the courts rarely order the losing party to pay more than the minimal fee provided for in the regulation.

When it comes to the reimbursement of the cost of a party’s appearance before the court, it should be noted that, in general terms, a party represented by a professional lawyer is not obliged to be present throughout the hearings, unless the court orders the party to appear in person. Therefore, a party represented by a professional lawyer is entitled to reimbursement of the costs of personal appearance only if such appearance is summoned by the court. A party not represented by a lawyer can request a reimbursement of the costs of personal appearance irrespective of a court summons, within the limits of the fee of the lawyer performing his or her professional activities in court.

VI CONCLUSIONS AND OUTLOOK

Third party litigation funding (namely the financing of a claim of a party to a court or tribunal dispute) has no strong presence in Poland, and data regarding this practice is difficult to access. The segment of the claims funding industry that is recognised is claims purchasing, performed under various schemes. Most frequently it involves entities dealing with difficult-to-collect or non-collectible receivables that wish to use debt recovery services or that will sell their claims to securitisation entities to recover at least part of their funds, making the claims purchasing market buoyant. Some entities would rather insure against legal expenses to mitigate any future risk of their inability to bear the costs of litigation; however, legal expenses insurance constitutes only a marginal share of the insurance market.

Part of the growing industry segment is class action claims (albeit with the state as the rather unusual ‘funder’).

The insignificant size of the market in third party litigation funding (in its core feature) is reflected by the lack of specific regulations in this regard. It can be expected that as soon as this branch of business starts to grow, relevant regulations shall be introduced. For now, litigation funding is considered a commercial activity allowed under the general rules of freedom of economic activity, whereas the specific legal framework is driven by the regulations of the Civil Code. Since third party litigation funding is not a regulated activity, investors can take up and pursue this kind of economic activity without any limitations. Obviously, certain specific regulations apply to some areas of the industry related to claims purchase schemes, such as securitisation funds or insurance; third party litigation funding is not subject to any of these.
I MARKET OVERVIEW

The market for third party funding in Portugal is still small compared with more evolved markets such as the United States, United Kingdom, Australia and Germany, and still unknown to some Portuguese companies and law firms. However, the high costs of pursuing complex arbitration or litigation are paving the way for small and medium-sized Portuguese companies to seek litigation financing. This makes Portugal a country to keep on the radar as a growing market.

On the other hand, academic discussion surrounding third party funding is also on the rise, with three academic papers on the subject published by Portuguese jurists, including one of the authors of this chapter. The 2017 postgraduate course on arbitration at the University of Lisbon School of Law also specifically included a lecture on third party funding.

On 9 October 2017, a special event took place in Lisbon to present and discuss, among prominent international and Portuguese academics, practitioners and arbitrators, the ‘Draft Report for Public Comment’ of the ICCA-Queen Mary Task Force on Third-Party Funding. It should come as no surprise, therefore, that this practice looks set only to increase in the context of Portuguese arbitration and litigation.

Portugal has a long-standing practice of insurance for judicial protection; this kind of insurance is widespread in Portugal and, in most cases, is included in the civil liability insurance for motor vehicles. Although less common, there is also insurance coverage for other kinds of claims, including family, commercial, real estate and other areas of the law.

The model adopted in policies including such insurance is the typical ‘before-the-event’ insurance for legal and judicial risks. The insurance companies, in these cases, have virtually no control over the case, with their involvement limited to the payment of judicial costs and

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4 See, for example, https://www.arag.pt/.
attorneys’ fees up to the limit covered by the policy. In some cases, they appoint the counsel who will have direct and exclusive contact with the insured party. However, no generic coverage is accorded to cases involving arbitration.

This insurance practice has different characteristics and is subject to regulation that is quite distinct from that applicable to third party funding, therefore it is not feasible to transpose directly any of the concepts from this insurance practice to third party funding. Also, as yet, the funding of arbitration cases using the modern business model of third party funding is uncommon in Portugal. Nonetheless, it is undeniable that, in practical terms at least, the notion of a litigation case being financed by an insurance company is not wholly alien to the Portuguese market. However, the same conflict-of-interest issues that arise in the context of arbitration (the subject of the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines) – see Section IV) should also arise in relation to disclosures of interests for both before-the-event insurance and (albeit less common in Portugal) after-the-event insurance. For although they are different models, the same principles of disclosure apply to funders and insurers, both of whom have a direct or indirect economic interest in the arbitration.

In any event, given the size and characteristics of the Portuguese legal market, we see potential for the growth of third party funding, which will primarily involve (1) small and medium-sized Portuguese companies pursuing complex claims that need sophisticated counsel and experts; (2) Portuguese companies in financial distress that need to secure rights through litigation or arbitration claims; (3) foreign investors seeking redress through investment arbitration against the Portuguese state, or Portuguese companies against a foreign state; and (4) international commercial arbitration in Portugal, where companies willing to pursue their claims often do not have the initial capital to pay the advance on costs, including those of some international arbitration institutions.5

II  LEGAL AND REGULATORY FRAMEWORK

There is no specific regulation of third party funding in the Portuguese legal system, or in the European Union for that matter.

There are also no judicial precedents in Portuguese courts relating to third party funding and no association for self-regulation of funders, such as the Association of Litigation Funders of England and Wales.

However, the common law rules prohibiting champerty (supporting litigation in exchange for a share of the proceeds of that litigation) and maintenance (supporting litigation, regardless of the reason) do not exist in the Portuguese legal system. Although

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5 A simple exercise to estimate the advance on costs for an ICC arbitration (see https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/) will show that an amount in dispute of US$20 million, with one arbitrator, will require advance on costs of approximately US$200,000, with this amount increasing to approximately US$450,000 for three arbitrators. These are only the costs to start the arbitration and do not include the arbitrator’s expenses and counsel’s fees. These amounts may prove prohibitive for some small and medium-sized companies.
even in common law jurisdictions these rules have lost some of their importance or have been eliminated altogether,\textsuperscript{6} the lack of prohibition in Portugal fosters more flexibility for the participants in this industry and poses fewer challenges for the application of funding.

Notwithstanding this, it is worth investigating the possible challenges litigation funding by third parties may face in relation to the Portuguese legal system.

The following are the fundamental challenges: (1) verifying whether the activity of litigation funding may be subject to prior authorisation or licensing by Portuguese financial authorities; (2) assessing whether the third party funding business model may fall into a quota litis or sharing-of-attorneys’-fees model; (3) analysing the issues pertaining to attorney–client privilege; (4) verifying the extent to which third party funding may be characterised as usury; (5) analysing whether third party funding can be considered a ‘monetisation’ of justice and, if so, what consequences derive from that assertion; and finally (6) assessing whether it violates principles of public policy and good morals.

\textbf{i Licensing of the activity}

Banking and financial activities in Portugal are regulated by Decree-Law No. 298/92 of 31 December, as modified and adjusted.\textsuperscript{7}

We find it challenging to place third party funding within any of the activities of credit or financial institutions allowed under this Act (as described in Articles 3, 4-A and 6 of Decree-Law 298/92). We also question whether third party funding can be characterised as any of those activities that are exclusive to institutions of credit, as provided for in Article 6 of Decree-Law 298/92.

By the same token, we cannot conclude that the modern type of litigation funding agreements fulfil the definitional requirements of the financial agreements listed in Article 2-A of Decree-Law 298/92.

Equally, it does not seem correct to affirm that third party funding could be classified as an insurance activity (for the purposes of the legal regime governing access to and exercise of insurance and reinsurance activity provided by Law No. 147/2015 of 9 September), because even though the funding agreement contains the element of risk, in the very same fashion as an insurance policy, it lacks a fundamental requirement of the insurance policy: the premium, which is the typical ‘price’ for the insurance policy. Indeed, because third party funding in its common model is a non-recourse finance model, it typically does not have a price attached.

In summary, we understand that there is no legal provision under Portuguese law requiring the licensing of the activity of third party funding.

It may be the case that funders may be subject to licensing and regulation to the extent that they become listed companies or need to raise capital in the financial market. However, these cases do not pertain to, and cannot be confused with, the activity of financing litigation, which remains unregulated in Portugal.

\textsuperscript{6} This was the case in Australia. Hong Kong and Singapore also passed legislation in 2017 permitting third party funding in arbitration. The Irish Supreme Court, however, ruled on 23 May 2017 that a funding arrangement of this type is unlawful because it violates the country’s law barring champertous agreements.

\textsuperscript{7} The 46th version is the most recent modification, from Law No. 30/2017 of 30 May.
Portugal

ii Issues related to the legal profession in Portugal

The new Rules of the Portuguese Bar Association, approved in Law No. 145/2015 of 9 September, maintain the traditional rule in Portugal that prohibits the pactum de quota litis.8 This provision has the purpose of protecting the dignity of the legal profession by declaring it unlawful to waive the fees that compensate a lawyer for his or her professional performance.

It does not seem to us, however, that the funding of litigation by a third party violates this rule. Even if the attorneys’ fees are paid directly by the third party funder, which is a common scenario in many jurisdictions where payment of this kind is not forbidden,9 the funder is only doing so on behalf of the client and this does not call into question counsel’s right to the fee.

It also cannot be claimed that a third party funder is practising any form of quota litis agreement. The funder does, in fact, have a share in the proceeds of the case under the agreement with the assisted party, but such an agreement is not prohibited by Article 106 of Law No. 145/2015, because neither the funder nor the assisted party is a lawyer, nor are they acting in the capacity of a lawyer.

The Rules of the Portuguese Bar Association also ban the practice of sharing attorneys’ fees.10 However, in a litigation finance agreement, there is no sharing of attorneys’ fees.

In any event, the question that follows is whether the counsel who accepts to work under a contingency fee agreement or for a success fee (to the extent permitted by Article 106 of Law No. 145/2015) is performing the activity of a third party funder. Is the party's counsel financing the case and, as such, subject to the same consequences and treatment as a third party funder? The answer can only be a negative one. The salient issue here is not so much whether a contingency fee agreement constitutes some form of litigation finance but rather ascertaining whether counsel can be considered a third party. Given the legal representation phenomenon, in Portugal, the identity of counsel and client may be considered the same and, therefore, there is no involvement of a third party in the dispute.

At the same time, a party’s counsel could not be held liable for adverse costs or security for costs. Aside from the issue of liability for acts in the exercise of the legal profession or vexatious litigation,11 the responsibility for paying the costs of a claim cannot be transferred to a party’s counsel.

Finally, it is also important to mention the confidentiality obligation of the party’s counsel and the relationship between the party’s counsel and the third party funder.

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8 Article 106(2) of the Rules of the Portuguese Bar Association: ‘By “quota litis agreement” is understood the agreement between the attorney and his or her client, before the definitive conclusion of the matter in which the latter is a party, by which the right to attorney’s fees is exclusively dependent on the result obtained in the matter, and by virtue of which the constituent is required to pay its counsel part of the result obtained, either in amounts in cash or in any other good or value,’ (free translation).

9 For instance, under French and Belgian rules applicable to the legal profession, an attorney cannot be paid and cannot enter into any fees agreement with a party other than his or her client.

10 Article 107 of the Rules of the Portuguese Bar Association: ‘It is forbidden for the counsel to share his or her fees, even as a commission or another form of compensation, except with other lawyers, trainees or paralegals with whom he or she is associated or who may have provided collaboration,’ (free translation).

11 Article 545 of the Portuguese Civil Procedures Code: ‘When it is recognised that the party’s attorney in fact had personal and direct responsibility in the acts revealed as vexatious litigation, this fact will be notified to the relevant professional public association, so that the association may apply the sanctions and charge the attorney in fact with the portion of the costs, penalties and indemnification it deems fair,’ (free translation).
The Portuguese legal system provides for attorney–client privilege in Article 92 of the Rules of the Portuguese Bar Association, under which the counsel has a duty of confidentiality in relation to all information provided to him or her and about the case.

Disclosure of information by the assisted party’s counsel to a third party funder can only be made upon the waiving of privilege by the client (i.e., with prior authorisation from the latter). Without this authorisation, the lawyers could only disclose information protected by attorney–client privilege if the disclosure were absolutely necessary for the defence of their own dignity, rights and legitimate interests or those of their clients or representatives, and with prior authorisation from the chairman of the Bar Association’s regional council (Article 92(4) of the Rules of the Portuguese Bar Association).

The same obligation or right does not extend to the third party funder. Except for the confidentiality obligation provided in the funding agreement, the third party funder cannot benefit from a privilege that is conveyed exclusively to the legal profession. The common-interest doctrine of some common law jurisdictions, extending to the funder the protection of privileged information, is not applicable under Portuguese law. Thus, a funder may be ordered by a court judge to disclose any information it has obtained during the financing of a claim.

iii Usury
The prohibition of usury is a general principle of Portuguese law.

The question of usury, however, has not been much debated in the international arbitration setting (particularly in matters involving the United States and the United Kingdom). The discussion is at best limited to whether a funding agreement can be characterised as a loan.

However, in Portuguese law, the debate proves to be more significant because the prohibition of usury goes beyond the mere verification of the interest rates agreed in a contract.

According to Article 282 of the Portuguese Civil Code, a transaction is voidable when a party exploits another party’s state of necessity, inexperience, dependency, weak mental state or character to obtain excessive or unjustified benefits or the promise thereof, for itself or a third party.

Hence, the challenge may exist when litigation finance is used to fund a party in financial distress, which is the most typical case. In these cases, we may well encounter a party in a state that qualifies as one of necessity, dependency or mental weakness. Could such a party later invoke usury to have the contract declared void? Or would that claim challenge the limits of good faith?

The answers to these questions are not straightforward, but rather should be assessed on a case-by-case basis. In any event, given that the theoretical risk is significant, the funding agreement should be drafted with an eye to the limits of proportionality acceptable in Portuguese law.

iv Monetisation of awards and judgments
The Portuguese legal community may question whether third party financing could fall within the concept of transforming a lawsuit into a commodity or reducing justice to a commercial asset.

This, however, seems a far-fetched idea and one that does not consider the actual benefits of third party funding, most notably the access to justice.
There may be cases where the rights of the funder in a funding agreement may be used as collateral for its operations, or those rights may even be recorded as financial assets in its balance sheets, but even these circumstances do not go so far as to characterise third party funding as a monetisation of awards and judgments.

In fact, experience shows that most funding agreements do not allow for the free assignment or pledge of the funder’s rights, because of the specificity of those rights and the personal nature of the funder’s obligations.

We have not found, in any case, any provision under Portuguese law or reference therein that may be interpreted as considering third party funding a monetisation of awards and judgments.

v Public policy and good morals

Articles 280 and 281 of the Portuguese Civil Code consider a transaction that violates public policy or good morals to be null and void.

However, we cannot find any principles of this nature in the Portuguese legal system (either of public policy or good morals) that would call into question the validity and effectiveness of a funding agreement. Neither have we found any judicial precedents that could be used to support an argument along these lines.

Even if, theoretically, any such argument could arise, it would have to be balanced against another fundamental right, which is the access to justice that third party funding provides – a consideration often forgotten.

III STRUCTURING THE AGREEMENT

As mentioned above, there are no laws in Portugal that regulate third party funding. For this reason, the funding agreement is not a typified (regulated) contract and it is far from harmonised. With a legal nature of uncertain status, the most cautious approach is to assess such agreements on a case-by-case basis.

The most common business model of third party funding is where the funder finances the litigation, with some level of monitoring or control, in exchange for a share of the proceeds if the claim is successful. This model would not seem to constitute a loan agreement, since the repayment of the funding is not obligatory but at the funder’s risk. It is not a partnership, nor a commercial company, because the structure of the funding agreement does not create a separate legal entity. What then is the legal nature of the typical funding agreement?

There are those who consider the funding agreement to be a joint-venture agreement, more specifically an ‘association in partnership’ in Portuguese law (Decree-Law 231/81 of 28 July).\(^{12}\) The similitude of relations that exist between third party funding and the association in partnership may indeed allow, by analogy, the application of Decree-Law 231/81 to regulate funding agreements.

In this case, Decree-Law 231/81 should be analysed to determine which contractual provisions should be expressly included, to avoid results that may not have been intended by the parties.

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The following are the most relevant provisions that, pursuant to Decree-Law 231/81, require express and written agreement by the parties in the contract for litigation finance:

a. Where there is more than one funder in a funding agreement, the contract should provide for the exercise of the right of access to information, as well as the rights of audit and monitoring of the case by the various funders. The joint and several liabilities of the funders in the losses and gains of the claim also require an express provision in this sense.

b. If the parties agree that the funder will not bear the ‘losses’ arising from the claim, that is, that the funder will not be liable for paying adverse costs or security for costs, the contract must expressly provide for this exclusion. The lack of such an express provision may be construed as the funder’s obligation to participate in the losses.

c. Conversely, the funder’s unlimited responsibility to bear adverse costs or security for costs must also be expressly written in the contract, as otherwise it will be limited to the amount of the funder’s contribution.

d. The assignment of the funder’s contractual standing must be expressly permitted in the contract.

e. The contract must specifically provide for the participation and the manner in which the funder will participate in the proceeds of the claim. By the same token, the contract must provide for the financial contributions of the funder in the claim.

f. The requirement that the assisted party not perform certain acts, nor take certain steps, without the funder’s previous consent must be expressly included in the contract. The assisted party shall be liable for any damage caused to the funder for acts performed in non-compliance with these contractual obligations.

g. The survival of the funding arrangement in the event of death or extinction of the assisted party or the funder must be expressly included in the contract.

h. The termination of the funding agreement for reasons other than ‘just cause’ (for instance, if the funder believes that the dispute is no longer commercially viable) must be expressly included in the contract.

i. Article 31 of Decree-Law 231/81 provides for the assisted party’s annual obligation to report to the investor. The reporting should be precise and clear on all operations the investor may have an interest in, justifying the amount of its participation in eventual losses or gains, if any. Therefore, any reporting obligations by the assisted party to the funder that are different from the provisions of Article 31 of Decree-Law 231/81, or in a more detailed manner, must be expressly included in the contract.

13. Article 22(2) of Decree-Law 231/81.
15. Article 21(2) of Decree-Law 231/81.
16. Article 23(2) of Decree-Law 231/81.
17. Article 25(4) of Decree-Law 231/81.
18. Article 25(1) of Decree-Law 231/81.
19. Article 24(1) and (4) of Decree-Law 231/81.
20. Article 26(2) and (3) of Decree-Law 231/81.
22. Article 30 of Decree-Law 231/81 does not specifically provide for events of termination such as these.
Besides the above, the agreement should stipulate confidentiality obligations between the funder and the assisted party, including any information received from the financed party’s counsel. If the funder wishes to receive information directly from the party’s counsel, the waiver of attorney–client privilege must be express and in writing.

Finally, as stated previously, the principle of proportionality is a fundamental principle of law, as is the prohibition of excess under Portuguese law. This principle is encapsulated in Article 18, among others, of the Portuguese Constitution and may be considered a principle of Portuguese international public policy.23

Ultimately, this means that the parties’ free will is limited by these principles. Provisions that are excessively advantageous to one of the parties and a detriment to the other may be subject to scrutiny, review and, eventually, annulment by the Portuguese courts.24

IV DISCLOSURE

The duty of disclosure of the existence of third party funding is a matter of much discussion and it relates not only to the parties’ duty of disclosure but also to the arbitrator’s duty of disclosure.

This discussion has revolved around the following main concerns in the context of arbitration: the possible conflicts of interest of arbitrators; and the arbitral tribunal’s assessment of whether a party may be considered impecunious and thus unable to pay the adverse costs of a claim and consequently be ordered to pay security for costs.

The discussion on conflicts of interest of arbitrators arises for a diversity of reasons in relation to third party funding, not the least of which is that ultimately arbitrators, unlike judges, receive their fees from the parties to perform their roles. In this context, the analysis of potential conflicts should focus on the extent to which an arbitrator, in the eyes of the parties, may be questioned as to his or her independence and impartiality in an arbitration in which one of the parties is being financed by a third party.

On the grounds of the principles of law, the duties of independence and impartiality of the arbitrators require them to be free of any prejudice, predisposition or affinities that may affect their fair and impartial decision in a claim, and to be free of any personal, contractual or other relationship that may call into question the independence of the arbitrator.25

Consistently, Article 9(3) of the Voluntary Arbitration Act (Law No. 63/2011 of 14 December) expressly requires that the arbitrators be independent and impartial in the exercise of their duties. This is a duty that cannot be waived by the parties and violation of this duty will result in annulment of the final award. Furthermore, Article 11(1) of the Rules of Arbitration of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (also known as the Commercial Arbitration Centre) provides that arbitrators shall be, and shall remain, independent and impartial (and available); and Article 11(2) sets out that ‘any person who agrees to sit on an arbitral tribunal shall sign the statement provided

for in the previous article, in which he or she will disclose any circumstances which may, from the parties’ viewpoint, give rise to reasonable doubts as to his or her independence, impartiality (or availability).

The rules of arbitration of other Portuguese arbitration institutions require similar standards from the arbitrators. These institutions include the Centre for Commercial Arbitration of the Oporto Institute of Commercial Arbitration, the Concórdia Centre for Conciliation, Mediation of Conflicts and Arbitration, and the Arbitrare Centre for Arbitration for Intellectual Property, Domain Names, Corporate Names and Designations.

In addition, General Standard 3(a) of the IBA Guidelines provides for the arbitrators’ duty to disclose any facts or circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence. On the other hand, General Standard 7(a) provides that the parties have a duty to inform an arbitrator or the arbitral tribunal of any relationship between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The official explanation to General Standard 7(a) sets out that ‘Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator’s impartiality or independence based on information learned after the appointment’, and gives the example of an entity providing funding for the arbitration as a person having direct economic interest in the award. It should be noted that insurers are also included in the duty to disclose, as they too may have a direct or indirect economic interest in the arbitration.

The question that follows from this is whether and how the Portuguese jurisdiction is giving weight to the IBA Guidelines. In this respect, albeit considered in a specific setting (arbitrations involving public entities), in four recent cases brought before the Supreme Court of Justice and the Lisbon and Oporto Courts of Appeal, the courts considered that ‘particular weight should be given to the IBA Guidelines’. In these cases, the courts relied on the IBA Guidelines as a particularly useful instrument in deciding conflicts of interest. Portuguese commentators have also attributed substantial relevance to the IBA Guidelines. As a consequence, we may conclude that General Standard 3(a) and General Standard 7(a) of the IBA Guidelines will most likely apply in Portugal.

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29 See the decision of the Portuguese Supreme Court of Justice of 12 July 2017, decisions of the Lisbon Court of Appeal of 24 March 2015 and 29 September of 2015, and the decision of the Oporto Court of Appeal of 3 June 2014, all accessible at http://www.dgsi.pt/.
30 See Dário Moura Vicente (Coordinator), Lei da Arbitragem Voluntária Anotada (3rd Edition, Almedina, 2017), at 44; and Mário Esteves de Oliveira (Coordinator), Lei da Arbitragem Voluntária Comentada (Almedina, March 2014), at 129-130.
Therefore, since the issue of disclosure has a legal basis in Portuguese law and is also provided for in certain rules of international arbitration institutions,\textsuperscript{31} it follows that in arbitrations in Portugal the parties must disclose whether they have resorted to third party funding and arbitrators must disclose whether they have any relationship with the funders.

Finally, the question also remains as to the content of the disclosure by the parties regarding third party funding. The international setting shows us that there is no uniform understanding of this issue. Although initially the duty to disclose was limited to the existence of third party funding and the identity of the funder, it seems that information of a broader scope has been demanded more recently.\textsuperscript{32}

Therefore, in Portugal we may expect parties to be required to disclose the existence and details of any funders, as well as further information of relevance to the dispute, as was the case in the decision of Professor Julian Lew.\textsuperscript{33}

V THE FUNDER’S UPLIFT FEE, COSTS AND SECURITY FOR COSTS

The decision of the High Court of Justice in the United Kingdom in the \textit{Essar v. Norscot} case,\textsuperscript{34} in 2016, merits discussion in relation to Portuguese arbitration, because a similar decision could potentially be reached in Portuguese courts.\textsuperscript{35}

In his decision, J Waksman QC confirmed the award made by Sir Philip Otto in an ICC arbitration seated in London. The arbitrator considered the financing arrangement the claimant had made with a third party funder to be ‘costs’ incurred by the claimant in pursuing its claim, which should therefore be reimbursed by the defendant in the recovery of expenses.


\textsuperscript{32} See Order No. 3 of Prof. Julian Lew of 12 June 2015, in \textit{Muhammet Çap & Sehil İnsaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan} (ICSID Case No. ARB/12/6), where the arbitral tribunal ordered the claimant to ‘confirm to respondent whether its claims in this arbitration are being funded by a third party funder, and, if so, shall advise respondent and the Tribunal of the name or names and details of the third party funders, and the nature of the arrangements concluded with the third party funders, including whether and to what extent it/they will share in any successes that claimants may achieve in this arbitration’. See also, Article 24, l, of the Investment Arbitration Rules of the Singapore Investment Arbitration Centre.

\textsuperscript{33} See footnote 29.


Under Portuguese law, arbitral tribunals have the authority to allocate costs under the principle that ‘costs follow the event’, that is, the prevailing party has the right to recover the costs of the claim from the other party. There is no limit to this allocation other than what the tribunal deems to be ‘reasonable’. Therefore, given the arbitral tribunal’s discretion to allocate adverse costs as it sees fit, it is possible that a similar decision could be rendered by an arbitral tribunal applying Portuguese law. However, it is appropriate to question not whether the arbitral tribunal has this authority, as it clearly does, but rather the real or effective extent of the reach of this authority.

We believe that the decision in the Essar v. Norston case should be met with criticism because it produces an unjust outcome, it is a strong deterrent to arbitration and is potentially damaging to the third party funding industry and to arbitration in general as a consequence. The uplift fee payable to the funder is neither a party’s cost, nor is the assisted party liable for the uplift fee in the form of damages. The understanding that a financing arrangement might constitute costs could lead to a double (or triple or multiple) recovery or could be characterised as unjust enrichment attributable to the prevailing party.

Finally, such an understanding could have two adverse consequences for the funders: a strong argument for disclosure of the financing agreement and its conditions; and the resulting liability of the funders for the adverse costs, under the principle of ubi commoda, ibi incommoda (one who benefits from a legal regime must also assume the corresponding risks). Thus, we must watch carefully and eventually condemn this possible outcome if a decision such as that in the Essar case is repeated in Portugal, which may well happen.

On a different note, if we analyse the possibility of a court or arbitral tribunal in Portugal ordering the payment of adverse costs by the funder, as happened in the UK Court of Appeal Excalibur case, we may conclude that the same result would be unlikely in a Portuguese court or in a tribunal seated in Portugal.

In the Excalibur decision, the Court held that the funders were required to pay the defendants’ costs on an indemnity basis, even though the funders were not a party to the actions that led to the award of indemnity costs against Excalibur.

The authority of common law judges seems to have a greater reach than that of civil law judges. To a limited extent, Portuguese judges have authority over third parties (e.g., to order the submission of evidence), but not to the extent shown in the Excalibur decision.

However, depending on the development of third party funding in Portugal and, in particular, the level of control a funder may have in a claim, the principle of ubi commoda, ibi incommoda may eventually be taken into consideration in Portuguese courts to allocate adverse costs to a funder. A similar outcome is potentially feasible in arbitration, although the

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36 Article 42(5) of the Voluntary Arbitration Act (Law No. 63/2011, 14 December 2011) sets out that: ‘Unless the parties agree otherwise, the award must contain the division by the parties of the costs directly resulting from the arbitral proceeding. The arbitrators may decide in the award if they deem it fair and adequate that one or some of the parties compensate the other or others for the totality or part of the reasonable and evidenced costs and expenses resulting from the involvement in the arbitration.’ Similarly, Article 48(3) of the Rules of Arbitration of the Commercial Arbitration Centre allows the tribunal to ‘decide on the manner of division of arbitration costs, attending to all circumstances of the case, including the adverse result and procedural behaviour of the parties’.

jurisdiction of the arbitral tribunal should be dealt with in a separate case under a doctrine allowing the extension of the arbitration agreement.\textsuperscript{38} Certainly, any development along these lines should be followed carefully in the near future.

As to the matter of security for costs, in theory it may be ordered by arbitral tribunals to be paid by the claimant or the defendant when the arbitral tribunal considers there to be a real and verified the risk that a party may not be able to bear the other party’s costs in an adverse scenario.

In arbitration as well as in court proceedings, security for costs will be raised on the grounds of being a necessary interim measure, requiring, implicitly, the fulfilment of many prerequisites, such as the \textit{periculum in mora} (the urgent need for the order and the ‘danger in its delay’) and the \textit{fumus boni iuris} (a prima facie case).

However, the requirement for a party to pay the costs of the claim is a matter that the Portuguese courts and arbitral tribunals will not decide in advance so readily. For this reason, we anticipate that we may only see the imposition of this measure in extraordinary cases and in exceptional circumstances.

In any case, and in line with what has been defended in international disputes (aside from the conspicuous case of \textit{RSM v. Santa Lucia}),\textsuperscript{39} we anticipate that tribunals will not assume a party’s impecuniosity nor the impossibility of a party meeting its costs solely because it resorted to third party funding.

\section*{VI \ THE YEAR IN REVIEW}

It is fair to say that much of what has been discussed so far in this chapter in respect of third party funding has also been debated among the Portuguese legal community in the course of the past year.

We have not seen any court or legislative developments for, as already mentioned, third party funding has not yet reached the stage of regulation or court precedents in Portugal.

However, academic discussions and relevant events for practitioners, such as the inclusion of a third party funding lecture in the postgraduate course on arbitration at the University of Lisbon School of Law, the ICCA-Queen Mary Task Force on Third-Party Funding event held in Lisbon in October 2017 and the Congress of Commercial Law, also held in Lisbon, in November 2017, with a presentation on third party funding, show the signs of the development of this industry in the country. We will presently see much more progress in this direction in Portugal.


\textsuperscript{39} \textit{RSM Production Corporation v. Saint Lucia}, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs (13 August 2014).
VII CONCLUSIONS AND OUTLOOK

Even though the third party industry is not yet fully developed in Portugal, it continues to take strides in that direction.

Given the high costs of some commercial claims and the need for small and medium-sized Portuguese companies to finance the pursuit of their claims, coupled with the increase in international arbitration and the steady economic growth in size and complexity of commercial transactions in Portugal, we expect third party funding to feature increasingly in commercial and international disputes in Portugal.

As the discussions on the need for regulation of third party funding grow at international level, we anticipate that it will also be regulated at some stage in Portugal.

Regulation of third party funding could deal with issues such as costs related to arbitration and the responsibility of the funder for such costs; the definition of third party funding; the relationship between the funders, the assisted parties and the parties’ counsel as regards attorney–client privilege, as well as the question of disclosure of the existence of a funding agreement and conflicts of interest.

In conclusion, given these challenges, it would seem prudent for arbitration agreements to include certain provisions to ensure less uncertainty in potential claims and, in particular: (1) the obligation to disclose the existence of funding agreements in the event of disputes and the content to be disclosed; and (2) acknowledgement by the parties that, as a security measure to avoid a potential annulment of the award or refusal of its recognition and enforcement under the 1958 New York Convention, the funder’s eventual uplift fee should not comprise any recovery of costs or indemnity due to the prevailing party in the arbitration or litigation.

Last, but not least, if the practice of third party funding is to grow in Portugal, it is the duty of policymakers, judges, arbitrators and practitioners to ensure that its use and practice are tailored to the particularities of Portugal’s legal system, otherwise there is a risk of driving participants away instead of encouraging them to develop this industry. Framing a safe and steady practice that embraces the needs of the Portuguese business community is key to the success of third party funding in Portugal.
Chapter 17

SINGAPORE

Matthew Secomb, Adam Wallin and Gabriella Richmond

I MARKET OVERVIEW

Singapore opened its doors to third party funding in early 2017, but only for international arbitration and related proceedings. Since then, funding has become a growing feature of Singapore's international arbitration landscape. Funders are quickly establishing a presence in the city state.

Singapore is one of the world's leading international arbitration jurisdictions. The caseload of the Singapore International Arbitration Centre (SIAC) has increased considerably over the past decade. In 2018, SIAC received over 400 new cases involving parties from 65 jurisdictions, and the total aggregate sum in dispute for new cases filed in 2018 was S$9.65 billion. These trends look set to continue. SIAC's caseload has grown more than fivefold in the past decade, and, since 2017, both the ICC International Court of Arbitration and the Permanent Court of Arbitration have established offices in Singapore to meet the growing demand for commercial and investor–state arbitration.

A market for third party funding is also emerging. The first third party funding agreement under the new statutory framework was reported in July 2017, and international funders have a regular – and growing – presence in Singapore. Several funders have already opened permanent offices.

Further changes may also be on the horizon. In May 2018, Singapore's Ministry of Law concluded a public consultation seeking feedback on the third party funding framework. While it is still early days, funding in Singapore benefits from a combination of light statutory regulation, a rich pool of disputes and serious interest from international funders. All this means that the future looks bright for third party funding in Singapore.

1 Matthew Secomb is a partner and Adam Wallin and Gabriella Richmond are associates at White & Case.
5 KC.Vijayan, 'First third-party funding for S'pore arbitration case,' The Straits Times (1 July 2017).
II LEGAL AND REGULATORY FRAMEWORK

The legal and regulatory framework for third party funding in Singapore changed significantly on 1 March 2017. Singapore law now permits third party funding in international arbitration (and related proceedings) if the funder meets certain qualifying criteria. Outside the international arbitration context, however, funding is generally prohibited on public policy grounds; however, there are signs that this could change.  

The regulatory regime for funding in international arbitration has been designed with flexibility and party autonomy in mind. Statutory regulation is relatively light and focuses on lawyers and law firms practising in Singapore. Softer regulation from relevant institutions is emerging, but it remains to be seen how this will be used in practice.

The framework allowing third party funding is made up of various instruments.

i The Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017

Before the recent reforms, almost all funding arrangements in Singapore were unenforceable on public policy grounds. The amended Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017 provide a new framework to allow funding in certain cases.

The Civil Law Act abolishes civil liability for the tort of maintenance and champerty. However, funding agreements will still be unenforceable if they are contrary to public policy or are otherwise illegal.

The Civil Law Act also creates a category of permitted funding agreements. These are contracts ‘under which a qualifying third-party funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings’.

7 Pre-reform case law suggested limited exceptions to this general prohibition, including the sale of a cause of action in the context of insolvency, or where the funding party has a legitimate interest in the claim (Re Vanguard Energy Pte Ltd [2015] 4 SLR 597). The Singapore courts have recently confirmed third party funding in the context of insolvency litigation proceedings (Solvadis Commodity Chemical Gmbh v. Affert Resources Pte Ltd (2018) SGHC 210; Re Fan Kow Hin (2018) SGHC 257). These exceptions still appear to be available under the new framework, at least for funding agreements outside Section 5B of the Civil Law Act (see below).

8 Indranee Rajah SC (Senior Minister of State for Law at the time), Second Reading of the Civil Law (Amendment) Bill (10 January 2017) https://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00010624-WA&currentPubID=00010625-WA&topicKey=00010625-WA_4%2Bid-83aace76-742e-45d8-bc2c-9996aa8b95b3%2B.

9 Civil Law Act Section 5A(1). This abolition of civil liability reflects earlier statements of the Singapore High Court that neither champerty nor maintenance is a tort or crime in Singapore: see Jane Rebecca Ong v. Lim Lie Hua [1996] SGHC 140.

10 Civil Law Act, Section 5A(2).

11 Civil Law Act, Section 5B(2). Curiously, the remainder of the Civil Law Act provisions do not refer to this formulation. Rather, they refer to ‘third-party funding contracts’. To fall under that definition, the funding must be given ‘in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled’ (Civil Law Act, Section 5B(10)). This implies that permitted funding agreements must also meet this requirement.

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Under the new framework:

\textit{a} ‘Prescribed dispute resolution proceedings’ means: 12

\begin{itemize}
\item international arbitration proceedings; 13
\item court proceedings arising from or out of or in any way connected with international arbitration proceedings;
\item mediation proceedings arising out of or in any way connected with international arbitration proceedings;
\item an application for a stay of an international arbitration agreement and any other application for the enforcement of an arbitration agreement; and
\item proceedings for or in connection with the enforcement of a foreign award under the International Arbitration Act.
\end{itemize}

\textit{b} A third party funder is ‘a person who carries on the business of funding all or part of the costs of dispute resolution proceedings to which the person is not a party’. 14 Dispute resolution proceedings are defined broadly to include the ‘entire process of resolving or attempting to resolve a dispute’, including through ‘any civil, mediation, conciliation, arbitration or insolvency proceedings’. 15

\textit{c} To ‘qualify’ under the Civil Law Act, the third party funder must carry on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the third party funder is not a party; 16 and have a paid-up share capital of not less than S$5 million or not less than S$5 million in managed assets. 17

The effect of these provisions is that most commercial third party funders will now be able to fund international arbitration and related proceedings under Singapore law. However, the requirement to ‘carry on the principal business’ of funding and the apparent need to fund ‘in return for a share or other interest in the proceeds or potential proceeds of the proceedings’ seem to exclude respondent-side funding 18 and non-commercial funders (such as pro bono funders, most individual persons and businesses not principally engaged in funding).

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12 Regulations, Regulation 3. This chapter focuses on funding in international arbitration, rather than related court proceedings.
13 See Section 5 of the International Arbitration Act (to which Regulation 2 of the Civil Law (Third Party Funding) 2017 Regulations refers) for a full definition of ‘international arbitration proceedings’. In summary, an arbitration is international if: at least one of the parties has its place of business outside Singapore when the contract containing the arbitration agreement is signed; the place of the arbitration under the arbitration agreement, the place most closely connected with the dispute or the place where a substantial part of the parties’ obligations are to be performed is outside the state where the parties have their place of business; or the parties otherwise agree the arbitration agreement is international.
14 Civil Law Act, Section 5B(10).
15 Civil Law Act, Section 5B(10).
16 Regulations, Regulation 4(1)(a).
17 Regulations, Regulation 4(1)(b). ‘Managed assets’ are defined in Regulation 4(2). In each case, this can be satisfied by an equivalent foreign currency amount.
18 See also the Law Society Guidance Note (discussed below), which states that ‘Third-party funding involves a commercial funder agreeing to pay some or all of the claimant’s legal fees and expenses’. The definition of a ‘third-party funding contract’ would, however, appear to permit the funding of a counterclaiming respondent (Civil Law Act, Section 5B(10)).
Where a third party funder does not comply with the qualification requirements identified above, its rights under a funding agreement will not be enforceable. The funder can, however, apply to the court or arbitration tribunal for relief. It may be granted relief if the disqualification or non-compliance was accidental, inadvertent or for other sufficient cause, or where it is otherwise just and equitable to grant the relief. If the funder’s rights become unenforceable, the rights of any other party under the funding agreement will not be affected. In practice, however, funders will most likely seek to neutralise this provision by including this situation as a termination event in the funding agreement.

ii Legal Profession Act and Legal Profession (Professional Conduct) Rules 2015
The new framework also makes amendments to the Legal Profession Act and the Professional Conduct Rules applicable to legal practitioners and law firms in Singapore. The amendments impose requirements to disclose the existence of third party funding (these are addressed further in Section IV). They also prohibit lawyers and law firms from holding financial interests in funders, or from receiving commissions, fees or shares of proceeds from funders.

These amendments are supplemented by a Guidance Note from the Law Society of Singapore. Aspects of the Law Society Note are addressed in further detail below.

iii Other guidelines and practice notes
As anticipated when the Civil Law Act was passed, various practitioner and institutional commentaries, guidelines and rules have emerged. The most significant to date are those produced by the Singapore Institute of Arbitrators (SIArb) and SIAC.

SIArb has produced Guidelines for Third Party Funders that aim to promote best practice for funders in Singapore-seated arbitration. Although not mandatory, the SIArb Guidelines are the result of significant input from the Singapore arbitration community and carry considerable weight. The SIArb Guidelines identify matters to be addressed in funding agreements and suggest approaches to issues of confidentiality and privilege, conflicts of interest and control of proceedings, withdrawal of funding and disclosure.

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19 Civil Law Act, Section 5B(4).
20 Civil Law Act, Section 5B(6).
21 Civil Law Act, Section 5B(7).
22 This includes Singapore solicitors, certain registered foreign lawyers in Singapore, every Singapore law practice and law practices licensed under the Legal Profession Act: see Legal Profession (Professional Conduct) Rules 2015, Rule 3(8) and Legal Profession Act, Section 106A.
23 Legal Profession (Professional Conduct) Rules 2015, Rule 49B.
25 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 9.
26 SIArb Guidelines for Third Party Funders (18 May 2017) https://siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf. Under the SIArb Guidelines, a ‘funder’ is a ‘third party . . . [that] provides financial support to enable a party (the Funded Party) to pursue or defend an arbitration or related court or mediation proceedings. Such financial support is provided in exchange for an economic interest in any favourable award or outcome that may ensue’ (Paragraph 1.1). This scope of funding to which the SIArb Guidelines potentially apply is therefore broader than that possible under the definition of ‘qualifying third-party funder’ in the new statutory framework.
SIAC has produced a Practice Note on Arbitrator Conduct in Cases Involving External Funding. The Practice Note applies in SIAC arbitration involving a permitted ‘external funder’. It includes provisions on disclosure (including the disclosure of potential arbitrator conflicts) and costs.

SIAC also recently published the SIAC Investment Arbitration Rules 2017, which include provisions on third party funding.

Specific aspects of these materials are addressed further below.

III STRUCTURING THE AGREEMENT

The new statutory framework is silent as to the structure and terms of the funding agreement. The SIArb Guidelines, however, provide extensive guidance and have gained traction in the market. At the time of writing, nine funds have publicly endorsed the Guidelines. The Law Society Note also makes recommendations to legal practitioners when advising on funding negotiations.

The Law Society Note identifies five key themes outlined below, which overlap with the SIArb Guidelines.

i Confidentiality and privilege

The Law Society Note recommends that certain terms be included in an initial confidentiality or non-disclosure agreement. The terms are designed to protect confidentiality and privilege in documents disclosed to a funder before it decides to fund a claim. The SIArb Guidelines echo the need for this protection.

The Note also recommends that similar provisions be included in the funding agreement itself. In addition, the SIArb Guidelines prohibit a funder from seeking disclosure of information from a funded party’s legal practitioner that might amount to a breach of privilege or the practitioner’s confidentiality obligations.

28 An external funder is ‘any person, either legal or natural, who has a Direct Economic Interest in the outcome of the arbitration proceedings’ (SIAC Practice Note, Paragraph 3(c)). This definition is broader than the definition of a ‘qualifying third-party funder’ under the Civil Law Act. Further, the SIAC Practice Note is not limited to funding arrangements governed by the new statutory framework.
30 The prospects of this are good, at least for funding agreements negotiated by Singapore legal practitioners. The Law Society Note (Paragraph 22) recommends that guidelines published by SIArb and SIAC should either be incorporated into the funding agreement or the funder should agree to comply with them.
32 SIArb Guidelines, Paragraph 2.2.
33 Law Society Note, Paragraph 29; SIArb Guidelines, Paragraph 5.
34 SIArb Guidelines, Paragraph 5.2. The provision excludes situations where the funded party consents or the disclosure is made under a pre-agreed arrangement approved by the funded party.
ii  Scope of funding
The funding agreement should specify the amount of funding (and how this may be varied) and the agreed investment return.\(^{35}\) It should also state the type of costs that will be funded, and in particular whether a funder is liable for adverse costs, insurance premiums, amounts ordered as security for costs or any other financial liability.\(^{36}\) The Law Society Note also recommends terms on the priority and timing of payments to the funder.\(^{37}\)

iii  Managing conflicts of interest
The Law Society Note recommends terms designed to reduce the risk of conflicts between a funder and the funded party. These include the funder acknowledging that the lawyer’s duties are owed to the client, not the funder; the lawyer only sharing written opinions with the funder if the funded party consents; and the funder not inducing the lawyer to breach his or her duties or cede control of the dispute to the funder.\(^{38}\)

The SI Arb Guidelines contain similar provisions, although they appear to allow slightly more leeway for funders to control a dispute if the funding agreement permits.\(^{39}\) The SI Arb Guidelines also require funders to be satisfied the funding will not give rise to conflicts of interest.\(^{40}\) Where a funder funds more than one party in the same proceedings, it must notify the funded parties of any potential conflict that arises during the case.\(^{41}\)

The related issue of disclosure between adverse parties and to the court or tribunal is addressed further in Section IV. The SI Arb Guidelines envisage the funding agreement authorising the funded party to disclose the funder’s identity and address, and the existence of the funding, to the other parties, legal practitioners and court or arbitral tribunal.\(^{42}\) The guidelines also require funders to cooperate with any further disclosure about the funding required by the court or tribunal or under any applicable rules.\(^{43}\)

iv  Funder’s level of involvement in decision-making and dispute resolution
The Law Society Note recommends that a funding agreement specify the nature and scope of the funder’s role, and gives examples of what this might look like in practice.\(^{44}\) Outside the context of settlement, the SI Arb Guidelines do not specifically envisage a term outlining the funder’s role, although the Guidelines favour clarity where possible.\(^{45}\)

Both the Law Society Note and the SI Arb Guidelines advocate including a dispute resolution provision for managing conflicts between the funder and funded party.\(^{46}\) The Law Society Note gives two examples of possible procedures: referral of disputes to an independent

\(^{35}\) Law Society Note, Paragraph 30(a-b); SI Arb Guidelines, Paragraphs 3.1.2-3.1.3.
\(^{36}\) Law Society Note, Paragraphs 30(c) and 31; SI Arb Guidelines, Paragraph 3.2.
\(^{37}\) Law Society Note, Paragraphs 33–34.
\(^{38}\) Law Society Note, Paragraph 37(a-e).
\(^{39}\) SI Arb Guidelines, Paragraphs 6.1 and 6.2.
\(^{40}\) SI Arb Guidelines, Paragraph 2.1.3.
\(^{41}\) SI Arb Guidelines, Paragraph 6.1.5.
\(^{42}\) SI Arb Guidelines, Paragraph 3.1.5.
\(^{43}\) SI Arb Guidelines, Paragraphs 3.1.6 and 8.1.
\(^{44}\) Law Society Note, Paragraph 41. The examples include assisting with choice of solicitors, arbitrators and mediators; assisting with strategic or tactical decisions; considering advice and providing instructions; managing expenses; and providing input on settlement.
\(^{45}\) SI Arb Guidelines, Paragraph 7.1.1 (funder’s role in settlement).
\(^{46}\) Law Society Note, Paragraph 42; SI Arb Guidelines, Paragraphs 3.1.7 and 6.2.3.
arbitrator for an expedited and binding decision; or giving the funded party the final say, but reserving the funder's right to claim against the funded party if it acts in bad faith. By contrast, the SIArb Guidelines suggest a 'fair, transparent and independent dispute resolution mechanism'.

v Termination of the funding agreement

The funding agreement should identify the situations in which it may be terminated by the funder. The Law Society Note recommends that funders should generally not have a discretionary right to terminate a funding agreement. The funding agreement may also provide for termination by the funded party.

Termination provisions should clarify the extent to which a funder remains liable for accrued obligations. The Law Society Note suggests the funding agreement should also require the funder to pay costs caused by the funder's termination.

IV DISCLOSURE

Disclosure of funding arrangements to adverse parties and the court or arbitral tribunal is a central tenet of Singapore's new funding framework. The disclosure rules are designed to address issues that can arise from a lack of transparency and conflicts of interest in funded proceedings, while avoiding prescriptive regulation that limits party autonomy and flexibility.

i Disclosure of basic funding information

Amendments to the Legal Profession (Professional Conduct) Rules 2015 require legal practitioners in Singapore to disclose certain information to the court or tribunal and every other party to funded proceedings, namely the existence of the funding agreement and the identity and address of the third party funder.

Disclosure must be made either on the date the proceedings are commenced or, if no funding is in place at that date, as soon as practicable after that.

The Law Society Note also recommends that any termination of a funding agreement or change of funder should also be disclosed.

The rationale for these obligations was to give the disclosure requirements 'practical and real effect', instead of attempting to regulate funders or funded parties, which are often located outside the jurisdiction. Two important consequences flow from this.

47 Law Society Note, Paragraphs 42(a-b).
48 SIArb Guidelines, Paragraph 3.1.7.
49 Law Society Note, Paragraph 43; SIArb Guidelines, Paragraph 7.1.2.
50 Law Society Note, Paragraph 43.
51 Law Society Note, Paragraph 45.
52 Law Society Note, Paragraph 44(a); SIArb Guidelines, Paragraph 7.1.3.
53 Law Society Note, Paragraph 44(b).
54 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 9.
55 ibid.
56 Legal Profession (Professional Conduct) Rules 2015, Rule 49A(1).
57 Legal Profession (Professional Conduct) Rules 2015, Rule 49A(2).
58 Law Society Note, Paragraph 52.
59 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 9.
First, although the disclosure requirement on legal professionals themselves are relatively limited, it is unclear whether legal practitioners subject to the Professional Conduct Rules must disclose funding arrangements in proceedings outside Singapore.⁶⁰ If they must disclose in those circumstances, this may create inequalities in the disclosure obligations applicable to the parties’ respective legal teams in some situations.⁶¹

Second, as the Professional Conduct Rules only bind Singapore legal practitioners, legal teams outside Singapore will not need to comply. This may create inequalities in the ethical rules applicable to legal practitioners even in Singapore-seated arbitration. In practice, the risk of inconsistent or unequal treatment may be limited, because tribunals or courts may take an active role in requesting the disclosure of funding arrangements (as is now possible under the SIAC Rules and SIAC Investment Arbitration Rules).⁶² They may use this power to deal with inequality (e.g., where one party’s lawyers are obliged to disclose, but the other side’s lawyers are not).

ii Disclosure of more detailed funding information in SIAC arbitration

Unless the parties have agreed otherwise, a tribunal in a SIAC arbitration may conduct ‘such enquiries as may appear to the Tribunal to be necessary or expedient’.⁶³ This may include ordering the disclosure of the existence of funding, the funder’s identity and, where appropriate, details of the external funder’s interest in the proceedings and whether the funder has committed to undertake adverse costs liability.⁶⁴

iii Arbitrator disclosure under the SIAC Rules

The SIAC Practice Note requires arbitrator candidates to disclose to the SIAC Registrar and the parties any direct or indirect relationship with a funder involved in the arbitration.⁶⁵ The disclosure must be made as soon as reasonably practicable, and in any event before the candidate is appointed.⁶⁶ In addition, an arbitrator must disclose any such relationship that is discovered or arises during the arbitration proceedings.⁶⁷

⁶⁰ The analysis turns on the definition of ‘dispute resolution proceedings’ and ‘third-party funding contract’ under the professional conduct rules and the Civil Law Act. Neither of these terms are expressly limited to Singapore proceedings. However, the Civil Law Act’s definitions of those terms are limited to ‘prescribed dispute resolution proceedings’, which are in turn (indirectly) limited to proceedings in Singapore (see Regulations 2 and 3, the International Arbitration Act, Section 5 and the Model Law at Schedule 1 of the International Arbitration Act, Article 1(2)).

⁶¹ This issue is not unique to third party funding or the Singapore framework. Differences in ethical rules frequently arise in various contexts in international arbitration and the issue is sometimes referred to as the ‘inequality-of-arms problem’ (see, e.g., the discussion in Catherine A Rogers, Ethics in International Arbitration (OUP 2014) at Paragraphs 3.21–3.22).

⁶² See SIAC Practice Note, Paragraphs 5, 7 and 8; SIAC Investment Arbitration Rules, Article 24(f).

⁶³ SIAC Practice Note, Paragraph 5; SIAC Investment Arbitration Rules, Article 24(c).

⁶⁴ SIAC Practice Note, Paragraph 5; SIAC Investment Arbitration Rules, Article 24(f).

⁶⁵ The SIAC Practice Note uses the term ‘external funder’, which is defined as ‘any person, either legal or natural, who has a Direct Economic Interest in the outcome of the arbitration proceedings’ (SIAC Practice Note, Paragraph 3(c)).

⁶⁶ SIAC Practice Note, Paragraph 4.

⁶⁷ SIAC Practice Note, Paragraph 6.
V  COSTS

Two broad categories of costs issues arise: costs recovery by the funded party and costs recovery by an adverse party. Although the new statutory framework is silent on these issues, SIAC has produced guidance that will inform party expectations, at least in SIAC arbitrations.

i  Costs recovery by the funded party

The SIAC Practice Note provides that “The Tribunal may take into account the existence of any external funder in apportioning the costs of the arbitration”;68 and ‘The Tribunal may take into account the involvement of an external funder in ordering . . . that all or a part of the legal or other costs of a Disputant Party be paid by another Disputant Party.”69 These provisions confirm that the tribunal may take into account funding arrangements when apportioning costs of the arbitration and awarding costs to a funded party.

Different tribunals will approach the issue of costs in funded cases differently. For example, SIAC’s formulation above may be wide enough to permit the recovery of a party’s funding costs (i.e., in addition to the legal costs).70 At the other end of the spectrum, in some situations tribunals may decide a funded party should not be awarded any of the legal costs paid by the funder at all.71 These examples represent the extremes and most tribunals will reach a solution somewhere in between.

ii  Costs recovery by the adverse party

A party in opposition to a funded party will wish to ensure it can recover its costs if it is successful in the proceedings.

A party will often do this by seeking security for its costs. In the funding context, the question is whether the existence of a funding agreement amounts to evidence that the funded party would be unlikely or unable to pay costs if ordered to do so. The SIAC Practice Note addresses this as follows: ‘The involvement of an External Funder alone shall not be taken as an indication of the financial status of a Disputant Party. The Tribunal may take into account factors other than the involvement of an External Funder in an order for security for legal or other costs.’72

Tribunals may also see an increase in applications for disclosure of the terms (if any) on which a funder has agreed to undertake adverse costs liability.73 Such applications may be used to assess prospects of recovering costs from a funded party, or as a precursor to a security application.

68 SIAC Practice Note, Paragraph 10. See also the SIAC Investment Arbitration Rules, Paragraph 33.1.
69 SIAC Practice Note, Paragraph 11. See also the SIAC Investment Arbitration Rules, Paragraph 35.
70 The English High Court, in Essar Oilfield Services Ltd v. Norscot Rig Management PVT Ltd [2017] Bus LR 227, held that such costs would fall within the meaning of ‘other costs’ under the United Kingdom’s Arbitration Act 1996.
71 For example, where a funding agreement becomes unenforceable by the funder under the Civil Law Act, the funded party would have no liability to the funder (Civil Law Act, Sections 5B(4)–(7)). In that situation, a tribunal might consider that allowing the funded party to recover legal costs paid by the funder would amount to a windfall for the funded party.
72 SIAC Practice Note, Paragraph 9.
73 See the tribunal’s powers under SIAC Practice Note, Paragraph 5 and SIAC Investment Arbitration Rules, Rule 24(l).
VI THE YEAR IN REVIEW

Singapore’s new funding framework reflects a trend towards third party funding in arbitration in other leading international arbitration jurisdictions. The framework adopts a light-touch approach to regulation and places disclosure at its heart to promote greater transparency and fewer conflicts of interest.

The framework also leaves space for industry norms to establish and grow. Some organisations, notably the Singapore Law Society, SIAC and SIArb, have led the way by issuing guidance and new institutional rules. Nine funds have already signed up to the SIArb Guidelines.

The Singapore government is also keen to ensure the framework is working well and to identify areas for further improvement and innovation. Between April and May 2018, Singapore’s Ministry of Law carried out a public consultation. The consultation sought feedback on the operation of the current third party funding framework and suggestions for improvement and extension beyond international arbitration. The results of the consultation are expected in due course. Preliminary observations in March 2019 from Edwin Tong SC (Senior Minister of State for Law), suggests the feedback has been positive, with funders seeing an upturn in their requests for funding in Singapore. On 8 August 2019, the Senior Minister for Law announced that the third party funding framework would be extended to domestic arbitration proceedings and certain prescribed proceedings in the Singapore International Commercial Court. The implementation and practical effect of this announcement remains to be seen.

VII CONCLUSIONS AND OUTLOOK

The third party funding framework has been a welcome development for international arbitration in Singapore. It provides parties with greater risk management opportunities and access to justice, and funders with a new pool of potential investments. Since the framework was introduced in early 2017, Singapore has seen an influx of funders, and the market is growing. In keeping with other aspects of the dispute resolution environment in Singapore, the Ministry of Law has sought views from users to catalyse further innovation. The recent public consultation on third party funding may thus lead to further refinements and improvements to the framework over the next year.

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74 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 9.
75 ibid.
77 Ministry of Law, footnote 6.
Outside the international arbitration context, for now third party funding remains generally prohibited. Looking forward, however, there are already signs that third party funding may be extended to other categories of proceedings in the future (potentially including domestic arbitration and litigation).\textsuperscript{80} Parties, funders and practitioners alike will be watching market developments with interest.

\textsuperscript{80} Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 6: ‘we want to have the framework tested in a limited sphere, where those involved are typically well advised, commercially sophisticated and better able to bear the reduction in damages. If the framework works well, as and when appropriate, the prescribed categories of proceedings may be expanded. The Ministry will consult closely with the profession and stakeholders on this, as we have been doing.’ Developments in this sphere are still occurring, particularly in light of the announcement in August 2019 by the Senior Minister for Law regarding the extended application of third party funding, https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/Public-Consultation-on-Conditional-Fee-Agreements-in-Singapore.html.
I MARKET OVERVIEW

The legal services market in Spain is mature, highly competitive and well internationalised. Continental Europe’s second-largest law firm is Spanish,2 with two additional Spanish firms within the European top 10.3 Four of the United Kingdom’s magic circle firms have a local presence in Spain. Costs for legal services in Spain may generally be described as lower than in other civil and common law jurisdictions.4

According to EU statistics on judicial trends,5 in 2018, Spanish courts registered 2.5 civil or commercial claims per 100 people, as did the French and Italian courts, but this was more than German (1.5), Dutch (0.9) or Luxembourgish courts (0.8). The effectiveness of the Spanish courts is comparable to that of other states in the European Union. On average, Spanish first instance courts took, 329 days to solve a litigious civil or commercial case. They were faster than French or Italian courts but slower than German courts (204 days), Dutch courts (124 days) and Luxembourgish courts (108 days).

Spanish civil and commercial first-instance court judgments are rarely appealed (only 16.6 per cent of cases), are habitually upheld at second instance (60.3 per cent), and are usually upheld at third instance (85.7 per cent).6

Demand for litigation risk management solutions is high. Small and medium-sized law firms still show a significant appetite for taking on litigation risks in major consumer and mis-selling claims, and are usually keen to share their financial burden and profit expectations with funders. Spanish corporates are particularly active in the claims and claim-portfolio monetisation segment, with some large listed companies having recently disclosed notable transactions executed in the past months. The level of awareness of third-party funding solutions has grown rapidly among sophisticated claimants, and SMEs and other market participants are expected to follow.

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2 The Lawyer European 100 at https://www.thelawyer.com/garrigues.
II LEGAL AND REGULATORY FRAMEWORK

Spanish law establishes no explicit legal prohibition on funding others’ claims. There are some barratry-related rules affecting lawyers, but common law doctrines of champerty and maintenance are alien to the Spanish legal system. Further, certain forms of buying into someone else’s claim for profit are explicitly permitted by the Civil Code, albeit subject to certain restrictions.

Spanish judges have in the past deliberated on the legality of third-party litigation funding (TPF). As liquidation of bankrupt companies in Spain requires a pre-established court-sanctioned liquidation plan, on 4 November 2014, Commercial Court No. 3 of Madrid approved the liquidation plan of the Spanish companies Petersen Energía Inversora, SAU and Petersen Energía, SAU. The liquidation plan, as approved by the Court, contemplated the Petersen companies entering into litigation funding arrangements to initiate proceedings against the Argentine Republic.7

Sharing litigation risks for profit is common for Spanish lawyers under damages-based agreements. This practice was expressly forbidden until 2008, when the Spanish Supreme Court ruled null and void Article 16 of the Spanish Bar Association Code of Conduct, lifting a centuries-old prohibition on the pactum de quota litis.8

Seeking profit on the buying and selling of claims is also addressed by Article 1534 of the Spanish Civil Code; clearly inspired by the Roman Lex Anastasiana, this Article establishes that in the event of the transfer of a ‘litigious’ credit, the debtor will be entitled to extinguish this by reimbursing the assignee for the price paid to the assignor (plus interest and costs). Notably, a credit will be considered litigious only if a lawsuit demanding payment has already been answered by the debtor. In other words, Article 1534 applies only to claim transfers made after commencement of proceedings. And within those boundaries the restriction may sound reasonable to the extent that it encourages the parties to settle the claim and to put an end to the litigation rather than to let litigation continue by transferring the claim for an amount at which they might have been willing to settle.

For these and other reasons it seems clear that Spanish legislators were never particularly concerned about claimants seeking the assistance of third parties in alleviating both the financial risk and the inefficient diversion of resources caused by the inevitable emergence of commercial disputes in the course of ordinary business. In a framework such as that of Spanish legislation, the validity of funding others’ claims is hardly challengeable.

A meaningful, and certainly more interesting, debate may be held as to the legal nature of a TPF agreement.

Most discussions on this topic start by considering whether TPF may be nothing but a new form of credit or loan operation. Under Spanish law this is also a valid question and its answer could be as crucial here as it is in many other jurisdictions. To name just one practical consequence, Spain has usury statutes protecting borrowers from abusive interest rates. Tax and statutory treatment of TPF in Spain also depend heavily on what the legal nature of TPF is in accordance with the law.

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7 Details of the Petersen v. Argentina case are publicly available at https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015cv02739/440752/63/ (Opinion and Order of Judge Loretta A Preska in the New York Southern District Court (9 September 2016), Court File No. 15-CV-2739 (LAP)).
8 Supreme Court Sentence dated 4 November 2008.
Reasons why TPF should not be legally treated as loans were discussed by Professor Victoria A Shannon in ‘Harmonizing Third-Party Litigation Funding Regulation’. Professor Shannon also noted the eventual restrictions that usury statutes could impose on TPF and identified substantial differences between loans and TPF on two levels. First, the non-recourse nature of litigation funding and the absence of an absolute obligation to reimburse the funds. Second, the asymmetric information and uncertainty regarding the funder’s future returns. Some of these are not definitive arguments, at least not if considered individually. For instance, loan contracts with no absolute obligation for reimbursement (such as maritime risk loans) existed and were regulated in Spain until 2014, when Articles 719 to 736 of the Commercial Code were derogated. Article 140 of the Law on Mortgages expressly authorises non-recourse mortgage loans, whereby the lender is not entitled to pursue any assets of the borrower other than the mortgaged property. The lender’s return over monies lent under a participative loan is uncertain and calculated by reference to ‘net profit, revenue, total wealth or any other [criteria] freely agreed by the parties’.

However, unlike any of the above-mentioned forms of loans similar to TPF (despite being loans), only in TPF are both repayment and the size of the returns uncertain and dependent on the outcome of a future event. In any event, it seems uncontroversial that under Spanish law one cannot categorise as a loan any business in which obligation for repayment is not absolute. That may be the reason why it is now generally accepted among Spanish scholars that maritime risk loans were not really loans but something else, closer in legal nature to a form of insurance contract. The limited-recourse mortgage loan, however, may be regarded as an exception to this principle.

An additional difference is to be found in the role that time plays in loans, as opposed to the role it plays in TPF. Term and maturity are usually regarded as essential elements of Spanish loan and credit operations. Time defines repayment obligations, remuneration on the amount lent or both. Although the passage of time is not irrelevant in TPF transactions, it is far from being the essential parameter of the transaction’s contractual configuration.

When TPF is considered in relation to legal categories other than loans, it becomes clearer that loans and TPF do not share the same substance. TPF finds a much better fit within the legal frameworks that underpin silent partnerships, particularly those regulated by

10 Under Spanish standards, TPF can hardly be regarded as non-recourse financing from a strictly technical perspective. The funder’s right to receive its fee or return is certainly conditional upon payment of the litigation proceeds by the defendant, but once the right becomes effective the funder would be entitled to collect its fee from any of the claimant’s assets. If, for instance, another creditor of the claimant successfully forecloses on the litigation proceeds before the funder collects its fee, the funder would probably still be entitled to collect from other assets of the funded party; unless agreed to the contrary.
11 These maritime risk loans were a form of bottomry whereby repayment was contingent on the ship successfully completing the voyage. They were common in ancient Greece and described by Plutarch in his Life of Cato the Elder as ‘the most disreputable of all ways’ of lending money (The Parallel Lives by Plutarch, p. 325, published in Vol. II of the Loeb Classical Library edition, 1914). In the thirteenth century, Pope Gregory IX criticised this practice for being usurious in his Decretal Naviganti.
12 Article 20 of Royal Decree-Law 7/1996.
Articles 239 to 243 of the Commercial Code. In fact, a similar approach to the nature of TPF is apparently taken in the German jurisdiction, whose legal system has traditionally been a benchmark for Spanish legislators.14

Spanish silent partnerships enjoy a simple, flexible and consolidated legal regime and have traditionally been used as a hybrid, allowing new forms of financial investments to be accommodated, particularly in the private equity sector. The essence of Spanish silent partnerships is set out in Article 239 of the Commercial Code:

Businesspersons may participate in operations by other businesspersons, contributing to them with a part of the capital they may agree, thus becoming partners in the profits or losses according to the proportion determined.

The party that contributes capital will remain a silent partner throughout the life of the funded operations. Relationships with third parties shall only be entered into by the non-silent partner, who in turn is the only one entitled to take action against those third parties (‘unless he formally assigns his rights’ to the silent partner, as established in Article 242 of the Commercial Code). In turn, third parties cannot take any action against the silent partner. This latter provision has an obvious impact regarding funders’ potential liability for adverse costs.

Although the character of the silent partnership would appear to provide a fitting answer to the question as to the legal nature of TPF and would also clarify any questions about the tax treatment of TPF, the definitive solution will only come with formal regulation of the industry. The currently limited public impact of TPF in Spain suggests that neither legislators nor the various agents involved in the administration of justice have detected a need for regulation, or at least do not see it as a priority.

III STRUCTURING THE AGREEMENT

With the notable restriction of Article 1534 of the Civil Code, Spanish law permits the buying and selling of claims, entitling the debtor to extinguish the transferred claim by reimbursing the assignee for the price paid (but only if the transfer was made after a lawsuit was answered by the defendant).

Monetisation of awards and judgments through full transfer also fits well with Spanish judicial enforcement procedures. Article 540 of the Law on Civil Procedure expressly regulates situations in which the award or judgment may have been transferred to a third party, who will be entitled to enforce it against the defendant. Enforcement procedures are summary, generally quick and effective, and allow very few defences.

Funding or monetising claims through their purchase simplifies the contractual structure, as the funder becomes the owner of the claim and most of the usual provisions on confidentiality, termination, settlement or liability for costs become rather irrelevant. Yet, for many reasons, a claims purchase agreement may not fit the interests of a funder or a claimant in a particular transaction, even in monetisation deals. Recent monetisation transactions have reportedly been implemented through an assignment of future payment rights rather than as a claim assignment.

14 Chapter by Burkhard Schneider and Heiko Heppner in International and Comparative Legal Guides. Class and Group Actions 2017. 9th edition published by Global Legal Group, in association with CDR.
If the transaction is not a plain claim purchase but a pure legal costs funding agreement, it will usually include all the contractual provisions that are common in international TPF practice. The essence of the agreement will be the undertaking by the funder to pay all costs arising from the pursuance of the claim, in exchange for a fee that is contingent on the claim being successful.

Beyond the essential elements of a TPF transaction (undertaking to pay legal costs in exchange for a future and contingent fee) the remaining contractual issues are those typically addressed by international standards. TPF agreements entered into with Spanish counterparties will usually include a due diligence and exclusivity period, unless the claimant is in formal liquidation or under receivership, where exclusivity is usually avoided to allow formal tender processes. Putting various funders in competition tends to maximise returns for the insolvent estate and increases transparency throughout the contracting process.

The issue of the funder’s control over how the claim is conducted is one of the key contractual discussions. In England and Wales, the Code of Conduct of the Association of Litigation Funders (ALF) addresses this matter clearly and directly by prohibiting funders who have accepted the Code from taking material control of the dispute. This prohibition in the ALF Code of Conduct is probably designed to mark the dividing line between TPF and the practices of champerty and maintenance. However, the need to mark that line vanishes in a jurisdiction such as Spain, where prohibitions on funding someone else’s claims have never existed. Consequently, Spanish TPF agreements are certainly more flexible when it comes to distributing control rights between the claimant and the funder.

Linked to the question of control over the dispute is the termination of the agreement at the funder’s request. Funders understandably seek to preserve an option to discontinue funding when success expectations are materially and adversely affected. The contractual construction of this right has to respect the prohibition on leaving the performance of the contract ‘to the discretion of one of the contracting parties’. Hence, it is advisable to include contractual mechanisms to ensure that the funder acts reasonably when it chooses to stop funding the claim. The most common of these mechanisms is the submission of the matter to an independent third party, who will evaluate the reasonableness of the funder’s behaviour if the funded party so requests.

Recourse to an independent third party is also a valid solution to disagreements over settlement offers, which is another common issue dealt with by Spanish funding agreements.

Upon success of the claim, distribution of the proceeds will be made in accordance with a priorities agreement, which may be put in place as a separate document or embedded in the funding agreement. Lawyers and court agents may also become a party to this agreement, as litigation proceeds are usually paid by the losing party into the court bank account. The court will forward the funds to the successful party following the court agent’s request and instructions. Although trust schemes are not common in Spain (and unlikely to be enforceable if purported to be governed by Spanish law), escrow accounts can also be put in place, either through domestic entities or abroad.

Lastly, security documents would also be executed by the parties, particularly when the funded party is under insolvency proceedings. In the insolvency context, courts and court-appointed insolvency practitioners will be able to provide the funder with much of the comfort it seeks, especially in ensuring that the litigation proceeds will be available for the funder to collect its fee. In the absence of any insolvency proceedings (or even within them),

15 Article 1256 of the Civil Code.
funders will tend to obtain security over the claim or over the proceeds arising therefrom. Taking security over any forms of credit rights is valid and relatively simple under Spanish law (notice to the debtor-defendant is not required for perfection). Funders, however, must act carefully when taking security over international claims or over proceeds to be paid by non-Spanish residents, as the question of the law applicable to this type of security remains unresolved.

IV DISCLOSURE

Preservation of confidentiality or privilege is rarely affected by the fact that a claim has been funded. Litigant parties in Spain have a general duty to disclose all documents requested by the other party, but only if the court recognises they are directly relevant and useful to clarify the facts that gave rise to the dispute. Disclosure orders to third parties, such as a funder, will be made by a court following the petition of a litigant party, but only if the document is ‘transcendent’ for the outcome of the proceedings and, again, if it refers to the facts giving rise to the dispute.

In Spain, procedures for obtaining evidence from the opponent party are not comparable to the Anglo-Saxon standards of discovery or disclosure. Mechanisms for obtaining evidence prior to commencement of civil proceedings exist in Spain, but they are of limited efficacy and thus not very commonly used. Besides, the general rule is that documents or information requests shall refer only to facts that constitute the object of the proceedings but not to satellite circumstances, such as whether the claim is being funded. There are no public precedents regarding requests for disclosure relating to TPF transactions, but under the current civil procedural rules it seems unlikely that a defendant could successfully force disclosure of the fact that a claim is being funded.

According to the above, it seems that disclosure of the fact that a claim has been funded will rarely be the consequence of the defendant’s or the court’s actions. However, disclosure of this circumstance may be advisable when certain forms of security are taken. As noted previously, perfection of security over credit rights does not require the serving of notice to the debtor-defendant. Yet, such notice may be of practical use, as it would eventually permit the funder to force the debtor-defendant to satisfy the credit by paying its amount not to the claimant but to the security’s beneficiary (the funder).

Legal professional privilege in Spain is both an obligation and right of the lawyer (who cannot be forced to disclose any privileged information) established under the Spanish Constitution (in respect of criminal proceedings) and under Article 542 of the Law on the Judiciary (in respect of all kinds of proceedings). Privilege thus protects all communication from being disclosed. Although there is a general consensus regarding the client’s right to waive privilege (general, but not unanimous), a valid discussion would concern the question of whether disclosing privileged documents to third parties (such as a funder) also entails an implicit waiver of privilege in relation to the opposing party. As stated, no relevant judicial precedents exist on the issue, but in light of the constitutional relevance of the right to privilege and the very limited scope of disclosure and discovery procedures, it appears very unlikely that a court could find there to be a waiver of privilege in the disclosure of information to a potential funder, especially if the disclosure is also made under a confidentiality agreement.
V COSTS

Awards for costs in Spain are driven by the loser-pays rule.\textsuperscript{16} Exceptions may apply if the court finds that the facts or the law applicable to the case were seriously doubtful.

The Spanish costs rule is not effectively based on an indemnity principle, so litigants are not truly entitled to recover costs they have incurred but to obtain a generic compensation fixed by the provincial bar associations. Most of the bar and professional associations have published guidelines for calculation of costs. In the absence of an agreement between the litigants as to the amount of costs, the court will order the corresponding bar or professional association to study the case and issue an opinion. The opinion, although not legally binding, tends to be followed by the court.

Recoverable costs are only those listed in Article 241 of the Law on Civil Procedure, including judicial taxes, lawyer’s and expert’s fees or court agent’s fees. The current drafting of Article 241 of the Law on Civil Procedure, together with the lack of an effective ruling on the indemnity principle, leaves little or no room to request the reimbursement of the costs of securing funding for bringing a claim.

Security for costs is a virtually non-existent phenomenon in Spanish litigation. There is no procedure for requesting or ordering this specific type of security. Hence, it would be beyond the courts’ authority to order the provision of security for costs.

In a typical funding transaction, correctly structured as a silent partnership, the funder would never be found liable for adverse costs. Article 242 of the Commercial Code expressly protects the silent partner from claims by third parties. Forms of partnership other than the silent partnership established under the Commercial Code may not offer the same degree of protection for the funder, as some of them do not limit the liability of the partners in relation to third parties. Be that as it may, the issue has never reached the courts and, even if it does, the rather inflexible current costs rule makes it very unlikely that a non-litigant party could ever be found liable for costs.

VI THE YEAR IN REVIEW

Notable claims monetisation transactions were executed during 2019, with several taking top positions in terms of capital deployment. In its Q1 quarterly results, Spain’s major telecom operator, Telefonica, announced that it had sold a claim portfolio for approximately €103 million,\textsuperscript{17} with Fortress being the alleged purchaser.\textsuperscript{18}

In June 2019, Acciona notified the Spanish financial markets authority (CNMV) that its subsidiary ATLL Concesionaria de la Generalitat de Catalunya (in bankruptcy liquidation) had sold a claim of approximately €1 billion against the regional government of Catalonia for €170 million (plus a contingent additional amount).\textsuperscript{19} Later, in September, the media reported that Acciona had also monetised a 70-claim portfolio valued at €300 million.\textsuperscript{20} According to media sources, Fortress was again the capital provider in both transactions.

\textsuperscript{16} Article 394 of the Law on Civil Procedure.
\textsuperscript{17} Telefonica, SA January–March 2019 interim management report.
\textsuperscript{19} Relevant fact No. 279374 notified by Acciona, SA to CNMV on 21 June 2019.
\textsuperscript{20} https://www.eleconomista.es/empresas-finanzas/noticias/10064965/09/19/Acciona-vende-una-cartera-de-litigios-al-fondo-Fortress-por-unos-300-millones.html.
In July 2019, the press confirmed that the listed Spanish infrastructure company OHL was reportedly in talks with Davidson Kempner to transfer certain credit rights related to multimillion-euro litigation over a failed project.²¹ In September, the media also reported that Fortress was allegedly finalising a claim-portfolio monetisation with Iberdrola.²²

Lastly, Abengoa notified the CNMV that it had sought approval to partially monetise its arbitration claims against the Kingdom of Spain under the Energy Charter Treaty for a price of €75 million (plus an additional amount contingent on the outcome of the arbitration). The identity of the purchasers was not disclosed, but they were said to be ‘of recognised prestige’.²³

In the classic funding-model segment, Vannin Capital recently announced that it is funding Trucks Cartel-related claims in Spain, by co-investing with a local family office.²⁴

VII CONCLUSIONS AND OUTLOOK

It may come as a surprise to some international TPF practitioners, but the Spanish market has evolved rapidly from having only a very limited awareness of the existence of TPF in 2017 to being a vibrant multibillion-euro claims monetisation market in 2019.

Market activity is now primarily focused on monetisation of large claim portfolios held by premium listed corporations. These transactions have attracted significant media attention and will decisively spread the word on claims monetisation and litigation finance as valid and powerful tools for enhancing all kinds of businesses. There is little doubt that Spain will continue to embrace litigation finance and that the Spanish market will continue to grow exponentially in the coming years.

²¹ https://www.expansion.com/empresas/2019/07/21/5d34dc86e5fdea7b4f8b46bd.html.
²² https://www.eleconomista.es/empresas-finanzas/noticias/10082030/09/19/Iberdrola-negocia-con-el-fondo-Fortress-la-venta-de-un-paquete-de-litigios.html.
²³ Relevant fact No. 281788 notified by Abengoa, SA to CNMV on 17 September 2019.
I MARKET OVERVIEW

Despite its breakthrough at the global level, third-party funding is still a relatively new and unfamiliar phenomenon in Sweden. In part, this is due to the fact that there is currently only a limited domestic market in Sweden for third-party funding. The instances in which third-party funding is currently used in Sweden are instead predominantly limited to international arbitration proceedings seated in Sweden.

Historically, the most common type of litigation investment that has been established in Sweden has been sales of claims for damages. Sweden has seen many examples of companies established for the sole purpose of acquiring smaller claims, typically damages claims against company directors. Lately, this trend has also evolved into larger damages claims, including claims in cartel cases. Formerly, this was primarily a trend in other Nordic countries, such as Finland, but there is reason to believe that we will see more of this phenomenon on the Swedish market in the future.

In our view, investors that acquire damages claims do not fall within the scope of the type of litigation investment that has come to be referred to as third-party funding. However, the case law that has evolved in Sweden in respect of acquisitions of damages claims is, nonetheless, of interest when assessing issues commonly seen in connection with arbitrations involving third-party funding, such as liability for legal fees and litigation costs. For this reason, in Section V, we will discuss the existing case law in relation to liability for legal fees and litigation costs in conjunction with acquisitions of damages claims.

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1 Johan Sidklev is a partner and Carl Persson is a senior associate at Roschier Advokatbyrå AB. Bruno Gustafsson, associate at Roschier, has conducted research, revised, and provided updates to the current version of this article.
3 This term also includes investments relating to claims pursued by arbitration.
5 In this chapter, third-party funding refers to a situation in which an investor that is not party to the proceedings or otherwise connected to the dispute between the parties is funding the claimant’s claim; the sole interest of the investor being to receive compensation for its funding by way of a proportion of the funds that are expected to be received as a result of the legal action. A similar definition is used by Catherine Rogers in Ethics in International Arbitration (Oxford, 2014), p. 185.
As noted above, the instances in which third-party funding is currently used in Sweden are probably limited to international arbitration proceedings in which the seat of arbitration is located in Sweden. There are currently no statistics available as regards the number of arbitration proceedings that have been financed via third-party funding in Sweden. However, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) dealt with 152 arbitration proceedings in 2018. Since third-party funding has grown on the international market, it is undoubtedly the case that at least some of these proceedings have been funded via third-party funding. The authors of this chapter know for certain that at least five major arbitration proceedings held in Sweden under the SCC rules were initiated by way of funding from a third-party funder between 2014 and 2018. However, the actual number of cases funded by third-party funders is most likely significantly higher.

II LEGAL AND REGULATORY FRAMEWORK

In Sweden, third-party funding is unregulated. Hence, there is no legislation or other mandatory rules in Sweden barring the use of third-party funding. Furthermore, given the absence of a substantial domestic third-party funding market, no domestic self-regulation exists. Given the perceived absence of a domestic market, it is unlikely that either mandatory rules or self-regulation will be introduced in Sweden in the near future.

In terms of the approach taken by the Swedish courts to third-party funding, there is currently no case law that explicitly concerns third-party funding. However, case law does exist in relation to issues that often arise in connection with third-party funding, such as conflicts of interest. In relation to these issues, Swedish courts have been inclined to draw inspiration from international guidelines, such as guidelines established by the International Bar Association (IBA). Arguably, Swedish courts will take a similar approach with respect to third-party funding as well (i.e., they will be guided by international guidelines in these areas). This will be further elaborated upon in this chapter when discussing issues of conflicts of interest and disclosure.

A regulatory framework that also may be of importance to a third-party funding arrangement involving Swedish lawyers is the Swedish Bar Association’s Code of Professional Conduct (the Bar Rules), which governs the financial interests of lawyers in disputes in which they act as counsel. The Bar Rules may be of importance since, in certain jurisdictions, it has become common practice to structure a third-party funding arrangement by way of a risk-sharing agreement between the third-party funder and the law firm, whereby the lawyer’s fees are based fully or partially on the outcome of the dispute. Thus, similarly to third-party funding, the lawyer has a direct financial interest in the outcome of the dispute. However, this is not a viable option in a third-party funding arrangement involving a Swedish lawyer as counsel.

With the exception of a few narrow grounds set out in the Bar Rules, lawyers are prohibited from entering into risk agreements in Sweden. The existing exceptions apply primarily to situations where the client is financially unable to bring the legal action (access

6 Statistics from the SCC; http://sccinstitute.se/statistics/
7 The cases have been financed by third-party funders from the United Kingdom.
9 Section 4.2.1 of the Swedish Bar Association’s Code of Professional Conduct (the Bar Rules).
to justice) or where the arrangement constitutes part of a larger international dispute based on a contingency fee agreement. However, the Bar Association’s Disciplinary Committee has applied these exemptions very restrictively. In one important case, the Disciplinary Committee reprimanded a lawyer for charging a risk-based fee.10 This was despite the fact that the client proposed the arrangement and the client explained that it would not be financially viable to bring the action unless the lawyer accepted the risk agreement. The client had contacted the lawyer to investigate the prospects of recovering unpaid royalties. The parties agreed that the lawyer would receive 25 per cent of the royalties received in exchange for the lawyer bearing all the costs incurred from pursuing the legal action. The majority of the Disciplinary Committee held that the arrangement was not permissible. As far as we are aware, as at the time of writing, the Disciplinary Committee has given no rulings permitting risk agreements. Given this fact, the prevailing principle concerning risk agreements for lawyers can best be described as a general prohibition. This means that it will not be possible for Swedish lawyers to enter into a risk agreement when representing parties funded by a third party.

An alternative to risk agreements, however, is a ‘conditional fee arrangement’. Arrangements of this kind allow for outcome-based increases or reductions of the lawyer’s fee that come into effect once the dispute is concluded. As regards conditional fees, the situation is not as clear-cut under the Bar Rules. There is no case law from the Bar Association or indeed the courts to provide guidance on this type of arrangement. However, the Bar Rules do state that an agreement under which the lawyer assumes a financial risk in relation to the outcome of the case does not necessarily mean that the lawyer’s financial self-interest will be disproportionate or could affect the way in which the lawyer performs his or her work on the case.11 Consequently, in our assessment, the Bar Rules appear to permit conditional fee arrangements where the risk and the reward are reasonably balanced. This option might therefore be of interest when structuring the lawyer’s fees in a third-party funding arrangement.

In summary, third-party funding remains an unregulated practice in Sweden. However, it is clear that a restrictive view applies in Sweden in relation to lawyers’ financial interests in the outcome of a dispute when exercising their professional role. Conversely, third-party funders who engage Swedish legal counsel must come to terms with the fact that Swedish lawyers, as a rule, charge fees based on traditional fee models, possibly with the exception of conditional fees. This, in turn, may affect the construction of the funding arrangement, as some funders require the funded party’s legal counsel to impart risk through the use of outcome-based fee arrangements.12

III STRUCTURING THE AGREEMENT

In light of the fact that there is only a limited third-party funding market in Sweden, no common practice has developed in terms of the typical structure of an agreement between the claimant and the investor. As mentioned above, litigation investment on the Swedish market has historically related to transfers of damages claims. The transfer agreement is diametrically different from an investment agreement. This type of transfer is also covered by

10 Disciplinary Committee’s decision in D-2014/1967.
11 Section 4.2.2 of the Bar Rules.
legal provisions setting out how the acquirer of the damages claim can take over the action.\textsuperscript{13} This type of issue does not arise in the case of third-party funding, since third-party funding does not generally involve any transfer of the damages claim.

However, a number of other interesting issues arise in the case of third-party funding, such as in relation to exclusivity, settlements and confidentiality. In relation to these and other potential issues, it is important to bear in mind that, under the Swedish Bar Rules, a lawyer must carefully assess whether he or she might be considered to be representing both the claimant and the investor when third-party funding is used. How this situation should be dealt with is discussed below.

As regards the relationship between the claimant and the investor, initially the lawyer should make it very clear that the claimant is the client, which should also be stated in the investment agreement between the claimant and the investor. Even though this relationship is evident, situations could arise that result in the lawyer facing serious ethical challenges. The following example illustrates this. Generally, investment agreements provide for a right for the investor to terminate the agreement if the prospects of success in the dispute diminish. If a lawyer perceives that because of some factor the legal action has changed to diminish the prospects of success, the lawyer undoubtedly has a duty under the Bar Rules to inform the client (i.e., the claimant).\textsuperscript{14} A lawyer’s primary duty is a fiduciary duty to his or her client.\textsuperscript{15} However, the question is whether the lawyer has an equivalent duty to the investor (i.e., whether the investor should also be informed of the poorer prospects of success). This question is further complicated by the fact that under the agreement the claimant is generally always under a contractual obligation to inform the investor if circumstances change. In all likelihood, the correct solution for the lawyer in this situation is to inform the claimant of the new circumstances and then remind the claimant of its contractual obligation to inform the investor.\textsuperscript{16}

The situation described above is rendered even more cumbersome if the investor pays the lawyer’s fees (which is typically the case) and the lawyer has agreed to regularly update the investor on the dispute (which is also typically the case). In this situation, the lawyer could owe a fiduciary duty to the investor, meaning that both the claimant and the investor are the lawyer’s clients. If a claimant in this situation tells the lawyer that under no circumstances should the investor be informed of the new circumstances that have diminished the prospects of a successful outcome in the dispute, the lawyer will probably be placed in an impossible situation. In a case such as this, the lawyer is likely to have no choice other than to decline to act for the client in the dispute. This means that, where possible, the lawyer should explain his or her role carefully to both the claimant and the investor at the outset of the engagement. If the lawyer assumes a role that could trigger a fiduciary duty to the investor, the lawyer should explain clearly to the claimant what effect this has on the lawyer’s role. The claimant must also comply in full with the provisions of the investment agreement to avoid placing the lawyer in an impossible situation where he or she may ultimately be compelled to decline acting for

\textsuperscript{13} In the case of transfers of damages claims in litigation proceedings, the conditions that must be met for the third-party acquirer to take over an ongoing action are set out in the Swedish Code of Judicial Procedure. If the claimant transfers the claim, the third-party acquirer will be permitted to assume the claimant’s claim and take over the action.

\textsuperscript{14} Section 2.3 of the Bar Rules.

\textsuperscript{15} Section 1 of the Bar Rules.

\textsuperscript{16} In this respect, it should be noted that a lawyer is not permitted to assist in the investor’s deceptive conduct, according to the commentary on Section 1 of the Bar Rules.
the claimant in the dispute. The example given is only one of many examples of issues that need to be taken into account and considered in relation to third-party funding. Accordingly, a great deal of importance should be placed on the way in which the investment agreement is structured to ensure that the agreement also works for all the parties involved.

IV DISCLOSURE

Another pressing issue relating to the procedural impact of third-party funding is the extent to which a claimant that receives third-party funding is under an obligation to disclose this to the arbitral tribunal or the other party to the dispute. This question is strongly linked to the requirement for an impartial and independent arbitral tribunal, which constitutes a fundamental principle in both domestic and international arbitration proceedings. Currently, neither Swedish legislation (i.e., the Swedish Arbitration Act (SAA)) nor the SCC’s rules impose any obligation to disclose the existence of funding on a party’s own motion.¹⁷ However, for the purpose of minimizing risks of conflicts of interest among arbitrators, the SCC will issue guidelines encouraging parties to disclose the identity of any third-party interests in the dispute, including the existence of third-party funders. Furthermore, there are no such mandatory disclosure rules relating to litigation proceedings. Thus, as the law now stands, the parties in arbitration proceedings are not under any obligation to inform the arbitral tribunal that they are being funded by an investor.

However, it is important to note in this respect that the general rule under Section 8 of the SAA is that an arbitrator must be impartial and that, upon application by a party, an arbitrator can be discharged if circumstances exist that could give reason to question the arbitrator’s impartiality. The assessment of whether an arbitrator is impartial must be objective.¹⁸

The third-party funder’s impact on the arbitrators’ impartiality under Section 8 of the SAA has not been addressed by Swedish courts. However, internationally, these issues have been subject to extensive doctrinal developments as well as public discourse. The latter has given rise to a body of guiding principles that are seen, inter alia, in the provisions of the IBA Guidelines and also the general recommendations laid out in the Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration. This raises the question

¹⁷ Numerous established arbitration institutes have assessed the need to implement provisions in their rules regarding disclosure of third-party funding and there are examples internationally of disclosure provisions specifically in relation to funded arbitrations. For instance, under the Singapore International Arbitration Centre (SIAC), the arbitral tribunal is authorised to enquire regarding the existence of third-party funding. With regard to investment treaty arbitration, the arbitral tribunal is expressly mandated under Rule 24(l) of the SIAC Investment Arbitration Rules to order disclosure of third-party funding, including certain pieces of information regarding the contents of the funding agreement, such as whether the funder has agreed to cover adverse costs. Furthermore, pursuant to Article 44 of the 2018 Administered Arbitration Rules of the Hong Kong International Arbitration Centre, the funded party is obligated (by written notice) to communicate to all other parties the existence of third-party funding, and the identity of the funder. Additionally, the proposed updated arbitration rules for investment treaty arbitration conducted under the auspices of the International Centre for Settlement of Investment Disputes include an obligation for the funded party to disclose, inter alia, the identity of the funder and the source of the funding.

of whether Swedish courts are inclined to resort to international guidelines and other sources of a ‘soft-law’ nature to decide on issues pertaining to international arbitration in general and third-party funding in particular.

In this respect, the Supreme Court has stated that, based on the similarity of the rules and the international elements that are often present, when assessing impartiality, not only should the provisions of the SAA be observed, but also international rules and guidelines.\(^{19}\) In our experience, it is rarely the case that parties agree on a strict application of, for instance, the IBA Guidelines on Conflicts of Interest. This notwithstanding, in one Supreme Court case, the court based a disqualification of an arbitrator partially on provisions laid out therein.\(^{20}\) A similar line of argument with reference to the IBA Guidelines on Conflicts of Interest was also applied in a subsequent Supreme Court case.\(^{21}\) Consequently, applicable case law supports the notion that Swedish courts generally have a positive attitude towards deriving guidance from international rules when determining matters – both domestic and international – relating to, among other things, conflicts of interest. This has also been confirmed by leading authorities in the area, such as the former President of the Supreme Court, Stefan Lindskog.\(^{22}\)

In light of the above, it is noteworthy that the IBA Guidelines on Conflicts of Interest include the following provision:

\[
\text{If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.}\(^{23}\)
\]

This means that, from a conflict-of-interest perspective, third-party funders can be deemed to be comparable to a party to the proceedings whose claim the investor has funded. The explanatory section further states that a third-party funder ‘may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party’.\(^{24}\)

Consequently, the IBA Guidelines advocate for a case-by-case assessment as to whether a third-party funder ‘may be considered to bear the identity’ of the funded party. As far as the commentary is concerned, since a third-party funder is generally likely to fall within the scope of the provision, it will ‘bear the identity’ of the claimant.

According to Article 7(a) of the IBA Guidelines on Conflicts of Interest, the parties are required to disclose any relationship with the arbitrator that may trigger impartiality concerns. In accordance with what has been stated above, the parties’ duty to disclose ‘any’ relationship between the arbitrator and the party extends to relationships with persons or entities with a direct economic interest in the award, such as an external funder, or any individual or entity committed to indemnify a party for an adverse costs decision or award.\(^{25}\) The fact that the rules of the IBA Guidelines are generally not binding upon the parties means that it is within their own discretion to decide whether or not to disclose the existence of funding. It has been argued in this respect that the arbitrators cannot be deemed conflicted if they are not aware

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19 Case reported on p. 841 in NJA 2007.
20 Case reported on p. 841 in NJA 2007.
21 Case reported on p. 317 in NJA 2010.
23 IBA Guidelines on Conflicts of Interest 2014, General Standard 6(b).
24 IBA Guidelines on Conflicts of Interest 2014, Explanation to General Standard 6(b).
of the circumstances triggering the conflict. However, under Swedish law, the presence of any conflict of interest is determined based on an objective assessment. Arguably, this means that a Swedish court will not take into consideration whether the arbitrator de facto has been influenced when deciding on the existence of conflicts with disqualifying potential.

Accordingly, in light of the above, should a claimant and a third-party funder fail to disclose the existence of funding, they do so accepting the inherent risk that this will be discovered later on during or after the proceedings. This, in turn, could induce a conflict of interest under the SAA, which could lead to one or more arbitrators being discharged. Moreover, if the conflicting realities come to light after the conclusion of the arbitration proceedings, the conflict of interest could constitute grounds for setting aside the arbitral award. However, in this respect it should be noted that challenges to arbitral awards are subject to a two-month limitation period under Swedish law. If a challenge is not brought within this period, the grounds for challenge will be procedurally barred. This is the case even in situations where the party that wants to challenge the award became aware of the grounds for challenge after the expiry of the limitation period.

A typical case in which it can be disclosed that a third-party funder is funding a dispute is where the opposing party suspects that this is the case and requests that the arbitral tribunal order the opposing party to disclose whether it is being funded by a third party. If the arbitral tribunal grants this request, the opposing party will have no choice other than to disclose the funding. If it turns out that there is a conflict of interest, this could create problems for both the parties and the arbitral tribunal. As stated above, it could mean that an arbitrator is required to resign from his or her appointment at a late stage in the proceedings. It could also constitute grounds for a challenge action against the arbitral award pursuant to Section 34 of the SAA. Consequently, the issue of whether or not the third-party funding should be disclosed should be carefully considered when using such funding.

Regardless of the above, and specifically the fact that currently no obligation for a funded party to disclose its third-party funding seems to exist (neither for the funded party nor for the third-party funder), we are yet to experience how courts and arbitral tribunals in practice will handle the correlation between disclosure and third-party funding. In addition to the principles inherent in the IBA Guidelines on Conflicts of Interest, support for an open-ended view on imposing disclosure obligations can be found in the ICCA-Queen Mary Task Force Report. For the purpose of mitigating the risk of conflicts of interest, the report suggests that parties ‘should, on their own initiative, disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrators’. This should be done as soon as possible after the funding has taken place. The report further advocates for a fairly generous view with respect to the arbitral tribunal’s mandate to order disclosure of whether a party is funded, as well as the identity of the funder. As noted above, transnational soft-law sources have influenced the Swedish Supreme Court’s interpretation of the provisions relating to disclosure and third-party funding.

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26 The Swedish Arbitration Act was updated as of 1 March 2019. In the previous version of the Swedish Arbitration Act, challenges to arbitral awards were subject to a three-month limitation period. The three-month limitation period still applies to arbitral proceedings that were commenced prior to the entry into force of the new Swedish Arbitration Act on 1 March 2019.


28 See Report for public discussion of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, Apr. 2018. The ICCA Reports No. 4. at 81.

29 id.

30 id.
to conflicts of interest in the SAA on numerous occasions. If applied in a third-party funding context, this tendency may predict a shift towards a stricter view on disclosure duties, at least with respect to the existence of funding and the identity of the funder.

V COSTS

Under Swedish law, a claimant that transfers a claim to a party that has no financial resources to pay the defendant’s legal fees and litigation costs in the event the claim is unsuccessful could later be ordered to pay those costs. However, this requires that the claimant retains a financial interest in the outcome of the dispute insofar as the outcome is positive. The question is whether this can also be applied to third-party funding and, if so, whether this means that a third-party funder can later be ordered to pay the defendant’s legal fees and litigation costs if the claimant does not have the financial resources to do so.

Under Swedish law, the assumption is that the party that loses the case must compensate the opposing party for its reasonable legal fees and litigation costs. 31 The problem described above arises when the claimant is in such a poor financial condition that it is unable to pay the defendant’s legal fees and litigation costs and, furthermore, has not agreed that the third-party funder will cover the opposing party’s legal fees and litigation costs.

In this respect, it should be noted at the outset that Swedish courts have held that a party in poor financial condition is entitled to bring a legal action. 32 However, the Supreme Court has held that, in a situation where the claimant is unable to pay the defendant’s legal fees and litigation costs, in exceptional cases there may be grounds for imposing liability for paying these costs on a third party with a financial interest in the outcome of the dispute.33 According to case law, this probably requires the third party to be the effective beneficiary in the dispute and the claim to have been transferred to an individual or a company in poor financial condition for the purpose of limiting the adverse financial consequences of a negative outcome in the dispute.

In light of the above and based on current case law, it is probably difficult to impose liability for legal fees and litigation costs on a third-party funder, since third-party funding does not generally involve the claim being transferred to an individual or company in poor financial condition. The situation is reminiscent of that where an individual creditor in bankruptcy invests in the bankruptcy estate’s action against a debtor in respect of a claim in favour of the bankruptcy estate. In a case such as this, the creditor in bankruptcy is the effective beneficiary in terms of the financial outcome of the dispute and probably also

31 Chapter, 18, Section 1 of the Swedish Code of Judicial Procedure. This also applies to arbitration proceedings (see Stefan Lindskog, Skiljeförfarande: En kommentar [Arbitration: A Commentary] (2nd edn), p. 1023).
32 Case reported on p. 144 in NJA 2000.
33 The cases reported on p. 420 in NJA 2006 and p. 887 in NJA 2014.
exercises a certain amount of influence over the action. Under Swedish law, in this situation the creditor in bankruptcy is unlikely to be ordered to pay the opposing party's legal fees and litigation costs in the event the action is unsuccessful.34

In light of this, it is unlikely that a third-party funder will be held liable for paying legal fees and litigation costs based on current case law. However, this does not prevent the Supreme Court from altering this position when it has the opportunity to assess a situation relating to liability for legal fees and litigation costs where a third-party funder has been involved.

VI THE YEAR IN REVIEW

In the past year, there have been no significant changes in the Swedish market that bear relevance as to third-party funding. However, we have seen an increase in awareness and interest among Swedish lawyers towards third-party funding and its potential benefits. While third-party funding was previously regarded fairly negatively, during the course of the past few years we have noted a more positive attitude towards third-party funding.

VII CONCLUSIONS AND OUTLOOK

In summary, third-party funding is a phenomenon that is relatively new and unfamiliar in Sweden. The situations in which third-party funding is used in Sweden are probably limited to international arbitration proceedings in which the seat of arbitration is located in Sweden. Furthermore, since third-party funding is relatively new in Sweden, there is no legislation governing or barring the use of third-party funding. In our view, this will remain the case in the near future. If third-party funding issues arise in the Swedish courts, it is reasonable to assume that the courts will be guided primarily by international guidelines and other soft-law sources.

As for the future, we predict great potential for the continued development of third-party funding in Sweden. The SCC is one of the major arbitral institutions and will thus continue to attract many arbitration cases. Moreover, the SCC is noted as being one of the major institutions when it comes to larger disputes, which typically are of greatest interest to third-party funders. Therefore, it is likely that the third-party funding market will increase in Sweden in the coming years.

34 The trustee in bankruptcy can ask the creditor in bankruptcy to provide security for any compensation payable for the defendant's legal fees and litigation costs. However, if the creditor in bankruptcy is unwilling or unable to provide the security, the trustee in bankruptcy can still bring an action. However, if there is a risk that the bankruptcy estate will not be able to pay the defendant's legal fees and litigation costs if the claim is unsuccessful, an action should not be brought against the creditor in bankruptcy (see Lars Heuman, Specialprocess [Special proceedings] (6th edn), p. 227, and the cases reported on p. 131 in NJA 1999 and p. 420 in NJA 2006).
Chapter 20

SWITZERLAND

Urs Hoffmann-Nowotny and Louis Burrus

I MARKET OVERVIEW

Third party litigation funding is still a relatively new phenomenon in Switzerland. Triggered by the commercial success of FORIS AG in Germany in the late 1990s, first reports about litigation funding emerged in Swiss legal writing around the turn of the century. FORIS AG entered the Swiss market in 2000. At the time, the legality of litigation funding under Swiss law was still uncertain. In the wake of the leading case of the Swiss Federal Court, the country’s highest court, which answered the question in the affirmative in 2004, Allianz ProzessFinanz GmbH (Allianz), a subsidiary of the German Allianz Insurance Group, also entered the Swiss market. In 2008, Allianz even opened a representative office in Zurich. However, in 2011, Allianz stopped writing new funding business worldwide (including in Switzerland).

Until recently, two funders were known to be actively operating out of Switzerland, (1) Profina Prozessfinanzierung GmbH in Zug, which was founded in 2006, and (2) JuraPlus AG in Zurich, which was founded in 2008. In 2017, a new participant, Nivalion AG in Zug, which was founded in late 2016, entered the market. Furthermore, in 2018, Vannin Capital announced the launch of an office in Germany with an aim to, inter alia, fund business in Switzerland. In 2019, a new participant called Swiss Legal Finance SA opened an office in Geneva. Among larger international participants, Omni Bridgeway is the only one with a presence in Switzerland, through an office in Geneva. Several other non-Swiss (in particular German, English and French) funders are also said to be taking on Swiss cases.

1 Urs Hoffmann-Nowotny and Louis Burrus are partners at Schellenberg Wittmer Ltd.
3 For more detail on this case, see Section II.
4 Allianz was one of the complainants that obtained the Federal Court’s leading case.
5 See www.profina.ch, last visited on 3 September 2019.
6 See www.jura-plus.ch, last visited on 3 September 2019.
7 See http://nivalion.ch, last visited on 3 September 2019. Nivalion focuses on large-scale cases (minimum amount in dispute exceeding 7.5 million Swiss francs) and is particularly active in arbitration.
9 See https://www.swisslegalfinance.ch/english, last visited on 3 September 2019.
10 See https://www.omnibridgeway.com/contact-us, last visited on 3 September 2019.
Most Swiss-based participants seem to focus primarily on state court litigation, notably civil liability cases as well as intellectual property and inheritance disputes. Other fields of law with funded cases are general contract and corporate law (including liability of directors and officers).\textsuperscript{11} Furthermore, there is anecdotal evidence for third party funding in arbitration and in claims dormant in foreign bankruptcies,\textsuperscript{12} until recently mostly by non-Swiss funders.

The Swiss market is still relatively small. Swiss funders ordinarily require a minimum amount in dispute of 250,000 Swiss francs.\textsuperscript{13} Representatives of funders have stated at conferences that there are no more than around 50 funded cases in Switzerland per year. According to recent indications from representatives, Swiss funders receive around 50 to 100 enquiries per year each, which result in the conclusion of between five and 15 agreements per funder.\textsuperscript{14} Also, there are no Swiss industry associations.\textsuperscript{15}

\textbf{II LEGAL AND REGULATORY FRAMEWORK}

The legality of litigation funding is no longer an issue in Switzerland since the Swiss Federal Court rendered the already mentioned decision of 10 December 2004.\textsuperscript{16} In this case, the Court had to review the constitutionality of a provision of the 2003 Zurich Cantonal Act on the Legal Profession (the Zurich Lawyers Act)\textsuperscript{17} that made it illegal to fund a lawsuit on a commercial basis and against a participation in the success of the suit. The Court found that the provision violated freedom of commerce as guaranteed in the Swiss Federal Constitution.\textsuperscript{18} The Court therefore quashed the critical provision of the Zurich Lawyers Act.

The Federal Court issued a very detailed opinion that provides guidance on a number of critical aspects of litigation funding. The most important points addressed are the following:

\begin{itemize}
\item[a] The Court addressed the question whether third party litigation funding might jeopardise the independence of the lawyer acting for the funded party. Under the Swiss Federal Act on the Freedom of Lawyers (the Federal Lawyers Act), lawyers in
\end{itemize}

\begin{footnotesize}
\begin{enumerate}
\item See in this respect Hunkeler/Wohl, Kommerzielle Prozessfinanzierung zu Gunsten von Insolvenzmassen?, in: BSchK 2015, pp. 41 et seqq; for a discussion of bankruptcy-related aspects of third party funding, see furthermore Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, in: ZZZ 2019 3 et seqq., pp. 5 et seq. and 14 et seqq.
\item As a rule, minimum requirements are 250,000 francs (Profina), 300,000 francs (JuraPlus) and 7.5 million francs (Nivalion) (see http://nivalion.ch/direct funding/, last visited on 3 September 2019; Wegmüller, op. cit., p. 241).
\item See for a recent overview Schumacher, Richterliche Pflicht zum Hinweis auf private Prozessfinanzierung?, in: AJP 2018 458 et seqq. (cited Schumacher, Pflicht zum Hinweis), p. 460 et seq. Accordingly, there has been a slight market growth in recent years (see, for comparison, Schumacher, Prozessfinanzierung, p. 8 with figures from 2014).
\item However, Nivalion is an overseas funder member of the Association of Litigation Funders of England and Wales (see http://associationoflitigationfunders.com/membership/membership-directory/, last visited on 3 September 2019).
\item The decision is reported in the Official Case Reporter: BGE 131 (2004) I 223 et seqq. It was confirmed later by the decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.1 (not published in the Official Case Reporter).
\item Anwaltsgesetz of 17 November 2003, LS (Systematic Collection of Zurich Cantonal Laws) 215.1.
\item Article 27 of the Swiss Federal Constitution, SR (Systematic Collection of Swiss Federal Laws) 101.
\end{enumerate}
\end{footnotesize}
Switzerland must exercise their activity independently.\textsuperscript{19} The Court found that the plaintiff’s contractual obligations under the typical funding arrangements to promptly and fully inform the funder on all aspects of the case and not to settle the case without the funder’s prior approval do not jeopardise the lawyer’s independence.\textsuperscript{20}

\textit{b} The Federal Court then considered the concern that the lawyer’s duty of confidentiality\textsuperscript{21} was at risk. In the Court’s analysis, it is perfectly permissible for the client to allow his or her lawyer to disclose confidential information to the third party funder and this does not call into question the lawyer’s confidentiality obligation.\textsuperscript{22}

\textit{c} The Federal Court finally looked at the issue of conflicts of interest. Swiss lawyers have not only a contractual, but also a statutory duty to avoid conflicts.\textsuperscript{23} The Court found that the party’s and the third party funder’s interests were, as a rule, aligned since they are both interested in obtaining the best possible result in the proceedings. However, the Court accepted that conflicts of interest might arise in certain scenarios; for example, when it comes to accepting or rejecting a settlement proposal. However, in the Court’s analysis, such potential conflicts can be managed by appropriate arrangements in the funding agreement. Therefore, the mere possibility of such conflicts does not suffice to preclude third party litigation funding.\textsuperscript{24}

\textit{d} The Federal Court also looked at the commercial realities of third party litigation funding. The Court recognised that funders will focus their acquisition efforts on lawyers and that the lawyers thus have a commercial interest in entertaining good relationships with professional funders, thereby being at risk of putting the funders’ interests before those of the client. However, the Court found that this was not the only area of potential conflicts of interest for lawyers; it pointed as an example to the situation where the lawyer is paid by the client’s professional liability insurer. The Federal Court came to the conclusion that the existence of the lawyer’s legal obligation always to put the client’s interests first, coupled with the threat of severe sanctions in the event of a breach, adequately addresses this concern.\textsuperscript{25}

\textsuperscript{19} Article 8(1)(d) of the Federal Lawyers Act of 23 June 2000, SR 935.61. The statutory requirement that lawyers exercise their activity as independent professionals does not prohibit law firms from being organised as corporations, as long as the corporation is controlled by independent lawyers. It also permitted for a lawyer to exercise his or her activity as an employee provided he or she is employed by an independent lawyer or law firm.

\textsuperscript{20} BGE 131 (2004) I 223 c. 4.5.

\textsuperscript{21} The duty of confidentiality is based on a number of legal sources: the contract between lawyer and client, Article 13 of the Federal Lawyer’s Act and the rules issued by the cantonal bar organisations. Breach of the duty constitutes a severe criminal offence, pursuant to Article 321 of the Swiss Penal Code (PC; SR 311.0); it also entails disciplinary sanctions.

\textsuperscript{22} BGE 131 (2004) I 223 c. 4.5.6.

\textsuperscript{23} The duty to avoid conflicts of interest is again based on a number of legal sources, in particular, Article 398(2) of the Swiss Code of Obligations (CO; SR 220), which requires lawyers to diligently and faithfully perform the business entrusted to them, as well as Article 12(c) of the Federal Lawyers Act.

\textsuperscript{24} BGE 131 (2004) I 223 c. 4.6.

\textsuperscript{25} BGE 131 (2004) I 223 c. 4.6.3, 4.6.4 and 4.6.6.
There are no specific statutory rules concerning third party litigation funding. Certain clauses in litigation funding agreements can be inadmissible; for example, if the funder was granted an excessive share of the proceeds of the litigation.26 Furthermore, as discussed by the Federal Court in its leading case, the most important legal limits and prohibitions arise from the lawyers’ duties (1) to exercise their activity independently, (2) to keep client-related information confidential, and (3) to avoid conflicts of interest.

In this context, the Administrative Court of the canton of Aargau dealt with a case in 2008 in which the lawyer who represented the plaintiff as counsel was at the same time the president of the board of the third party funder financing the litigation. Despite this double function, the court found that the lawyer’s duty to act independently had not been breached as long as the litigation funding agreement provided for the priority of the lawyers’ rules of professional conduct over the interests of the funder and did not grant the funder any right to interfere with the lawyers’ handling of the litigation.27

By contrast, in another decision, of 22 January 2015, the Swiss Federal Court found that a lawyer had breached the duty to avoid conflicts of interest in a situation where the lawyer had represented both his client and the litigation funder when they negotiated the funding agreement. The Court found that there was a conflict between the interests of these parties with respect to the share of the proceeds of the litigation that they would receive.28 In addition, the Court criticised the fact that the agreement provided for a share of the proceeds to be used to repay private loans that the lawyer had granted his client earlier on. As a consequence, the Court found that the lawyer had breached his professional duties.29

Furthermore, Swiss law narrowly restricts the options for lawyers to agree to success-related remuneration. The Federal Lawyers Act bans the possibility of agreeing on a full-success fee (i.e., arrangements under which remuneration is only owed in the event of success, or in which the sole remuneration consists in a share of the proceeds of the litigation (pactum de quota litis)).30 By contrast, Swiss case law has confirmed the permissibility of a pactum de palmario, an arrangement pursuant to which the client pays a reduced fee and the lawyer is in turn entitled to a share of the proceeds of the litigation as an additional (contingent) fee component.31 The courts have held that the fee component that is unrelated to the outcome of the litigation must at least cover the lawyers’ costs and must allow for a reasonable profit.32 In its most recent leading case, the Federal Court has furthermore

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26 Article 157 PC prohibits ‘profiteering’ (i.e., exploitation of a party in need). Under Swiss civil law, a party that is affected by an agreement that takes unfair advantage can declare its rescission within one year of the contract having been entered into (Article 21 CO); see also BGE 131 (2004) I 223 c. 4.6.6.
27 AGVE (Official Case Reporter of Court and Administrative Judgments of the Canton of Aargau) 2008 275 et seqq., c. II.2.3.
28 Decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.2.
29 Decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.3.
30 Article 12(e) of the Federal Lawyer’s Act; furthermore, BGE 143 (2017) III 600 c. 2.5 with further references.
31 BGE 143 (2017) III 600 c. 2.7.4 and 2.7.5; decision of the Federal Court 2A.98/2006 of 24 July 2006 c. 2.1 (not published in the Official Case Reporter); furthermore, the *obiter dictum* in BGE 135 (2009) III 259 c. 2.3. Article 19 of the Rules of Professional Conduct of the Swiss Bar Association also assumes the permissibility of a pactum de palmario.
32 BGE 143 (2017) III 600 c. 2.7.5; decision of the Lawyer’s Supervisory Commission of the Canton of Zurich of 2 March 2006, in: ZR (Official Case Reporter of the Canton of Zurich) 105 (2006) No. 46; see also decision of the Federal Court 2A.98/2006 of 24 July 2006 c. 2.2 according to which this only leaves a relatively narrow scope for the agreement of success-related fee components.
specified that the success-related component must not exceed the amount of the unconditional fee component. Furthermore, the agreement of a *pactum de palmario* is only permissible at the outset of the mandate or after the dispute has ended, but not in between.33 Litigation funding arrangements that circumvent the general ban on success fees are also prohibited. This can be the case if counsel in the litigation is at the same time a shareholder of the funder, in which case the lawyer’s duty to act independently would also be violated.34

Currently, there is no specific regulation and supervision of third party litigation funding in Switzerland. In particular, the Swiss Federal Court clarified that third party litigation funding does not qualify as an insurance that would fall under the Insurance Supervision Act35 because there is no payment of a premium in exchange for insurance against a future risk.36 Furthermore, the core offering of litigation funders does not fall within the scope of other Swiss financial market laws.37 The Federal Court does not seem to exclude a need for future regulation,38 and representatives of litigation funders have considered whether regulation may actually be in the interest of providers to help and better establish the existing offer.39 Nevertheless, there is currently no prospect of regulation (and no self-regulation either).40

### III STRUCTURING THE AGREEMENT

There is no specific model agreement in use by Swiss litigation funders and each funder uses its own template. However, most of the relevant agreements are structured very similarly.41 Some funders provide a template for download from their website.42

The process of entering into a funding agreement ordinarily consists of two phases: after a preliminary assessment of the prospects of the case, the funder will require the prospective plaintiff to enter into an exclusivity arrangement for a certain period (e.g., three weeks); during the exclusivity period, the funder will conduct a more thorough assessment allowing for an informed decision on whether to take on the case.43

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33 BGE 143 (2017) III 600 c. 2.7.5.  
34 See AGVE 2008 275 et seqq. c. II.4. As early as 2004, the Swiss Federal Court had in its leading case stated that a lawyer’s independence could potentially be jeopardised if the counsel to a party held a stake in or acted as a board member of the litigation funder and would thus indirectly profit from the outcome of the litigation (BGE 131 [2004] II 223 c. 4.6.4; see also decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.1).  
35 SR 961.01.  
37 Wegmüller, op. cit., p. 238.  
38 See BGE 131 (2004) I 223 c. 4.6.6 ("These concerns can be addressed by existing laws or, if need be, regulations that will still be introduced.") and 4.8; furthermore, Schumacher, *Prozessfinanzierung*, pp. 20 et seqq.  
39 Wegmüller, op. cit., p. 245.  
40 See, however, Schumacher, *Pflicht zum Hinweis*, pp. 464 et seq., who raises the question whether a duty for courts to inform plaintiffs about the possibility of litigation funding, as it is proposed in a recent draft law for a partial revision of the CPC (see Section VII), should go hand in hand with regulation.  
Funding agreements in Switzerland are typically structured as a financing (not as a purchase) of the claim. The funder enters into an obligation to pay all costs that are reasonably required to pursue the claim. This relates to court costs (including advances that are payable by the plaintiff) and the plaintiff’s own attorney’s fees. Furthermore, the potential compensation of the defendant for its legal fees if the claim is unsuccessful is also covered, which is not the case for many non-continental European funders. Depending on the nature of the case, the plaintiff may furthermore require the funding of a party-appointed expert to pursue the claim.

In exchange for the financing, the funder receives a share of the proceeds of the litigation. Generally, Swiss funders can be expected to take a share in the region of 30 per cent of the net revenue. The share may vary, however, depending on the absolute value recovered and the point in time at which the dispute comes to an end (i.e., the funder’s share will be lower in the case of high amounts recovered and in the case of an early settlement). In some cases, the funder’s share is also calculated as, or limited to, a multiple of the amount invested by the funder.

Under Swiss law, the question arises as to how the funder’s claim can be secured. In Swiss civil procedure, a party cannot be authorised by agreement to pursue a claim on behalf of another person. As a consequence, the plaintiff would no longer have standing to sue if the claim was assigned to the funder. Therefore, some agreements merely provide for a duty to assign the agreed share to the funder upon first request. However, a pledge of the claim as security for the funder’s share seems to be the preferred option.

The agreements usually provide for the funder’s right to withdraw from the contract if events materially affect the initial assessment of the case. Such events typically include (1) the surfacing of previously unknown, detrimental facts, (2) a change in case law that affects the case, (3) a loss of important evidence, and (4) a deterioration of the defendant’s financial position. Some funders will only commit to funding the case before the courts of first instance. In any event, however, the rendering of a judgment that results in a full or partial dismissal of the claim will usually also trigger a right of termination by the funder. In the event of withdrawal, the funder will be required to cover all costs that have been incurred so far (including costs resulting from a termination of the proceedings). However, the plaintiff will be entitled to continue the proceedings at its own cost and risk.

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44 Schumacher, *Prozessfinanzierung* p. 104.  
45 Wegmüller, op. cit., p. 241; Wey, op. cit., p. 52.  
46 Schumacher, *Prozessfinanzierung*, p. 21. See, however, also Wey, op. cit., p. 53, who reports a range of 20 per cent to 50 per cent.  
48 BGE 137 (2011) III 293, c. 3.2.  
49 Profina Finanzierungsvertrag, § 3.  
50 Schumacher, *Prozessfinanzierung*, p. 223; Meier, op. cit., pp. 7 et seq.  
51 Wey, op. cit., p. 56.  
52 Profina Finanzierungsvertrag, § 1.  
54 Schumacher, *Prozessfinanzierung*, p. 99; Wey, op. cit., p. 56.
Similarly, funding agreements often provide for an exit mechanism if the parties (i.e., the funder and the plaintiff) fail to reach an agreement regarding a settlement offer. The party rejecting the settlement is usually entitled to continue the proceedings but will become liable to the other party for the proceeds that would have resulted from the settlement.\textsuperscript{55}

There are no known examples of disputes between funders and plaintiffs in Switzerland.

IV DISCLOSURE

In Swiss civil procedure law, the parties can seek disclosure and the production of documents from the counterparty or third parties if the information is of relevance for the court’s decision.\textsuperscript{56} However, production requests must be precisely worded and relate to documents that are clearly specified since fishing expeditions are inadmissible.\textsuperscript{57}

Legal documents stemming from communications between a party or third party and counsel are exempt from disclosure obligations (attorney–client privilege).\textsuperscript{58} The scope of this exception was significantly expanded in 2013\textsuperscript{59} and is today predominantly deemed to apply to all types of legal documents (including notes to file, whether prepared by the lawyer or the client, legal assessments, draft contracts, etc.) and irrespective of whether they are in the possession of the lawyer, the client or even a third party.\textsuperscript{60} As a consequence, assessments from counsel will be subject to privilege even if they are in the hands of the litigation funder.

Under Swiss civil procedure law, there is also no duty to disclose the existence of a litigation funding agreement.\textsuperscript{61} In particular, production requests relating to the funding of a claim are not permissible because they are irrelevant for the court’s decision.\textsuperscript{62} As a consequence, more often than not in court litigation, the existence of a funding arrangement will not be disclosed.

\textsuperscript{55} Schumacher, Prozessfinanzierung, p. 100; see also Wey, op. cit., p. 56.

\textsuperscript{56} Article 160(1)(b) of the Swiss Federal Code of Civil Procedure (CPC; SR 272). The taking of evidence is generally limited to disputed facts that are legally relevant (Article 150 CPC; see in this respect also decision of the Court of Cassation of the Canton of Zurich of 23 February 1981, in: ZR 80 [1981] No. 102 c. 7b).


\textsuperscript{58} Article 160(1)(b) CPC; see also Article 166(1)(b) CPC.

\textsuperscript{59} Formerly, the exception was limited to genuine criminal defence counsel-related correspondence and it was argued that only documents in the hands of external lawyers would be protected.


\textsuperscript{61} An exception applies where a party has previously obtained legal aid, in which case it is required to notify the court upon entering into a litigation funding agreement that it has made sufficient funds available and no longer depends on legal aid (see decision of the Superior Court of the Canton of Zurich of 8 April 2012, LA110040, c. 8.3; furthermore, also of the Federal Court 2C_814/2014 of 22 January 2015 c. 5.2).

\textsuperscript{62} See Section IV, first paragraph.
By contrast, in international arbitration, some authors have argued that a claimant would be under a duty to disclose the fact that it is supported by a litigation funder, in particular to allow for the evaluation of a security-for-costs request. Furthermore, under the IBA Guidelines on Conflicts of Interest in International Arbitration, as revised in 2014, any legal or physical person having a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of that party. As a consequence, concerns regarding relationships between an arbitrator and one of the parties with respect to conflicts of interest extend to third party funders and may require the disclosure of the existence of a funding arrangement.

In Switzerland, litigation funding agreements are typically subject to confidentiality obligations. A disclosure requires the consent of the other party. Nevertheless, consideration is given to whether the chances of settlement would increase if the case’s own financial strength (because of the funder’s support) and soundness (given that it has passed the funder’s assessment) is demonstrated to the opposing party early on. As a consequence, a voluntary disclosure of the existence of a funding arrangement for tactical reasons is considered.

V COSTS

Swiss law of civil procedure generally follows the loser-pays rule, according to which the losing party has to pay the court costs and also compensate the winning party for that party’s attorney’s fees. However, party costs are awarded on the basis of tariffs that depend on the amount in dispute. In most cases, the compensations awarded cover only part of the actual costs incurred.

Upon the filing of the statement of claim, the court will usually request an advance on costs from the plaintiff to cover the prospective court costs. The amount of this advance depends on the amount in dispute. Furthermore, each party must advance the costs for the taking of evidence that it has requested. In addition, at the defendant’s request, the plaintiff must also provide security for the party costs if, inter alia, (1) the plaintiff is domiciled abroad

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64 General Standard 6(b) and 7(a) of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.


66 Schumacher, Prozessfinanzierung, p. 98.

67 Wey, op. cit., pp. 54 et seq.

68 Article 106(1) and (2) CPC.

69 See Article 96 CPC.

70 Article 98 CPC.

71 Article 102 CPC.
and no treaty exemption applies, (2) the plaintiff appears to be bankrupt, or (3) there are other grounds for assuming that a claim for party costs would be at risk. The question of whether the funding of a plaintiff’s claim (to the extent the defendant becomes aware of this fact) may give rise to a duty to secure the defendant’s party costs is hardly discussed in legal writing in Switzerland. In an unpublished decision of the Commercial Court of the Canton of Zurich, however, the Court ordered a plaintiff who – had it not been for a litigation funding arrangement – clearly lacked sufficient funds for conducting major litigation to provide security for the defendant’s party costs. Furthermore, in another case before the same court, where the conditions for having to secure party costs were met on the part of the plaintiff (who was bankrupt), the question arose whether the plaintiff could avoid the duty to furnish security by reference to the fact that its funder would be liable under the funding agreement for potential party costs payable if the claim was unsuccessful. The Court held that only the actual party’s ability to meet its financial obligations was relevant for assessing whether party costs had to be secured under the CPC. As a consequence, the Court concluded that the obligation of the funder, which only exists in relation to the plaintiff, to pay compensation for the defendant’s party costs, did not release the plaintiff from its duty to furnish a security.

In international arbitration, notable authors even argue that a claimant appearing to lack assets to satisfy a final cost award but pursuing the claim with the funding of a third party makes a strong prima facie case for security for costs. Therefore, just as in other jurisdictions, there is a risk in Swiss-based proceedings that a funded party bringing a claim will be ordered to pay a security for party costs if the lack of sufficient own funds is apparent or once the existence of a funding arrangement has been disclosed.

VI THE YEAR IN REVIEW

The past years have seen some movement in the Swiss market for litigation funding, with Nivalion AG, Vannin Capital and Swiss Legal Finance SA entering as new participants. Foreign participants, in particular the ones based in Germany, the United Kingdom or France, have also shown an increased interest in the Swiss market.

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There has also been a slight increase in reported court cases relating to issues of litigation funding.\textsuperscript{79} It will be interesting to see whether this trend continues. Furthermore, scholarly writers have recently pointed to the fact that Swiss lawyers are under a duty to advise their clients regarding the availability of third party funding and to represent them when entering into a funding agreement.\textsuperscript{80} All these factors indicate an increased awareness of third party litigation funding and the opportunities arising from it.

\textbf{VII CONCLUSIONS AND OUTLOOK}

In light of the limited number of funded cases in Switzerland so far,\textsuperscript{81} litigation funding is not yet an important phenomenon. However, litigation funding is here to stay and will very likely gain further in importance in the future.

The fact that the importance of third party funding in Switzerland has remained rather modest until now may in part have to do with the fact that class actions or other mechanisms of collective redress do not exist in Switzerland at present. In 2013, the Swiss government, the Federal Council, had published a report on collective redress, which suggested a number of measures to improve an efficient handling of mass claims in Swiss civil procedure.\textsuperscript{82} In this report, the government expressed support for the further development of the Swiss market for litigation funding and described it as an important factor to improve access to justice in mass tort and consumer cases.\textsuperscript{83} In March 2018, the Federal Council proposed a partial revision of the CPC one of the key objectives of which is to strengthen mechanisms of collective redress. Furthermore, the preliminary draft law provides for a duty for courts to inform plaintiffs about the possibility of litigation funding.\textsuperscript{84} These legislative efforts to establish mechanisms of collective redress in Swiss law are ongoing and may, if made law in future, favour third party funding.


\textsuperscript{80} Schumacher/Nater, Anwaltsrubrik: Prozessfinanzierung und anwaltliche Aufklärungspflichten, in: SJZ 2016 43 et seqq. with reference to a corresponding statement of the Federal Court in its decision 2C_814/2014 of 22 January 2015, c. 4.3.1.

\textsuperscript{81} See Section I.


\textsuperscript{84} Explanatory Report of the Swiss Federal Council on the Revision of the CPC (Improvement of the Application of the CPC and the Enforcement of Rights) of 3 March 2018, pp. 50 et seq.; see also Schumacher, Pflicht zum Hinweis, pp. 458 et seqq.
Chapter 21

UKRAINE

Olexander Droug

I OVERVIEW

Third party funding is not regulated in Ukraine. Accordingly, there are no limitations or prohibitions on funding the claims in the civil and commercial proceedings before the Ukrainian courts and in arbitration proceedings seated in Ukraine.

At the same time, third party funding is not known on the market and in practice it is not used in proceedings before the Ukrainian courts and in arbitration proceedings seated in Ukraine.

Some Ukrainian parties resort to third party funding from non-Ukrainian funders to pursue their claims in foreign jurisdictions, including in the United Kingdom and in arbitrations seated outside Ukraine.

In any event, as regards a party wishing to use third party funding in Ukraine, the Rules of Professional Conduct contain a requirement that when representing a client an attorney practising in Ukraine may not take into account instructions from other parties. Furthermore, an attorney intending to share any privileged documents or information with a third party (i.e., a funder) must obtain the client’s consent.

Although strictly not third party funding, it is a rather common practice in Ukraine for lawyers to handle cases under conditional fee agreements. The Rules of Professional Conduct expressly allow this way of structuring the payment to an attorney.

However, recently the Supreme Court stated that a provision of a contract between a client and an attorney allowing a conditional fee is void. In the view of the Supreme Court, the outcome of litigation may not be the subject of a legal services contract.²

Not all judges of the Supreme Court agreed with this position and there was a dissenting opinion that a conditional fee agreement does not in fact breach any mandatory rule of Ukraine.³ Therefore, further developments in Ukrainian court practice on conditional fee agreements can be expected.

Ukrainian procedural rules for civil and commercial litigation, as well as the Arbitration Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, provide for the standard rule of ‘costs follow the event’, which can help reduce the financial burden suffered by a party to a dispute.

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1 Olexander Droug is a partner at Sayenko Kharenko.
2 Resolution of the Supreme Court dated 12 June 2018 in case No. 462/9002/14-ц.
3 Dissenting opinion of Vasyl Krat, judge of the Supreme Court, dated 12 June 2018 in case No. 462/9002/14-ц.
Notwithstanding this, in August 2019, the Supreme Court expressed the view that a court is not obliged to award the winning party the full amount of any attorneys’ fees if, on the basis of the principles of fairness and rule of law, the court finds that the fees agreed by the client and attorney are (1) excessive in view of the complexity of the case and the time spent on it by the attorney, and (2) inconsistent with market prices for legal services.4

There is also a market in Ukraine for acquisition of non-performing loans and distressed debt in general. Factoring companies, debt collection companies and other financial companies frequently purchase claims from corporates and banks and then enforce them in their own name. However, we do not consider this to constitute third party funding.

We continue to follow developments in this sphere in Ukraine.

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4 Resolution of the Supreme Court dated 1 August 2019 in case No. 915/237/18.
UNITED ARAB EMIRATES: DUBAI INTERNATIONAL FINANCIAL CENTRE

Mohamed El Hawawy and Monika Humphreys-Davies

I MARKET OVERVIEW

The Dubai International Financial Centre (DIFC) is a free zone within the United Arab Emirates (UAE), which was established in 2004. The DIFC is a common law jurisdiction – an enclave within the UAE’s otherwise civil law legal system – and has its own courts (the DIFC Courts), where proceedings are governed by the Rules of the DIFC Courts (RDC), which are closely modelled on the English Civil Procedure Rules. The DIFC also has its own civil and commercial legal framework, which is different from the onshore UAE law. As part of that framework, the DIFC has its own Arbitration Law, which is based on the UNCITRAL Model Law.

The UAE, and the Middle Eastern region in general, have not been a traditional market for litigation funding, and that has been mostly because funders have perceived Middle Eastern jurisdictions as not offering the level of certainty and predictability they look for in the legal process. However, the introduction of common law free zones such as the DIFC (and more recently Abu Dhabi Global Market), with their own courts and arbitration laws, gives rise to more attractive new markets for funders.

Since their establishment in 2011, the DIFC Courts have seen their caseload increase steadily, and they are becoming the preferred dispute resolution forum in the region for both local and regional parties, as well as for parties from other international jurisdictions. According to the DIFC’s annual report for 2018, the total number of cases before the DIFC Courts and in arbitration was 670, with an average value of 188,865,211 dirhams for cases before the Court of First Instance and in arbitration; an average value of 134,365 dirhams for cases before the Small Claims Tribunal; and with the average value of enforcement cases being 57,431,557 dirhams. In the first half of 2019, the DIFC Courts reported that a total of 463 cases were filed across all its divisions, which meant that there was a 25 per cent increase in the number of cases compared to the same period in 2018. This, in turn, indicates potential for growth for litigation funding.

As things stand, there are no funders based in the DIFC. However, various international funders have funded disputes in the DIFC in the past or have expressed interest in doing so in the future.

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1 Mohamed El Hawawy is a partner and Monika Humphreys-Davies is an associate at Ince.
2 DIFC Law No. 1 of 2008, as amended.
One point that has attracted some interest from international funders is the enforcement of foreign arbitral awards through the DIFC as a conduit jurisdiction to the wider UAE jurisdiction (see Section VI).

II LEGAL AND REGULATORY FRAMEWORK

Established in 2004, the DIFC is a relatively new common law jurisdiction. As a result, it does not have the same history of changing attitudes to third party funding (TPF) and champerty as that shared by other common law jurisdictions. DIFC legislation is silent on the issue of TPF and champerty, but, having its origins in the English common law system, the DIFC jurisdiction has inherited much of the same modern approach to these issues.

The position in England is that maintenance and champerty are no longer crimes or torts under English law, but that champertous agreements, as a matter of public policy, are unenforceable. TPF agreements, if properly structured, have been held to be in the public interest and not champertous. This is relevant, because English court judgments have persuasive authority in the DIFC Courts.

However, any English law precedent must be approached with caution, because the DIFC Courts have issued Practice Direction No. 2 of 2017 (PD), which has created new rules that are similar, but not identical, to the English law position.

In adopting the PD, the DIFC Courts have opted for a light-touch approach to regulation, with the main requirement being that of disclosure of the fact of TPF and the identity of the funder. It is worth noting that Subsection 3 of the PD makes it clear that the PD ‘is without prejudice to any subsequent determination of the DIFC Courts regarding LFAs [litigation funding agreements] in general or any specific LFA in particular (or any part thereof)’. This means that we can expect further pronouncements by the DIFC Courts regarding TPF that will continue shaping the procedural requirements for TPF in the DIFC.

Currently, the TPF market in the DIFC is not regulated, but this may change as the DIFC has been considering expanding the powers of the DIFC Courts to issue regulations regarding TPF (see Section VII).

It is worth noting that contingency fees, or no-win-no-fee arrangements and agreements whereby a lawyer is rewarded by way of a share of the proceeds, are prohibited in proceedings in the DIFC Courts. Conditional fee arrangements are permitted (whereby, in the event that the client is successful, the legal representatives receive an uplift in fees, as opposed to a share in the proceeds).

III STRUCTURING THE AGREEMENT

TPF in the DIFC is growing in popularity, but is yet to reach the levels comparable with funding available in other common law jurisdictions. As a result, the TPF agreement structure is borrowed heavily from the structures typical in other common law jurisdictions, and parties can expect to negotiate similar provisions relating to exclusivity, withdrawal, confidentiality, pricing, settlement and liability for costs.

The DIFC Courts have not yet had an opportunity to consider specific clauses in contractual disputes between funders and claimants. In one case, the claimant’s funders filed a Part 8 claim with the DIFC court to protect and preserve its interest in the funding agreement following a change of legal representation by the claimant without finalising the replacement payment mechanism under the funding agreement. The funders obtained an order that the defendants pay the sum adjudged by the DIFC court to the claimant (in excess of US$11 million) into court and that this sum be held by the court until the parties reach settlement or until final award or judgment. This indicates the willingness of the DIFC Courts to uphold the rights of the funders under TPF agreements, which is a positive trend in this jurisdiction.

IV DISCLOSURE

The PD requires the funded party to disclose the fact of funding and the identity of the funder. The PD also sets out when and how notice must be given. For a standard claim (RDC Part 7), notice must be given in the case management information sheet, which has to be submitted before the case management conference (CMC) pursuant to RDC 26.3. Alternatively, if a party enters into a TPF agreement after the CMC, notice must be given in writing to all the other parties, as well as to the DIFC Courts’ Registry, within seven days of entering into the agreement. In all other claims, written notice must be served to all other parties to the dispute as well as the DIFC Courts’ Registry, where proceedings have yet to be commenced, as soon as practicable after commencement, including within the claim form or the particulars of claim and, in instances where the agreement was entered into after the proceedings were commenced, notice must be given within seven days of the date of the agreement.

The PD also makes it clear that there is no notice requirement for claims made in the Small Claims Tribunal unless those claims are transferred to or appealed to the Court of First Instance, in which case notice must be given in accordance with the procedures outlined above.

This move towards transparency has its advantages, but parties should bear in mind potential consequences that this may entail. The PD does not require disclosure of a copy or of any part of the TPF agreement, but it is notable that the court may order such disclosure. TPF agreements often contain confidential and privileged information, so it is sensible that there is no standard requirement to disclose an agreement. It remains to be seen in which circumstances the DIFC Courts would order the disclosure of an agreement or parts of it. As the DIFC is a common law jurisdiction, the DIFC Courts recognise the concept of privilege, and therefore the parties can seek to protect their interests by utilising carefully drafted non-disclosure and common-interest clauses in TPF agreements.

Finally, while there is no general requirement to disclose any information about TPF in DIFC arbitration proceedings, the tribunals can exercise their powers to order such disclosure.

7 Vannin Capital PCC PLC v. Mr Rafed Abdel Mohsen Bader Al Khurafi and ors 2014 DIFC CFI 036.
V  COSTS

The position in relation to the liability of funders for adverse costs, security for costs and recovery of costs of securing TPF in the DIFC is broadly similar to the position in the United Kingdom.

The PD clarifies that the DIFC Courts have inherent jurisdiction to make costs orders against third parties, including funders, where the court deems appropriate. However, the PD is silent on the amount of costs that can be so recovered. It remains to be seen whether a cap similar to the Arkin cap on costs recoverable from third party funders will apply.

A defendant may seek an order for security for costs against a third party funder, and the DIFC Courts have jurisdiction to make this order if they are satisfied, having regard to all the circumstances of the case, that it is just to do so.

RDC Rule 25.103 clarifies that the defendant may seek an order for security for costs against someone other than the claimant, and the court can make such an order if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and one or more of the conditions in Rule 25.104 applies. RDC Rule 25.104 stipulates two conditions: that the person has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him or her; or has contributed or agreed to contribute to the claimant’s costs in return for a share of any money or property that the claimant may recover in the proceedings, and is a person against whom a costs order may be made.

In addition, the PD says that the court may take into account the fact of disclosure of TPF when deciding on the application for security for costs, but the fact of funding shall not by itself be determinative.

The PD does not address the question of whether the costs of TPF are recoverable in DIFC court proceedings; therefore, this remains an area of uncertainty.

In line with other major jurisdictions, the arbitration legislation in the DIFC does not authorise arbitrators to make costs orders against third parties as they are not parties to the arbitration agreement. The position regarding recoverability of TPF costs in DIFC-seated arbitration has not been addressed in case law yet. In England, the judgment in Essar v. Norscot9 addressed this issue, finding that the definition of ‘other costs’ in Section 59(1) of the English Arbitration Act 1996 includes TPF costs. Notably, Section 38(5) of the DIFC Arbitration Act, which defines the scope of what constitutes arbitration costs, is not as wide as Section 59(1) of the Arbitration Act 1996.

VI  THE YEAR IN REVIEW

One type of case often discussed in the context of TPF is the enforcement of foreign arbitral awards in the DIFC. The past 10 years have seen the rise and fall of the DIFC Courts as a conduit jurisdiction for enforcement of foreign arbitral awards and judgments in the onshore UAE jurisdiction. The historical difficulties involved in enforcing foreign arbitral awards and judgments in the local UAE courts led claimants to seek an alternative route via the DIFC Courts, which gave rise to its emergence as a conduit jurisdiction. In relation to the enforcement of foreign arbitral awards, claimants have successfully obtained judgments from the DIFC Courts to enforce such awards in the DIFC in the absence of any connection

between the parties or the facts of the case and the DIFC. The intention of these parties was then to enforce the DIFC court judgment in Dubai courts, which is a straightforward procedure. This trend was followed by claimants seeking to enforce foreign judgments in the DIFC purely with a view to enforcing it onshore. Both trends were welcomed by many local practitioners, as these promised to simplify the process for enforcement of foreign arbitral awards and judgments in Dubai and the UAE generally, although doubts always remained regarding other emirates.

However, these trends were halted by the establishment of the Judicial Tribunal for the Dubai Courts and the DIFC Courts (JT) by Dubai Decree No. 19 of 9 June 2016, and the decisions that have followed. The JT’s remit is to determine conflicts of jurisdiction between the jurisdiction of the DIFC Courts and that of the Dubai courts. The concern raised regarding the use of the DIFC Courts as a conduit jurisdiction has usually been framed in terms of a potential conflict between the DIFC Courts and Dubai courts to enforce foreign arbitral awards and judgments. The decisions published by the JT to date indicate that it is likely to find in favour of the Dubai courts’ jurisdiction whenever there are parallel proceedings issued in the DIFC and Dubai courts.

The Emirates Maritime Arbitration Centre, which opened its doors in 2016 to parties as a new specialised maritime arbitration centre with a default seat in the DIFC has now started receiving cases with claims valued in excess of 45 million dirhams.10 There are also indications that the Dubai International Arbitration Centre (DIAC) is considering moving its default arbitration seat from onshore Dubai to the DIFC. In addition, there are suggestions that DIAC’s new rules expressly recognise that the parties may utilise TPF to finance their case. These new rules are eagerly awaited by the UAE arbitration community. These developments show the growth of the DIFC as an arbitration jurisdiction.

While not specifically relevant to DIFC, onshore UAE arbitration is now governed by Federal Law No. 6 of 2018, which is based on the UNCITRAL Model Law. This change brings the UAE into line with internationally accepted standards in terms of procedure and enforcement. It remains to be seen how the new Law will be applied in practice, but this development is likely to offer more certainty and therefore likely to make UAE-seated arbitration more attractive to funds.

One of the main developments in the area of TPF in the UAE has been the issuance of the Litigation Funding Rules by the Abu Dhabi Global Market Courts (the ADGM Courts) on 16 April 2019.11 This move came about as a response to the growing interest in TPF in the region. These Litigation Funding Rules are the first of their kind in the whole Middle East and Africa region and aim to provide both parties and funders with greater certainty in relation to the enforceability of funding arrangements in proceedings for resolving disputes. The Litigation Funding Rules were issued after an extensive review of the TPF frameworks in other jurisdictions and a consultation stage was carried out to ensure that the views of all interested parties were received by the ADGM Courts. The Litigation Funding Rules set out, among other things minimum requirements for litigation funding agreements.

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VII CONCLUSIONS AND OUTLOOK

The DIFC Courts have dedicated significant attention to developments in TPF worldwide and to creating a regulatory environment that benefits parties’ access to TPF. In June 2017, the DIFC issued a consultation paper proposing amendments to the DIFC Court Law 2004 specifically addressing the issue of TPF. The consultation paper proposed an amendment that would give the Chief Justice of the DIFC Courts powers to issue regulations regarding TPF in the DIFC Courts. According to the paper, the intention is to enable the DIFC Courts to ‘monitor the conduct of parties and practitioners before the DIFC Courts in relation to TPF of the DIFC Courts’ proceedings, mirroring a global trend towards increased regulation of this swiftly changing industry’. The outcome of the consultation remains to be seen, but it is clear that the DIFC Courts are keen to ensure that TPF is available to parties in the DIFC and is appropriately regulated. The move by the ADGM Courts in issuing the Litigation Funding Rules shows a strong interest in TPF in the region, and it will be interesting to see whether the DIFC Courts will follow suit and issue further regulations relating to TPF.

Another development in the DIFC Courts that will be interesting to watch in the coming years is the establishment of the Technology and Construction Division (TCD) to deal with construction and engineering disputes. The TCD offers a forum similar to that of the Technology and Construction Court of England and Wales. It is staffed with specialist judges who are able to handle complex technical disputes that, until now, have mostly been referred to arbitration by parties in the region.
I MARKET OVERVIEW

The US market for third party litigation finance has grown at an increasing rate over the past several years. Although the current size of the asset class is unknown, it is estimated that over US$1.8 billion has been collectively raised by dozens of commercial funding entities since 2016, contributing to overall commercial funding commitments of up to US$5 billion.

i Types of claims

Third party funding is typically used for two main categories of claims: commercial and consumer. Commercial claims predominantly consist of business-to-business disputes with substantial amounts in controversy (often in excess of US$10 million). Common commercial claims include breach of contract, business torts, antitrust violations, intellectual property infringement and trade secret theft. Funding also exists in insolvency and distressed scenarios. For example, liquidation trustees may obtain funding to pursue claims on behalf of bankruptcy estates. Commercial funders also frequently finance qui tam or ‘whistle-blower’ suits.

By contrast, consumer claims that receive funding are brought on behalf of individual claimholders and are typically of a mass tort or personal injury nature. Individually, such claims tend to be far smaller in magnitude than funded commercial claims.

ii Funding entities

In the commercial arena, major litigation funders can be generally categorised as follows:

a large, publicly traded entities (such as Burford Capital and Bentham IMF);

b US-based private funds (such as Parabellum Capital, Longford Capital and Lake Whillans);

c privately held foreign-based funders (such as Therium);

1 Sean Thompson is director of intellectual property strategies and general counsel, Dai Wai Chin Feman is director of commercial litigation strategies and Aaron Katz is co-founder and chief investment officer at Parabellum Capital LLC.


funders focused on smaller opportunities (such as LexShares, Legalist and Statera); and lesser known, smaller entities, some of which are backed by single investors or raise capital on an investment-by-investment basis.

### iii Other funding-side market participants

The commercial market also includes various other actors beyond litigation funders. Entities functioning as brokers are increasingly present. Multi-strategy investment funds such as Fortress Investment Group and DE Shaw & Co are also active in the litigation finance space. Others, including Soros Fund Management, have expanded their involvement to consumer funding.\(^4\)

Moreover, a growing secondary market exists, in which hedge funds and other investment managers increasingly participate.\(^5\) For example, in June 2018, funder LexShares launched LexShares Private Market, an exchange for secondary market transactions available to qualified institutional buyers.\(^6\) The Special Situations Groups of investment banks Jefferies and Stifel Nicolaus broker secondary transactions as well.

### iv Consumers of litigation funding

Litigation funding has traditionally been described as a means for low-resourced claimholders to pursue affirmative litigation they may not otherwise be able to afford. In recent years, however, consumers of funding have grown to include parties of all sizes and wherewithal seeking to finance litigation for various reasons. Motivations may include unlocking working capital, monetising the value of legal claims on an accelerated basis and obtaining favourable accounting treatment for legal expenditures. Consumers currently span the spectrum from capital-constrained corporate claimholders, to pro bono legal services organisations, to publicly traded Fortune 500 companies.

The law firm market has also evolved. Whereas law firm consumers of funding were once thought to be boutique or plaintiff-contingency focused in nature, some of the largest US law firms now utilise litigation finance.\(^7\)

### v Products

While single-case, early-case financing remains a common model for the financing of attorneys’ fees or out-of-pocket expenses or some combination of the two, major funders have increasingly shifted toward portfolio funding. Portfolios allow a law firm or corporate to obtain funding for a collateral pool of multiple cases. Portfolios generally provide more

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limited returns in exchange for greater principal protection via cross-collateralisation.⁸ In addition, the funding of domestic class actions, while still uncommon, is widely regarded as only available on a portfolio basis because of ethical concerns.

Some funders also provide loans to law firms against legal receivables. Such loans may provide returns akin to fixed income investments rather than the equity-like-returns sought by traditional litigation finance. While law firm lending is hardly a new phenomenon, the participation of commercial litigation funders in the lending market creates new options for law firms to borrow money on a non-recourse basis, albeit at a potentially higher rate than traditional legal lenders and lines of credit.

The commercial market has also experienced an uptick in claim monetisation, through which funds are advanced on a non-recourse basis against settlement or judgment. Monetisation may occur in conjunction with or independently of traditional litigation funding. Common in appeal and enforcement proceedings, monetisation may also be available earlier in the litigation process to access value inherent in otherwise illiquid legal claims. While monetisation funding is typically thought to be used as working capital, funding proceeds are often unrestricted in use.

Finally, funders are actively working to market defence-side products. Such products have yet to become mainstream, perhaps because of difficulties in defining success, negotiating returns, limiting a defendant’s ultimate exposure or obtaining first-priority recourse in the event of success.

II LEGAL AND REGULATORY FRAMEWORK

Litigation finance in the United States is primarily governed by three areas of law: state common law and statutory limitations on providing financial assistance to litigants; state statutes governing debtor-creditor arrangements; and attorney ethics rules.

i Maintenance, champerty and barratry

The most widely discussed limitations on litigation finance have been the common law doctrines of maintenance, champerty and barratry. These doctrines are relevant for US litigation finance because they were common law torts under English law at the time of the founding and thus incorporated into the laws of many US states. ‘[M]aintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.’

The original rationale for these restrictions was to prevent feudal lords from funding claims by their retainers as a means of increasing their real estate holdings.¹⁰ With the decline of the feudal system, and with it feudal lords supporting large numbers of retainers, the original impetus for restrictions on helping others prosecute suits fell away, ‘[b]ut champerty,

¹⁰ Max Radin, Maintenance by Champerty, 24 Cal. L. Rev. 48, 64 (1935) (noting that the torts were ‘specifically directed [to] the support given by a feudal magrate to his retainers in all their suits, without any reference to their justification,’ which ‘became in fact one of the means by which powerful men aggrandized their estates’).

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now joined with maintenance in a sort of indissoluble hendiadys, remained an offense for which a new basis had to be found.\textsuperscript{11} That new basis was ‘the fundamental distrust of legal procedure and of lawyers’ and the desire to reduce litigation, on the grounds that litigation itself was a vice to be avoided.\textsuperscript{12}

In the United States, ‘[t]he consistent trend across the country is toward limiting, not expanding, champerty’s reach.’\textsuperscript{13} Courts in a number of states, including Arizona, California, Connecticut, New Jersey, New Hampshire, New Mexico and Texas, have determined that those states never incorporated those torts from English law.\textsuperscript{14} Other states, such as Massachusetts, have expressly abolished the doctrines.

In states where restrictions on maintenance and champerty persist, they do not typically constitute independent torts. Instead, they tend to exist as either criminal offences or, more commonly, defences to a contract action.\textsuperscript{15}

At the most restrictive end of the spectrum, states that have explicitly applied champerty or maintenance in the litigation funding context include Alabama, Kentucky, Minnesota, Missouri, Mississippi and Pennsylvania.\textsuperscript{16} By contrast, states that either do not recognise champerty or maintenance, or expressly permit litigation funding by statute or exception, include Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, New Hampshire, New Jersey, Ohio and Texas.\textsuperscript{17}

In states that do recognise champerty or maintenance, there is a high degree of variation among states that continue to enforce restrictions on champerty and maintenance as to what constitutes a violation (and in many states, courts have not yet had occasion to address the application of these doctrines to litigation funding). For instance, New York continues to recognise champerty as a contractual defence, but the doctrine is limited in a number of important ways. Under New York law, individuals and companies may not ‘solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding

\begin{itemize}
  \item id. at 66.
  \item id.
  \item \textit{Del Webb Communities, Inc. v. Partington}, 652 F.3d 1145, 1156 (9th Cir. 2011).
  \item Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, Report on the Ethical Implications of Third-Party Litigation Funding (2013).
  \item \textit{Burnes v. Scott}, 117 U.S. 582, 589 (1886) (‘The question raised by the present assignment of error is not whether a champertous contract between counsel and client is void, but whether the making of such a contract can be set up in bar of a recovery on the cause of action to which the champertous contract relates. We must answer this question in the negative.’); \textit{Malibu Media, LLC v. Zumbo}, No. 13-729, 2014 WL 2742830, at *5 (M.D. Fla. June 17, 2014) (‘[A] plaintiff does not forfeit a valid claim against a defendant merely by entering a champertous contract with a third party’).
\end{itemize}
thereon'. Nonetheless, the statute does not apply where ‘things in action, or any claims or demands’ have a purchase price in excess of US$500,000. Additionally, the New York Court of Appeals has held that for an assignment or purchase to be champertous, the ‘primary purpose’ of the purchase or assignment must be ‘for the very purpose of bringing such suit’. Thus, in practice, champerty is ‘limited in scope’. Particularly because almost all commercial litigation transactions involve claims in excess of US$500,000 and almost never involve the assignment of the claim, very few commercial transactions, if any, would run afoul of New York law.

ii Usury

Although it is very uncommon for a commercial litigation transaction to be structured as a loan, it is conceivable that, in some situations, parties would wish to use a traditional debt structure for their transaction. Such transactions may implicate state laws against usury, which limit the rate of interest that can be charged to borrowers.

Generally, for a transaction to be usurious, it must involve (1) a loan of money, (2) an absolute obligation to repay the principal, and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. A key element in determining whether the transaction involves a loan is whether repayment was based on a contingency. If repayment is based on a contingency, then it is considered an investment rather than a loan and it is accordingly not subject to usury laws.

Usury laws are generally not implicated in commercial litigation finance because it is typically non-recourse in nature. The lack of an absolute obligation to repay has led most courts to characterise these transactions as investments, rather than loans.

iii Attorney ethical rules

Professional conduct rules governing lawyers may also affect transactions between funders and law firms. Rules directed to the professional independence of a lawyer are often the most relevant to litigation finance transactions.

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18 N.Y. Judiciary Law §§ 488 – 89.
19 N.Y. Judiciary Law § 489(2).
23 id.
24 id.
25 Dopp v. Yari, 927 F. Supp. 814, 823 (D.N.J. 1996) (‘[T]he collection of interest in excess of the lawful rate is not usurious if collection of the entire interest is at risk and depends upon a contingent event and provided and the contract was entered into in good faith and without the intent to evade the usury laws’); Kraft v. Mason, 668 So. 2d 679, 684 (Fla. App. 4 Dist. 1996) (‘[W]hen the loan was given, any talk of recovery was pure speculation. Quite possibly, there would be no successful recovery from the antitrust litigation, and [plaintiff] might have collected nothing beyond the pay back of the loan. This contingent nature of any ‘interest’ to [plaintiff] makes the agreement non-usurious.’); Nyquist v. Nyquist, 841 P.2d 515, 518 (Mont. 1992) (rejecting argument that a transaction was usurious because ‘[n]o certainty ever existed that the plaintiffs in that litigation would prevail and receive a damage award’).
Rule 5.4(a) of the Model Rules of Professional Conduct provides that ‘[a] lawyer or law firm shall not share legal fees with a nonlawyer’ other than in certain specified circumstances, such as payments to a lawyer’s estate after the lawyer’s death or compensation payments to non-lawyer employees of a law firm. The comments to Rule 5.4 note that the Rule’s provisions ‘express traditional limitations on sharing fees’, which ‘are to protect the lawyer’s professional independence of judgement’, as well as place ‘limitations on permitting a third party to direct or regulate the lawyer’s professional judgement in rendering legal services to another’. Every state has implemented some form of a professional responsibility rule that tracks the language of Model Rule 5.4 to some degree.

Courts have generally found that a lawyer’s execution of a commercial litigation contract does not violate Rule 5.4. For example, in *Hamilton Capital VII, LLC, I v. Khorrami, LLP*, the New York Supreme Court held that a transaction in which a loan to a law firm in exchange for ‘a percentage of the [l]aw [f]irm’s gross revenue’ did not violate Rule 5.4(a), notwithstanding that the firm’s gross revenue was ‘essentially composed of contingent fees earned on client settlements and verdicts’. The court noted that ‘[p]roviding law firms access to investment capital where the investors are effectively betting on the success of the firm promotes the sound public policy of making justice accessible to all, regardless of wealth’. Similarly, in *Lawsuit Funding, LLC v. Lessoff*, the New York Supreme Court found that a litigation funding agreement providing that the funder would ‘receive a portion of the contingent legal fee that [attorneys] were expected to receive if five specifically named lawsuits were adjudicated in favor of [the attorneys’] clients’ did ‘not violate Rule 5.4(a) and was not unenforceable as against public policy’.

In contrast, on 30 July 2018, the Professional Ethics Committee of the New York City Bar Association (the Association) published a non-binding advisory opinion stating that certain non-recourse agreements between law firms and funders violate Rule 5.4(a)’s prohibition on fee-sharing. The Association distinguished between ‘traditional “recourse” loan agreement[s] . . . in which a lawyer’s payments are not contingent on the receipt or amount of legal fees in particular matters’, which it concedes are permissible under the Rule, from ‘funding arrangement[s] in which the lawyer’s payments are contingent on the lawyer’s receipt of legal fees’. The Association concluded that the latter is impermissible where ‘the lawyer’s payments are tied to the lawyer’s receipt of fees in one or more matters’, which would apply to single-case and certain portfolio transactions. In support, the Association reasoned that ‘[r]ightly or wrongly, the rule presupposes that when non-lawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer.’

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26 See generally, Have New York courts created a litigation funding exception to Rule 5.4?, Simon’s NY Rules of Prof. Conduct § 5.4:3.1.
28 id. at 5.
31 id. at 2, 4.
32 id. at 5-6.
No court or other Bar association has adopted or even considered the Association’s opinion to date. It therefore remains to be seen what, if any, influence the Association’s opinion has on courts, disciplinary bodies or the industry. However, several leading legal ethicists have criticised the opinion – with some even calling for its withdrawal – on three main grounds.33

First, commentators have taken issue with the Association’s suggestion that litigation funding arrangements involving payments that are contingent on a lawyer’s receipt of legal fees could impinge on a lawyer’s independence. The opinion does not explain how litigation funding can improperly influence lawyers, so it is not clear what specific issues the Association finds problematic. In practice, all reputable commercial litigation funders expressly disclaim by contract any ability to control litigation.

Moreover, commentators argue that it is difficult to reconcile the Association’s view that traditional, recourse lending from banks complies with Rule 5.4, while non-recourse commercial funding does not. As one noted, banks often require law firms to agree to terms that pose far more serious risks to a lawyer’s independent judgement than non-recourse litigation funding.34 In addition, to the extent the perceived issue is lawyers improperly allowing their own financial considerations to drive settlement considerations, commentators maintain that the risks of a lawyer’s independence being compromised are more salient with respect to traditional bank lending.

Second, with respect to the Association’s assertion that litigation funding arrangements are not within the enumerated list of acceptable arrangements set out in Rule 5.4(a), commentators have observed that the enumerated practices set out in the list are not a comprehensive list of the practices permissible under the Rule. As stated in Comment [14] to the ABA Model Rules, the rules of professional conduct are ‘rules of reason’ that ‘should be interpreted with reference to the purposes of legal representation and of the law itself’. Notably, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility had long recognised two types of arrangement presently enumerated in Rule 5.4 – non-lawyer employee participation in profit-sharing plans and the sharing of court-awarded legal fees with non-profits – as permissible under the Rule before it was amended to expressly permit such arrangements. Accordingly, commentators note that litigation finance arrangements – which did not exist in the United States at the time Rule 5.4 was promulgated – need not be explicitly enumerated by the Rule to be permissible.

Third, commentators have criticised the Association’s characterisation of the relevant case law. In particular, commentators have remarked that the Association mischaracterised the leading New York cases on litigation funding agreements, including Hamilton Capital and Lawsuit Funding, as standing only for the proposition that lawyers who enter into agreements that allegedly violate Rule 5.4 cannot use the fact that the agreements are unethical to avoid

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34 Davis and Sebok, supra.
the repayments required by the agreements. Instead, the courts in both Hamilton Capital and Lawsuit Funding expressly found that the litigation funding agreements at issue complied with Rule 5.4.35

In response to strong reactions to the Association’s opinion, the Association formed a Litigation Funding Working Group tasked with ‘studying the issues and practices surrounding litigation funding’ and issuing a report by year-end 2019.36

III STRUCTURING THE AGREEMENT

The structure of litigation finance transactions remains largely opaque. The private nature of the industry is largely attributable to the relative immaturity of the market, combined with concerns related to disclosure. As a result, there are few instances of funding agreements in the public domain. For example, in 2017, the production of a Therium investment contract in litigation was a newsworthy event.37 Furthermore, funding agreements are widely regarded as bespoke in nature, as they are highly customised to the particular idiosyncrasies of a given litigation, counterparty or jurisdiction.

Nevertheless, funding agreements will typically be structured to address certain core issues. These issues are discussed below, but may vary depending on the type of product at issue. For instance, the issues raised by early-stage funding differ from those attendant on monetisation or appeal hedging.

i Single-case or portfolio

Single-case and portfolio transactions differ considerably. As an initial matter, the funder’s counterparty in a single-case is the claimholder, whereas a portfolio counterparty is typically a law firm. Corporate portfolios, however, are becoming increasingly popular.

Portfolios are typically cross-collateralised to protect a funder’s investment principal. To mitigate against adverse case selection, portfolios may be exclusive, contain rights of first refusal, or require the inclusion of additional cases over time.

ii Ethical and regulatory issues

Depending on the nature of the transaction, various ethical and regulatory issues should be addressed. For example, funders would be well advised to cede all litigation control to parties and their counsel to avoid champerty challenges, as well as providing claimholders with the opportunity to seek independent counsel in negotiating the agreement. Structuring the agreement as a purchase of claim proceeds – rather than a purchase or assignment of the claim

35 The Lawsuit Funding court cited the Delaware Superior Court for the propositions that ‘[t]he Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest’ and ‘there is no real ‘ethical’ difference whether the security interest is in contract rights (fees not yet earned) or accounts receivable (fees earned) in so far as Rule of Professional Conduct 5.4, the rule prohibiting the sharing of legal fees with a nonlawyer, is concerned’. See PNC Bank, Delaware v. Berg, No. 94C-09-208-WTQ, 1997 WL 527978, at *10 (Del. Super. Ct. Jan. 21, 1997).

36 See https://www.nycbar.org/member-and-career-services/committees/litigation-funding-working-group.

itself – is another common means of avoiding champerty challenges. Also, in the class action context, funding on a single-case basis is discouraged because of restrictions on fee-sharing with non-lawyers. Further, some jurisdictions have limits on maximum contingency stakes, which should be considered when structuring returns.

Some states also have various requirements regarding the disclosure of key financial terms and use of disclaimers, as well as registration and fee caps. Such requirements are geared towards consumer rather than commercial transactions.

To address jurisdiction-specific issues, a funding agreement may contain a choice-of-law clause designating a favourable state’s laws. Provided that the chosen state bears a connection to the transaction, the choice-of-law clause may enhance the funding agreement’s enforceability.

### iii Recourse

The commercial funding market largely advertises itself as non-recourse in nature. However, recourse arrangements do exist and the nature of the recourse would be addressed by a funding agreement.

### iv Return and waterfall

Returns are typically structured as a multiple of capital invested or committed, a percentage of the gross or net recovery, an interest rate or internal rate of return, or any combination of the foregoing. Portfolios have less risk because of cross-collateralisation and, accordingly, tend to have lower returns. The higher the perceived risk — which could be based upon merits, jurisdiction, adversary or collectability — the greater return a funder will seek. A funder’s return may also increase over time to account for duration risk.

With respect to the waterfall, funders may demand priority for a portion or all of their return, and inhibit a claimholder’s ability to grant junior interests on the litigation proceeds. Following the funder’s initial recovery, the next levels in the waterfall may be apportioned on a complete or percentage basis to any of the funder, the claimholder and the law firm. Some claimholders may also negotiate the right to prepay a funder’s return.

### v Funding commitment, budget and counsel compensation

Funders may limit their maximum commitment to a certain dollar amount, as well as commit to fund some or all legal fees or expenses, or both. Counsel may be compensated on an hourly, reduced fee or hybrid-contingency basis. In any scenario, funding agreements may set a case budget to which counsel must adhere. Budgets may limit expenditures on an aggregate basis or through various case stages, helping to hedge risk and mitigate the effects of information asymmetry.

Funding may be disbursed as fees accrue on a monthly or quarterly basis, or may be tied to milestones. Milestones may include major events in the litigation, such as filing the complaint, defeating a motion to dismiss, and defeating summary judgment and *Daubert*

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motions. Milestones may also vary by case type. For example, in patent litigation, payment may be contingent on surviving *inter partes* review or receiving a favourable claim construction. Funding may also include commitments to finance the defence of counterclaims.

**vi Representations and warranties**

In light of information disparity between claimholders and funders, funding agreements commonly contain representations and warranties regarding various pertinent issues, such as the claimholder’s creditworthiness and disclosure of material information regarding its claims. Such representations and warranties are not typically available in portfolio transactions.

**vii Control**

Sophisticated funders typically disclaim any right to control litigation or settlement for ethical and regulatory reasons. However, they may obtain contractual entitlements to be apprised of major developments (including settlement discussions), as well as receive material non-privileged information and work product throughout the course of the litigation for investment monitoring purposes.

**viii Non-monetary consideration**

A case may be resolved on non-monetary terms. For example, a contract dispute may result in the reinstatement of the parties’ agreement. Where a scenario like this is possible, funding agreements may provide metrics to value non-monetary consideration. In addition, where settlements or judgments create future cash streams (e.g., future royalties or licensing fees), the streams may be assigned in whole or in part to the funder to achieve its return.

**ix Common interest and confidentiality**

Funding agreements routinely provide that the existence of the parties’ arrangement is confidential. Further, to enhance privilege protections afforded to materials shared with funders and mitigate the risk of waiver, funding agreements may provide that any exchange of information is pursuant to a common legal interest.

**x Termination rights**

Litigation funders typically reserve the right to terminate funding. Funding agreements may delineate circumstances justifying termination, such as the occurrence of a materially adverse event, fraud or bad faith. Agreements may also allow unilateral termination, usually in exchange for a reduced return.

**xi Dispute resolution**

In keeping with the private nature of third party funding, funders may insist that disputes related to funding agreements be subject to confidential arbitration.
IV  DISCLOSURE

i  Federal regulations

At the federal level, no Federal Rule of Civil Procedure mandates the automatic disclosure of funding arrangements. Legislative and lobbying efforts to require the disclosure of litigation finance have been largely unsuccessful.39

Roughly half of federal circuit courts40 and one-quarter of federal district courts41 require the disclosure of outside parties with a financial interest in the outcome of a litigation.42 The purpose of that disclosure is to avoid judicial conflicts of interests.43 Accordingly, court rules are typically restricted to the disclosure of publicly owned outside parties, which would not apply to the vast majority of litigation funding entities.

39 In 2014 and 2016, the Advisory Committee on Rules of Civil Procedure declined to adopt proposals to amend Fed. R. Civ. P. 26 to ‘require the disclosure of third-party litigation funding arrangements in any civil action filed in federal court’. See Minutes of Advisory Committee on Civil Rules at 13 (Oct. 30, 2014). In 2019, the MDL Subcommittee of the Advisory Committee on Rules of Civil Procedure stated that:

The MDL Subcommittee continues to study third-party litigation funding (TPLF), including various proposals for disclosure. All that is clear at the moment is that the underlying phenomena that might be characterized as third-party funding are highly variable and often complex. They continue to evolve at a rapid pace as large third-party funders expand dramatically. It seems clear that more study will be required to determine whether a useful disclosure rule could be developed. Nor does it seem likely that the several advisory committees will soon be in a position to frame possible expansions of disclosure requirements designed to support better-informed recusal decisions.


40 3rd Cir. L. R. 26.1.1(b); 4th Cir. L. R. 26.1(2)(B); 5th Cir. L. R. 28.2.1; 6th Cir. L. R. 26.1(b)(2); 10th Cir. L. R. 46.1(D); 11th Cir. L. R. 26.1-1(a)(1); 11th Cir. L. R. 26.1-2(a).

41 Ariz. Form – Corporate Disclosure Statement; C.D. Cal. L. R. 7.1-1; N.D. Cal. L. R. 3-15, Standing Order for All Judges of the N.D. Cal.; S.D. Cal. L.R. 41.1; M.D. Fla. Interested Persons Order for Civil Cases (does not apply to all judges); N.D. Ga. L.R. 3.3; S.D. Ga. L. R. 7.1; N.D. Iowa L. R. 7.1; S.D. Iowa L. R. 7.1; Md. L. R. 103.3(b); E.D. Mich. L. R. 83.4; W.D. Mich. Form – Corporate Disclosure Statement; Neb. Form – Corporate Disclosure Statement; Nev. L. R. 7.1-1; E.D. N.C. L. R. 7.3; M.D. N.C. Form – Disclosure of Corporate Affiliations; W.D. N.C. Form – Entities with a Direct Financial Interest in Litigation; N.D. Ohio L. Civ. R. 3.13(b); S.D. Ohio L. R. 7.1.1; E.D. Okla. Form – Corporate Disclosure Statement; N.D. Okla. Form – Corporate Disclosure Statement; N.D. Tex. L. R. 3.1(c), 3.2(e), 7.4; W.D. Va. (Form – Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation); W.D. Wis. (Form – Disclosure of Corporate Affiliations and Financial Interest).

The Western District of Texas permits parties to use interrogatories to inquire regarding financially interested non-parties. See W.D. Tex. L.R. CV-33.

43 See, e.g., 5th Cir. L. R. 28.2.1 (‘The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue’); C.D. Cal. L.R. 7.1-1 (instituting disclosure requirements ‘[t]o enable the Court to evaluate possible disqualification or recusal’); see also FastShip, LLC v. United States, 143 Fed. Cl. 700, 716 (2019) (‘Several circuits around the country have amended their local rules to require disclosure of litigation financing agreements with third parties that have a financial interest in the outcome. These rules, however, are focused on disclosure and transparency; they do not ban or disfavor litigation financing agreements. Indeed, the government concedes as much.’) (internal footnote omitted).
With the exception of the Northern District of California, which requires parties to disclose the identity of funders in class and collective actions only,44 court rules mandating disclosure of financially-interested outside parties do not expressly apply to litigation funding.45 Nor do court rules require disclosure beyond the identity, and sometimes the nature of the financial interest, of the outside parties. Thus, while the existence of a funder’s interest may be subject to disclosure, details of the funding arrangement remain confidential in the absence of a court order.

ii State regulations

At the state level, Wisconsin is the only state requiring the disclosure of litigation funding in commercial litigation. Wisconsin passed a law in March 2018 requiring parties in civil litigation to disclose funding arrangements. The 2017 Wisconsin Act 235 requires parties, ‘[e]xcept as otherwise stipulated or ordered by the court’, to ‘provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise’. This disclosure is automatic and does not require a discovery request from the adverse party.

With respect to privilege issues, Indiana, Nebraska and Vermont have enacted statutes providing that litigation funding arrangements do not undermine the attorney–client privilege or work-product doctrine.46

iii Discovery disputes

The rising popularity of litigation funding has led to defendants increasingly seeking discovery concerning funding agreements. Defendants’ stated rationales vary from the desire to determine if privilege has been waived via disclosure to a funder, to challenging adequacy requirements under Fed. R. Civ. P. 23, to seeking transparency regarding the control of litigation. Plaintiffs, on the other hand, resist disclosure on the grounds of relevance, confidentiality and privilege. Plaintiffs further argue that motions to compel disclosure of funding are motivated purely by voyeurism and lead to unnecessary ancillary litigation that needlessly prolongs and increases the cost of disputes.

44 N.D. Cal. L. R. 3-15 (‘In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim’).
Courts have largely shielded funding-related documents from disclosure on the basis of privilege. These courts have held that case-related communications with a funder are entitled to work-product or common interest protection, or both. Claims to work-product are enhanced when materials are shared following execution of a non-disclosure agreement. Courts have also found that documents related to litigation funding are irrelevant as a matter of law and therefore not subject to disclosure.

47 See, e.g., Space Data Corp. v. Google LLC, 2018 WL 3054797, at *1 (N.D. Cal. 2018) (denying motion to compel on grounds of relevance and proportionality); Lambeth Magnetic Structures, LLC v. Seagate Technology (US) Holdings, Inc., Nos. 16-538, 16-541, 2018 WL 466045, at *1-2 (W.D. Pa. Jan. 18, 2018) (affording work-product protection to funding agreement and communications with funder); Viamedia, Inc. v. Comcast Corporation, No. 16-546, 2017 WL 2834535, at *3 (N.D. Ill. June 30, 2017) (holding that communications with funders are entitled to work-product protection); Eidos Display LLC v. Chi Mei Innolux Corp., No. 6:11-CV-00201-JRG, 2017 WL 2773944, at *1 (E.D. Tex. 2017) (granting motion in limine to preclude references at trial to litigation funding or related documents); Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd., No. 15-01735, 2016 WL 7665898, at *5 (S.D. Cal. Sept. 20, 2016) (noting that many courts have found that work product protection is applicable to litigation finance documents); United States v. Homeward Residential, Inc., No. 12-461, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016) (‘The Court finds that the litigation funding information is protected by the work-product doctrine. The litigation funding documents were between [litigant] and actual or potential litigation funders and were used to possibly aid in future or ongoing litigation.’); United States v. Ocwen Loan Serv, LLC, No. 12-543, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016) (same); In re Int'l Oil Trading Co., 548 B.R. 825, 835 (Bankr. S.D. Fla. 2016) (concluding that the documents concerning the negotiation of a litigation funding agreement were protected by the attorney-client privilege and the work-product doctrine and citing the 'common enterprise' approach); Charge Injection Techs., Inc. v. E.I. Du Pont De Nemours & Co., No. 07C-12-134-JRG, 2015 WL 1540520, at *4 (Del. Super. Ct. Mar. 31, 2015) (concluding that litigation funding documents were protected by the attorney-client privilege and the work-product doctrine); Doe v. Soc'y of Missionaries of Sacred Heart, No. 11-02518, 2014 WL 1715376, at *3 (N.D. Ill. May 1, 2014) (‘[T]he Financing Materials identified by Plaintiff in his privilege log constitute opinion work product. These materials incorporate opinions by Plaintiff’s counsel regarding the strength of Plaintiff’s claims, the existence and merit of certain of Defendants’ defenses, and other observations and impressions regarding issues that have arisen in this litigation.’) (internal quotations omitted); Mondis Tech., Ltd. v. LG Elecs., Inc., Nos. 07-565, 08-478, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011) (‘All of the documents were prepared . . . with the intention of coordinating potential investors to aid in future possible litigation. The Court holds that these documents are protected by the work product protection.’); Rembrandt Techs., L.P. v. Harris Corp., No. 07-C-09-059-JRS, 2009 WL 402332, at *7 (Del. Super. Ct. Feb. 12, 2009) (affording common interest and work-product protection).


49 See Mondis Tech., Ltd., above.

Notably, a federal court recently balanced competing interests by ordering the production of litigation funding agreements on an ex parte and in camera basis. In In re National Prescription Opiate Litigation, 2018 WL 2127807, at *1 (N.D. Ohio 2018), District Judge Dan Polster required attorneys to 'submit to the Court ex parte, for in camera review, the following: (A) a letter identifying and briefly describing the [third party] financing; and (B) two sworn affirmations – one from counsel and one from the lender – that the [third party] financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel’s obligation of vigorous advocacy, (3) affect counsel’s independent professional judgement, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement'.

Special circumstances may exist warranting the disclosure of litigation finance materials. For instance, financing may be relevant to standing issues particular to the patent litigation, and personal injury contexts.

V COSTS

The United States generally follows the ‘American Rule’, under which attorneys’ fees are not shifted to prevailing parties in the absence of a contractual or statutory basis, or egregious or frivolous conduct. While prevailing parties may be entitled to recover costs at the conclusion of litigation, these costs are typically limited to certain statutorily enumerated line items that comprise a miniscule proportion of the total costs incurred.

Accordingly, where a funder backs a losing case, it is rare that the party in litigation itself is liable for significant costs. Funding agreements thus rarely – if ever – provide security for adverse costs. To the contrary, litigation funders typically disclaim any liability for adverse costs awards. Moreover, third party funding is typically restricted to cases with extremely strong merits, thereby reducing the likelihood of fee-shifting on the basis of frivolous claims.

However, funders frequently finance prevailing parties that ultimately obtain an award of attorneys’ fees (as well as costs). Indeed, the availability of attorneys’ fees under a contractual or statutory fee-shifting provision, or otherwise under the common law in circumstances warranting punitive damages, is a feature that litigation funders find attractive in underwriting cases. In those circumstances, the funding agreement will likely provide that the fee award be added to the litigation proceeds and treated as ordinary damages. Then, the fees will be recovered pursuant to the agreed-upon return and waterfall structure.


52 See, e.g., Zwogat v. Bd. of Trs., No. 18CV-10593, 2019 Ohio Misc. LEXIS 228, at *12 (Ct. Com. Pl. July 25, 2019) (‘In a class action, the impact of any third party involvement must also be considered from the standpoint of the named plaintiffs, and their ability to be active representatives of the class’).

53 See In re NFL Players’ Concussion Injury Litig., 923 F.3d 96 (3d Cir. 2019).

54 See 28 U.S.C. § 1920 (providing that the following categories of costs are taxable: clerk and marshal fees, transcript fees, printing and witness fees, copying costs, docket fees, and compensation of court-appointed experts and interpreters).
To date, courts have rarely considered whether the existence of third party funding affects a prevailing party’s entitlement to recover attorneys’ fees in a commercial case. Nor has a US court considered whether a prevailing party is entitled to an enhanced recovery by virtue of additional costs incurred because of third party commercial funding. In the event that either issue is litigated further, the procurement of funding should not affect a prevailing party’s recovery. That is because fee awards are traditionally decided independently of the means by which a case is funded – whether from the claimant’s own funds, a loan, a line of credit, an attorney contingency arrangement or a third party funder.

VI THE YEAR IN REVIEW

Over the past year, the litigation finance market has continued to experience significant growth through increasing adoption by litigants, law firms and investors. Existing market participants, including Legalist, announced the closures of funding rounds, and the market also saw several new entrants. Although most attention is on growth, the asset class has received some criticism with respect to accounting metrics used by funders.

The law has continued to develop in a generally pro-funding manner. Recent case law, while still rare, has almost uniformly ruled in favour of funders and funded parties with respect to issues of relevance and privilege.

As in past years, the industry’s growth has been accompanied by attempts to regulate disclosure. The Committee on Rules of Practice and Procedure has also considered a proposal to amend Fed R Civ P 26(a)(1)(A)(v) to require disclosure of litigation financing. That proposal, like many that affect the industry, has been spearheaded by the US Chamber of Commerce’s Institute for Legal Reform and its constituents. Additionally, Senate Judiciary Committee Chairman Chuck Grassley has reintroduced proposed federal legislation requiring disclosure of funding agreements in civil lawsuits. The Litigation Funding Transparency Act of 2019, which follows similar attempts in past years that were unsuccessfully referred to the Senate Judiciary Committee, would amend 28 USC Section 114 to require counsel in federal

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55 One rare case addressing this issue is FastShip, LLC v. United States, 143 Fed. Cl. 700, 717 (2019), in which the court held that ‘[a]t bottom, FastShip will need to pay Dentons for its legal representation in this litigation. That payment, if attorneys’ fees and expenses are not awarded, would reduce the recovery received by FastShip for the infringement. Thus, as the Federal Circuit and this court have routinely held, “in this sense, ‘[a plaintiff who must turn over any fee award to the attorney per their agreement] incurs the attorney fees that may be awarded.’”’ (quoting Hitkansut LLC v. United States, 142 Fed. Cl. 354 (2019)).

56 However, a court has taken third party funding into account in awarding fees to a prevailing party in public interest litigation. See NorCal Tea Party Patriots v. Internal Revenue Service, No. 13-341, 2018 WL 3957364, at *2 (S.D. Ohio Aug. 17, 2018) (‘there is an important societal interest in rewarding attorneys and third party funders who engage in public interest litigation’).


58 See Myles McCormick, Muddy Waters v Burford Capital – the claims and defence, Financial Times (Aug. 8, 2019), available at https://www.ft.com/content/d06665de-b9e4-11e9-96bd-8e88d3ea203.


60 The text of the bill is available at https://www.congress.gov/bill/116th-congress senate-bill/471/text?q=7B%22search%22%3A%5B%22litigation+fees+awarded+to+prevailing+party%5D%.cr=1&s=2.
The current consensus is that the US litigation funding industry will continue to grow for the foreseeable future. Funding entities are proliferating in response to the influx of demand from investors seeking high, non-correlated returns, and more jurisdictions are endorsing funding as permissible and supportive of public policy. Moreover, awareness of funding among claimholders and law firms still remains relatively low, indicating that a significant proportion of the market remains ripe for growth.

The next year is likely to witness material developments in the area of disclosure, as more courts are confronted with discovery motions regarding third party funding, and proposed legislation undergoes review. Ethical questions may continue to percolate, particularly in the event that model rules of professional conduct are amended to expressly address the permissibility of portfolio funding. Finally, as capital continues to flow to the industry, funders will most likely develop new strategies to increase demand and gain market share.

61 id.


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For nine years until 2015, Leslie was also the senior independent director of DAS, the UK market leader in legal expenses insurance.

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Roschier Advokatbyrå AB

Carl Persson is a senior associate in Roschier’s dispute resolution practice in Sweden. Carl specialises in commercial dispute resolution. His practice covers arbitration and litigation, and he has experience in disputes across a wide range of different areas, including oil agreements, gas agreements, director and auditor liability, M&A transactions, shareholders’ agreements, sale and purchase agreements, financial agreements and insurance agreements.

**REIN PHILIPS**  
*Redbreast Associates NV*

Rein Philips is managing director and co-founder of Redbreast Associates, an internationally oriented Dutch litigation fund.

Before setting up Redbreast, Rein worked as an insolvency and restructuring lawyer at RESOR, in which capacity he represented multinational corporations, investors, banks and other stakeholders in formal and informal restructurings, insolvency matters and related disputes.

Rein is a fellow and member of INSOL International and member of INSOL Europe. He regularly publishes and lectures on matters of litigation finance and insolvency law.

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**GABRIELLA RICHMOND**  
*White & Case*

Gabriella Richmond advises clients on a broad range of international arbitration matters. Her practice covers a range of industry sectors, including infrastructure and construction, telecommunications, financial institutions and investment treaty disputes. Gabriella relocated from the London office of White & Case to the firm's Singapore office in 2019.

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**MATTHEW SECOMB**  
*White & Case*

Matthew Secomb is a partner in White & Case's international arbitration practice. His practice concentrates on international commercial arbitration with a focus on energy-related and construction disputes. He has been involved in arbitration proceedings under most of the major institutional rules, as well as in ad hoc arbitration. He is admitted to practise in Australia and England and Wales, and is an *avocat* at the Paris Bar. He also acts regularly as arbitrator, having chaired or sat as sole arbitrator and co-arbitrator in arbitration proceedings conducted under various rules.

Matthew spent nearly 10 years in White & Case's Paris office before moving to Singapore in 2015. Prior to joining White & Case, Matthew was counsel to the ICC International Court of Arbitration. He also teaches regularly at various universities, including as an adjunct associate professor in energy arbitration at the National University of Singapore, Faculty of Law.

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**DANIEL SHARMA**  
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Daniel Sharma has extensive experience in advising clients in international disputes. He regularly acts for private companies, as well as governments, governmental institutions and international organisations, in a variety of industry sectors, including infrastructure, power, aviation, oil and gas, automotive, chemicals, pharmaceuticals, financial services and manufacturing. He is licensed to practise in Germany (Rechtsanwalt) and additionally as a solicitor of the Senior Courts of England and Wales. Daniel has advised clients with regard to ad hoc and institutional arbitrations in English, French and German, and under different
rules, including ICC, SIAC, DIS, CIETAC, UNCITRAL and ICSID. He regularly sits as an arbitrator. Daniel is also highly experienced in antitrust laws and represents clients in private antitrust litigation proceedings. Daniel is chair of the firm’s global India group.

JOHAN SIDKLEV  
*Roschier Advokatbyrå AB*

Johan Sidklev heads Roschier’s dispute resolution practice in Sweden. He is the presiding President of the Swedish Arbitration Association and also serves as a board member of the Arbitration Institute of the Stockholm Chamber of Commerce. Johan specialises in commercial dispute resolution and has extensive experience in international arbitration, often concerning energy-related disputes with an East–West angle. He has acted as counsel in a significant number of international arbitrations in Stockholm, London and Paris in relation to oil and gas, construction and distribution matters. In the area of investment arbitration, Johan has experience of arbitrators’ appointments, and of advising both private investors and various governments as counsel, inter alia, in matters concerning the Energy Charter Treaty.

Johan is recognised as one of the leading experts in Sweden within dispute resolution by international directories such as *Chambers Global, Chambers Europe, The Legal 500* and *Who's Who Legal*.

EIVIND TANDREVOLD  
*Arntzen de Besche Advokatfirma AS*

Eivind Tandrevold specialises in commercial dispute resolution. As a senior lawyer in Arntzen de Besche’s litigation and arbitration team based in Oslo, Eivind handles a wide range of contractual and tortious disputes. In recent years, he has acted in some of the most sensitive and high-profile claims instituted against professional service-providing companies in Norway.

Further to acting in litigation and arbitration proceedings, Eivind regularly advises clients on risk management issues.

SEAN THOMPSON  
*Parabellum Capital LLC*

Sean Thompson is director of intellectual property litigation strategies and general counsel, and is responsible for the development and execution of Parabellum’s intellectual property investment strategies. He also serves as the firm’s general counsel. Sean is an experienced IP litigator, having represented both patent owners and accused infringers. Before joining Parabellum, Sean was senior litigation counsel at Blackbird Technologies, a leading patent monetisation company. At Blackbird, he served as lead counsel on numerous patent litigations at the district court and Federal Circuit levels. Sean was previously an IP litigator at WilmerHale, where he represented some of the largest technology and pharmaceutical companies in the world. He litigated cases involving patents directed to a wide range of technologies, including semiconductors, unmanned aerial vehicles, and pharmaceutical products. Sean began his career as a commercial litigator at Cravath, Swaine & Moore LLP. He earned his joint JD/LLM from Cornell Law School, where he was an editor of the *Cornell Law Review*. He received his BA from Boston College and his MS from the London School of Economics.
ADINA THORN
Adina Thorn Lawyers

Adina Thorn has a high level of experience and expertise in the areas of commercial, construction and property litigation and dispute resolution. Adina has also been involved in organising and bringing multimillion-dollar representative actions funded by litigation funders.

Adina has acted for clients in all levels of court in New Zealand and has been involved in hundreds of mediations, arbitrations and adjudications. She also appeared as counsel in the landmark Supreme Court of New Zealand decision concerning barristerial immunity.

Adina has dual qualifications in law and property and is frequently asked to comment by the media in relation to property and construction issue, including on television and radio.

Adina is a current member of the New Zealand Law Society, Institute of Directors in New Zealand (Inc), Property Institute of New Zealand (Affiliate), Women in Property and Auckland Property Investors Association APIA.

Adina is a graduate of the University of Auckland and holds Bachelor of Laws (honours) and Bachelor of Property degrees.

ADAM WALLIN
White & Case

Adam Wallin advises clients on a broad range of litigation and arbitration matters. His practice covers a wide spectrum of international commercial disputes and internal and regulatory investigations. Adam has experience of arbitration proceedings conducted under the rules of various arbitral institutions, and litigation in the English courts. He also has significant experience of counselling clients on eDisclosure and discovery issues.

MARCEL WEGMÜLLER
Nivalion AG

Marcel Wegmüller is a co-founder and managing partner of Nivalion AG, a Swiss third party litigation and arbitration funder focusing on continental Europe, with offices in Switzerland, Germany and Austria. He has many years of experience in the funding of judicial and, in particular, arbitration proceedings in various European jurisdictions, and has played a key role in establishing the first Swiss provider, which he led as managing director until 2016. Prior to that, he held senior positions in the areas of strategy and corporate development and legal and compliance for various units of the Credit Suisse Group. He is a Swiss lawyer, holds a degree in law from the University of Zurich and has completed executive programmes at INSEAD and at the London Business School. He regularly publishes and speaks at conferences on the topic of litigation funding.

ANTONIO WESOLOWSKI
Calunius Capital LLP and Wesolowski Abogados SLP

Antonio Wesolowski is the general counsel for Spain and Latin America at Calunius Capital LLP, which he joined in 2017.

Antonio’s professional career includes extensive experience in banking and finance law, both as a transactional adviser to banks and corporate entities and as specialised litigator. He previously worked in Clifford Chance’s litigation and arbitration, and banking and finance
departments in Madrid, and in the Spain and Portugal operations legal division of the European Investment Bank in Luxembourg. In 2017, he co-founded Wesolowski Abogados, which is based in Madrid.

His practice is mainly focused in cross-border corporate, project and asset finance transactions, as well as in large-scale insolvencies and restructuring situations. He also has extensive experience in derivatives litigation, consumer mass claims, infrastructure and energy projects in Spain and Latin America, and general commercial litigation, including shareholder disputes and directors’ liability matters.

Antonio has degrees in law and in economics from the University of Navarra and studied at Bentley University of Boston and at Princeton University.
Appendix 2

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