Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

2019

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Litigation Funding 2019

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Steven Friel and Jonathan Barnes

Woodsford Litigation Funding

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Preface

Litigation Funding 2019

Third edition

Getting the Deal Through is delighted to publish the third edition of *Litigation Funding*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, Spain and the United Arab Emirates and a new article on United States – other key jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
November 2018

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Introduction

Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

This is the third edition of our global survey of the law and practice of litigation funding. The exponential growth of our industry continues, as does the widespread professional, judicial and legislative support for our capital and professional investment in litigation lawyers and their clients.

The first litigation funding rankings were published by Chambers and Partners in 2018, confirming the dominance of the well-established players in the market – in particular, the members of the London-based Association of Litigation Funders. Woodsford, Burford and Vannin shared the distinction of being the only funders to rank in both the United States and the United Kingdom – the two main centres for the international litigation funding industry.

The amount of capital being deployed into litigation funding continues to be high. Burford, whose shares have soared by more than 1,000 per cent in three years, raised £193 million in an alternative investment market equity placing, while Woodsford announced a further US$75 million shareholder facility.

One of the benefits of an annual publication such as this is that we can track changes in the jurisdictions we monitor.

In Australia, litigation funding has long been closely related to the class action landscape. In 2018, there were a number of cases where the courts made so-called 'common fund' orders, both as part of a class action settlement and also at an early stage of proceedings. A common fund order can effectively bind all members of a class to the terms of a funding agreement, not just those who have executed the agreement. Its purpose is to equalise the distribution of damages so that unfunded claimants must also contribute to the costs of the claim, including the funder's fee. It was observed in *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 FCAFC 148 at [82]:

> *We expect that the courts will approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias.*

While the majority of US consumer class actions are financed by class counsel (that is, counsel advances expenses for the case in the hope of eventually earning a fee award), there are other jurisdictions in which the development of class actions is related to the growth of litigation funding. In Germany, for example, the government established in November 2018 a special kind of class action (*Musterfeststellungsklage*), which will be available for consumer rights as well as business claims (eg, cartel damages).

In New Zealand, the Law Commission 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. 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'.

In the Cayman Islands, a draft bill has been circulated in respect of a law to regulate the private funding of litigation. The draft bill, would (among other things) repeal any offences under the common law of maintenance and champerty, and impose (as yet unspecified) limits on the amount payable to a third-party funder.

In Ireland, there have been further calls from the senior judiciary for the legislature to step in to amend and the clarify the ancient case law that has impeded the development of litigation funding in that jurisdiction. In the case of *SPV OSUS Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors*, the Irish Supreme Court identified that 'urgent reform is needed so that the right of access to the courts can be rendered effective in a practical sense.'

In Singapore, growth of third-party funding has been slower than expected. The Ministry of Law stated in September 2018, that they are aware of only one publicised instance of a 'live' Singapore-seated arbitration being financed by a third-party funder.

In England, Lord Justice Jackson, while reviewing the reforms made as a result of his 2009 report into the civil litigation costs regime, noted that his proposals to promote third-party funding and introduce a code for funders have been successful. He said:

> *These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so. Funders are highly experienced litigators and they exercise effective control over costs. They often insist upon having court-approved budgets. Self-evidently, these reforms promote access to justice and tend to control costs.*

The New York City Bar Association issued an advisory opinion that called into question the appropriateness of law firms obtaining non-recourse loans from funders to be repaid from the law firm's future legal fees. A number of experts have commented that the opinion is inconsistent with settled New York case law on this point, and no doubt this issue will have developed further by the time we sit down to write the 2020 edition of this publication.

As always, we are grateful to the authors of the national chapters for their hard work. We are particularly grateful to the authors of the new national chapters, from Israel, Spain and the United Arab Emirates.

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International arbitration

Zachary D Krug, Charlie Morris and Helena Eatock
Woodsford Litigation Funding

Third-party funding in international arbitration
While international arbitration spans multiple types of claims, overlapping jurisdictions and legal regimes, there are some commonalities to consider it an appropriate subject for a brief addendum within this guidebook's framework. A practitioner considering a transaction involving third-party funding of international arbitration will need to consider multiple potentially relevant jurisdictions. For example, one might need to consider the applicable arbitral rules (if any), the law of the seat of the arbitration, the governing law of the underlying agreements, any applicable international treaties, the law of the jurisdiction in which the award will be enforced, and, potentially, the law of the parties' counsels' home jurisdictions. Accordingly, this addendum is necessarily limited and endeavours to highlight some of the issues and approaches that are common in the context of third-party funding and international arbitration.

Prime among these commonalities is the tremendous uptake of third-party funding in international arbitration in recent times, regardless of claim type or venue. This is hardly surprising because international arbitration generally involves complex commercial disputes with sophisticated counsel at premier international law firms. The resulting fee burden can be substantial. Moreover, many international arbitrations involve claimants who are capital constrained (often as a direct result of a respondent's conduct) and would not be in a position to have their claims heard in the absence of third-party funding.

Anecdotally, our experience speaking with claimants, practitioners and others who are frequently involved in international arbitration suggests that most claimants involved in larger international arbitrations are either being funded or have, at some stage of the process, considered using funding. What little public data is available tends to confirm this trend, for example, in connection with the rules concerning third-party funding recently proposed by the International Centre for Settlement of Investment Disputes (ICSID), the Centre noted an 'increased resort' to third-party funding and at least 20 recent ICSID cases involving third-party funding.

Growing recognition of the use of funding in international arbitration
Concomitant with the increased use and availability of funding generally, there has been a gradual easing of the traditional doctrines of champerty and maintenance, which typically exist in common law (rather than civil law) jurisdictions. As is well covered in the country-specific chapters of this guide, this trend is occurring rapidly in a number of jurisdictions globally. For arbitration, this is potentially significant given that the law of the arbitral seat is most likely to govern whether or not a claimant is permitted to avail itself of funding.

Indeed, certain jurisdictions, most notably Singapore and Hong Kong, have recently introduced legislation to expressly allow third-party funding of international arbitration. In 2017, Singapore's parliament passed the Civil Law Amendment Act and the Civil Law (Third-Party Funding) Regulations 2017, which effectively abolish the common law torts of champerty and maintenance, and permit third-party funding in respect of international arbitration and associated proceedings (eg, enforcement and mediation proceedings). In addition to the legislative provisions, the Singapore Institute of Arbitrators has introduced a set of guidelines for third-party funding, with which funders will be expected to comply. It is also anticipated that the key arbitral institutions, such as SIAC, will amend their rules to accommodate the new legislative provisions (indeed, SIAC has already addressed third-party funding in the first edition of its investment arbitration rules).

In 2013, Hong Kong's Law Reform Commission launched a public consultation on whether to permit third-party funding for international arbitration seated in Hong Kong. This culminated in October 2016 with a recommendation to allow it. Following approval of the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2017, the Arbitration Ordinance was amended to provide, in summary, that the doctrines of champerty and maintenance no longer apply to third-party funding of arbitration or related court or mediation proceedings. Interestingly, unlike in Singapore, no distinction is made in Hong Kong between domestic and international arbitration; funding will be permitted in both. While, at the time of writing, the statutory provisions have not yet taken effect, their implementation is expected in the coming months. The legislation also anticipates the introduction of a code of practice, which will regulate a funder's conduct in respect of any given arbitration.

Some jurisdictions have been more hesitant when it comes to the current legacy of champerty and maintenance restrictions. In May 2017, delivering the judgment for *Persona Digital Telephony Ltd v The Minister for Public Enterprise* [2017] IESC 27, the Supreme Court of Ireland ruled the common law prohibitions on maintenance and champerty remain in force in Ireland, thereby restricting the availability of third-party funding. While the *Persona* decision did not itself address international arbitration, the Court's decision would have implications for an arbitration seated in Ireland or if an arbitral award were to be enforced in Ireland.

By contrast, in civil law jurisdictions – which did not inherit the common law's restrictions on maintenance and champerty, and have long permitted the alienation of litigation rights in some form – there has been predictably little discussion of the permissibility of funding whether in arbitration or litigation. That will likely soon change, given the substantial use of arbitration in many civil law countries (eg, in Latin America). In this vein, the Brazil-Canada Chamber of Commerce (CAM-CCBC), a leading arbitration centre in Brazil, became the first arbitral centre in the region to affirmatively address the use of third-party funding, issuing guidelines regarding the disclosure of funding arrangements.

In 2018, the long-anticipated International Council of Commercial Arbitration (ICCA)-Queen Mary Task Force on Third-Party Funding issued its final Report on 'Third-Party Funding in International Arbitration', ICCA Report No. 4 (April 2018). Expansive in scope, the report covers a range of important topics on third-party funding from numerous angles, and serves as a useful resource for consideration of the relevant issues and current precedents from both international and domestic sources. Further, the Task Force issued a set of principles and best practices, which attempted to distil the overall conclusions of the committee.

Disclosure and conflicts of interest
A topic of substantial discussion in the international arbitration community has been the potential for conflicts to arise in funded cases, and whether disclosure of the fact that a party is funded and, if so, the identity of the funder is necessary to prevent such conflicts. While the same discussion has arisen in the context of litigation, the issue is perhaps more acute in the context of international arbitration, because the

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parties have a role in appointing arbitrators, and there is a relatively small bar of practitioners who act as both arbitrators and advocates, who themselves may be involved in funded matters. See generally chapter 4 of the ICCA Report.

After some healthy debate, a consensus has begun to emerge that the disclosure of a party's funded status and the identity of the funder (but not of the terms of the funding arrangement) in an arbitration may be beneficial so as to avoid potential conflicts. Accordingly, in the last several years, a number of jurisdictions, arbitral institutions and organisations have offered specific rules of guidance on this matter.

ICSID proposed rules

In August 2018, ICSID published a set of proposed changes designed to modernise its rules, offering states and investors an improved range of dispute settlement mechanisms. Proposed Rule 21 would make it compulsory for parties to disclose the existence of funding at any stage in the proceedings. Importantly, disclosure is limited to existence of funding and the identity of the funder. Interestingly – and somewhat controversially – the proposed rules define funding for disclosure purposes to include donation and grant-originated funding.

International Chamber of Commerce (ICC)

The ICC addressed the issue of potential conflicts in its 2017 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (October 2017, paragraph 24), which noted, inter alia, that 'relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.'

SIAC

The SIAC's newly released Investment Arbitration Rules (IARs) specifically allow arbitral tribunals to order disclosure of the existence of third-party funding and the identity of such funder (IAR 24(l)).

Hong Kong International Arbitration Centre (HKIAC)

The HKIAC has recently proposed Rules amendments, at article 44.1, which echo the requirement in section 98U of the Arbitration Ordinance in Hong Kong, stating that if a funding agreement is made, the funded party must give written notice of:

- the fact that a funding agreement has been made; and
- the name of the third-party funder.

China International Economic and Trade Commission (CIETC)

The CIETC mandates disclosure of third-party funding pursuant to article 27 of its International Arbitration Investment Rules (2017). Specifically, the Rule provides that 'as soon as a third-party funding arrangement is concluded' the funded party 'shall notify in writing' and 'without delay' the tribunal and other parties. Such disclosure must provide the 'existence and nature' of the funding arrangement and the identity of the funder. Moreover, the Rules provide the tribunal shall have the power to order further disclosure as appropriate.

CAM-CCBC

CAM-CCBC Administrative Resolution No. 18 (2016) 'recommends' the parties disclose the use of funding 'at the earliest opportunity'.

ICCA-Queen Mary Task Force Principles

The Task Force Principles state that a party 'should' voluntarily disclose the existence of funding, and that arbitral institutions have the authority to request disclosure.

International Bar Association (IBA)

The IBA was the first organisation to take a position on funding, when it published the I*BA Guidelines on Conflicts of Interest in International Arbitration* in 2014. The IBA Guidelines state that parties shall disclose 'any relationship, direct or indirect, 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.'

Nevertheless, such disclosure obligations should be narrowly limited to their intended purpose of avoiding conflicts, rather than an opportunity for distraction, delay or satellite litigation regarding, for example, disclosure of the terms of a funding agreement or waiver of privilege or confidentiality. As ICSID's comments to the proposed Rule make clear, its proposed disclosure requirement 'does not create a general duty to disclose the terms of funding or the agreement itself' as 'this more elaborate information is not required to achieve the objective of preventing conflicts of interest.'

Confidentiality and privilege

Another issue that has frequently arisen in domestic litigation in various jurisdictions around the world is whether a claimant's sharing of confidential or privileged information with a funder might raise issues of waiver. Parties to arbitrations are similarly mindful of the issue.

Arbitration is commonly a confidential process between the parties to the arbitration. However, the emerging consensus is that the sharing of information with a funder pursuant to a non-disclosure agreement will not result in waiver. That said, an arbitral tribunal often has wide discretion to determine the scope of material admitted into the proceedings and application of privilege is generally determined by resort to the relevant law of the seat of the arbitration (or potentially the substantive law of the dispute).

The rules of the major arbitral institutions do not yet, for the most part, address this issue expressly. However, the HKIAC has, in its recent rules consultation, given an indication of how arbitral instructions may do so. Article 45.3(3) of the HKIAC's proposed new rules, which is based on section 98 of the Arbitration Ordinance, expressly permits the sharing of confidential information to a person for the purposes of having, or seeking, third-party funding of arbitration.

Similarly, the recent Task Force Principles provide that although the existence of funding is not itself privileged, the underlying provisions of a funding agreement may be privileged and should only be ordered disclosed in 'exceptional circumstances'. Moreover, the Task Force Principles note the disclosure of information between a party and a funder should not be a basis for privilege waiver. Further, as the comments to ICSID's proposed rules note, parties should be able to seek appropriate confidentiality protections on privilege in the context of disclosure.

Ultimately, while we predict that concerns over waiver will fade, those contemplating funding should still ensure that all communications with funders are made pursuant to non-disclosure agreements.

Third-party funding and costs in international arbitration

Another important issue is the impact of third-party funding, if any, in the allocation of costs and related costs orders.

While arbitral panels generally have wide discretion in the allocation of costs, the principle of 'costs shifting' (ie, the loser pays the winner's costs) is prevalent in arbitration in numerous jurisdictions. In general, the fact that a prevailing party has been funded has not been deemed relevant as a basis to deny the recovery of costs. See, for example, *Kardassopoulos and Fuchs v the Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award (3 March 2010); *RSM Production Corporation v Grenada* (ICSID Case No. ARB/05/14), Decision on Costs (28 April 2011).

Significantly, particularly in circumstances involving improper conduct on the part of the respondent, a funded claimant may be able to recover not only the costs of the arbitration but also the premium or success fee paid to the funder. For example, in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), the English High Court, which had supervisory jurisdiction, reviewed the decision made in an ICC arbitration seated in London to award the claimant (Norscot) not only its legal costs of the arbitration, but also the cost of paying the funder, Woodsford, the funding 'success fee' on the basis that the respondent had caused the claimant's impecuniosity and effectively 'forced' it to seek funding. The respondent challenged the award on the basis that the arbitrator erred in concluding that he had jurisdiction to award such costs as 'other costs', but the English High Court upheld the award.

A further important issue is the relevance, if any, of third-party funding in connection with a tribunal's consideration of security for costs applications. While each jurisdiction or tribunal has different rules that apply to such applications, in general, unless a tribunal establishes a likelihood that costs could, in principle, be awarded against an unsuccessful claimant, it cannot make a decision on security for costs applications. Moreover, a tribunal will often lack the jurisdiction to make an order for security for costs against a funder that is not party to the arbitration agreement.

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Respondents that seek security for costs application sometimes argue that the fact that a party has sought funding is evidence of impecuniosity or will render it less likely to be able to satisfy an award of costs in the event the claim fails. But third-party funding is frequently used by parties who are solvent and, in any event, such funding is generally provided on a non-recourse basis and therefore does not compromise a party's financial position if the claim is lost. As such, there is a growing consensus, particularly in investor-state arbitration, that the mere fact that a party has obtained third-party funding is not, by itself, a reason to justify a security for costs order. See, for example, *EuroGas Inc and Belmont Resources Inc v Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 (23 June 2015); see also *South American Silver Limited v the Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2013-15), Procedural Order No. 10 (11 January 2016); *Guaracachi America Inc and Rurelec v Bolivia* (UNCITRAL, PCA Case No. 2011-17), Procedural Order No. 14 (11 March 2013).

However, in two 'exceptional' matters, the existence of third-party funding has been an important – but not the sole – factor in the ultimate decision to order security for costs. In *RSM Production Corporation v Saint Lucia* (ICSID Case No. ARB/12/10), the tribunal made an order for security for costs, apparently on the basis of the claimant's poor conduct during the course of the arbitration (including, for example, repeated failures to comply with the tribunal's orders). See also *Manuel García Armas et al v Venezuela* (PCA Case No. 2016-08), Procedural Order No. 9 (20 June 2018). There is reason to suggest that *RSM* and *García Armas* may be relatively isolated cases.

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Australia

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

Third-party litigation funding is permitted in Australia, however, not without complexity.

Maintenance and champerty are obsolete as crimes at common law (*Clyne v NSW Bar Association* (1960) 104 CLR 186, 203) and maintenance and champerty have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory. In Queensland, Western Australia, Tasmania and the Northern Territory, the torts of maintenance and champerty have not been abolished. Notwithstanding legislation, it remains the position in all Australian jurisdictions that general principles of contract law, pursuant to which a contract may be treated as contrary to public policy or as otherwise illegal, are not disturbed. This means that a third-party litigation funding agreement could be set aside by an Australian court if it were found to be inconsistent with common law public policy considerations.

The High Court in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) CLR 386 (*Fostif*) considered provisions of the New South Wales legislation abolishing maintenance and champerty as torts. The High Court held that third-party funding per se was not contrary to public policy or an abuse of process. The Court ruled that the fact that a funder may exercise control over proceedings and bought the rights to litigation to obtain profit did not render the funding arrangements contrary to public policy. The Court held that profiting from assisting in litigation and encouraging litigation could only be contrary to public policy if there was a rule against maintaining actions (which in New South Wales had been abolished). Concerns raised about the possibility of unfair bargains and the potential for litigation funding to distort the administration of justice were rejected. The Court ruled that where these concerns arose they could be adequately dealt with through existing doctrines of contract and equity (unfair contracts), abuse of process (rules of court dealing with the administration of justice) and existing rules regulating lawyers' duties to the court and clients (conflicts, etc).

Importantly, *Fostif* did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished.

In a joint publication by the Law Council of Australia and the Federal Court of Australia it was stated that:

> *In many cases, litigation funding has proven to be the lifeblood of much of Australia's representative proceeding litigation at federal and state level. Not all cases are funded by third-party litigation funders but a sufficiently large number of class actions have been funded in this manner that it has had a major impact of the sort of cases conducted.*

The availability of funding has not been attributed to any overall rise in litigated matters, suggesting that litigation funding is being used cautiously in order to improve access to justice while bringing commercial gain and without encouraging vexatious or unmeritorious claims.

The available statistics about class action filings demonstrate that funded litigation is on the increase in Australia. Between June 1997 and May 2002, funded class actions comprised 1.7 per cent of all class actions. In the past five years, funded class actions compromised 46.2 per cent of all class actions. Further, 71 per cent of all shareholder class actions filed in Australia on or before 31 May 2017 were funded by commercial litigation funders.

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

There is no legislation or regulation in Australia that limits the fees that funders can charge.

The High Court in *Fostif* held that contract law considerations such as illegality, unconscionability and public policy may still arise in relation to a litigation funding agreement but there is no objective standard against which the fairness of the agreement may be measured. Accordingly, whether a particular clause in a litigation funding agreement may contravene public policy will be answered having regard to the circumstances of each particular case.

Theoretically, Australian courts could set aside a litigation funding agreement where the funder's interest constituted an equitable fraud in the sense that it involved capturing a bargain by taking surreptitious advantage of a person's inability to judge for him or herself, by reason of weakness, necessity or ignorance.

Australian courts exercising equitable jurisdiction can set aside bargains where terms are harsh or unfair. The High Court in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 restated the principles relating to unconscionable conduct. A court may set aside a bargain as unconscionable if one party, by reason of some condition or circumstance, is placed at a special disadvantage compared to another and the other party takes unfair or unconscientious advantage of that special disadvantage. In those circumstances, the innocent party may be relieved of the consequences of the unconscionable conduct. In *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392 HCA 25, a gambling addict sought to avoid losses with a casino, arguing that the casino had taken unconscionable advantage of his vulnerability. The Court in rejecting his claim ruled that inequality of bargaining power was relevant, but not essential to establish unconscionability and that a party must rely upon standards of personal conduct known as 'the conscience of equity'. The High Court drew a clear distinction between the equitable principles of unconscionable conduct and undue influence.

Prohibitions against unconscionable and misleading or deceptive conduct that may apply to dealings between litigation funders and funded litigants are also reflected in general consumer protection provisions in the Competition and Consumer Act 2010 (Cth) and provisions in the Australian Securities and Investment Commission Act 2001 (Cth).

The Federal Court Class Actions Practice Note (GPN-CA) requires disclosure to group members who are clients or potential clients of the applicant's lawyers regarding applicable legal costs or litigation funding charges in class action matters, and sets out the manner in which these arrangements should be communicated. The Court must also be provided with a copy of any litigation funding agreement. Disclosure of a litigation funding agreement to other parties to the litigation is also required with the disclosure being redacted to conceal information that might reasonably be expected to confer a tactical advantage.

While not a means of formally limiting litigation funding charges, settlements in funded class actions (including the amounts allocated for the payment of a funder's fee) are subject to approval by the court. In a number of recent cases the courts have made so-called 'common fund' orders, both as part of a class action settlement and also at an early stage of proceedings. A common fund order has the effect of binding

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all members of the represented group to the terms of a funding agreement, not just those who have executed the agreement. Its purpose is to equalise the distribution of damages so that unfunded claimants must also contribute to the costs of the claim, including the funder's fee. It was observed in *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 FCAFC 148 at [82]:

> *We expect that the courts will approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias.*

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

Third-party litigation funders in Australia currently are not required to be licensed and are not subject to any form of prudential supervision.

In 2012, the federal government exempted a person providing financial services to a litigation scheme from all forms of regulation that apply to providers of financial services and credit facilities. However, the federal government has enacted a regulation that requires that providers of litigation funding services adopt and maintain adequate processes to manage conflicts of interest. Criminal sanctions apply for non-compliance with the conflict management requirements. The conflict management requirements are policed by the Australian Securities and Investment Commission (ASIC).

The purpose of the regulation is to ensure that conflicts – ordinarily where the interests of funders, lawyers and claimants diverge – are appropriately managed by the litigation funder. ASIC's Regulatory Guide 248 sets out ways in which funders can meet their conflict management obligations under the regulation, but otherwise do not prescribe the required mechanism for compliance with the regulation. There is a requirement that providers of litigation funding maintain adequate practices and follow certain procedures for managing conflicts of interest. However, the regulation does not prescribe the content of the policy or the processes that a litigation funder must have in place to respond to a conflict of interest.

The Federal Court Practice Note Class Actions (GPN-CA) requires that 'any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of "duty and interest" and "duty and duty") between any of the applicants, the class members, the applicant's lawyers and any litigation funder'. Similar practice notes operate in Victoria, Queensland and New South Wales.

On 7 September 2017, the Victorian Law Reform Commission (VLRC) published its review of current regulation of litigation funders and lawyers in Victoria. The VLRC Report suggested that as the Federal Court has done, the Supreme Court could also introduce practice requirements for litigation funders involved in class actions in relation to conflicts of interest.

In December 2017 the Australian Law Reform Commission (ALRC) was asked to consider a range of matters relating to class action proceedings and third-party litigation funders and in particular whether third-party funders should be subject to Commonwealth regulation.

The ALRC released a discussion paper in June 2018 that proposed that third-party litigation funders be required to obtain and maintain a 'litigation funding licence' to operate in Australia and that such licence should include requirements relating to adequate risk management systems, adequate arrangements for managing conflicts of interest, ensuring that the licensee does all things necessary to provide services efficiently, honestly and fairly and have sufficient resources (including financial, technology and human resources). See: Australian Law Reform Commission, *Class Action Proceedings and Third-Party Litigation Funding*, Discussion Paper No. 85 (2018).

The ALRC is due to provide its report and recommendations to the federal government by December 2018.

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

There are no specific professional or ethical conduct rules that apply to the role of legal professionals in advising clients in relation to third-party litigation funding or in funded proceedings.

Australian legal practitioners are regulated by state-based regimes prescribing professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons.

The interposition of a third-party litigation funder into the lawyer–client relationship raises ethical issues around conflicts, loyalty, independence of a lawyer's judgement and confidentiality. Legal practitioner conduct rules in all Australian jurisdictions deal with each of these concepts. The conduct rules reflect a lawyer's fiduciary duty towards his or her client and primary duty to the court.

A practitioner (which includes a law practice) will have a conflict of interest when the practitioner serves two or more interests that are not able to be served consistently, or honours two or more duties that cannot be honoured compatibly.

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

See question 3 with respect to the regulation of conflicts of interest. Outside of managing conflicts of interest, there is currently no formal regulatory framework applying to litigation funders.

There are some specific examples where the terms of litigation funding agreements are subject to review by the courts. In a corporate insolvency context, it is common for a liquidator to enter into a funding agreement with a third-party funder to pursue recoveries on behalf of creditors.

Under the Corporations Act 2001 (Cth), a liquidator is required to seek the approval of the company's creditors or the court's approval, where the terms of a contract that he or she enters into will last for more than three months. This means that in many cases where a liquidator enters into a litigation funding agreement, court approval is sought.

When reviewing a litigation funding agreement for approval, the court takes account of a range of factors, including:

- the liquidator's prospects of success in the litigation;
- the interests of creditors;
- possible oppression in bringing the proceedings;
- the nature and complexity of the cause of action;
- the extent to which the liquidator has canvassed other funding options;
- the level of the funder's premium and other funding terms;
- the liquidator's consultations with creditors; and
- the risks involved in the claim, including the amount of costs likely to be incurred in the proposed litigation and the extent to which the funder is to contribute to those costs, to the costs of the defendant in the event that the action is not successful, or towards any order for security for costs.

The decisions involving approval of funding agreements demonstrate that the courts do not simply 'rubber stamp' a funding proposal put forward by a liquidator. The approval of the court is not intended to be an endorsement of the proposed funding agreement or the proposed claim, but merely a permission for the liquidator to exercise his or her own commercial judgement in the matter.

The case management of class actions commenced in the Federal Court and other state courts involving litigation funding require at or prior to the initial case management conference that each party disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order.

All settlements reached in class action proceedings must be approved by the court. Where a settlement involves a funder's success fee being deducted from funds otherwise available to class members, those terms are subject to judicial scrutiny as to reasonableness and proportionality.

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

Yes. It is a permissible level of control over the litigation process for a third-party funder to insist on their choice of lawyers retained. Third-party funders are invariably consulted when it comes to retaining counsel. Commonly, the funder will, pursuant to the funding arrangement, appoint the lawyers to provide the legal work, and the retainer agreement between the lawyers and the funded client will be pursuant to terms agreed by the funder subject to the lawyers' overriding duties to act in the best interests of their client.

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

Yes. It is a permissible level of control over the litigation process for the litigation funding agreement to provide that the funder has the right to give instructions to the lawyers concerning the conduct of the litigation, subject to the funded client having the right to override the funder's instructions.

Commonly, save in respect of settlement (see below), in circumstances where a conflict arises between the lawyer's duty to his or her client and the funder, the lawyer is required to prefer the interests of and to take instructions from his or her client.

It is submitted that this level of control over the litigation process is consistent with the principles in *Fostif* and not contrary to public policy.

In a settlement context, in recognition of the funder's interest in the resolution of the litigation, where there is a difference of opinion between the funded client and the funder in respect of a settlement offer, the standard practice among funders operating in Australia and consistently with ASIC's Regulatory Guide 248 is that the difference of opinion is referred to the most senior counsel acting in the matter for advice whether the settlement offer is reasonable in all the circumstances and the parties agree to act in accordance with that advice. In the class action context, any settlement reached on behalf of the representative applicants, including the reasonableness of the funder's commission, will be subject to court approval. The Federal Court Practice Note Class Actions (GPN-CA) sets out a range of requirements for parties in order to satisfy the court that the proposed settlement is fair and reasonable and in the interests of the group members.

8 Do funders have veto rights in respect of settlements?

In class actions, a funder cannot veto a settlement and any difference of opinion between a funder and a representative applicant regarding a proposed settlement are dealt with pursuant to the practice outlined in question 7. For other types of funded litigation, the funder's control over a settlement is subject to terms of the funding agreement.

9 In what circumstances may a funder terminate funding?

Commonly, litigation funding agreements entered into in Australia allow a funder to terminate the litigation funding agreement without cause on the giving of notice.

Usually, the circumstances giving rise to the termination of a funding agreement will relate to the commercial viability of the claim, a material change to the legal merits or to the value of the claim. Circumstances may also arise where the funder considers that there is an irreconcilable and unavoidable conflict of interest in its continuing to be a party to the funding agreement. Contract law principles that apply to the termination of contracts generally will apply.

It is usual that the litigation funder will have responsibility to pay adverse costs and provide security of costs incurred up to the date of termination. In *Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd* [2016] WASC 159, the funder (LCM) terminated a litigation funding agreement that obliged LCM to satisfy orders for security for costs. Beech J held that under that litigation funding agreement LCM was obliged to satisfy orders for security for costs made prior to the termination date but not after the termination date.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

It is recognised and accepted that litigation funding plays an important role in providing access to justice. Especially in the class action context, decisions of Australian courts following *Fostif* are philosophically supportive of the role that lawyers and third-party funders have in the identification and management of claims.

In a number of cases where the court is considering a common fund order or orders that could affect the funder's interest, the courts have permitted the funder to retain its own representation and appear before the court to make submissions (a recent example of this approach is *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 (18 September 2018)).

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

'No win, no fee' conditional costs agreements are permitted in Australia.

There are prohibitions on legal service providers obtaining a fee calculated by reference to the amount of a settlement or judgment. While the regulations differ from state to state, lawyers are prohibited from entering contingent fee agreements, but are permitted in a conditional fee agreement to charge an 'uplift' of up to 25 per cent of 'at risk' fees based on standard hourly rates. The permissible percentage uplift may vary from state to state.

The Productivity Commission's Access to Justice Report (September 2014) recommended lifting the prohibition on contingency fee arrangements because they promote access to justice by addressing imbalances between individual litigants in complex matters and well-resourced defendants.

The recommendation was on the basis that comprehensive disclosure was provided as to the percentage of damages to be recovered by law firms, responsibility for liability for disbursements and adverse costs orders and capping the percentage limit on a sliding scale (to prevent law firms gouging, or earning windfalls on high-value claims).

As a safeguard against contingency fees giving rise to unmeritorious claims, the Commission referred to the existing powers of courts to make adverse costs orders against non-parties, the regulation of the legal profession and lawyers' ethical and professional obligations. The Commission's recommendations have yet to be implemented.

The ALRC as part of its June 2018 discussion paper has proposed the introduction of a specific contingency fee arrangement for class actions subject to prior approval of the court. The ALRC will provide final recommendations to the federal government in December 2018.

12 What other funding options are available to litigants?

After-the-event insurance (ATE), while having long been available in the UK market is relatively new in Australia. It can be purchased after a dispute has arisen or a proceeding is contemplated and covers a claimant's liability to pay adverse cost orders in the event litigation fails. When purchasing ATE insurance for use in Australian courts, it is important to understand whether the policy includes an obligation on the insurer to provide security for costs and the form in which such security will be provided, in particular, the availability of a deed of indemnity by the insurer. See question 19 regarding security for costs.

On 1 January 2017, the Commonwealth Government extended funding for its Fair Entitlements Guarantee Recovery Program that is litigation funding for liquidators of companies and trustees in bankruptcy. It is focused on recovering employee entitlements paid by the Commonwealth Government to employees of insolvent enterprises. Evidence of the scheme in practice can be seen in *Needham, Re; Bruck Textile Technologies Pty Ltd (In Liquidation)* [2016] FCA 837.

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

It is not possible to say how long a commercial claim may take to reach a decision at first instance.

All Australian civil courts adhere to procedures, court rules and written practices of case management directed to the cost-effective, efficient and expeditious administration of justice. Cases must be brought under court management soon after their commencement. Different kinds of cases require different kinds of management. The general rule is that the number of court appearances must be minimised. Realistic but expeditious timetables must be set and trial dates are generally set as soon as possible and practicable. Unless there is good reason, the timetable provided to the legal practitioners to manage the progression of the case must be adhered to. One key objective of the state and federal regimes currently in place is to identify the issues in dispute early in the proceedings. Alternative dispute resolution is encouraged and sometimes mandated. There is monitoring of the courts' caseloads in order to provide timely and comprehensive information to judges and court officers managing cases.

The Productivity Commission's report into Government Services 2017 set out the clearance rates for Australian courts for 2015–16. While this figure encompasses all civil matters – not merely commercial proceedings – the overall picture is that the clearance rate in both lower and superior courts (from which data was available) suggests that Supreme Courts of each state and the Federal Court are, on average, clearing

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around 98 per cent of all civil matters listed in a given calendar year. This statistic discloses only that courts are close to disposing of as many proceedings as are commenced in any given calendar year. However, complex commercial matters are unlikely to be resolved within one year of commencement, for example, 7.3 per cent of the Federal Court caseload was over 24 months old, and that largely comprised matters where the causes of action are described as corporations, intellectual property, trade practices and taxation. That said, case management is an important component of the administration of justice in Australian courts.

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

Nationally, in 2016–17, 1,045 appellate cases were filed in the Federal Court. Despite variance in completion rates, and accepting that the caseload of the appellate court was preferable to proceedings on appeal that had been on the court lists outside 2016–17, in the reporting year 885 appeals and related actions were finalised by the Federal Court. At 30 June 2017 there were only two matters that were 24 months or older. The clearance rate for appeals was 99.3 per cent for 2016–17. Accordingly, it is appropriate to conclude that most appeals are determined within 12 months of the filing of a notice of appeal.

In NSW, as a further example, Supreme Court of NSW Provisional Statistics (as at 18 May 2018) show that 359 cases were filed in the NSW Court of Appeal during the 2017 year, and 380 cases were finalised. Note, where an appeal has been preceded by a grant of leave, this is counted as one continuous case, with a final disposal being counted only when the substantive appeal is finalised. For this reason, the figures for disposals of notices of appeal (and applications for relief) and disposals of applications for leave, combined, exceed the number of final disposals). From these statistics it is hard to determine the number of appeals not determined within a calendar year.

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

There is no available data showing the proportion of judgments requiring contentious enforcement processes.

Enforcement of judgments in Australia can be undertaken through insolvency mechanisms. Non-compliance with a judgment is a recognised basis for the appointment of a liquidator or a trustee in bankruptcy. Judgments may also be enforced with the assistance and supervision of the court through the issuing of writs of execution. A judgment creditor may obtain a garnishee order directing a third party who holds funds on behalf of the judgment debtor, or owes the judgment debtor funds, to pay the funds, or a proportion of the funds, to the judgment creditor. In some jurisdictions, judgment creditors have a right to secure a judgment against real and personal property of the judgment debtor through the registration of a security interest.

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

Yes. Class actions are permitted in Australia and are common. Class actions can be funded by third parties. In late 2016, the Supreme Court of Queensland became the third state after New South Wales and Victoria to introduce court procedures specifically directed to the conduct of class actions in that court.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Yes. The courts in Australia have power to order that an unsuccessful party pay the costs of the successful party although the amount that may be recovered varies from court to court. Costs are at the discretion of the court. Unless it appears to the court that some other order should be made, costs follow the event. The usual adverse order for costs requires the unsuccessful party to pay the successful party's reasonable legal costs.

There are differing regimes for the determination of the reasonable legal costs that an unsuccessful party is obliged to pay.

There is currently no case law in Australia that holds that an unsuccessful party to litigation may be required to pay the litigation funding costs of the successful party.

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

Yes. Confirmation that a court can order costs against a non-party was confirmed by the High Court in *Knight v FP Special Assets* (1992) 174 CLR 178 (*Knight*). In this case, Mason CJ and Deane J stated that there was a general category of cases in which an order for costs should be made against a non-party. The category consists of circumstances where the non-party has played an active part in the conduct of the litigation and where the non-party has an interest in the subject of the litigation. In these circumstances, an order for costs should be made against the non-party if the interests of justice require that it be made.

In a third-party litigation funding context, the *Knight* case was cited in *Gore v Justice Corp Pty Ltd* (2002) FCR 429 FCA 354, where Justice Corp was held liable to pay the appellants' costs in this appeal and the costs of and incidental to the hearing of the appellants' notice of motion in the court below.

In *Ryan Carter and Esplanade Holdings Pty Ltd v Caason Investments Pty Ltd & Ors* [2016] VSCA 236, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against a litigation funder Global Litigation Funding Pty Ltd (Global), Global's sole director and company secretary of Global and shareholder. The decision arose in a context where the amounts ordered by way of security for costs were insufficient to cover the defendant's actual costs. Arguments that making a costs order against the company director was 'piercing the corporate veil' were rejected. The Court of Appeal determined that the trial judge had exercised his discretion appropriately, there was no miscarriage of justice and the appeal was dismissed.

Legislation also confers power on the courts to make adverse costs orders against non-parties. For example, section 98 of the Civil Procedure Act 2005 (NSW) confers a general power to make costs orders against parties and non-parties alike.

Non-party costs orders are rarely made against litigation funders because in almost all third-party funded cases the funded litigant will be ordered to provide security for the defendant's costs.

19 May the courts order a claimant or a third party to provide security for costs?

The court has the power to order a plaintiff to give security for the defendant's cost of defending the plaintiff's claim. The court can order a stay of proceedings until security is given and if there is persistent non-compliance, the court may dismiss the plaintiff's claim. The power to order security for costs comes both from statutory rules and from the inherent jurisdiction of the court. Security is sought in circumstances where there is a concern that the plaintiff may be unable to satisfy an adverse costs order made against it should the plaintiff's claim fail.

The existence of a litigation funding agreement will be relevant in an application for security for costs. In most instances, the litigation funding agreement would be tendered in any response to an application for security, and consideration will be had to the ability of the funder to meet its indemnity obligations in respect of adverse costs.

If recourse to the third-party funder's balance sheet is not accepted as satisfactory evidence of the funder's ability to meet its indemnity obligations, recognised forms of security include the payment of money into court, bank guarantees and in more recent times, ATE insurance and deeds of indemnity from insurers securing direct recovery rights to the defendants in the event of an adverse cost order.

In that regard, *In the matter of DIF III Global Co-Investment Fund LP (formerly Babcock & Brown DIF III Global Co-Investment Fund LP) v BBLP LLC (formerly Babcock & Brown LP)* [2016] VSC 401 (DIF) the Court accepted as adequate security a deed of indemnity proffered by an overseas based ATE insurer. However, in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699, Yates J, while accepting that an appropriately worded ATE policy may be capable of providing sufficient security for an opponent's costs, in the circumstances of that case and based on the terms of the ATE policy before him, rejected an ATE insurance policy from an overseas insurer as providing sufficient security.

The amount of security is calculated by reference to the reasonable and necessary costs of defending the action. This will be a matter for evidence. In complex claims, it is usual that security orders will be given in stages by reference to identified phases in the litigation.

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

If the matter is funded, the court will generally order security for costs. It is a relevant consideration in the granting of security that a third-party litigation funder intends to benefit from any recovery (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744).

In the case of *Perera v Getswift Limited* [2018] FCA 732, the Court observed: 'it is accepted that in the event that funders are using the processes of the court in order to procure a commercial benefit, a sine qua non of this is the provision of adequate security.'

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

ATE insurance is permitted and is commonly used, particularly in funded class action litigation.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Generally, no. However, for class actions commenced in the Federal Court and certain of the state courts, claimants are required to disclose the litigation funding agreement. The commercial terms may be redacted. *Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd (t/as ANZ Investment Bank)* [2016] FCA 306 provides examples of terms that may be redacted.

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

Some but not all communications between a litigant or their lawyers and a funder may be protected by privilege.

A claim of privilege can be made to object to the production of, or access to, documents in response to a subpoena to produce, notice to produce or order to give discovery. In addition, privilege can be claimed to object to answering interrogatories.

Client legal privilege protects confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice or a lawyer providing legal services relating to litigation. Professional confidential relationship privilege protects communications to preserve the confidential nature of certain relationships that could be undermined by disclosure. Settlement negotiations privilege protects communications or documents created in connection with an attempt to settle a dispute. A common interest privilege may arise if two parties with a common interest exchange information and advice relating to that interest, the documents containing that information may be privileged from production in the hands of each.

With the exception of the common interest privilege each of these privileges was derived from the common law but is now given a statutory basis in the Uniform Evidence legislation.

In *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, the claimant sought production of certain documents created in connection with investigations carried out by law firm Maurice Blackburn in anticipation of the commencement of representative proceedings. Maurice Blackburn claimed client legal privilege over the majority of the documents sought by IOOF. The Court accepted, for the most part, the client legal privilege claims made by Maurice Blackburn. However, the Court stopped short of accepting in their entirety similar claims from the litigation funder, Harbour Litigation Funding Ltd, who separately claimed privilege over certain documents relating to communications with Maurice Blackburn.

Despite the fact that there was no 'traditional client-lawyer relationship' between Harbour and Maurice Blackburn, the Court accepted that Harbour sought legal advice from Maurice Blackburn (despite not formally retaining them) and could claim privilege over that advice. Where documents that could be subject to a claim for litigation privilege by Maurice Blackburn's 'client' had been confidentially shared with Harbour, the Court accepted that this may not amount to a waiver.

Harbour was, however, required to produce certain communications with Maurice Blackburn that related to proposed funding agreements for the class action as these were found to be 'commercial negotiations between . . . two arm's length parties' and not created for the dominant purpose of legal advice. This finding is noteworthy because it distinguished previous authority that had held that litigation privilege could apply to a funding agreement and related documents on the basis that, in this case, there was no evidence that any client had sought to claim privilege over the documents in question and Harbour could not claim litigation privilege in its own right (as it was not a potential party to the class action).

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

There are numerous decisions involving challenges to the funding relationship brought by defendants to the funded litigation, but very few reported decisions in disputes between plaintiffs and their funders.

The two reported cases arose in the context of the termination of a litigation funding agreement.

In *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45, which is significant for its clarification that a litigation funder did not require an Australian Financial Services Licence (AFSL), the funder sought payment of an early termination fee that arose as a result of a change in control transaction by the litigant. The litigant resisted the payment of the early termination fee on the basis that it had a statutory right of rescission due to the funder's failure to hold an AFSL. The Court held that the funder was not required to hold an AFSL and the litigant could not avoid the financial consequences under the funding agreement.

Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd [2016] WASC 159 considered whether a litigation funder was obligated to satisfy a staged security for costs order made prior to termination. The court dismissed the litigant's claim and determined that LCM was not obliged to satisfy the remaining stages of the order.

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

Practitioners should be aware of the current reference to the ALRC Inquiry into Class Action Proceedings and Third-Party Litigation Funders. Key law reform proposals include:
- regulation of third-party litigation funders through licensing;
- enhancing the powers of the court to reject, vary or set commission rates in third-party funding arrangements for funded class actions; and
- amendments to require all class actions to proceed as 'open' class actions and powers to manage 'competing' class actions.

The ALRC is to report to the federal government in December 2018. It is not clear whether the federal government will act on any, some or all of the ALRC's recommendations and if so, how quickly law reform may occur.

In addition to the ALRC reference, there is currently a reserved judgment of the Full Court of the Federal Court of Australia in relation to class action litigation concerning *Get Swift Limited*. This judgment should illuminate the approach that the Federal Court of Australia will adopt in the management of multiple identical class actions supported by different lawyers and third-party litigation funders.

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Austria

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

The Austrian Supreme Court approved litigation funding by a third-party in a 2013 decision (*OGH*, 6 Ob 224/12b). In addition, in 2004 and 2012, the Vienna Commercial Court denied the defendants' objections to third-party funding of the respective claims.

Thus, today, litigation funding in Austria is accepted practice and has been judicially endorsed by the Austrian courts in recent years. Although the courts did not comprehensively cover all aspects involved, they established in Austria an unquestioned and favourable environment for third-party litigation funding.

Compared to other jurisdictions, third-party litigation funding has had a late start in Austria. Recently, it has started to become an established, albeit selective, litigation tool, but with regard to the potential market size, it might still be an exaggeration to declare third-party litigation funding to be of common use in Austria.

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

There is no explicit limit on what is an acceptable compensation for the funder's services. However, as a general rule, a third-party funding agreement – as any other agreement under Austrian law – must not constitute profiteering (ie, exploitation of a person in need; article 1 of the Act against Profiteering).

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

There are no specific provisions in Austrian legislation.

Lawyers' professional conduct in Austria does not allow for lawyers to be paid on the basis of contingency fees only (section 16 of the Lawyer's Ordinance (RAO) and section 879 II of the Austrian Civil Code (ABGB)), so any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer violates these provisions.

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

Lawyers' professional conduct in Austria is provided by the RAO. In light of the RAO, the lawyer's independence in acting on behalf of the litigant is crucial, and this also applies to cases involving a third-party funder. However, by a clear separation of the roles between the lawyer and the funder, a lawyer who advises his or her clients in relation to a funder has no conflict of interest in principle.

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

As at the time of writing, neither the Austrian financial regulator nor any other governmental body has any known interest in overseeing reported litigation funding.

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

Independence in acting on behalf of the litigant described above (see question 4) is an important principle of the lawyer's professional conduct. In light of the established third-party litigation funding concept, this means that, in general, the litigant's lawyer must be able to act freely from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder's right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that, if the litigant intends to replace his or her lawyer, funding will only be further granted if the new lawyer is accepted by the funder.

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

In domestic litigation, court hearings are generally public and funders can attend without having to obtain specific permission. On the other hand, settlement and organisational proceedings are conducted in private. However, if the counterparty does not object to it, a litigant might invite his or her funder to participate in such proceedings based on a relevant clause in the funding agreement.

This also applies to arbitration. While the respective hearings and proceedings are generally private, funders may participate if there is no objection by the counterparty.

However, it has to be kept in mind that the majority of cases funded by third-party funders in Austria so far have been carried out without disclosing the funder's engagement. As such, the relevance of the funder's permission to attend or participate is limited.

8 Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in the funding agreement. This is, in general, permissible under the ABGB and interferes with neither the independence of the litigant's lawyer nor with any other provision of Austrian law. Moreover, it is quite usual that litigants and funders agree in advance on certain minimum and maximum amounts concerning the limitation of the funder's veto right and his or her right to oblige the claimant to accept a particular settlement.

9 In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. Usually, such circumstances fall into two categories: on the one hand, there are events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or authority decisions that result in a full or partial dismissal of the claim;
- the disclosure of previously unknown facts;
- a change in the case law that is decisive for the current litigation process;
- a loss of evidence or evidence that is accepted and tends to be negative; and
- a major change in the creditworthiness of the respondent.

In practice, a funder would, under such circumstances, terminate the funding agreement and bear any costs incurred or caused until the termination, as well as costs that occur as a result of the termination.

While these clauses prevent the funder from having to continue funding litigation processes that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such a case, the funder can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, given these

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circumstances, the litigant is usually obliged to reimburse the funder for its costs and expenses.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

In light of the independence of the claimant's lawyer from the third-party litigation funder, a direct approach of the funder in order to instruct the lawyer during the proceedings is not permissible. The lawyer would violate the professional conduct as provided by the RAO if his or her actions were based on a funder's, rather than on his or her client's, instructions. Therefore, any rights and actions the funder intends to exercise during the course of the litigation process have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation process and any rights to veto the actions a litigant is usually free to take.

Consequently, the litigant is usually obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written permission of the funder. Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding (see question 3), funders only need to take an active role as provided by the litigation funding agreement. In addition, the involvement of a litigation funder is not disclosed to the court nor the counterparty in the majority of the cases, which also considerably limits the funder's role within the litigation process.

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

The lawyer's professional conduct prohibits fee agreements in which the lawyer's fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are inadmissible. Only if the lawyer charges a basic fee (flat or on an hourly basis) for the services that cover the actual costs of the lawyer's practice, is he or she allowed to agree on a premium in the event of a successful outcome, in addition to the basic fee.

Consequently, the litigation funding agreement must not directly or indirectly provide a model resulting in a conditional or contingency fee for the lawyer. However, it is permissible to add a success fee for the lawyer, within the limits described above, in the funding agreement.

12 What other funding options are available to litigants?

Legal cost insurance is widely available in Austria. However, the extent and limits of coverage depend upon the specific policy, as this kind of insurance usually only covers the costs of certain types of claim. Furthermore, the insurance policy usually has to be arranged before a person or entity becomes aware of the need to litigate. After-the-event (ATE) litigation insurance is not common in Austria (see question 21).

A claimant may also seek legal aid 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. However, both conditions are handled rather strictly by Austrian courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs and to provide security, an exemption from court costs or the appointment of a lawyer by the court if necessary to protect the rights of the party. Since 2013, legal aid is also available to companies with financial constraints if the claim does not seem devoid of any chance of success.

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

In general, a commercial litigation before a court of first instance in Austria takes between 12 and 18 months. If the case is rather complex or if the court accepts an extended range of evidence to be heard, the litigation process may take considerably longer. In domestic arbitration, the duration is normally between one and three years.

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

There is a considerable difference in the respective practice of the various states of Austria. As a general rule, approximately half of the judgments are appealed before the second instance of the respective state. On average, the second instance takes between 12 and 18 months. Only a small proportion of these judgments are appealed before the Austrian Supreme Court. There, an average appeal takes approximately one year.

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective number seems to be rather low.

The enforcement of Austrian judgments is governed by the Code of Civil Procedure (CCP) and by the provisions of the Austrian Enforcement Regulation (EO). A judgment rendered by an Austrian court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement or it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

In general, the enforcement of an enforceable judgment or arbitral award in Austria is not seen as particularly burdensome, expensive or unsecure.

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

Apart from the joinder of parties, known also in other jurisdictions, Austrian law does not provide for a specific collective redress. However, a class action mechanism has nevertheless been part of Austria's civil procedural law practice for over 10 years. This particular instrument, often referred to as 'class action Austrian-style' is based on the combination of several elements of the CCP. In principle, not only the original owner of a claim can assert it against the debtor, but also a third party to which the claim has been assigned. Furthermore, if a plaintiff asserts several claims against the same defendant, he or she can bundle all claims to a single litigation. Finally, if the assignee and class action claimant happens to be a specific association (eg, a consumer organisation), claim-size restrictions are removed so that all claims can be brought before the Supreme Court regardless of their individual claim size. The Austrian Supreme Court explicitly approved the funding of such a class action by a third party in the 2013 *OGH* decision (see question 1).

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

As a general principle, court fees, as well as all other expenses arising from the litigation including the opposing lawyer's fees, are borne by the losing party. If a party prevails only in part, the fees and expenses will be split proportionally between the parties. In the event of a settlement, the costs are charged to the parties according to the terms and conditions of the settlement agreement.

The Austrian courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before the state courts and the Austrian Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party, although section 41 of the CCP would provide the basis for a rather broad spectrum of cost compensation in favour of the successful party.

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

The CCP does not provide for a basis for the court to order a third-party funder to pay adverse costs and to hold him or her liable for such costs. In the litigation funding concept developed and observed in Austria, the funder's contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect.

In theory, there are two ways in which a litigation funder can be held liable for these costs by the prevailing respondent.

If the unsuccessful claimant assigns his or her claim against the funder to cover the adverse costs imposed on him or her by the court to the respondent (and the litigation funding agreement allows for such

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an assignment), the respondent can take the assigned claim against the funder to the competent court.

If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow for an assignment), then the respondent must take legal action against the claimant. In practice, the Austrian courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the EO that govern the enforcement of a judgment, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

19 May the courts order a claimant or a third party to provide security for costs?

There are two different types of security for costs that Austrian courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs. In addition, the claimant must advance the costs for taking the evidence he or she requested.

At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party's costs if the claimant has no residence or registered office in Austria. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Austria has entered into a treaty that excludes respective security bonds.

The CCP does not provide for a basis to request such security from the funder of a claim and there have been no cases reported where Austrian courts considered such a request.

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

In most of the cases funded so far by third-party funders in Austria, the funder's engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts decided on advances and securities solely focusing on the claimant's status (see question 19) and did not take the existence of the third-party funder into account.

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

ATE litigation insurance is not common in Austria. Although no legal or regulatory restrictions limit the respective product, there is, currently, no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases in Austria.

By contrast, legal cost insurance is commonly used in Austria. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy but usually only for certain types of claims.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

The CCP does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that he or she is supported by a third-party funder. It also does not provide a basis for an Austrian court to order a litigant to do so.

Whereas some authors have argued that a litigant might have such an obligation in domestic arbitration under specific circumstances, there have been no cases reported where a litigant had to disclose the litigation funding agreement in an Austria-based arbitration.

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

Whereas any legal advice given by an Austrian or non-Austrian lawyer to a litigant is privileged and does not have to be disclosed to the other party nor the court, the communications between litigants or their lawyers and third-party funders do not fall within the legal privilege.

However, there have been no cases reported where such communications had to be disclosed by order of an Austrian court.

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

No disputes between litigants and funders have been recorded in Austria so far.

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

No.

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Bermuda

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

Litigation funding is fairly common in Bermuda and there is judicial authority to support the now commonly held view that such funding agreements are valid as a matter of Bermuda law.

In *Stiftung Salle Modulable and Rütli Stiftung v Butterfield Trust (Bda) Ltd* [2014] Bda LR 13 (*Salle Modulable*), Bermuda Chief Justice Ian Kawaley (as he then was) held that a litigation funding agreement with Harbour Litigation Funding (which was governed by English law) was not only valid but suggested that use of such funding arrangements in civil litigation should be encouraged.

In that 2014 decision, it was held that the constitutionally protected rights of access to the court implicit in the Bermuda Constitution as read with the relevant section of the European Convention on Human Rights suggest that 'such funding arrangements should be encouraged rather than condemned'.

'I see no reason why Bermuda's common law should adopt the antiquarian approach contended for by the [defendant],' he added, rejecting the argument advanced by the defendant that common law prohibitions against such arrangements were still good law in Bermuda.

While *Salle Modulable* scrutinised the legality of funding from a professional funder, there have been a number of cases tried by the Bermuda courts where funding for the litigation was provided more generally by third parties, including by related entities.

Although there are no known Bermuda judicial decisions dealing directly with this point in the context of an arbitration, it is likely that the position would be the same.

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

There are, at present, no statutory limitations on the fees or interest that funders may charge; however, draft legislation has been submitted to the Bermuda government for consideration and review, which, if adopted, could put a percentage cap on the amount that funders may claim (see question 5).

It should also be noted that, while the Bermuda court has expressly validated third-party litigation funding for civil matters, the question of whether the costs of litigation funding can be recovered from the losing party as damages remains open.

In *Salle Modulable*, Chief Justice Kawaley (as he then was) said: 'The present case is not one where the issue of recoverability of litigation is truly engaged head on and so the weight to be attached to my findings on this issue in future cases is clearly limited.'

That case related to a contractual dispute and the proper law of the contract was deemed to be Swiss law, under which litigation funding expenses are regarded as legal costs. It was held, however, that the procedural law of the forum (Bermuda) would govern recovery of legal costs. 'Litigation expenses, absent new statutory rules, properly fall to be dealt with under the taxation of costs regime under Bermuda law as the procedural law governing the present proceedings.'

All indications are that how this may be dealt with by Bermuda's taxation regime is still to be tested.

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

No. At present there are no specific Bermuda legislative or regulatory provisions applicable to third-party litigation funding. See questions 2 and 5.

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

No. Lawyers are not, at present, able to participate alongside third-party litigation funders by entering into separate conditional fee arrangements with the client. This is because contingent and conditional fee arrangements are prohibited in Bermuda, subject to a very few exceptions. Lawyers who deal in undefended debt collections, for example, may enter into contingent fee arrangements, as set out in the Bermuda Barristers Code of Professional Conduct 1981.

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

A subcommittee of the Bermuda Bar Council – the regulatory council governing the legal profession – has submitted draft legislation to the Bermuda government that would not only legislate the use of third-party litigation funding but also allow lawyers in Bermuda to enter into conditional fee arrangements in respect of most civil litigation matters.

The push to introduce some form of conditional fee agreement was presented to the Ministry of Justice in late 2014 and there has been little in the way of development since. The prospect did, however, garner praise from Bermuda's then Chief Justice who stated, in the 2016 Bermuda Judiciary Annual Report, that the efforts by the Bar Council to introduce such arrangements was 'close to his heart' as a way to promote enhanced and affordable access to justice.

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

It is not unusual for counsel to be instructed on a matter prior to a funder becoming involved but where the funder becomes involved from an early stage, it is plausible that the funder could have a greater degree of influence over the course of proceedings, including the choice of counsel. It should also be noted that leading counsel will typically be instructed to act in cases of considerable complexity or legal importance and it is fairly common for the funder to help determine the choice of leading counsel.

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

While funders do not typically attend Bermuda court hearings, nor is it common to become directly involved in settlement negotiations, there would be nothing to prevent a funder, for example, attending proceedings in open court to observe. The need to do so, however, is no doubt moderated by it being a common feature of funding agreements to provide the funder with timely updates on proceedings (including as to any settlement discussions).

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8 Do funders have veto rights in respect of settlements?

The funding agreement will dictate the extent to which a funder will be able to influence the course of the proceedings, including as to settlement. In our experience, however, it is uncommon for a funder to have veto rights per se but to have the right to terminate the agreement if a reasonable settlement offer is refused by the client.

9 In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate funding will vary according to the terms of the agreement between the parties but typically the funder will, for example, protect its right to be able to withdraw from funding a claim in certain circumstances, including in respect of a settlement offer (see question 8), or if there is a material change to the prospects of the claim succeeding.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

The level of involvement the funder takes in the litigation process is likely to be prescribed by the terms of the funding agreement. However, the degree of involvement is usually limited to what would be required for the funder to monitor its financial exposure.

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

No, except in very limited circumstances (see question 4).

12 What other funding options are available to litigants?

Although uncommon, it may be possible to get a bank loan for this purpose. After-the-event insurance may also be obtained, although this type of coverage is typically purchased in conjunction with third-party funding in order to limit exposure to an adverse costs order.

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

It is fairly common for a substantive commercial claim to take two years or more to be tried and decided. In cases where there is either a greater degree of complexity or the need for a preliminary trial of certain issues, for example, the time to reach a decision at first instance may be extended beyond that period by a year or more.

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

Although the number of first-instance judgments is reported each year in the Bermuda Judiciary's annual report, as are the number of matters decided by the Court of Appeal, the proportion of first-instance judgments that are appealed in any year fluctuates. Between 2013 and 2016, the number of published civil appeals represented between 11 and 18 per cent of the total civil judgments published during the same period.

Bermuda's Court of Appeal generally sits three times a year, usually for a period of about three weeks each session. In urgent circumstances, the Court of Appeal Registrar may request that the Court of Appeal have a special sitting to hear a matter outside of the normal calendar but this is exceptionally rare because the majority of the Court of Appeal justices also sit as Court of Appeal judges in other jurisdictions and therefore have limited time in which to accommodate extra sittings.

Under normal circumstances, an appeal can usually be heard within six to nine months, or sooner if the issues on appeal are of particular public importance.

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

There is no official information as to the number of judgments that require contentious enforcement proceedings. In circumstances where enforcement does become necessary, however, there are a number of ways to pursue the judgment debtor, although this is much more straightforward if there are assets within the jurisdiction.

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

Under Bermuda's Rules of the Supreme Court 1985, a plaintiff or a defendant is able to not only represent themselves but others with the same interest. While we did not find any decisions directly on this point, given the reasoning of the Chief Justice in *Salle Modulable* about constitutionally protected rights of access to the court, we think it likely that funding of litigation in a representative capacity would be considered favourably by the Bermuda court, bearing in mind that there is a distinction between a party suing or being sued in a representative capacity and a nominal plaintiff.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

As a general rule, costs will be awarded to the successful party. As to the payment of the litigation funding costs of the successful party, see question 2.

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

The court does have the jurisdiction to make a third-party costs order.

19 May the courts order a claimant or a third party to provide security for costs?

See question 20.

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

It is likely to be a factor that is taken into consideration by the court. In *Phoenix Global Fund Limited and another v Citigroup Fund Services (Bermuda) Limited and the Bank of Bermuda Limited* [2007] Bda LR 61, the Bermuda Supreme Court ordered the third-party funder to put up security for costs. Security for costs was also paid into court by the funder in the *Salle Modulable* case.

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

ATE insurance is permitted, although it is typically purchased in conjunction with litigation funding (see question 12).

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

That a litigant has entered into a litigation funding agreement is likely to have to be disclosed but the exact terms of the funding agreement may be privileged and protected from disclosure. In *Stiftung Salle Modulable and Rütli Stiftung v Butterfield Trust (Bda) Ltd* [2011] Bda LR 53, litigation privilege was held to have been waived because the agreement was referred to in the pleadings without the necessary qualification. Even so, the court held that certain redacted information in a copy of the funding agreement provided to the defendant did not have to be disclosed as it was either of limited relevance or it would be prejudicial to the plaintiff's right to a fair trial to have to disclose that information.

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

Yes. These communications will be protected by litigation privilege although care should be taken not to waive that privilege. See the decision in *Stiftung Salle Modulable*, referred to in question 22.

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

No.

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

No. The main issues are covered above.

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Brazil

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

Third-party funding is not a regulated activity in Brazil. Aside from the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce (CAM-CCBC) Administrative Resolution No. 18, issued in July 2016, there are no other rules expressly dealing with the subject, and no statutory regulation exists. Despite the lack of regulation, third-party funding activities in Brazil are increasing, especially in arbitrations. The same is not true as far as litigation is concerned.

Since last year's survey, the number of third-party financed arbitrations has increased from zero to four. However, it would be an exaggeration to say third-party funding is commonly used. There is no record of court cases involving third-party funding issues and, consequently, there is no common understanding or approach concerning funding by third parties in Brazil.

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

There are no specific statutory limitations for the fees or the interest owed to the funder.

However, should a limit apply, chances are that the court or arbitral tribunal would consider a limit of around 30 per cent, given a relevant precedent by the Superior Court of Justice (REsp No. 1155200) from March 2011. In this case, an ad exitum collection of 50 per cent of the amount in dispute was deemed excessive by the court because this rate was not a reasonable proportion between the quota litis agreement and the amount in dispute. Further to that, the court ruled that the lawyer had taken advantage of their client's need to solve the conflict, thus deeming such percentage unacceptable. This case could provide a good starting point, but given this issue has not yet been raised, such understanding is still subject to much debate and interpretation.

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

If one were to imagine any type of control or rule to be applicable – even indirectly – a valuable source would be the Statute of the Brazilian Bar Association (EOAB), which sets forth the conditions and the boundaries of lawyers with regard to their clients. In addition, the Brazilian Code of Civil Procedure (BCCP) and the Brazilian Arbitration Act (BAA) impose upon arbitrators' duties of independence and impartiality. Therefore, some may say that the duty to disclose the existence of a funder derives from these instruments.

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

At the time of writing, there were no specific ethical rules applicable to third-party litigation funding. As mentioned in question 1, when it comes to arbitration, the only rule regulating client-attorney relationships and third-party funding is CAM-CCBC's Administrative Resolution No. 18. Section 1 of the Resolution establishes a set of guidelines applicable to the parties involved in arbitration funding and describes funding as the situation:

> *when a natural or legal person who is not party to the arbitration proceedings provides full or partial resources to one party so as to enable or assist the payment of the arbitration costs, receiving in return a portion or percentage of any profits earned from the award or from the agreement.*

To avoid conflicts of interest, the CAM-CCBC recommends full disclosure (ie, full qualification) of the funder at the 'earliest opportunity' (section 4 of the Resolution). Besides, according to our researches, other arbitral institutions, such as the Arbitration and Mediation Center of the American Chamber of Commerce (AMCHAM) and the Business Arbitration Chamber (CAMARB), also seem to be concerned with establishing recommendations regarding third-party funding.

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

No public entities in Brazil have laid down any principles or established any oversight mechanisms to control third-party funding in Brazil yet.

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

Since there is no regulation regarding third-party funding in Brazil, the parties are free to negotiate the terms of the financing.

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

Funders' attendance at, or participation in, arbitration proceedings depends mainly on the parties' consent. However, in court cases, as long as the case is not held in legal confidentiality, hearings are public, as stated in section 189 of the BCCP.

8 Do funders have veto rights in respect of settlements?

As mentioned in question 6, the parties are free to negotiate the terms of the financing.

9 In what circumstances may a funder terminate funding?

As the parties are free to negotiate the terms of the financing, the provisions of the applicable law chosen by the parties will describe the termination procedure.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

This depends on the interpretation given to 'active role'. If by active role one means intervening directly in the course of a litigation or arbitration and hence acting as a lawyer (ie, filing submissions and requests to the tribunal on behalf of the lawyers and the party), then according to section 3 of the EOAB, the funder is not permitted to take an active role in the litigation process. Other than that, surveillance and control of the relationship between funder-party-attorneys is subject to the contractual commitments from one party to the other.

In that sense, it seems that, under the law, having a third-party funder taking an active role in the arbitral procedure would not necessarily constitute a breach of the BAA or the EOAB. However, it is too soon to assume that parties, judicial courts and arbitration institutions would easily accept such level of participation without resistance.

Since there is no provision regarding third-party funding in Brazil, the funder's role in the process shall be bound by the terms of the financing contract. It is interesting to highlight that some funds will

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only accept financing the litigation or arbitration process if the parties permit them to interfere in the procedure (ie, strategy definition, hiring experts or prohibiting amicable settlement between the parties).

To verify whether this issue has been discussed in the context of arbitration, we asked some of the most prominent arbitration institutions, namely the CAM-CCBC, the Chamber of Mediation and Arbitration (CMA CIESP/FIESP), AMCHAM, the Market Arbitration Chamber (CAM-BOVESPA), the Brazilian Centre of Mediation and Arbitration (CBMA), the Arbitration and Mediation Chamber of Fundação Getúlio Vargas (FGV), the Arbitration and Mediation Chamber of the Federation of Industries of Paraná, CAMARB, the Arbitration Council of the state of São Paulo, the European Court of Arbitration and the Chamber of Conciliation, Mediation and Arbitration of the Commercial Association of Bahia about their experiences with cases involving third-party funding. We found that, as of the time of writing, only two of these arbitration institutions have ever dealt with such cases. As a result, one cannot yet establish with certainty the acceptable standard of participation a funder may have in an arbitration.

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

The Brazilian Bar Association Federal Council is not supportive of conditional fees – as is the case of quota litis, believing this fee arrangement represents a potentially harmful practice that leads to the depreciation of the work of attorneys. As consequence, the Brazilian Bar Association has stated that hourly fees – duly supported by the client throughout the litigation – is the rule, while quota litis remains an exception.

Since Superior Court of Justice case REsp No. 805.919 of October 2015, contingency or conditional fee agreements have become more accepted in lawsuits dealing with civil law matters. In his opinion, the reporting justice stated that it is valid and admissible for an attorney to receive only success fees, to be borne by the losing party. According to this interpretation, it is permitted for lawyers to be paid on a fixed percentage of the final amount collected by their clients. Nonetheless, this decision has not yet been confirmed.

12 What other funding options are available to litigants?

Aside from contingency or conditional fee arrangements and third-party funding, there are no other funding options available. Although one might think that assignment of claims may provide a choice of funding, it is not encompassed by the idea of third-party funding – rather, it consists in the actual transfer of monies and rights in connection with a claim to a third party.

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

The length of time taken to reach a first instance decision depends on the city in which the lawsuit is filed as well as other factors, such as the complexity of the case and the number of procedural issues and events. Every year, the National Council of Justice publishes a report with statistics regarding the national administration of justice in Brazil. The latest report indicates that, on average, the cognisance procedure takes just over one year and the enforcement procedure takes about four-and-a-half years. It is important to mention that, after 2005, the enforcement procedure became a procedural step in court cases, automatically commencing after the cognisance procedure.

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

The research conducted by the National Council of Justice, 'Justice in Numbers 2017' (www.cnj.jus.br/files/conteudo/arquivo/2017/09/904f097f215cf19a2838166729516b79.pdf) does not provide a breakdown of the ongoing lawsuits that are subject to appeal, but current figures on the ratio between appeals and decisions in Superior Courts. The research indicates that an appeal may take from nine months to two years and 10 months, depending on the jurisdiction.

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

Not applicable. See question 13.

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

Group actions are permitted in Brazil in a few areas. Since there is no regulation regarding third-party funding in Brazil, there seems to be no restriction on third parties financing class actions or group actions.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The BCCP lays down a distinction between legal fees (section 85) and other procedural costs (ie, translations, transfer, expert's fees, hotel fees, etc; see section 84). The legal fees of the winning party shall be borne by the losing party according to section 85. However, the same rule does not apply to other procedural expenses (section 86, chapeau). Despite the 'loser pays' rule of section 85, court practice shows judges are more prone to embrace a proportional allocation of costs and legal fees. In other words, judges tend to apply the rationale of section 86 to both procedural costs and legal fees.

In addition, claimants are mandatorily responsible for costs arising from proceedings whenever possible, except in cases where the state is the counterparty. Therefore, if the claimant handles its case successfully and is proven right, the respondent will have to reimburse the claimant for initial costs, in addition to any other costs incurred throughout the proceedings.

There are plenty of examples of the application of adverse costs by Brazilian tribunals. The Superior Court of Justice, for instance, in *EDF International SA v Endesa Latinoamerica SA and YPF SA* (Supreme Court of Justice, SEC 5.782-EX), ordered the losing side to pay all the costs of the procedure. Another example is *Electrônica SA v INACE - Indústria Naval do Ceará SA* (Supreme Court of Justice, SEC 14.679).

Therefore, the judge can rule the payment of adverse costs (ie, all the judicial costs, expert fees, registration taxes and even monetary penalties fixed during proceedings). The same applies to arbitration. However, section 2 of CAM-CCBC Administrative Resolution No. 18 provides other examples of payment of adverse costs, such as attorneys' and arbitrators' fees. Therefore, arbitration costs covered by the adverse costs' awards may be even higher.

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

Parties are free to negotiate the terms of the financing (see question 6).

19 May the courts order a claimant or a third-party to provide security for costs?

According to section 83 of the BCCP, courts may order the claimant to provide 'security for costs' if it is not domiciled in Brazil. The aim of the legislator was to guarantee that the costs and legal fees would be paid if the claimant did not hold assets in Brazil. There is no fixed standard for security for costs and it can be deposited in a public financial institution account (ie, Banco do Brasil) or – upon justified request – in an escrow account in a private financial institution.

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

No. Since security for costs may only be provided when the claimant does not live in Brazil, third-party funding will not influence the court's decision on granting it.

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

There is no specific statutory prohibition; however, ATE insurance is not commonly used in Brazil. Usually, parties bear the costs of the adverse party themselves if they lose the case.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Not applicable.

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

The law does not require parties to treat arbitrations as confidential, but it is reasonable to say this is a customary rule. In most cases, parties prefer to include an explicit confidentiality provision, either in the arbitration clause or in the terms of reference. On top of that, many Brazilian arbitration institutions have, among their rules, express provisions to maintain the confidentiality of proceedings, including the arbitral award and all documents presented therein, for example:

- CAM-CCBC arbitration rules (section 14);
- CMA CIESP/FIESP arbitration rules (section 10.6);
- CAMARB arbitration rules (section 13.1);
- CAM-BOVESPA arbitration rules (section 9.1);
- AMCHAM arbitration rules (sections 18.1 and 18.2);
- FGV arbitration rules (sections 61 and 62); and
- CBMA arbitration rules (section 11.2 and 17.1).

However, there are no guidelines regarding communications between parties and their funders, neither in arbitration nor in court proceedings. Considering the standard approach of maintaining confidentiality for most aspects related to arbitration, it is possible that communications between litigants and funders would likely be treated as confidential.

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

One of the arbitral institutions consulted reported discussions arising from third-party funding regarding the following:

- violation of the procedure confidentiality;
- the funders' commitment to the confidentiality of the arbitral proceedings;
- whether the funder could be liable for any breach of confidentiality;
- whether the financing contract exclusively concerns one particular arbitral procedure;
- whether the financing contract grants the third party the right to interfere in the arbitral procedure (eg, strategy definition, hiring experts, prohibiting amicable settlement between the parties);
- whether the funder was granted a guarantee of some kind; and
- whether the financing contract included the allocation of the costs of loss.

We do not have access to the answers provided.

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

Most information collected on the practice comes from informal, therefore not publishable, sources. This information shows that third-party funding is a reality in Brazil, though in a limited way. However, comparing our data with that of last year, we see an increase in the number of cases financed by a third parties and, to us, it is clear that third-party funding is expected to increase in coming years.

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Cayman Islands

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Campbells

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

Third-party litigation funding agreements are not commonly used in the Cayman Islands, except when the plaintiff (or counterclaimant) is a company in official liquidation. This is because, outside the context of an official liquidation, they are void for illegality on the grounds of maintenance and champerty. Maintenance is the giving of assistance or encouragement to a litigant by someone without an interest in the proceedings or any legally recognised motive. Champerty is a form of maintenance by which assistance is provided in consideration for a share of the proceeds. Champerty and maintenance (which is also a tort) remain offences under the common law of the Cayman Islands, although there have been no prosecutions in the jurisdiction for either offence. This contrasts with the position in England, where both offences were abolished by statute in 1967. See, generally, in this regard *Quayum v Hexagon Trust Company (Cayman Islands) Limited* [2002] CILR 161.

Third-party litigation funding is, however, common, and has been judicially endorsed on many occasions, in the context of litigation brought by Cayman Islands companies in official liquidation. This is because liquidators have a statutory power to sell the 'fruits of an action' to a third-party funder, and the court has recognised that the exercise of this power constitutes a 'special statutory exemption' conferring immunity on what would otherwise be a prima facie champertous agreement. The same principles should apply to an action brought in Cayman by a foreign company in liquidation where the foreign liquidator or trustee has sold the fruits of the action pursuant to a similar statutory power of sale, although we are not aware of any case in which this issue has been considered by the Cayman court.

The exercise of a liquidator's power to sell the fruits of an action is subject to the approval of the court and to various restrictions.

In particular, it is only possible for a liquidator to enter into a third-party litigation funding agreement in respect of claims that vest in, and are brought in the name of, the company. He or she cannot do so in respect of statutory claims that vest in him or her as liquidator (such as preference claims), because those claims do not form part of the company's property and any assignment of the liquidator's fiduciary power in that regard would be contrary to Cayman Islands public policy.

Further, the Cayman court will not permit a liquidator to enter into a third-party litigation funding agreement that provides the third party with the right to control or interfere with the litigation. Any such agreement would fall outside the scope of the 'special statutory exemption' and would therefore be void for illegality on the grounds of maintenance and champerty. However, an outright sale of a cause of action by an official liquidator, by way of legal assignment, where the price is expressed to be a percentage of the proceeds of the action, is a valid exercise of the liquidator's statutory power of sale, provided that it is sanctioned by the court. See, generally, in this regard *In the Matter of ICP Strategic Credit Income Fund Limited* [2014 (1) CILR 314].

There have historically been relatively few arbitrations in the Cayman Islands, although the Arbitration Law has recently been re-enacted to encompass the UNCITRAL Model Rules with a view to encouraging it. Accordingly, the question whether the common law principles of maintenance and champerty apply to arbitration proceedings has not been considered by the Cayman court. It is likely, however, that the Cayman court would follow the decision of Sir Richard Scott VC in *Bevan Ashford v Geoff Yeandle* [1999] 2 Ch 239, in which it was held that the doctrines of maintenance and champerty did apply to arbitration proceedings. In that case, it was held that a conditional fee agreement in relation to arbitration proceedings that would otherwise have been unenforceable would not be declared invalid since the public policy objections to maintenance and champerty had been removed in that jurisdiction. However, in the Cayman Islands, the public policy objection has not yet been overruled by relevant legislation, so it is likely that third-party litigation funding in relation to an arbitration (unless used by a liquidator with court sanction) would be unenforceable. Given the relative infrequency of arbitrations in the Cayman Islands, we have confined our answers to the following questions to litigation proceedings.

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

There is currently no statutory limit on such fees or interest, nor is there any firm judicial guidance in this regard.

However, as noted above, a liquidator requires the court's sanction to sell the proceeds of a claim pursuant to a third-party litigation funding agreement (see question 1). To obtain that sanction, he or she will need to satisfy the court that (among other things) he or she has taken reasonable care to obtain the best price available for the claim in the circumstances (see, for example, *In the Matter of Trident Microsystems (Far East) Limited* [2012] (1) CILR 424). The court will ordinarily expect the liquidator to have sought funding proposals from the stakeholders in the liquidation, and potentially also from third-party funders, and in so doing to have satisfied him or herself that the proposed funding terms are the best available in the circumstances. To the extent that there are competing funding proposals, this will necessarily operate to limit the amount of fees and interest that are charged. But even if the proposed funding agreement represents the best or only terms that were offered or that the liquidator was able to negotiate, the approval of the agreement remains a matter for the court's discretion based on the facts and circumstances of the case, and the court may direct the liquidator to explore alternative funding options if it regards the proposed fees or interest as excessive.

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

Not currently, but a draft bill has been circulated in respect of a law to regulate the private funding of litigation (the draft bill). If a law was enacted in the form of the draft bill, it would (among other things) repeal any offences under the common law of maintenance and champerty, and impose (as yet unspecified) limits on the amount payable to a third-party funder.

Progress with the draft legislation has, however, been slow and it is unclear whether the bill will proceed, at least in its current form.

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

Not currently. The draft bill proposes that no cause of action may be wholly or partially assigned by the client to the attorney who is acting for him or her.

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

At present, consideration of third-party funding lies in the hands of the judges, both as a result of the *Quayum* line of cases and, in insolvency proceedings, as a result of section 110(2)(a) of the Companies Law (2016 Revision), which requires official liquidators of a company to obtain the court's approval of any such arrangement undertaken on behalf of the estate.

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

It is unlikely that the court would sanction a liquidator to enter into a third-party funding agreement on terms that permitted the funder to select counsel. In *ICP Strategic*, it was held that a liquidator must not fetter his or her fiduciary power to control the litigation, and that the court should scrutinise a third-party funding agreement carefully 'to ensure that it does not directly confer upon the funder any right to interfere in the conduct of the litigation or indirectly put the funder in a position in which it will be able, as a practical matter, to exert undue influence or control over the litigation'.

The draft bill is silent on this matter, but it is possible that, should it come into force, regulations made under it might deal with the issue.

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

Funders would be entitled to attend any hearing in open court. They would usually be permitted to attend hearings in chambers with the consent of the liquidator and the judge, unless, perhaps, the other side objected. A funder would not have standing to appear by counsel at any hearing, save in the context of a costs order being sought against a funder as a non-party (see question 18).

A funder would not be permitted to have any control over a settlement (see question 6), but there is no reason in principle why it could not attend a settlement meeting with the consent of the liquidator and (if necessary) the other parties at the meeting.

8 Do funders have veto rights in respect of settlements?

No. See questions 6 and 7.

9 In what circumstances may a funder terminate funding?

The funder's rights of termination will be a matter of contract to be addressed in the funding agreement. Typically, a liquidator would seek to ensure that, in the event of termination, the funder was committed to provide sufficient funding to meet the company's costs of bringing an end to the proceedings and the amount of any adverse costs' orders.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

As outlined above, the role of the funder in the litigation process is currently circumscribed. This may change if the draft bill is enacted and regulations brought into force under the proposed new law provide differently.

On a practical level, funding agreements often contain extensive information rights for funders, sometimes including the right to see the liquidator's legal advice on prospective or actual litigation by asserting a common interest privilege. The basis for asserting this type of privilege under Cayman Islands law is, however, narrower than in some other jurisdictions (eg, the United States), and, depending on the nature of the information sought to be protected, common interest privilege might not be upheld if challenged on a discovery application brought by an opposing party. This is particularly important to bear in mind in the period leading up to the entry into the funding agreement and, in order to be secure, the third-party funder ought to make its own assessment of the merits of the case, since it is arguable that, until an agreement is reached, the parties are subject to a legal 'conflict of interest', in which case, privilege in the liquidator's legal advice may be lost inadvertently.

Where the company in liquidation has multiple claims against one or more defendants, a funding agreement might also give the funder the choice whether to fund a particular piece of litigation, provided that it does not give the funder any rights of control once the litigation has been commenced.

Further, many of the funding agreements sanctioned by the court are entered into with creditors of the insolvent company, who agree to fund third-party litigation in order to recover assets of the company for distribution to themselves and the other creditors, as well as making a profit (or reducing their losses) through the funding terms. Such funders may have some degree of influence (but not control) over the liquidator and the proceedings in their capacity as creditors (rather than as funders), through the processes of the liquidation committee, creditors' meetings and their right to make or appear at the hearing of sanction applications with regard to the exercise or proposed exercise of the liquidator's powers (eg, as to the settlement of the litigation).

Funders are not, therefore, required to take an active role in the litigation process, save as may be contractually required under the funding agreement (and provided that any such contractual obligations do not result in the funder interfering with the conduct of, or exerting undue influence or control over, the litigation).

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

Contingency fee agreements are currently contrary to Cayman Islands public policy so are void and unenforceable. Litigation lawyers in Cayman are therefore not permitted to enter into them. The Grand Court will, however, authorise Cayman Islands liquidators to enter into contingency fee agreements with foreign lawyers, provided that (among other things) contingency fee agreements are enforceable in the foreign jurisdiction where the proceedings are to be brought (see *ICP Strategic*).

Conditional fee agreements have been held by the Grand Court to be permissible, subject to approval by the court in each case, although they remain relatively rare in practice and the Court of Appeal has cast at least some doubt on whether they would be held to be enforceable as between the attorney and the client. In *Quayum*, the Chief Justice applied the following principles when considering whether to approve a conditional fee agreement:

- (a) *All such proposed arrangements must first receive the sanction of the court to be considered in the context of all the circumstances of the client and of the case.*
- (b) *The court is best placed to consider the reliability and reputation of the attorney, and will do so.*
- (c) *In the present matter and in others, as a matter of discretion, where there is to be an enhanced fee a requirement for submission to taxation on the solicitor and own client basis will be imposed and, if appropriate, a cap may be placed upon the quantum of fees recoverable.*
- (d) *In an appropriate case the court, as a matter of the exercise of its discretion, can disallow the whole or such part, as it sees fit, of any enhanced fee from the amounts which, upon taxation, the unsuccessful opponent may be required to pay. That is, the fee will be limited to what is reasonable in the circumstances. In this way the potential risk of unfairness to such an opponent can be avoided.*
- (e) *In appropriate cases, depending, among other things, upon the potential value and size of the litigation, the circumstances of the client and the proposed terms of the conditional fee agreement, the client should be encouraged to take independent legal advice about it. The court may so require before granting its approval.*
- (f) *The agreement must be in writing and there must be a mechanism by which the client can discharge the attorney.*
- (g) *The overriding objective is that the conditional fee arrangement must, from beginning to end, be governed in principle and in practice by what is fair and reasonable. To this end, notwithstanding the prior approval of the court, the court must always be able to oversee its execution, by reference, in particular, to the manner of the conduct of the proceedings by the attorney.*

In *DD Growth Premium 2x Fund* [2013] (2) CILR 361, the Chief Justice considered the level of remuneration proposed in a conditional fee agreement, drawing heavily on the guidelines used in England and Wales, in particular, the 'ready reckoner' contained in *Cook on Costs* (2012), which compares the chance of winning against a likely reasonable success fee.

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Additionally, the law firm in that case had agreed to a sliding scale of uplift to be applied, depending on the amount of damages subsequently awarded. The formula adopted also factored in an interest rate (on the basis that no interim payments of fees would be made).

In *Attorney General of the Cayman Islands v Barrett* [2012] 1 CILR 127, the Court of Appeal held that, under the rules of taxation of costs that currently apply in the Cayman Islands, any conditional uplift fee that might be payable by a successful party to his or her attorney would not in any event be recoverable by the successful party from the losing party. The Court of Appeal left open the question of whether the right to any such fee would be enforceable by the attorney against his or her own client, as it did not arise on the facts of the case, thereby casting some doubt on whether *Quayum* and *DD Growth* were correctly decided.

If a law in the form of the draft bill is enacted, then contingency and conditional fee agreements will be authorised by the statute, save in respect of criminal, quasi-criminal and family proceedings. Court approval of the agreements will not be required, provided that statutory limits on the fees based on a percentage of recoveries or uplifted hourly rates are not exceeded. An agreement containing fees in excess of the statutory limits will require the approval of the court.

12 What other funding options are available to litigants?

Bank lending is possible, although not common. Cayman Islands banks are generally risk averse, and would not be likely to advance significant funding for litigation costs unless heavily secured. 'Private' lending is also possible, but, in certain circumstances, a private source of funds may be regarded as an intermeddler, and can be found to be the subject of a third-party costs order (in the event that the borrower loses the case), or may have to provide a bond or payment into court on behalf of the litigant. It is possible, although not common, to obtain after-the-event insurance, but the costs of this would be unlikely to be recovered from the losing opponent.

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

No official statistics are available. Matters that are contested through to a trial may take, on average, 18 months to two years, depending on the complexity of the issues and the intensity of interlocutory proceedings.

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

No official statistics are available. The Cayman Islands Court of Appeal sits three or four times a year for two to three weeks each time. An appeal proceeding at usual pace will probably be dealt with within six to nine months. In cases of urgency, a procedure exists to convene a special sitting of the Court of Appeal outside its normal timetable, on payment of a fee.

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

No official statistics are available. Domestic judgments are relatively easy to enforce, particularly if there are assets within the jurisdiction that are available for execution. A wide variety of options exists, including charging orders for sale of real estate and other assets. If the judgment debtor is foreign, and has no assets in the Cayman Islands, it is possible to 'export' a Cayman Islands judgment for enforcement, provided that the jurisdiction in which the debtor has assets will recognise the judgment.

Most contentious enforcement proceedings concern attempts to enforce foreign judgments against assets situated in the Cayman Islands. Currently, this requires action by writ, based on the foreign judgment debt, in which summary judgment would be sought, followed by execution of the Cayman Islands judgment against the assets. Proposals for legislative changes to simplify this process are under consideration. It is possible in some circumstances to freeze the assets pending judgment, in cases where there is a risk of dissipation.

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

The closest thing that the Cayman Islands currently has to a 'class' or 'group' action is a 'representative' action under Order 15, Rule 12 of the Grand Court Rules. This is possible where numerous persons have the same interest in the proceedings. Such proceedings can be commenced in the name of a representative, but all those whom he or she represents are parties to the action. Such proceedings can be funded by a pooling arrangement between the participants. Subject to the approval of the Court, they could also be brought pursuant to a conditional fee agreement, but for the reasons explained above, they could not currently be funded pursuant to a third-party funding agreement.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The general rule in the Cayman Islands is that costs follow the event (ie, the loser pays). It is unusual for any other order to be made, unless there has been some kind of misfeasance or negligence on the part of the winner that justifies a departure from the normal rule, or there has been a without-prejudice save as to costs offer and the 'winner' has been awarded less than the offer.

It is highly unlikely under the current costs regime, including the rules for the taxation of costs by the court, that an unsuccessful party would be required to pay litigation funding costs (eg, interest on advances or similar charges, or legal costs attributable to the negotiation and execution of the third-party funding agreement) incurred by the successful party; however, there are no express rules or legislation in place and the matter has not been tested in the Grand Court.

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

Under certain circumstances, yes. The Grand Court has express jurisdiction under section 24(3) of the Judicature Law to order costs against non-parties. The principles on which it will do so were considered by the *Court of Appeal in Kenney v ACE* [2015] 1 CILR 367. In that case, a creditor under a foreign judgment sued a Cayman Islands company to enforce the debt. The judgment creditor was subject to the appointment of a receiver by the Liberian courts. The Grand Court ordered the judgment creditor to provide security for costs on the basis that it was merely a nominal plaintiff for an undisclosed principal (AJA). The plaintiff company failed to provide security for costs and its action was struck out, an order for costs being made in favour of the defendant. The Grand Court ordered the plaintiff to disclose the identity of those parties funding the litigation, including Mr Kenney, an attorney in practice in the British Virgin Islands, who acted for AJA. In evidence, it was determined that Mr Kenney and his clients, including AJA and a special purpose vehicle called CCI, controlled the receiver's actions, placed limits on his ability to act and required him to account to CCI for his decisions and expenditures. Mr Kenney ensured that the receiver was no more than a straw man, executing the plans of Mr Kenney and his clients. Mr Kenney's strategy also attempted to ensure that the actual litigant in the Grand Court, the receiver, would be judgment-proof and unable to pay costs. Mr Kenney funded the litigation, and had set in place a structure that would enable him to benefit from any recoveries. It appeared from the evidence that was placed before the court on the question of leave to serve the summons on the third parties outside the jurisdiction, that the agreement that Mr Kenney had entered into was a kind of contingency fee agreement (although it is important to bear in mind that he was not licensed to act as an attorney in the Cayman Islands and could not, therefore, have conducted litigation here himself).

The Grand Court gave leave to serve a costs summons on Mr Kenney and CCI in their home jurisdictions. This order was upheld on appeal. In so doing, the Court of Appeal cited the principles set out in the decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 with approval and summarised that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his or her own financial benefit, he or she should be liable for the costs if his or her claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is, him or herself, a director or liquidator who can realistically be regarded as acting in the interests of the company (and more especially its shareholders and creditors) rather than in his or her own interests. It is noteworthy that this principle does not depend on

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any analysis of maintenance and champerty, simply the degree of control and benefit that the third-party funder exercises and obtains.

If a third-party funding agreement is appropriately drawn, approved by the court and complied with, there should not, in most circumstances, be grounds for the imposition of a non-party costs order, although it remains the case that orders for security for costs might be made.

19 May the courts order a claimant or a third party to provide security for costs?

The Grand Court has a wide discretion to order security for costs against a claimant provided by Order 23 of the Grand Court Rules and also (against a company) under section 74 of the Companies Law (2016 Revision). There are four grounds provided in the Rules, namely that the plaintiff:

- is ordinarily resident outside the jurisdiction;
- is a nominal plaintiff suing for the benefit of some other person and there is reason to believe that he or she will be unable to pay the costs of the defendant if so ordered;
- has not endorsed his or her address on the writ or his or her address is incorrect; or
- has changed his or her address so to avoid the consequences of the litigation.

Under the Companies Law, security for costs may be ordered if the judge is satisfied that there is reason to believe that, if the defendant is successful in his or her defence, the assets of the plaintiff company will be insufficient to pay his or her costs.

In considering the plaintiff's ability to pay the costs, the court will take into account all the sources of funding available to the plaintiff (including third-party funding), not merely his or her own resources. The application is made by summons supported by an estimate of the costs to be incurred, and the court will, if satisfied, make an order in such sum as it thinks fit, bearing in mind that in some cases, a really significant order for security might stifle an otherwise arguable claim. It has been held that if the sole reason for ordering security is that the claimant is resident abroad, the amount of the security will be limited to the difference, if any, between the costs of enforcing a costs award in Cayman, and the (additional) costs of enforcing it abroad.

The proceedings are usually stayed until the security is provided. The most common means by which security is provided is a payment of cash into court, but in some circumstances a letter of credit or bank guarantee will be permitted. Unless the parties agree otherwise, the court will generally require any letter of credit or bank guarantee to be provided by a Cayman Islands bank.

There is no express power to order security to be provided by a third party (whether a funder or not), but, as mentioned above, the existence of third-party sources of finance to the claimant is a relevant factor that will be taken into account for the purpose of the decision.

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

On an application for security based upon the fact that the plaintiff is a nominal plaintiff, suing for the benefit of a third party, the existence of third-party funding is directly relevant, although in most cases, a claim brought with the benefit of third-party funding will not be a claim brought by a nominal plaintiff (see *Kenney*). In other cases, the statutory tests require consideration of the plaintiff's means, and the court will look to all of the resources of the plaintiff, including third-party funding, to make its decision. The Grand Court will apply the well-known principles in *Keary Developments v Tarmac Construction* [1995] 3 All ER 534. In that case, the court was required to consider a submission that a claim would be stifled if an order for security for costs was made because the plaintiff company was not substantial, although it was argued that it had a good claim. The Court of Appeal held that the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be uniquely within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation.

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

ATE insurance is permitted, but is uncommon, probably because of the limited size of the market. Defence costs are sometime paid by insurers (in third-party liability cases, such as those in professional negligence or directors' duties cases). We have had no experience of insurance for attorneys' fees other than that paid for defence costs, nor for non-payment of judgment debts. We do not think these would be objectionable in principle.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Liquidators must disclose litigation funding agreements to the court, within the liquidation proceedings, for the purpose of obtaining the court's sanction to enter into the agreement. A copy of the funding agreement, or an affidavit summarising its terms, will be placed on the court's liquidation file in connection with the application. Such a file is not open to inspection by the public, but it can be inspected by (among others) the creditors, shareholders, former management and former professional service providers to the company. Documents on the liquidation file can, therefore, become public through disclosure by one of those parties. If the court can be persuaded that the agreement or applicable affidavit is confidential and that its publication would harm the creditors' economic interests, it is possible to obtain a sealing order, within the liquidation proceedings, preventing the agreement or affidavit from being inspected on the liquidation file.

Prior to the decision in *Barrett* (see question 11), applications to sanction conditional fee agreements in ordinary civil cases were often made ex parte, and the first the defendant knew of the agreement was when a costs order was made against it. Bearing in mind that the success fee is not recoverable from the paying party, this practice is likely to cease. The question of whether disclosure of the funding agreement is compellable has not been tested but, in circumstances where the issue of funding is relevant (eg, to the status of the plaintiff or to an application for security for costs), it may well be within the discretion of the court to compel production, even if subject to safeguards as to future use of the documents or to draw adverse inferences where the plaintiff refuses to disclose any such agreements. Bearing in mind that the court has the power to compel disclosure of the existence of third-party funders (see *Kenney*), it is a short step to compelling disclosure of the nature and terms of the funding agreement (and it is apparent from the report of the judgment in *Kenney* that details of at least the nature of the funding agreement were before the court).

The draft bill does not consider these issues, but regulations may be made to regulate them.

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

There is no special category of privilege for such communications with funders. However, in the same way that an insurance policy is generally regarded as sui generis, we suggest that litigation funding agreements would be regarded as distinct from the facts giving rise to a cause of action, and therefore, discovery would not always be appropriate (see question 22). Clearly, if communications fit into other recognised categories of privilege (such as litigation privilege or legal advice privilege) then such privilege may be claimed, although it is unlikely that direct communications between litigants and their funders would fall within those categories. Common interest privilege, as understood in the Cayman Islands, is a fairly narrow concept, in particular a sub-set of legal professional privilege. Accordingly, the mere fact of communication between funder, litigant and the litigant's attorney does not give rise to privilege, if the substance of the communication would not, in itself, in the hands of the original donee of the information, have attracted legal professional privilege.

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

To date, no. However, there is an, as yet unreported, decision of the Court of Appeal in *Deutsche Bank AG London & Ors v Krys (as Official Liquidator of the SPhinX Group)*, 2 February 2016, relating to a dispute

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between Cayman Islands liquidators and lawyers they had retained on a contingency fee basis to pursue claims in courts in the United States. The facts of the case were, however, highly specific; the ratio of the case concerns a point of arbitration law not specifically related to the funding arrangements.

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

In two recent, as yet unreported, cases, outside the insolvency context, litigants have applied to Financial Services Division judges for quasi-approval of litigation funding agreements, in order to try to obtain a defence against possible allegations of maintenance and champerty. In A *Company v A Funder*, unreported, 23 November 2017, the plaintiff had obtained litigation funding from a third party. The plaintiff wished to use the funding to enforce an arbitration award in the Cayman Islands, but was concerned that, in doing so, an offence might be committed. Accordingly, the plaintiff commenced proceedings against the funder seeking a declaration that the funding agreement was not unlawful and that the enforcement proceedings would not be tainted by maintenance or champerty. The defendant funder did not contest the proceedings and the plaintiff itself acknowledged the artificiality of the construct, particularly as any declaration made would not bind the respondent to the arbitration award. The judge (Honourable Justice Segal) reluctantly granted the relief sought, subject to certain amendments to the terms of the funding agreement, holding that the legal principles applicable to the issue of whether funding agreements are unlawful by reason of maintenance and champerty were the same under Cayman Islands and English law. He held that the correct approach is:

(a) *that in considering whether a funding agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice, and that this question requires the closest attention to the nature and surrounding circumstance of a particular agreement; and*
(b) *that the rules against champerty are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction.*

The underlying concern is a risk of abuse. The funder's prospect of and need to protect and maximise profits may tempt the funder to interfere with the litigation process in a way that might inflame (inflate) claims, suppress evidence or suborn witnesses. The judge held that the following factors were likely to be of primary concern:

(a) *the extent to which the funder controls the litigation;*
(b) *the ability of the funder to terminate the funding agreement at will or without reasonable cause;*
(c) *the level of communication between the funded party and his attorneys (who must be independent of the funder);*
(d) *the prejudice likely to be suffered by a defendant if the claim fails;*
(e) *the extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation;*
(f) *the level of profit available to the funder; and*
(g) *whether or not the funder is a professional funder and or regulated.*

In *The Trustee v The Funder*, unreported, 26 July 2018, a foreign trustee engaged in contentious litigation concerning the trust obtained litigation funding and applied for a declaration in relation to the legality of the funding agreement. The Honourable Justice Segal was again concerned about the nature of the application, because the Court was being asked to issue an advisory opinion that would have only hypothetical effect. He expressed the view that it would be inappropriate for a practice to develop whereby parties to litigation funding agreements regularly applied to the Court for similar relief. Nevertheless, he considered the seven factors referred to in *A Company v A Funder*, and granted the declarations sought, subject to two amendments.

It is not yet clear whether litigants in the Cayman Islands will continue to approach the Court for similar declarations. The guidance provided by the Court in these two cases is, however, to be welcomed.

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England & Wales

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Woodsford Litigation Funding

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

Yes. Third-party litigation funding is permitted, and endorsed by the judiciary and policymakers as a tool of access to justice. While English law continues to discourage funders from 'controlling' the litigation that they fund, the courts have a generally positive attitude to third-party funding.

The historic, and long-abandoned, prohibition of third-party litigation funding was rooted in the ancient concepts of maintenance and champerty. Maintenance is third-party support of another's litigation. Champerty is a form of maintenance in which the third party supports the litigation in return for a share of the proceeds.

At the start of the twentieth century, maintenance and champerty were both crimes and torts. Following the second world war, the law on funding of civil litigation changed dramatically. The introduction of legal aid in 1950 created a state-funded exception to the historic prohibition on litigation funding. Further exceptions came with the growth of insurance and trade union-funded litigation. The Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty. While those principles continue to exist in the public policy relating to litigation funding, their scope has been much reduced, and they apply nowadays only to discourage funders from exerting undue control over the litigation that they fund. 'No win, no fee' arrangements between litigants and lawyers (in effect, another form of litigation funding) were introduced in the early 1990s and substantially liberalised in 2000.

R (Factortame Ltd) v Secretary of State for Transport was a case taken against the UK government by a company of Spanish fishermen who claimed that the United Kingdom had breached EU law by requiring ships to have a majority of British owners if they were to be registered in the United Kingdom. The case produced a number of significant judgments on British constitutional law. In 2002, the Court of Appeal in *Factortame (No. 8)* [2002] EWCA Civ 932 explained that only those funding arrangements that tended to 'undermine the ends of justice' should fall foul of the prohibition on maintenance and champerty. In other words, reasonable litigation funding arrangements entered into with professional and reputable third-party funders who respect the integrity of the judicial process are perfectly lawful.

In its 2005 decision in the case of *Arkin v Borchard Lines*, the Court of Appeal was again sympathetic to the position of professional litigation funders as tools for access to justice (see question 18).

In a landmark ruling in 2016 (*Essar Oilfields Services Limited v Norscott Rig Management* [2016] EWHC 2361 (Comm)), the English Commercial Court upheld the decision of an arbitrator (former Court of Appeal judge, Sir Philip Otton) to allow a successful claimant to recover its third-party litigation funding costs from the losing defendant as 'other costs' under section 59(1)(c) of the Arbitration Act 1996 (AA 1996).

In the 2017 case of *Walter Hugh Merricks v MasterCard & Others* [2017] CAT 16, while the Competition Appeal Tribunal rejected class certification (see question 16), the Tribunal stated that it would have approved the litigation funding arrangements in that case. In keeping with the dominant trend of judicial comment on both sides of the Atlantic, Mr Justice Roth and his colleagues on the bench spoke in positive terms about litigation funding, noting 'a range of extrajudicial material which recognised the importance of third-party funding in enabling access to justice'. They said that it should not be difficult for a tribunal to work out what a reasonable litigation funding return should be, not least because there is 'now a developing market in litigation funding'.

In March 2018, Lord Justice Jackson, while reviewing the reforms made as a result of his 2009 report into the civil litigation costs regime in England and Wales, noted that his proposals to 'promote [third-party funding] and introduce a code for funders have been successful. These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so. Funders are highly experienced litigators and they exercise effective control over costs. They often insist upon having court-approved budgets. Self-evidently, these reforms promote access to justice and tend to control costs.'

Third-party funding is now a well-established and commonly used part of the English litigation landscape, which is judicially recognised as controlling costs and promoting access to justice. The third-party funding industry, which is arguably centred in London, has grown significantly in terms of the number of market participants, the capital available to them, the types of disputes that are funded and the size of investments made.

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

Third-party funding is now well established in England and Wales. There are a large number of professional litigation funders in London, and the market is competitive. From a commercial perspective, therefore, there is a lot of downward pressure on funders' success fees. A litigant with a good case should readily be able to find litigation funding on attractive commercial terms.

In addition to the competitive limit on a funder's success fee, the principles of maintenance and champerty arguably apply in order to render unenforceable litigation funding arrangements where, even if the litigant's case is wholly successful, the funder's return is significantly greater than the litigant's return.

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

The voluntary Code of Conduct for Litigation Funders was facilitated by the Civil Justice Council, a government agency that is part of the Ministry of Justice of England and Wales (Ministry of Justice), on 23 November 2011. This Code sets out the standards of practice and behaviour required of members of the Association of Litigation Funders (ALF) funding litigation in England and Wales. ALF membership is voluntary; however, most of the more long-standing, professional third-party funders in the London market have joined. The Code includes provisions ensuring the capital adequacy of funders, the limited circumstances in which funders may be permitted to withdraw from a case, and the roles of funders, litigants and their lawyers.

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

The Solicitors Regulation Authority (SRA) Handbook is made up of two parts: the SRA Principles, which are mandatory principles and underpin all areas of legal practice, and the SRA Code of Conduct 2011. This Code sets out an outcomes-focused regulatory system for solicitors and establishes mandatory outcomes that must be achieved in appropriate circumstances in order to comply with the SRA Principles. The Code

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contains a number of provisions relevant to solicitors advising on funding. These include, chapter 1 on 'client care', chapter 3 on 'conflicts of interest', chapter 6 on 'your client and introductions to third parties', chapter 9 on 'fee sharing and referrals' and chapter 11 on 'relations with third parties'.

It is accepted that solicitors have an obligation to advise litigants on all reasonable funding options, including insurance and third-party funding. A failure to do so could result in sanction by the SRA, and potentially also liability for professional negligence.

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

The ALF, founded in November 2011, is an independent body charged by the Ministry of Justice with delivering self-regulation of disputes whose resolution is to be achieved principally through litigation procedures in the courts of England and Wales. The ALF actively engages with government, legislators, regulators and other policymakers to shape the regulatory environment for dispute resolution funding.

The ALF has been charged with administering self-regulation of the voluntary Code of Conduct for Litigation Funders that are ALF members and it also maintains the complaint procedure to govern complaints made against members by funded litigants.

Most professional litigation funders in London are staffed by solicitors and other professionals (eg, chartered accountants) who will ordinarily be regulated by their professional bodies.

Also, litigation funding necessarily exists in the context of litigation or arbitration proceedings, in which the relevant court or tribunal will have oversight.

In January 2017, Lord Keen of Elie, speaking on behalf of the UK government, stated that the market for third-party litigation funding continued to develop well and that he had no concerns about the activities of litigation funders. While the UK government continues to keep the industry under review, it remains of the view that the ALF voluntary Code of Conduct works well, and that there is no need for statutory regulation for third-party litigation funding.

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

In deciding whether or not to fund a case, third-party funders will take into account the expertise of the litigant's choice of counsel. If a funder does not think that the litigant's legal team is suitable, the funder can choose not to fund. Alternatively, it is open to the claimant to change its legal team in order to persuade a funder to invest.

Once invested in a case, a third-party funder must not exercise undue control over the litigation, including making demands as to the choice of counsel. To do so would risk offending the remaining vestiges of the principles of maintenance and champerty. This point is reflected in clause 9.3 of the voluntary Code of Conduct for Litigation Funders, which provides that members of the ALF must not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder.

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

Yes. Subject to objections from the judge, tribunal or mediator with authority over the relevant proceedings, it is perfectly lawful for funders to attend, and there are often good reasons why they should do so. Just as it has long been accepted that insurers and reinsurers with a financial interest in proceedings should be welcome to attend mediations and other settlement discussions, it is becoming increasingly common for third-party funders to also attend.

8 Do funders have veto rights in respect of settlements?

The ALF voluntary Code of Conduct for funder members states that the litigation funding agreement shall note whether (and if so, how) the third-party funder may provide input into the litigant's decision in relation to settlements. It is standard for English litigation funding agreements to provide that third-party funders will be kept abreast of settlement discussions and offers, and some agreements will also provide that settlement offers within a given range will be considered reasonable and should be accepted.

9 In what circumstances may a funder terminate funding?

For members of the ALF investing in English litigation, the only permissible circumstances for terminating funding are set out at clause 11.2 of the voluntary Code of Conduct for Litigation Funders, as follows:

- where a third-party litigation funder reasonably ceases to be satisfied on the merits of the dispute;
- where the funder reasonably believes that the dispute is no longer commercially viable (eg, where costs have escalated significantly, or the likely recovery has reduced significantly from what was anticipated at the outset); and
- where the funder reasonably holds the view that there has been a material breach of the litigation funding agreement by the funded litigant.

Clause 12 of the Code provides that, in the absence of the circumstances described in clause 11.2, the litigation funding agreement shall make clear that there is no discretionary right for a funder to terminate the agreement.

In circumstances where the Code does not apply, for example, because the funder is not an ALF member, the principles of maintenance and champerty arguably apply to prohibit the funder from using the threat of terminating funding as a means of exercising undue control over the litigation.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

In a February 2016 publication, '10 trends in 2016', *International Arbitration*, the arbitration team at international law firm Freshfields Bruckhaus Deringer LLP stated that third-party litigation funding 'is here to stay, and not just for small or cash-strapped claimants . . . [T]he involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk and cost-benefit assessments.' This comment reflects the maturity of the litigation funding market in London, even two years ago. While the early discussions about litigation funding, informed by the historic principles of maintenance and champerty, tended to focus on how to limit the funder's involvement in the litigation process, it has come to be recognised that, in addition to financial assistance, funders can also bring a lot of professional expertise to the proceedings. It remains the position in English litigation that funders should not 'control' the proceedings, but it is nonetheless acceptable that they provide input.

In *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144 (18 November 2016), the Court of Appeal endorsed the first instance judge's determination that a responsible funder is expected to carry out a 'rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate levels' and that such steps would not be champertous. This decision makes it clear that funders should take an active role in conducting thorough due diligence prior to funding the litigant and maintain a robust process for reviewing the litigation as it proceeds. It is important to note that the Court of Appeal correctly pointed out that none of the litigation funders in this case were ALF members and the Court drew the crucial distinction between 'professional funders' and 'the funders [in this case] [who] were inexperienced and did not adopt what the ALF membership would regard as a professional approach to the task of assessing the merits of the case'.

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

Yes. Conditional fee agreements (CFAs) have been permitted since the 1990s. In a CFA, some or all of the lawyer's fees are conditional on success. In the event of a success, the solicitor is entitled to payment of the conditional fees, plus a further uplift. The maximum uplift is 100 per cent of base rates. The Law Society publishes a model CFA and related guidance.

Damages-based agreements (DBAs) were introduced in England as part of the Jackson Reforms in 2012. DBAs are similar to the United States' concept of contingency fee agreements. In a DBA, if the case is successful, the lawyer's fee is calculated as a percentage (capped at 50 per cent in commercial cases) of the financial benefit obtained; if the case is lost, no fee is payable to the lawyer. DBAs were envisaged by Lord Justice Jackson in his report 'Review of Civil Litigation Costs' (December 2009) as an important litigation funding option. They have,

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however, been used relatively infrequently. The lack of popularity relates in part to the slow speed at which lawyers adopt new business models, and in part because of uncertainty as to how the rules governing DBAs apply in practice.

12 What other funding options are available to litigants?

The availability of legal aid has been significantly restricted in recent years. However, it is still available for some types of litigation, including judicial review.

Litigants who are members of a professional body or a trade union may benefit from a legal assistance scheme.

And various insurance policies, for example, home or car insurance policies, may contain legal expenses coverage.

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

The time taken for a claim in the courts of England and Wales to reach a decision at first instance will vary greatly according to the complexity of the issues in the case, the urgency of its determination and the caseload of the court in question. The Civil Justice provisional statistics for the first quarter of 2018, the most recent period available, stated there was an average of 33 weeks for a small claim to reach trial from issue and for a fast and multi-track claim (ie, higher value claims) it was almost 57 weeks.

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

There are no accurate, up-to-date statistics on the proportion of first-instance judgments that are appealed. However, the Civil Justice provisional statistics for the first quarter of 2018 stated that the Court of Appeal Civil Division had 914 appeals filed in 2017, down approximately 10 per cent on 2016.

The length of time from the date an appellant's notice is issued in the Court of Appeal to the date the appeal is likely to be heard varies from two months in urgent matters to around 18 months in very complex, non-urgent matters. The majority of appeals are resolved within nine months.

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

There are no statistics on the proportion of High Court judgments or arbitration awards that require contentious enforcement proceedings. However, the Civil Justice provisional statistics for the first quarter of 2018 recorded that there were 105,102 warrants (one of the methods of enforcing money judgments) issued in January to March 2018, an increase of 7 per cent on the same quarter in 2017. It is relatively easy to enforce judgments or awards against defendants within the jurisdiction of England and Wales. Civil Procedure Rule (CPR) 70 contains general rules about enforcement of judgments and orders. The methods of enforcement available to a judgment creditor include:

- seizing a judgment debtor's assets;
- third-party debt orders;
- charging orders;
- attachment of earnings;
- insolvency proceedings;
- appointment of a receiver;
- writs of sequestration; and
- orders of committal.

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

Yes. In English litigation, there are a number of ways in which multi-party claims can be pursued. The following procedures are covered by Part 19 of the Civil Procedure Rules:

- multiple joint claimants can proceed using a single claim form where their claims can be 'conveniently disposed of in the same proceedings';
- multiple claims can be managed under a group litigation order where the claims have 'common or related issues of fact or law'; and
- representative actions are permitted where one or more claimants can represent other claimants with the same interest, for example, beneficiaries of a trust.

There is no direct equivalent in English law to the US shareholder class action, but the Companies Act 2006 introduced changes to directors' duties and the derivative claims that may be brought against them.

Changes to English competition law in 2015 gave rights to individuals (consumers and businesses) to bring private damages actions and to allow authorised class representatives to bring collective proceedings on their behalf, either on an opt-in or an opt-out basis, in the CAT. Collective proceedings may be continued only on the basis of a collective proceeding order (CPO). To date, the CAT has heard two CPO applications (*Dorothy Gibson v Pride Mobility Products Limited* and *Walter Hugh Merricks v MasterCard Incorporated & Others*). Both of those applications were rejected (with an appeal of the Mastercard decision pending at the time of writing). Two further applications for CPOs (*Road Haulage Association Limited v Man SE and Others* and *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others*) were filed in the summer of 2018.

All of the above types of group action may be funded by a third-party litigation funder.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Yes. Under CPR 44.2, the court has discretion as to whether costs are payable by one party to another, the amount and when they are to be paid. However, if the court decides to make an order in relation to costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to some exceptions. There are a number of circumstances the court will have regard to, including the conduct of the parties.

In relation to domestic English arbitrations, the tribunal is under no duty to make an award as to costs, subject to any agreement between the parties. However, in practice, it is generally accepted that the tribunal should, unless the parties agree otherwise. If a cost award is made, unless otherwise agreed by the parties, section 61(2) of AA 1996 provides that the tribunal shall award costs on the general principle that costs should follow the event, subject to circumstances where this is not appropriate. That is, the unsuccessful party pays the costs of the successful party as well as its own.

In most forms of arbitration, a successful party can recover its funding costs, according to the 2016 decision in *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited*. In light of the defendant's behaviour in the arbitration, the Commercial Court upheld the decision of an arbitrator to allow a party to recover its third-party funding costs as 'other costs' under section 59(1)(c) of AA 1996. There is no equivalent procedure for litigation, and it is therefore uncertain whether an English Court would order an unsuccessful litigant to pay the litigation funding costs of the successful party.

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

In English litigation, yes, but not in arbitration.

In the case of *Arkin v Borchard Lines*, the claimant had owned a shipping line that he said had been forced out of business by anti-competitive and unlawful behaviour. Third-party funding was obtained, with the funder to receive 25 per cent of the recoveries up to £5 million and 23 per cent thereafter. The claimant lost. The claimant was impecunious and not in a position to pay the defendants' costs. The role of the third-party funder, in particular the funder's liability to pay the defendants' costs, came to be considered by the Court of Appeal. It is an established principle of English law that costs follow the event. It was held 'unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action'. However, the Court of Appeal was concerned that there would be a denial of access to justice if this principle were taken too far. If a professional funder who had undertaken to fund a discrete part of litigation were potentially liable for all the costs of all the opponents, then no professional funder would be likely to undertake the risk. The Court of Appeal's solution was that a professional funder who finances part of a litigant's costs of litigation should be potentially liable for the costs of the opposing party to the extent of the funding provided (commonly known as the 'Arkin cap'). In this case, the funder had spent £1.3 million on experts and supporting services,

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Update and trends

Inhibitions regarding the use of litigation finance are now in the past, with 2018 seeing greater judicial acceptance and further recognition of the fact that the involvement of a third-party funder can have significant benefits in controlling legal costs. The use of litigation finance continues its year-on-year growth, buoyed by claimants and law firms seeking innovative ways to manage the costs and risks of litigation. While funding of litigation or arbitration on a case-by-case basis retains its primacy, increasing numbers of law firms are likely to use portfolio finance (where the funder's risk and reward is spread across a number of cases being pursued by the same claimant(s) or being handled by one law firm) to gain an edge in an increasingly more competitive market for legal services.

and would be ordered to contribute the same sum to opponents' costs. Further guidance on the Arkin cap was recently given by the Court of Appeal in *Excalibur Ventures LLC v Texas Keystone Inc & Ors*. In this decision, the judge upheld the Commercial Court's decision that stated the Arkin cap should be calculated not only by reference to the amount a litigation funder provided in respect of the funded litigant's costs but also the amount provided by way of security for costs. The Court found that the money the litigation funders advanced to Excalibur to enable it to provide security for costs was an investment in the claim just as much as the money provided to pay Excalibur's own costs. The Commercial Court and the Court of Appeal agreed that both are components to be included in arriving at a figure for the Arkin cap. Therefore, payment of security for costs is simply part of the costs required to be met in order to be able to pursue the action.

It is also worth noting in the *Excalibur* decision, that the Court found that litigation funders are liable to pay indemnity costs awarded against the claimant. The Court's reasoning was that a litigation funder cannot dissociate itself from the conduct of those whom the litigation funder relies to make a return on its investment. Litigation funders, absent any extenuating circumstances, 'follow the fortunes of those from whom [they] hoped to derive a small fortune' and, in this case, that meant being held jointly liable for the indemnity costs ordered against Excalibur.

Arbitration is a consensual process, founded in the contractual arbitration agreement between the parties in dispute. An arbitral tribunal has jurisdiction to make orders only in respect of the parties to the arbitration agreement. This is unlikely to include a third-party funder.

19 May the courts order a claimant or a third party to provide security for costs?

Security for costs by a claimant

An English court may order a claimant to provide security for costs. Pursuant to CPR 25.13, the court may make an order for security for costs if it would be just to do so and one or more of the following conditions apply:

- the claimant is resident in a jurisdiction where it would be difficult to enforce a costs order;
- if a corporate entity, or acting on behalf of another as a nominal claimant (other than a representative claimant under Part 19 of the CPR), there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
- the claimant has withheld or changed his or her address with a view to evading the consequences of the litigation; or
- the claimant has taken steps in relation to his or her assets that would make it difficult to enforce an order for costs against him or her.

Section 38(3) of AA 1996, and the rules of most arbitration institutions based in common law jurisdictions, including England, expressly provide that arbitrators may order security for costs. While, technically, CPR 25.13 does not apply to arbitration, an English tribunal is likely to be guided by the approach referred to above.

Security for costs by a funder

CPR 25.14(2)(b) allows an English court to make an order for security for costs to be given by any party who 'has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings'. This definition is likely to cover many litigation funding arrangements.

Given the contractual basis of arbitration, an arbitral tribunal may order a party to pay security for costs only if that party enters into the arbitration agreement pursuant to which the arbitration proceeds. A third-party litigation funder is unlikely to do so.

Method and amounts

In court proceedings, security for costs usually takes the form of a payment into court or the provision by the claimant of a bond. Other alternatives available in litigation, and also in arbitration, include payment into an escrow account, bank guarantees, parent company guarantees, payment into court, a solicitor's undertaking or, in some circumstances, an after-the-event (ATE) insurance policy. See *Premier Motorauctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor* [2017] EWCA Civ 1872 (see question 21).

The amount awarded will usually be calculated by reference to the amount of costs the defendant would likely be awarded in the event that the claimant's case is unsuccessful. In arbitration, security may also be ordered in respect of arbitrators' fees.

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

The fact that a claim is funded is not, in itself, a ground on which a court may make an order for security for costs against a claimant under CPR 25.13. A defendant may seek to argue that the fact that the claimant is funded is evidence that the claimant will be unable to pay the defendant's costs if ordered to do so, which is a ground on which a court may make an order for security for costs against a claimant under CPR 25.13(c). However, while many claimants who seek third-party funding are impecunious, many others are not, and the mere fact of litigation funding would not be sufficient. Such a fact should not, in itself, influence the court's decision.

Under CPR 25.14, the court has the jurisdiction to make an order for security for costs against someone who has contributed to the claimant's costs in return for a share of any proceeds recovered in the proceedings, where the court is satisfied it is just to do so. This potential exposure of litigation funders to orders for security for costs against them does not, of course, of itself mean that an order for security for costs should be granted. In the High Court decision of *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), the Court examined factors it might consider in exercising its discretion, under CPR 25.14, as to whether or not to order security for costs against funder. These factors included:

- the motivation of the funder to be involved;
- the risk of non-payment by the funder;
- the link between the funding and the costs;
- the funder's understanding of the liability for costs; and
- other factors, including delay in bringing the application for security for costs, such as to tip the overall balance against making an order.

While, technically, CPR 25 does not apply to arbitration, an English tribunal is likely to be guided by the English court's approach referred to above.

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

Yes. ATE is both permitted and commonly used. There is a well-established and competitive market for ATE in respect of litigation and arbitration alike.

Because London is arguably the centre of the global insurance market, it is perhaps unsurprising that there are many other insurance products related to litigation and arbitration, including insurance for lawyers acting on contingency fee agreements, which covers the lawyers' fees in the event that the claim is lost, and judgment default insurance, which covers the risk that the defendant does not comply with a judgment against it.

As a general rule, London insurers will consider insuring any high-value risk relating to litigation or arbitration. There are specialist brokers who can liaise between litigants and insurers.

In *Premier Motorauctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor* [2017] EWCA Civ 1872, the Court of Appeal held that an

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appropriately framed ATE insurance policy could in theory answer an application for security for costs, but only if the ATE policy provided 'sufficient protection' to the defendant for the claimant being unable to meet the defendants' costs. Whether an ATE policy would provide that protection will depend upon the terms of the particular policy. In the *Premier Motorauctions* case, the Court held that the ATE cover provided did not give sufficient protection to the defendants because the policy could be avoided by the insurer. The ability for the insurer to avoid the policy led the Court to conclude that there was reason to believe that the claimant would be unable to pay the defendants' costs and security for costs was granted. It should be noted that the court considered the ATE policy as part of its determination of whether it had jurisdiction to grant the order for security for costs (ie, whether there was reason to believe the claimants would not be able to pay the defendants' costs), and not as part of its discretion to grant or refuse an order for security once jurisdiction had been established. As to discretion, the Court noted that once it is satisfied that the claimants are insolvent, that there was jurisdiction to order security for costs, and that an order would not stifle the claim, it is normally appropriate to order security.

In a further recent ruling, the High Court held that an ATE policy could be sufficient security, when accompanied by a deed of indemnity from the ATE insurer (ie, when the deed constituted a separate promise by the insurer to pay the defendant's costs, which was not subject to the same avoidance rights as the ATE policy itself) (*Recovery Partners GB and another v Rukhadze and others* [2018] EWHC 95 (Comm)).

ATE insurance cover was also considered in *The RBS Rights Issue Litigation* in relation to an application for security for costs against a funder.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no general requirement for a litigant to disclose a litigation funding agreement to any opposing party or to the court.

A litigant may, of course, voluntarily choose to do so. The fact that a professional third-party funder has agreed to back a litigation or arbitration may send a strong signal to the defendant both that the litigant has financial backing to bring the case through to trial, and that an objective third party believes the claim to be strong.

CPR 25.14(2)(b) is referred to in question 19. In the High Court case of *Wall v The Royal Bank of Scotland Plc* [2016] EWHC 2460 (Comm), the claimant was ordered to reveal the identity of third-party funders in order for the defendant to consider an application for security for costs against the funder. The Court held it has the power to order the claimant to disclose the identity of its litigation funder and whether the litigation funder would share in the proceeds of the litigation. However, this power could not be used as a 'fishing expedition' and such a disclosure would only be granted if there is good reason to believe the claimant is in receipt of litigation funding and an application for security for costs would have reasonable prospects of success. The Court concluded the facts of *The RBS Rights Issue Litigation* case met this test and ordered the relevant disclosure.

In the case of In the *Matter of Edwardian Group Limited* [2017] EWHC 2805 (Ch), the High Court rejected an application for an order disclosing the identity of the litigation funder, holding that it was irrelevant to the wider dispute.

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

In an unreported judgment in *Excalibur Ventures LLC v Texas Keystone Inc & Ors*, Mr Justice Popplewell held that legal advice privilege may apply 'insofar as the disclosure of the funding arrangements would or might give the other side an indication of the advice which was being sought or the advice which was being given', but that not all documents brought into existence for the purposes of actual or contemplated litigation will be protected by litigation privilege. Popplewell J agreed with previous authorities that it is the 'use of the document or its contents in the conduct of the litigation which is what attracts the privilege'. The Judge endorsed the principle stated in *Dadourian Group International Inc & Ors v Paul Simms & Ors* [2008] EWHC 1784 (Ch) that 'Litigation privilege . . . can include a communication between a client and his lawyer or between one of them and a third party which comes into existence after litigation is commenced or contemplated for the dominant purpose of obtaining information or advice in connection with such litigation or of obtaining evidence (or information which might lead to evidence) for use in the conduct of such litigation.' In *Excalibur*, Popplewell J held that the funding arrangements were directly relevant to the claims and defences pleaded in that case and as a result, the defendants were granted copies of Excalibur's funding agreements that were found not to be privileged. The Court was content for certain terms (including the success fee, settlement and termination provision) to be redacted to avoid any tactical advantage the defendants may get from reviewing the terms.

In the *Matter of Edwardian Group Ltd* [2017] EWHC 2805 (Ch) confirmed that a litigation funding agreement will be privileged where it 'gave a clue to the advice given by the solicitor (*Lyell v Kennedy (No. 3)* (1884) 27 Ch D 1), or betray[ed] the trend of the advice which [the solicitor] is giving the client' (*Ventouris v Mountain* [1991] 1 WLR 607)'.

Subject to *Excalibur* and *Dadourian*, the dominant view of practitioners appears to be that the litigant's privilege is protected in communications with a third-party funder by the common interest doctrine. A third-party funder may also be appointed as the litigant's agent for the limited purpose of reviewing and funding the case, which may add an additional layer of protection for the litigant's privilege.

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

There have been remarkably few publicly reported disputes between litigants and their funders. *Harcus Sinclair v Buttonwood Legal Capital Limited and others* [2013] EWHC 1193 (Ch) is rare example. In this case, there was a dispute in relation to the termination of a litigation funding agreement. The High Court held that the funder validly terminated the agreement under a clause that allowed for termination if, in the

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funder's reasonable opinion, the claimant's prospects of success were 60 per cent or less.

Another example of such a dispute is *Therium (UK) Holdings Limited v Brooke and others* [2016] EWHC 2421. In that case, a litigant was sentenced to prison for contempt of court after failing to obey court orders that arose from his alleged failure to pay his litigation funder a success fee following the settlement of his litigation.

The ALF has a procedure for complaints against its members.

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

Litigants and their instructed lawyers would be well advised to do business only with professional, regulated and properly capitalised funders (eg, funders that are ALF members). These members have committed to comply with the ALF voluntary Code of Conduct. This Code sets out clear and important rules governing the relationship between a funder and its client, and provides significant benefits to both parties, including clarity on issues such as case control, settlement and withdrawal.

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Germany

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

Third-party funding was launched in Germany in 1999. As is customary with new ideas, there were a few who took a critical standpoint, but the overwhelming majority of the legal community welcomed the idea. Litigation funding closed the gap between credit facilities provided by banks, which are typically not granted without securities being provided by the claimant, and the prohibition of lawyers providing legal services whose remuneration is based solely on a successful outcome of the case (pactum de quota litis). Commercial litigation funders do not – and are not allowed to – provide legal services. Therefore, statutory limitations on providing funding in return for a share of the proceeds do not apply in their case. Since 2010, conditional fee agreements may be concluded, pursuant to section 4a of the German Law on the Remuneration of Attorneys (RVG), but only in limited cases.

Third-party funding has, in fact, never been legally challenged; today, it is widely known and accepted. A small number of court decisions have also confirmed its legal structure as a partnership organised under the laws of the German Civil Code between claimant and funder. The courts' attitude ranges from neutral to positive, with no negative decisions against professional funders being known. This is different in cases in which lawyers try to use their own funding firms with the intention of acquiring clients and therefore funding their own mandates. Such practise would trigger a conflict of interest and accordingly constitute an infringement of the German lawyers' code of conduct, the Federal Regulations for Practising Lawyers (BRAO).

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

When it comes to determining a reasonable share of the proceeds for which a funder may ask, very few court decisions have been delivered so far. The standard terms and conditions call for a 30 per cent share of proceeds amounting to €500,000, and a 20 per cent share for any proceeds in excess of said amount. The Higher Regional Court of Munich confirmed in one case that a share of 50 per cent was justified because the funder stepped in after the first instance hearing had already been lost. A good rule of a thumb is that a share of 50 per cent is safe, but any share higher than that would, in all likelihood, and unless fully justified, go against public policy. As a matter of principle, the market regulates the share amounts to be agreed in litigation funding.

German funders do not charge interest. They prefer to structure their remuneration either as a percentage of the amount actually recovered or as a multiple of the amount invested. A hybrid model equipped with a cap or a floor is also a conceivable structure, for example, in international arbitration.

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

Because third-party funders are neither qualified as banks nor as insurers, neither legislative nor regulatory provisions apply.

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

The BRAO stipulate professional and ethical rules and regulations for lawyers; however, no specific rules regarding third-party funding exist. In accordance with various regulations and confirmed by innumerable court decisions, lawyers are obliged to advise their clients comprehensively and impartially. There have been no court decisions to date obliging lawyers to advise a client specifically about litigation funding and its options.

However, various contributions to the legal field champion such a duty of enabling the clients to choose whether they would like to take on the cost risk themselves or whether they would like to pass it on to a litigation funder. Because lawyers are already obliged to inform their clients about the possibility of obtaining litigation protection insurance, they are well advised to cover litigation funding too when informing their clients.

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

Financial institutions such as banks and insurance providers are regulated and supervised by the Federal Financial Supervisory Authority (BAFIN), located in Bonn. Commercial litigation funders are qualified neither as banks nor as insurance providers, therefore, they are not under the oversight of any public authority.

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

Most cases are referred to the funders by lawyers; the latter have assessed the claim's prospects of success and are aware that their clients do not want to fund or cannot afford to pursue legal proceedings. Funders are thus well advised to not interfere with the already existing lawyer-client relationship. If they did, and if that course of action became public knowledge, they would irreparably damage their main sales channel.

Hence, funders take into account the lawyer's quality and willingness to cooperate in their own overall assessment of a claim, and they will rather forgo offering funding than demand an alternative lawyer. Only where the claimant has not yet retained counsel do funders recommend lawyers to their clients. Of course, all funders dispose over their own network of lawyers and specialists.

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

This is handled differently depending on the funder. Some like to be involved to a higher degree and some prefer to remain in the background. However, all funders share the general conception of themselves as being more than just a cash provider and the preference for taking on an advisory role during the funding process.

8 Do funders have veto rights in respect of settlements?

All litigation funding contracts provide for this key issue. As a matter of principle, a settlement always requires the approval of both the claimant and the funder. If one party would like to settle and the other does not, the party willing to settle has a contractual right to terminate the funding contract. This has a twofold effect:

- the terminating party has the right to receive the share agreed for the case of a settlement being reached; and
- the party unwilling to settle at the offered terms proceeds with the case at its own risk (which might end with a better or worse result, or even a total loss).

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Update and trends

Increasingly more legal tech start-ups provide consumers with easy access to justice including funding (and lawyers) through internet platforms. This trend started some years ago with damages for delayed flights and other flight-related claims, but is growing and expanding the offered services in various areas of law fostered by fast-developing artificial intelligence software. A non-existent 'class action' still limits this growth, but consumer protection is on the agenda with the German government and the European Union. The European Commission recently published a *New deal for consumers* and the German government decided to establish on 1 November 2018 a special kind of class action (*Musterfeststellungsklage*). It appears to be only another step towards more class action style proceedings in the upcoming years which will then probably be available for consumer rights as well as for business claims (eg, cartel damages).

In practical terms, funders and clients are almost always able to come to a mutual understanding on whether a given settlement offer is to be accepted or denied. The most sensible course of action is for the funder and client (together with the lawyer) to work as a team. Should one party decide to leave the team, this weakens the remaining players, at the very least, and increases the risk for the party proceeding with the case (eg, the funder). As a matter of fact, claimants availing themselves of litigation funding will rarely be in a position to pay out a funder while the case has not yet been brought to a successful close.

9 In what circumstances may a funder terminate funding?

The commercial funder may terminate a funded case at any time and at its sole discretion should the chances of a successful outcome have been impaired. This may be because of new court rulings to the detriment of the claim, financial problems of the defendant or new facts that have come to light during the proceedings and that negatively influence the assessment of the claim. If, however, the funder terminates the funding contract, he or she is contractually obliged to pay all costs that have already been triggered in the course of the action (yet limited to those necessary to stop the case as quickly as possible). He or she further loses his or her right to receive a share of the proceeds. He or she retains, however, the right to have his or her investment refunded, provided the claimant finally succeeds on his or her own and receives payment.

This, however, is an ugly situation for a funder. Terminating the funding for an ongoing case, therefore, is always a funder's last resort. In a negative assessment of the case, he or she will have contemplated the case thoroughly and extensively and will also provide reasons for such assessment.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

As a general rule, German funders see themselves as active partners in a team that also comprises the claimant and the lawyer. They look at and check all writs and communication, and assist in analysing the best strategy and tactics before the case is officially pursued and throughout the whole process. The funders' representatives usually join meetings and take part in settlement discussions. It is also common that the funders' in-house lawyer responsible for the case is present in court or arbitration hearings. Because of the confidentiality of the funding, the lawyer's identity will, of course, not be disclosed. The defendant will only be informed of it if a disclosure strengthens the claimant's position (eg, in settlement negotiations).

Because class actions are gaining in relevance for business, litigation funders are book-building ever more cases. This means that the funder is active very early in the process and this, in turn, leads to the funder being heavily involved in the later proceeding as well, which then also includes choosing lawyers and experts. There are, however, no requirements in place for funders to take on an active role, but more than 19 years' worth of experience in professional litigation funding in Germany shows that funders are well advised to do so.

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

Since July 2010, German lawyers have been allowed to work for a partly success-based fee. The development came about because the government needed to limit expenses for legal aid, while at the same time improving access to justice. Section 4a of the RVG is not very precise, and the new regulation still lacks precedents setting a legal frame. As a matter of principle, it is understood that a lawyer may work for a success-based fee only if the client were deterred from proceeding on his or her own on account of his or her economic situation. The lawyer has to review whether or not this is true for his or her client. The scope of this due diligence has not yet been clearly defined and helpful court decisions are still lacking. One could argue that the lawyer must expend a reasonable amount of time and effort for the purposes of assessing his or her client's financial situation. In contrast to the rule in the United States, the lawyer is not allowed to fund court costs, corresponding costs or disbursements. He or she cannot agree on a success fee that provides for a percentage share in the proceeds, as funders do, because it lacks a connection to the statutory fees. Only a few lawyers – who are mostly from big international firms – use this opportunity, which is still quite new. Limited as they are to their fees, they are not direct competitors for litigation funders. On the contrary, funders make use of this circumstance to diversify the risk by agreeing on a fee that is (at least partially) contingent on a successful outcome.

12 What other funding options are available to litigants?

If a creditor does not qualify for legal aid in accordance with section 114 of the German Code of Civil Procedure (ZPO), which applies only to a very limited range of people, and if the claim cannot be sold, which is common for disputed claims, litigation funding is the only remaining possibility to enforce a claim. Some funders offer what is called 'monetarisation' or 'monetisation' and buy the claim for a portion of its value. This sounds like a good idea, but in practice it does not usually work. Either the creditor's price expectation is too high or the funder's offer is too low. In any case, agreeing on a sale of the claim and the further enforcement, including the involvement of the seller, may turn out to be rather cumbersome, if at all possible.

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

One needs to distinguish between the nature and the complexity of the claims. A comprehensive construction claim always takes longer than a claim based on a standard agency contract because of the necessity of obtaining expert reports in almost all cases. In any case, the majority of first-instance decisions are taken within one to two years.

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

About one-third of first-instance judgments are appealed, of which about 50 per cent are successful. This can mean a partial change, a settlement or an overturn. Under normal circumstances, an appeal takes at least another year or two. Difficult cases may run on for years. A third instance needs the approval of the court of appeals, which is delivered along with the decision. Today, only a few appellants move on to the Federal Court of Justice (BGH). If the court of appeals denies its approval, the unsuccessful party may bring a complaint against the refusal to grant leave to appeal on points of law directly with the BGH, but only about 5 to 10 per cent of complainants succeed in doing so.

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

Only a minority of judgments require enforcement proceedings. Because of Germany's long-lasting relative economic stability, non-payment of awards appears to be a negligible problem. Enforcement actions are triggered through the local courts. Court bailiffs work on a tariff system and have to take various legal limitations into account. They usually work slowly, but they do work. The defendant has a certain number of legal remedies at his or her disposal by which to hinder enforcement. As in almost all countries around the world, enforcement is an unpleasant and unsatisfying task.

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

Class actions as such, as they are customary in the US legal system, are unknown in Germany and the rest of Europe. It is possible to combine claimants through a bundling of claimants, but the legal framework is unclear and jurisdiction is colourful. A bundling of five to 10 claimants in one suit seems possible, provided their claims have the same legal basis and the individual taking of evidence (eg, hearing the individual parties) is not necessary. The handling differs from court to court and there is a risk of the court breaking up the suit into its individual, original cases. Besides these procedural problems, class actions can be funded.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

In accordance with section 91 of the ZPO, the unsuccessful party always pays the costs of the proceedings. These include court costs, expert costs (if ordered by the court) and the adverse costs in accordance with the German tariff system, but no costs beyond these. If the defendant, for example, incurred costs in excess of those stipulated by the German tariff system, or if the defendant provided a private expert opinion, those costs are generally not refundable. In case of a partial loss or win, costs are apportioned in the corresponding ratio. Because of the tariff system, court costs and those of lawyers can easily be calculated in advance; well-functioning calculators are available free of charge on the internet (eg, www.der-prozesskostenrechner.de).

Court decisions or orders that additionally refund the litigation funding costs, these being the funder's share in the proceeds, do not exist. Theoretically, a claimant would have to prove that his or her ability to enforce his or her claim depended solely on the support by a professional litigation funder (in return for a share in the proceeds). German courts are reluctant to expand access to damages and evidence hurdles are high. Premiums paid for litigation protection insurance are, for example, not accepted as damages (and after-the-event (ATE) insurance is unknown – see question 21).

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

No. Third-party funding is neither frivolous (the funder always supports a financially weaker party against a stronger party and its service allows access to justice and creates a desired 'balance of power' before the courts), nor is the contractual relationship between funder and claimant a contract with a third-party beneficiary.

19 May the courts order a claimant or a third party to provide security for costs?

Court orders for the provision of security for costs are very rare. In practice they are only possible for claimants from outside the EU. Even an insolvency administrator, who often has no funds at his or her disposal to cover adverse costs in case of a lost trial, cannot be prevented from suing somebody. Because funders are not a party to a trial, they cannot be ordered to deposit securities for the claimant. In addition, no obligations exist to disclose the (commercial) funding of a claim. In the rare case that security for costs is ordered, those costs are calculated and limited to the applicable tariff system for the defendant's and the court's costs.

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

See question 19.

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

Almost 40 per cent of German consumers and 20 to 25 per cent of companies have taken out litigation protection insurance, which covers all standard costs of a trial. ATE insurance is unknown. In practice, there is no necessity for it because of the easily calculated costs of lawyers and courts pursuant to the tariff system (which is, in comparison with the United Kingdom, inexpensive).

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

No. The disclosure of litigation funding is not required by law or by jurisprudence. As a matter of principle, litigation funding is confidential and will not be disclosed to the opponent unless advantageous (eg, in settlement negotiations).

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

The client-lawyer privilege common in Anglo-American contexts does not exist in German civil law. A German lawyer is, of course, obliged to keep all client information strictly confidential (as stipulated by section 43a(2) of the BRAO) and client documents in his or her possession cannot be seized by the authorities. But, importantly, there is also no obligation to disclose information in a trial. A party may keep unfavourable information and documents to itself and cannot be forced to disclose those to the other party or to the court. This principle is only deviated from under very limited exemptions (eg, a document that by its nature is only in the party's possession not bearing the onus of proof and that is relevant for a decision).

In addition, a party in civil proceedings (in contrast with criminal proceedings) has no right to lie (see section 138 of the ZPO). A lie in court is punishable under criminal law (as stipulated by section 263 of the German Criminal Code). Because a disclosure obligation similar to that in the Anglo and American legal systems does not exist practically in Germany, the provision for privilege can be dispensed with as well.

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

Only very few. Disputes between commercial funders and their clients are rare. Limited attempts at challenging funding agreements as such have all failed.

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

The German market of commercial litigation funding is neatly arranged. In fact, only three funders control over 90 per cent of the market. These are Roland ProzessFinanz AG in Cologne, Foris AG in Bonn and Legial AG in Munich. With respect to individual cases, no funders from outside of Germany are currently playing a major role in the German market. The minimum amount in dispute being funded is €100,000, and the standard share of the proceeds amounts to 30 per cent for any sum up to €500,000 and 20 per cent of any amount exceeding €500,000. However, individually agreed shares are common in larger cases.

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Hong Kong

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

Third-party funding is not generally permitted for litigation in the Hong Kong courts. Such funding is considered to infringe the doctrines of champerty and maintenance, which prohibit any party without a legitimate interest in the action from assisting or encouraging a party to that action in return for a share in the proceeds if the claim succeeds. Champerty and maintenance are both torts under Hong Kong law. They are also indictable offences at common law, punishable under section 101I of the Criminal Procedure Ordinance by imprisonment and a fine.

There are three – limited – exceptions to the general prohibition on litigation funding:

- 'common interest' cases, involving third parties with a legitimate interest in the outcome of the litigation;
- where 'access to justice considerations' apply; and
- a miscellaneous category, including insolvency litigation.

These exceptions were set out in *Unruh v Seeberger* [2007] 10 HKCFAR 31. Where one of the exceptions applies, litigation funding will be permitted.

Litigation funding is most commonly used in Hong Kong in respect of the third category: insolvency cases. Hong Kong courts will permit a funding agreement where it includes an assignment of a cause of action by a liquidator (*In re Cyberworks Audio Video Technology Ltd* [2010] 2 HKLRD 1137). The liquidator's right to assign causes of action is conferred by section 199(2)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, which empowers liquidators to 'sell the real and personal property and things in action of the company by public auction or private auction'. This includes a cause of action.

Section 199(2)(a) does not require the liquidator to seek the court's consent to the funding arrangement. In practice, however, the liquidator may choose to do so (eg, *Chu Chi Ho Ian v Yeung Ming Kwong* [2014] HKEC 1901).

Even where a claim falls outside the section 199(2)(a) exception to champerty and maintenance, Hong Kong courts have been willing to facilitate litigation funding in the insolvency context, as long as there is a 'legitimate commercial purpose' (*Jeffrey L Berman v SPF CDO I Ltd* [2011] 2 HKLRD 815; *In re Po Yuen (To's) Machine Factory Ltd* [2012] 2 HKLRD 752).

Until recently, it had been unclear whether champerty and maintenance applied to arbitration proceedings in Hong Kong. In *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 HKC 179, the Hong Kong Court of First Instance held that champerty and maintenance do not apply to arbitration proceedings, but are confined to the public justice system (ie, court litigation). However, a later decision of the Hong Kong Court of Final Appeal created confusion about the applicability of champerty and maintenance to arbitral proceedings. In *Unruh v Seeberger*, the Court of Final Appeal held that it had no objection to third-party funding of a claim that was arbitrated outside Hong Kong, in a jurisdiction (the Netherlands) that had no legal principle equivalent to champerty and maintenance. However, the Court left open whether champerty and maintenance applied to arbitrations in Hong Kong, because the question did not arise in that case. The judge indicated that it was for the Hong Kong legislature to clarify the position, should it so wish. The court in *Winnie Lo v HKSAR* [2012] 15 HKCFAR 16 made a similar statement.

Consequently, the Hong Kong Law Reform Commission formed a subcommittee (LRC Subcommittee) to conduct a public consultation on third-party funding of arbitration in Hong Kong. Following the consultation, the LRC Subcommittee recommended that the Arbitration Ordinance be amended to permit third-party funding for arbitrations taking place in Hong Kong. It also recommended that 'clear ethical and financial standards' be developed for third-party funders providing funding to parties to arbitrations in Hong Kong.

On 14 June 2017, Hong Kong's Legislative Council passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Funding Ordinance). The Funding Ordinance amends the Arbitration Ordinance to provide that third-party funding of arbitration and related mediation and court proceedings is not prohibited on grounds of champerty and maintenance. It makes similar amendments to the Mediation Ordinance.

As at September 2018, not all amendments are in force, but it is hoped that they will be effective soon. Sections 98E to 98J (definitions and interpretation) and 98P to 98X (code of practice) of the Arbitration Ordinance were gazetted on 23 June 2017 and are now in force. Sections 98K to 98O (third-party funding of arbitration not prohibited by champerty and maintenance; application to work done on arbitration outside Hong Kong and prohibition on lawyers funding arbitrations in which they act for any party) are not yet in force.

Hong Kong's Department of Justice recently issued a draft Code of Practice, which is subject to public consultation until 30 October 2018 (see question 5). It is hoped that the remaining provisions of the Funding Ordinance will be brought into force as soon as possible after the end of the consultation period.

As funding is only permitted in limited circumstances, it is not commonly used in Hong Kong. However, we are aware of some litigation funding activity, particularly for insolvency proceedings, and we expect this to increase significantly as soon as third-party funding of arbitration is permitted.

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

Fees and interest are matters for agreement between the funder and the funded party. Hong Kong law does not impose specific limitations on the amounts that third-party funders can charge.

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

Once the amendments enacted by the Funding Ordinance come into force, Part 10A of the Arbitration Ordinance will permit third-party funding of arbitration and related court and mediation proceedings in Hong Kong, as well as funding of work done in Hong Kong on arbitrations and related proceedings outside Hong Kong.

Third-party funding of mediations that are not related to an arbitration will be permitted under Part 7A of the Mediation Ordinance.

Law firms are prevented from funding cases by the Legal Practitioners' Ordinance and by professional conduct rules (see question 11). Section 98NA of the Arbitration Ordinance (once in force) will expressly prohibit lawyers and law firms from funding cases in which they act for any party in relation to the arbitration.

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

Professional conduct rules prevent Hong Kong lawyers and registered foreign lawyers from entering into conditional or contingency fee arrangements to act in contentious business. This prevents lawyers themselves, or their firms, from funding clients' claims in litigation or arbitration through such fee arrangements (see question 11). However, we are not aware of any rules that prevent lawyers from advising their clients on using third-party litigation, selecting funders or working with the funders during the proceedings.

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

Sections 98P and 98X of the Arbitration Ordinance (introduced by the Funding Ordinance) empower the Secretary for Justice to appoint an 'authorised body', which may issue a 'code of practice setting out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration'. Section 98Q sets out a number of criteria that the code of practice might include.

The same sections authorise the Secretary for Justice to appoint an 'advisory body' to monitor and review the operation of the Funding Ordinance, including the Code of Practice.

On 18 May 2018, Hong Kong's Department of Justice appointed Ms Teresa Cheng SC, Secretary for Justice, as the authorised body, with a remit to draw up the code of practice. On 30 August 2018, the Secretary for Justice issued a draft code of practice for public consultation. The consultation period will end on 30 October 2018.

On 24 August 2018, the advisory body was appointed. It comprises three senior, Hong Kong-based lawyers, Anthony Chow, Robert Pang SC and Victor Dawes SC.

In addition, to the extent that funders raise capital in Hong Kong, those activities could arguably be regulated by the Securities and Futures Commission, if the sources of funds amount to a 'collective investment scheme' under the Securities and Futures Ordinance. If the funds provided by a funder are considered a loan, the funder might be considered a 'money lender' under the Money Lenders' Ordinance and require a licence to conduct business with the funded party. However, most of the funding structures of which we are aware are unlikely to be considered a loan.

Where funders operating in Hong Kong, but based elsewhere, belong to regulatory bodies such as the UK's Association of Litigation Funders, they will typically adhere to that regulator's requirements when funding proceedings in Hong Kong.

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

In practice, yes, through their decision whether to fund the claim. Funders may decline to offer funding for a number of reasons, including that they are not happy with the party's choice of counsel. Where the funder is involved in the case before counsel is selected, the funder will generally be involved in the selection process.

Whether a funder is entitled to terminate funding during proceedings because it is dissatisfied with counsel will depend on the terms of the funding agreement.

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

Funders of arbitration proceedings may attend hearings, if the tribunal and all parties agree. Court hearings in Hong Kong are generally open to the public (apart from arbitration-related proceedings, which are not open to the public, unless the party applying for it to be heard in open court can satisfy the court that there is good reason), meaning that representatives of a funder may attend if they wish. In neither case is it usual for funders' representatives to take an active part in the proceedings.

Funders may attend mediation or other settlement negotiations if the parties (and any mediator or other third-party facilitator) agree.

8 Do funders have veto rights in respect of settlements?

A funder's rights to approve or reject a proposed settlement will depend on the terms of the funding agreement. In practice, the funded party will be guided by the terms of the funding agreement in deciding what to accept in settlement negotiations. This is because any settlement must allow the funded party to pay the funder its agreed share of the settlement amount or percentage of the funding amount (depending on the terms of the funding agreement).

9 In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate funding are a matter for agreement between the funder and the funded party, and should be recorded in the relevant funding agreement. Examples include the assessment of the merits becoming significantly worse during the case or the funder becoming aware of wrongdoing by the funded party.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Section 98Q of the Arbitration Ordinance provides that Hong Kong's code of practice for funders may require funding agreements to set out their key features, including 'the degree of control that third-party funders will have in relation to an arbitration'. While the code of practice is not yet in force (see question 5), the consultation draft prohibits funders from seeking to influence the funded party, or its lawyers, 'to give control or conduct of the arbitration or mediation to the third-party funder except to the extent permitted by law'. It also requires the funder not to take steps that cause, or are likely to cause, the funded party's legal representatives to breach their professional duties (see paragraph 2.9 of the Code).

In practice, some funders take a much more active role than others. At minimum, funders generally require regular updates from counsel on the progress of the case. They may also ask for updates on an ad-hoc basis, or when there is a significant development in the case. Funders may also advise counsel and the funded party on aspects of the case. In England and Wales, it is generally accepted that funders must not control the conduct of the case; such control remains with the litigant. Funders in other jurisdictions, notably Australia, exercise a higher degree of control. For example, some funders are known to have placed a representative within the counsel team for the duration of the case.

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

No. Hong Kong solicitors and barristers may not enter into conditional or contingency fee arrangements for acting in contentious business. The same restriction applies to foreign lawyers who are registered to practice in Hong Kong.

The restriction derives from section 64(1) of the Legal Practitioners Ordinance, Principle 4.17 Solicitors Guide to Professional Conduct, paragraph 124 of the Bar Association Code of Conduct, and the common law. This is confirmed by section 98NA of the Arbitration Ordinance (see question 3). These restrictions prevent law firms from acting as funders in Hong Kong, other than where they are providing third-party funding at arm's length in relation to a matter in which they do not act for any party.

12 What other funding options are available to litigants?

Litigants may fund proceedings using a bank loan, obtained on an arm's-length basis. However, a significant number of claimants who seek funding are impecunious, and may have difficulty obtaining a loan.

There is anecdotal evidence in Hong Kong of third parties who wish to fund a litigation, in which they have no legitimate interest, acquiring shares in the claimant entity, in order to create an interest and avoid liability for champerty and maintenance.

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

According to statistics released by the Judiciary of Hong Kong in February 2016 covering the period from April 2009 to March 2015, commercial claims at first instance take an average of two to two and a half years from commencement to trial. Anecdotal evidence suggests that it can take anywhere from three to six months before judgment is handed down after trial.

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

It is common for decisions to be appealed from Masters to the Court of First Instance (in respect of interlocutory decisions).

However, data from the Hong Kong Judiciary Annual Report 2017 (the Report) shows that a very small proportion of first instance judgments under the civil jurisdiction are appealed to the Court of Appeal, despite the fact that leave is not required (apart from certain limited circumstances) to make an appeal from the Court of First Instance to the Court of Appeal. According to the Report, only an estimated 1.6 per cent of first instance civil judgments were appealed to the Court of Appeal. The Report recorded 89 days (ie, three months) as the average waiting time for civil cases at the Court of Appeal from application to hearing date in 2017, which represents a 21 per cent improvement from the time reported in 2015 (ie, 112 days).

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

These statistics are not available. Whether or not a judgment may easily be enforced in Hong Kong depends on various factors, including the following:

- the availability of assets within the jurisdiction;
- the accessibility of assets that may be available;
- the type of judgment being enforced;
- whether a party is seeking to enforce a domestic or a foreign judgment; and
- in the case of a foreign judgment, whether there is a reciprocal enforcement arrangement between that country and Hong Kong.

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

At present, there is no class action regime in Hong Kong. The only avenue that is currently available for multiparty litigation is by way of a 'representative action' brought by a party on behalf of a group of others who have the same interest in the proceedings. The 'representative action' framework, however, is inadequate for dealing with large-scale multiparty situations, and courts in Hong Kong have had to proceed on an ad-hoc basis without rules designed to deal specifically with group litigation. Representative actions are not common in Hong Kong. Where they do occur, third-party funding is, in principle, permitted, where one of the recognised exceptions to champerty and maintenance applies (see question 1).

In May 2012, the Law Reform Commission published a report recommending the introduction of class actions in Hong Kong with a number of key features, including:

- the regime is implemented on an incremental basis, beginning with consumer cases (ie, tort and contract claims by consumers);
- such actions may only proceed with certification by the court;
- one of the criteria of the certification should be a representative plaintiff's financial ability to satisfy an adverse costs order, which should also be required to prove to the court's satisfaction that suitable funding and costs-protection arrangements are in place at the certification stage;
- an 'opt-out' approach be adopted as the default position for local parties and an 'opt-in' approach be adopted for overseas parties; and
- a general class actions fund be established in the long term to help fund eligible impecunious plaintiffs to pursue class actions, and the Consumer Legal Action Fund be expanded in the short term to fund class actions arising from consumer claims.

The Department of Justice, in response to the report, established a working group to consider the details of the proposed regime and make recommendations to the government. No reports have been published by the working group to date.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B of the High Court Ordinance empower the Hong Kong courts to order costs for or against any party to the proceedings, or a non-party, including a third-party funder. This is usually referred to as an 'adverse costs order'. The courts also have the discretion to order the extent to which the costs are to be paid. Usually the courts order that costs 'follow the event' (ie, that the unsuccessful party must pay to the successful party costs that were necessary to pursue or defend the action). It is exceptionally rare for a successful party to recover all of its costs in litigation. In practice, a party can expect to recover about half of the actual costs incurred by the litigant. It is not clear whether Hong Kong courts will be willing to order an unsuccessful litigant to pay the funding costs of its successful counterparty. English law is no longer binding on Hong Kong courts, although it is persuasive. Hence, it is at least possible that the Hong Kong courts might make such an order in appropriate circumstances, following the English case of *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm).

Arbitral tribunals sitting in Hong Kong have broad discretion to allocate the costs of the arbitration as they see fit. Section 74(2) of the Arbitration Ordinance provides that the tribunal may direct in its award 'to whom and by whom and in what manner the costs [of the arbitral proceedings] are to be paid'. However, the tribunal must only allow costs that are 'reasonable in all the circumstances' (section 74(7)(a) of the Arbitration Ordinance). It is most usual for Hong Kong tribunals to order that costs follow the event, but there is no universal practice.

In arbitration-related court proceedings in Hong Kong, the courts have developed a practice of ordering costs on a higher basis (known as the 'indemnity' basis) against a party that fails in an arbitration-related application. This has been applied in applications to challenge arbitral agreements, set aside arbitral awards, and resist enforcement of awards (among others). On the ordinary basis, the unsuccessful party will generally pay 50 to 75 per cent of the other side's actual expenditure. An indemnity costs order will require the unsuccessful party to pay all of the successful party's costs, except where they are unreasonable in amount or have been unreasonably incurred (Order 62, Rule 28(4A) of the Rules of the High Court).

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

In Hong Kong litigation, Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B of the High Court Ordinance empower the courts to order any third party, including a third-party funder, to pay costs. The court's order is known as an 'adverse costs order'.

In arbitration, the funder is generally not a party to the arbitration agreement. As a result, the tribunal lacks jurisdiction over the funder and cannot order it to pay adverse costs. Instead, the tribunal may make the adverse costs order against the funded party. Whether the funder will fund (or reimburse) the funded party in respect of any adverse costs paid will depend on the terms of the funding agreement. Section 98P of the Arbitration Ordinance provides that the code of practice may require funders to ensure that the funding agreement stipulates whether, and to what extent, the funder will be liable to the funded party for adverse costs orders made against the funded party. Funders' practice with respect to accepting liability for adverse costs varies. The consultation draft contains such a requirement.

19 May the courts order a claimant or a third party to provide security for costs?

Order 23, Rule 1 of the Rules of the High Court provides that the court can order security for costs against the plaintiff only. The court has no power to order security for costs against a third-party funder. However, the funding agreement can provide for the funder to reimburse the plaintiff for any amount paid into court in compliance with a security for costs order. This is a matter for agreement between the funder and the funded party.

Unless the parties agree otherwise, arbitral tribunals sitting in Hong Kong can order security for costs against a party to the arbitration (section 56(1)(a) of the Arbitration Ordinance). The tribunal has no jurisdiction to make such an order against a third-party funder. However, funding agreements will typically provide that a funder will pay any security for costs order, because, if such order is not paid, the claim will not proceed. Section 98P of the Arbitration Ordinance provides that the code of practice may require funders to ensure that the funding agreement stipulates whether, and to what extent, the funder will be liable to the funded party for security for costs orders made against the funded party. The consultation draft contains such a requirement.

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

As far as we are aware, this question has not arisen in funded litigations in Hong Kong. Arbitral tribunals sitting in Hong Kong may order the claimant to give security for the costs of the arbitration. However, they may not make such an order only on the grounds that the claimant is not based in Hong Kong (section 56(2) of the Arbitration Ordinance). These decisions are usually confidential, so it is not possible to say whether a tribunal is likely to be influenced by the existence of third-party funding in deciding whether to order security for costs.

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

There is no legislative or regulatory prohibition on ATE insurance in Hong Kong. However, third-party funding is a nascent market in Hong Kong. We are not aware that ATE or any other type of insurance are commonly used at present, but this is likely to change.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Where the funded party voluntarily seeks the court's approval of the funding arrangement, the court and other party will become aware that the arrangement exists and (possibly) learn the funder's identity. However, there is no general obligation on a funded litigant to seek the court's approval of the funding arrangement, nor is there a general obligation to disclose details of the funding arrangement to the court or the opposing party.

In June 2016, a Hong Kong court ordered plaintiffs to disclose details of the court's earlier approval of their litigation funding arrangements, where these were contained in evidence filed in support of the plaintiffs' ex parte applications to extend time for service of legal proceedings (*Enrich Future Ltd v Deloitte Touche Tohmatsu* HCCL 10/2011, 22 June 2016). The judge acknowledged that disclosure of the funding arrangement might put the defendant at an advantage, in particular by giving it an understanding of the plaintiffs' litigation 'war chest'. However, he considered that the principle of open justice prevailed over any concern about giving one party a tactical advantage. In accordance with that principle, the plaintiffs were entitled to know in full the evidence that had been presented to the court to obtain ex parte relief against them, including the evidence regarding the funding arrangements.

Section 98U of the Arbitration Ordinance (once in effect) will require a funded party to give written notice of the fact that a funding agreement has been made, as well as the name of the funder. The notice must be given to each other party to the arbitration, and to the arbitral tribunal, court or mediator (as appropriate). The funded party must also give notice if the funding agreement ends, other than because the arbitration has ended.

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

The right to assert legal professional privilege is enshrined in Hong Kong's Basic Law. Article 35 provides that Hong Kong residents shall have the right to 'confidential legal advice'.

To maintain privilege in any communication under Hong Kong law, the communication must remain confidential. Assuming that communications between a funder and the funded party are confidential (either pursuant to a confidentiality agreement or otherwise), they should be protected by litigation privilege. Litigation privilege protects communications between a lawyer, the lawyer's client and any third party, where litigation is pending or in reasonable contemplation, and the communications are made for the 'sole or dominant' purpose of preparing for or dealing with the litigation. (For the purposes of this test, 'litigation' includes both litigation and arbitration proceedings.)

In the context of arbitration, section 98T of the Arbitration Ordinance will permit a party to disclose information relating to the arbitration to a person without losing confidentiality in the information, for the purpose of having or obtaining third-party funding from the person. However, the person to whom the information is disclosed may not communicate it further, subject to certain exceptions.

Common interest privilege may also apply between the funder and the funded party, since they will have a common interest in the outcome of the proceedings. For common interest privilege to apply, the purpose of the communication must be for the parties to inform each other of the facts, issues or advice received in respect of a legal issue, or to obtain or share legal advice in respect of contemplated or pending litigation.

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

We are not aware of any such disputes.

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

There are no other issues.

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Ireland

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

Third-party litigation funding is not generally permitted in Ireland. The maintenance and champerty rules exist under the Maintenance and Embracery Act (Ireland) 1634 and prohibit third-party funding by third parties who have no legitimate interest in the proceedings.

The superior courts in Ireland have considered the impact of this old statute in a number of cases between 2013 and 2018 and, to date, have affirmed the rules still exist. In the context of third-party funding, an application was made in the case of *Persona Digital Telephony Ltd & anor v Minister for Public Enterprise & Others* (2016) to assess the legality of a third-party funding agreement. The plaintiff, Persona Digital Telephony Limited, was unable to fund the proceedings. A professional third-party funder from the UK was prepared to enter into a litigation funding arrangement. The plaintiff sought a declaration from the High Court that the litigation funding arrangement did not constitute an abuse of process or contravene the rules on maintenance and champerty.

While the High Court had some sympathy for the plaintiff, it affirmed that both maintenance and champerty are part of Irish law and are torts and criminal offences. The High Court found that to permit a litigation funding arrangement by a third party with no legitimate interest in the proceedings would necessitate a change in legislation and this could not be done by the High Court. This decision was unexpected, given some obiter dicta from the High Court in a judgment approving after-the-event (ATE) insurance that provided that the laws have to be interpreted in the context of modern social realities.

The decision was appealed to the Supreme Court to determine the question of: 'Whether third-party funding, provided during the course of proceedings (rather than at their outset) to support a plaintiff who is unable to progress a case of immense public importance, is unlawful by reason of maintenance and champerty.' The Supreme Court dismissed the appeal holding that the torts and crimes of maintenance and champerty continue to exist in this jurisdiction and it is for the legislature and not the courts to develop the law in this area and, in such circumstances, 'a person who assists another's proceedings without a bona fide independent interest acts unlawfully.' In July 2018, in the case of *SPV OSUS Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors*, which concerned the legality of an assignment of a cause of action, the Supreme Court called upon the legislature to urgently reform the area, failing which the Supreme Court itself may intervene. The Supreme Court has identified that:

> *urgent reform is needed so that the right of access to the courts can be rendered effective in a practical sense. It falls, in the first instance, at least, to the legislative arm of the State to take such measures as are necessary to this end. Given the complex nature of the issue involved and the multitude of ways (each with their own advantages and also drawbacks) in which it could be alleviated or remedied, it is a matter which should be resolved by the Oireachtas. The legislature is undoubtedly best equipped to carry out the sort of wide-ranging analysis, and balancing of important policy considerations, which would be required in order to ensure that the necessary change to the law can effectively vindicate the right of access to the courts. I urgently call for them to do so . . . where the legislature persistently fails to take corrective measures to vindicate a constitutional right, such as the right of access, responsibility in this regard will fall to be discharged by the judiciary. For my part, there will come a time when not to respond must constitute a neglect of responsibility; when that occurs, I will not hesitate to positively and decisively intervene in this area.*

While professional third-party funding arrangements are currently unlawful in this jurisdiction, the Irish courts have found that third parties who have a legitimate interest in proceedings, such as shareholders or creditors of a company involved in proceedings, can lawfully fund them, even when such funding may indirectly benefit them.

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

Third-party litigation funding is not currently permitted in this jurisdiction. As such, there are no limits.

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

Third-party litigation funding is not currently permitted in this jurisdiction by virtue of the common law rules on maintenance and champerty.

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

Because professional third-party litigation funding is not currently permitted in this jurisdiction, this question is not applicable.

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

No. See questions 1 to 4.

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

Currently not applicable.

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

Currently not applicable.

8 Do funders have veto rights in respect of settlements?

Currently not applicable.

9 In what circumstances may a funder terminate funding?

Currently not applicable.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Currently not applicable.

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

Litigation lawyers may enter into conditional or contingency arrangements with clients, where any payment made at all by the client to the

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solicitor is contingent on the success of the case. However, Irish lawyers are expressly prohibited from charging fees by reference to a percentage of damages awarded.

These arrangements are referred to as 'no foal, no fee' or 'no win, no fee' arrangements and are more common in personal injury claims involving an individual plaintiff than in commercial cases.

12 What other funding options are available to litigants?

In the *Greenclean Waste Management v Leahy* (2014) case, ATE insurance policies were held not to offend the rules of maintenance and champerty. Such policies can be used as security for costs, providing the terms are not conditional. No foal, no fee arrangements are permitted whereby the lawyers defer billing until the case has been won. Finally, third-party funding is permitted where the funder has a legitimate pre-existing interest in the litigation. During the course of argument in *Persona*, the question arose of a 'hypothetical situation in which the funders might actually acquire a shareholding in the plaintiff companies, with the intention of procuring adequate funds to process the litigation'. MacMenamin J commented that the validity of that type of funding remains unresolved following *Persona*. The purchasing of both the assets and liabilities (including anticipated or pending litigation against the company) of a company is common course. The issue will be whether there is any prohibition on a funder investing into a plaintiff company in this manner rather than simply funding the litigation for a share of the proceeds of the litigation. There is no obvious reason why an investor or purchaser of the shares in a plaintiff company would not have the same rights and obligations as all other shareholders and, therefore, should be entitled to reap the rewards, if any, as a shareholder in the plaintiff.

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

The length of time for a commercial claim to reach a decision in the High Court can vary considerably depending on the complexity and urgency of the case. However, recent data provides that the average length of High Court proceedings, from issue to disposal, is approximately two years.

In certain circumstances, a claim may be transferred to a division of the High Court known as the Commercial Court. The Commercial Court runs extremely stringent case management procedures and generally, although not always, delivers judgment promptly. According to Commercial Court statistics, 90 per cent of cases are decided within one year. There are considerable delays in the appellant courts.

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

According to recent data, approximately 2.5 per cent of High Court cases are appealed. These decisions can be appealed to the Court of Appeal or, in certain circumstances, to the Supreme Court. The average length of such proceedings is approximately two years in the Court of Appeal and three years in the Supreme Court.

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

There is no data publicly available.

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

There is no legislative framework, or formal procedure, in Ireland to facilitate class actions. However, multiparty litigation does occur and is often brought by way of 'represenive action' and 'test cases'. The Irish Commercial Court has applied scheduling measures to ensure consistency and efficiency in its handling of multiparty litigation, in particular, in financial services litigation. Frequently, a small selection of cases are tried together on the basis that it is likely the others will follow the judgment.

For example, in 2008, the Commercial Court was faced with more than 50 individual shareholder claims related to the fraudulent investment operations run by Bernard Madoff, and the Commercial Court decided to take forward a small number of cases initially, as representative actions or test cases. In this instance, it was decided that two cases by shareholders and two cases by funds would be heard sequentially as a first step, and the Court stayed the other claims pending the resolution of the four test cases.

A similar approach was adopted by the Irish Commercial Court in relation to claims for the mis-selling of financial products that were initiated by over 200 claimants against ACC Bank in 2010. Five claimants' cases were heard as test cases and the remaining claimants agreed that 'the outcome of the litigation will determine the result of their claims, subject to the possibility of a separate trial on particular and unusual facts different to those in issue in these proceedings.'

Funding of the representative action by the class members does not offend the laws of maintenance and champerty, as the class has a pre-existing legitimate interest in the litigation. Professional third-party funding is prohibited.

The potential introduction of class actions in Ireland is under consideration by a group established to review and reform the administration of civil justice throughout the country.

The proposal by the European Commission to introduce a collective redress mechanism for consumers may also change the current position, if introduced.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Yes. The loser-pays rule applies in this jurisdiction.

As such, costs 'follow the event' or, more simply, the successful party is entitled to recover its costs from the unsuccessful party. However, costs are ultimately a matter of discretion for the court and it is common now for issues-based cost awards to be made.

In addition, costs are usually awarded on a party-party basis rather than solicitor-client basis, which means that only the costs reasonably incurred by the successful party in prosecuting or defending the litigation are recoverable. Typically, recoverable costs are 50 to 75 per cent of the total costs incurred.

In relation to whether the courts may order the unsuccessful party to pay the litigation funding costs of the successful party, third-party litigation funding is not permitted in this jurisdiction, as set out in question 1, therefore this question is not applicable.

However, the case law in this area confirms that a legitimate third-party funder would be exposed to pay the unsuccessful party's costs. In *First Active Plc v Cunningham* [2011] IEHC 117 the High Court held that Mr Cunningham, who was the beneficial owner, a director and a 'prime mover' of the plaintiff companies in related litigation *Moorview Developments Limited & others v First Active plc & others* [2009] IEHC 214, was personally liable for the costs arising from the related. It was inferred that Mr Cunningham had funded the *Moorview* litigation, and that he had brought it for his own benefit. Mr Cunningham appealed the judgment of the High Court to the Supreme Court denying that he was the funder of the proceedings and argued that the High Court had no jurisdiction to make such an order, and that, even if it did, such jurisdiction was wrongly exercised in this case.

The Supreme Court dismissed Mr Cunningham's appeal on all grounds. While the Supreme Court noted that costs orders against non-parties are the exception rather than the rule in litigation, it confirmed that the Irish courts have a broad discretion to make such orders. The Supreme Court noted that one of the factors it would take into account in considering whether to make a costs order against a non-party is whether the non-party was on notice of the intention to apply for a non-party costs order. This factor is consistent with the approach taken in *Thema International plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357, where the plaintiff was ordered to undertake that the third-party funder (shareholders in the plaintiff) be notified of the potential for third-party costs liability and to keep proper records of third-party funding. This should ensure that HSBC could pursue the third party for costs at a later stage, if appropriate.

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

The Irish courts have recognised a jurisdiction under the Rules of the Superior Courts to make an award of costs against a legitimate third-party litigation funder (eg, a shareholder or creditor). See question 17.

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19 May the courts order a claimant or a third party to provide security for costs?

A defendant may make an application to court to seek security for costs from a claimant; however, it is at the court's discretion whether or not to make such an order.

It is important to note that different rules apply to foreign individuals and corporations than apply to Irish citizens and corporations. It is virtually impossible to obtain an order against an individual based in Ireland, the European Union or the territory covered by the Brussels Convention. The court grants such an order only in the following circumstances:

- if the claimant is resident outside the jurisdiction and not within the European Union or the European Free Trade Area (EFTA);
- if the defendant has a prima facie defence to the claim and verifies this on affidavit; or
- if there are no other circumstances that obviate the need for security for costs.

The defendant applies for security for costs by way of request to the claimant. If the claimant fails to agree to provide security within 48 hours of receiving the request, the defendant can make an application for security for costs to the court by notice of motion and grounding affidavit.

Security for costs can also be sought against an Irish corporate claimant. It is generally easier to obtain an order against a corporate claimant than an individual claimant, as a company has the benefit of limited liability. The defendant must establish a prima facie defence and demonstrate that there is reason to believe that the claimant would be unable to pay a successful defendant's costs. The onus then shifts to the claimant to establish that the order should not be granted. If an order is granted, the proceedings are stayed until the claimant provides the security. If the claimant does not provide the required security, its claim is dismissed.

Typically, security is a percentage of the predicted costs where there is evidence that the party is impecunious. In cases where the security is granted as the party resides outside of the EU or EFTA, it will be calculated on the basis of the additional cost of enforcement of a judgment.

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

See question 19.

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

ATE insurance is permitted in this jurisdiction. It is a relatively new product on the market and is not yet commonly used. However, as a result of a 2014 case confirming its legitimacy, it may become more popular. There are no other similar types of insurance available to claimants.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no obligation on a party to proceedings to disclose a funding agreement that is in place between itself and a legitimate third-party funder. An opposing party can make an application for disclosure of such an agreement, but this may not be granted.

In the recent *Persona* High Court case, the Court was asked to determine whether professional funding contravened the laws of maintenance and champerty. The judge held that a funding agreement was to be disclosed to the extent that it was necessary for the Court to determine the issue of whether the funding was lawful. He held that information relating to budgeting and method of payment, etc, was to be redacted, and that while it may later become relevant, such information was not relevant at the time and did not need to be disclosed. He stated that he was:

> *of the view that where the disclosure of the details of the funding agreement might confer an unfair and disproportionate litigation advantage, there should be careful scrutiny of the necessity for production of the document for the fair disposal of the issue.*

As such, it appears that a party may be compelled by the court to disclose a funding agreement to the extent that it is necessary to determine a particular issue, but that the courts will be reluctant to so do if it would result in an unfair advantage to the party seeking disclosure.

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

Yes. To the extent that the agreement is lawful it would be a privileged communication if the dominant purpose was the preparation and defence of the litigation.

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

There have been no reported disputes between litigants and their funders in Ireland.

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

No.

* *The authors would like to thank Valerie Sexton for her contribution to this chapter.*

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Israel

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Woodsford Litigation Funding

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

Third-party funding of litigation and arbitration is permitted in Israel and has received positive judicial endorsement. In *Benny Bachar Zoabi Construction company v Bank Hapoalim*, LF 29526-10-16 (Nazareth District) (published in Nevo, 26 October 2017), the vice president of Nazareth district court, Judge Attif Ailablouni, while holding that a litigation funding agreement was valid, also encouraged the use of such funding agreements in liquidation cases:

> *Finally, there is a fund that is willing to examine potential claims with professional eyes, and where the prospects of the claim look good, will be willing to fund the costs of the claim, while taking the risk that if the claim is rejected, there will not be indemnity on the funding costs, and if it succeeds, the fund will be indemnified and will receive additional returns. There is no doubt that we should bless the establishment of the fund and even say that it is a shame that it did not arise before. The idea underlying the establishment of the fund would enable the right of choice of the insolvency firm, if it so wishes, to use funding to file a claim and prevent a situation in which justified claims are waived only because of a shortage of funds. It is also necessary to encourage officeholders to apply for the services of the fund where it appears that there is a justified claim that has no sources of funding.*

The use of third-party litigation funding in Israel has only recently taken off, but has grown quickly and significantly over the past three years to become an accepted part of the litigation landscape. While most of the positive judgments regarding litigation funding in Israel have related to liquidation cases, the courts have also endorsed funding in general litigation.

The courts have not provided comprehensive rulings on the Israeli court's approval regarding all of the issues relevant to litigation funding. However, the courts have, through positive endorsement of funding, certainly established a favourable environment for litigation funding.

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

There are no specific statuary limitations on the fees or the interest a funder can charge, but according to the professional regulations governing lawyers in Israel, Bar Association Law, 5721-1961, the courts have the right to alter and reduce a lawyer's contingency fee arrangements if they are held to be excessive. Also, in liquidation cases, a liquidator requires the court's approval to enter into a funding agreement and the court may review the terms of that funding agreement to determine whether entry into a funding arrangement is in the best option available to the company in liquidation.

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

Presently there are none.

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

In Israel, a lawyer's conduct is governed by the lawyer's Bar Association Rules (Professional Ethics), 5746-1986 and Bar Association Law, 5721-1961. There are no specific professional or ethical rules applicable to a lawyer's advice in respect of third-party litigation funding, but general professional or ethical rules do apply:

- lawyers are obliged to act in the best interest of their clients;
- all information a lawyer obtains in relation to a case is confidential;
- lawyers are prevented from sharing their fee income with a third party (unless the third party is a lawyer); and
- lawyers are prohibited from soliciting work from their clients (either directly or through a third party).

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

At present, no public bodies have a specific interest in or oversight over third-party litigation funding, apart from in a liquidation context, in which a liquidator is required to seek the court's approval when entering into a funding agreement with a third-party funder.

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

There is no specific prohibition on a third-party funder insisting on a choice of counsel, and the courts have not yet considered the issue.

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

Court hearings are generally public (unless the court holds differently) and funders can attend without having to obtain permission. The court will usually set out the names of those in attendance at the hearing in the protocol (that is the transcript of the proceedings). In arbitrations or settlement proceedings, the parties usually have the right to decide who will attend on their behalf.

8 Do funders have veto rights in respect of settlements?

A funder's rights to approve or reject a proposed settlement will depend upon the terms of the funding agreement. There are no specific restrictions on these rights under Israeli law.

9 In what circumstances may a funder terminate funding?

The funder's right of termination will be a matter of contract to be addressed in the funding agreement. There are no specific restrictions on this under Israeli law.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

The level of involvement the funder takes in the litigation process will be determined by the terms of the funding agreement. There are no specific restrictions on this under Israeli law.

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

According to the Bar Association Law, 5721-1961 and the Bar Association Rules (Professional Ethics), 5746-1986, lawyers may enter into conditional or contingency fee arrangements, except in criminal cases. However, lawyers are not permitted to make payments for clients' expenses (such as court fees or expert costs) on their clients' behalf or to provide their clients with guarantees.

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12 What other funding options are available to litigants?

In several types of class action, where the case is of public and social importance, the Ministry of Justice or the Israeli Securities Authority may support the claimant with funding from dedicated funds. Also, litigants may ask for an exemption from the payment of court fees when they are unable to meet those costs, or where the claim relates to bodily injury matters. Various insurances may also contain legal expenses coverage.

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

According to the 2017 Israeli Judiciary report, an average civil procedure in the district court will take just over 16 months (including compromises and withdrawals).

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

There are no accurate, up-to-date statistics on the proportion of first instance judgments that are appealed. However, according to the 2017 Israeli Judiciary report, 842 civil appeals were filed in 2017, 115 less than 2016. Also, according to the report, an average civil appeal in the Supreme Court took just under 17 months (including compromises and withdrawals).

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

There are no statistics available measuring the proportion of judgments which require contentious enforcement proceedings. The enforcement process is regulated by the Execution Law, enacted in 1967. A judgment rendered by an Israeli court is, in general, enforceable if it is final and binding and if the court or the Chief Enforcement Officer has not suspended its enforcement. In general, the enforcement of an enforceable judgment or arbitral award in Israel is not yet seen as particularly burdensome. The methods of enforcement available to the judgment creditor include:

- seizing a judgment debtor's assets;
- third-party debt order;
- insolvency proceedings;
- appointment of a receiver;
- attachment of earnings; and
- preventing the debtor from leaving the country.

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

Class actions are permitted in Israel. The Israeli Class Action Law came into force in 2006, and formally regulates the proceedings applying to class actions in Israel. Since the advent of the Law, class actions have become a favoured path of pursuing litigation. The majority of class actions filed in Israel are consumer claims against corporate entities, and there are also a lot of securities and antitrust claims. As mentioned, the Ministry of Justice or the Israeli Securities Authority may fund the claim when it is of public and social importance. There is no prohibition on funding a class action.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The court will usually order the unsuccessful party to pay some of the costs of the successful party. The amount will usually be significantly lower than the costs that are incurred by the successful party. To date, the courts have not been asked to rule on whether an unsuccessful party should pay the litigation funding costs of the successful party. Given the relatively low amounts that are often granted to a successful party in respect of its legal costs, it is unlikely, at least in the near future, that the courts would order an unsuccessful party to meet such a cost.

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

No. According to the Civil Procedure Regulations, 5744-1984, only the party to the litigation can be liable for adverse costs.

19 May the courts order a claimant or a third party to provide security for costs?

The Civil Procedure Regulations, 5744-1984 and the Companies Law No. 5759-1999 allow the court to order a claimant to deposit security to meet the defendant's costs. When the claimant party is a limited company, the normal position is that the claimant is required to deposit security with the court (clause 353a of the Companies Law No. 5759-1999) (when the company is established outside of Israel the chance of security being granted is even higher). If the claimant is a natural person, the normal position is that he or she will not be ordered to deposit security. The main reason for this difference is that courts want to prevent claimants from hiding behind the legal personality of a company in order to avoid paying the expenses incurred by the defendants. The court might depart from the default position, if the financial strength of the company is insufficient or the claimant's claim is particularly strong.

Although the court is not able to order a third-party funder to provide security for costs, there have been cases in which a funder has voluntarily provided security on behalf of the claimant to allow the claim to continue. The calculation of security varies from case to case, but could be up to 2 to 2.5 per cent of the claim value. The most common means in which security is provided is a payment of cash into court, but in some circumstances a bank guarantee will be permitted.

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

The fact that a claim is funded is not, itself, a ground upon which the court may make an order for security for costs. A defendant may seek to argue that the fact that the claimant is funded is evidence that the claimant will be unable to pay the defendant's costs, if ordered to do so, which may influence the court's order regarding security.

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

There is no statutory prohibition on the use of ATE insurance, however, ATE insurance is not commonly used in Israel. Defendant's costs are sometimes paid by insurances, such as professional negligence or directors' duties cases.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no general requirement for a litigant to disclose a litigation funding agreement to any opposing party or to the court. To date, the courts have not ordered the disclosure of funding agreements when requested to do so, because the funding arrangements were found not to be relevant to the determination of the dispute (a primary requirement for obtaining a disclosure order). However, if the court finds the agreement relevant to the dispute, it can compel disclosure of a funding agreement. Further, in liquidation cases, the liquidator will have to obtain the court's approval to engage in a funding agreement, and as part of this procedure the liquidator is likely to be ordered to disclose the agreement to the court and possibly to the creditors and shareholders (see question 2).

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

Unlike communications between litigants and their lawyers, the communications between litigants (or their lawyers) and funders are not protected by privilege in Israel. In the very few decisions that have dealt with the communications between litigants and funders (see question 22), the courts did not order disclosure of the funding agreement (on the basis that it was not relevant to the dispute). In addition to 'litigant-client privilege', protecting communications between a lawyer and client there is also a privilege in Israel in respect of any information regarding 'preparation for trial', but once a party argues for such a privilege, that party cannot then subsequently use that information during the trial.

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

There are no such disputes reported as at the time of writing.

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

Practitioners of litigation funding should be aware that while Israeli lawyers' costs are relatively low in comparison to some jurisdictions (and contingency fee arrangements are possible), there is a mandatory court fee of 2.5 per cent of the claim value (up to 25 million Israeli shekels or 1 per cent of the sum above that), where half of the fee must be paid when the claim is filed, and the second half when the trial begins. Also, lawyers in Israeli are not allowed to pay the litigant's costs, such as court fees, experts' fees and security. The litigation funding industry is in its developing stages in Israel, and considering the increasing number of cases that are funded, we might see in the near future more court decisions that will determine the rules on matters like the limits on the fees and interest a funder can charge, the legality of veto rights and the privilege in the communications between litigants and funders (including disclosure of funding agreements).

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Korea

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

There is currently no law or regulation that expressly prohibits or specifically regulates third-party funding.

Korean courts have not expressly shown their attitude in regard to this issue and have not endorsed such funding. According to article 6 of the Trust Act, third-party funding must be arranged or structured in such a manner that does not constitute an entrustment of a lawsuit. In addition, under article 34(1) of the Attorney-at-Law Act, non-attorneys are prohibited from introducing, referring or enticing a party to a case to a specific attorney in exchange for money or other benefits, and under article 34(5) of the Attorney-at-Law Act, no fees and other profits earned through services that may only be provided only by attorneys-at-law shall be shared with any person who is not an attorney-at-law.

At this point, without further legislative changes, we expect Korean courts to take a conservative approach in regard to third-party funding.

While there have been active introductions and related discussions regarding this topic, it appears that third-party litigation funding is yet to be commonly used to date.

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

No. There is no specific limitation on the fees and interest a third-party funder may charge. However, a funding arrangement will still be subject to the Interest Limitation Act. Under the Interest Limitation Act, the amount of money that the funder receives from the successful party other than the principal amount will be counted as 'interest'. Pursuant to the Act, statutory interest as of 2018 is capped at 24 per cent per annum, and any amount exceeding such rate is null and void. In this regard, any amount of money that a creditor receives in connection with a loan, including a deposit, rebate, fees, deduction or advance interest is deemed as interest for the purpose of applying the statutory interest rate ceiling.

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

No. However, depending on how the third-party funding is arranged or structured, it may be limited based on the restrictions set forth under the Trust Act or the Attorney-at-Law Act (see question 1).

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

Under the Attorney's Code of Ethics, attorneys are prevented from 'stirring up litigation', either by directly encouraging potential clients or by indirectly permitting a third party to do so. In consideration of such rule, lawyers will need to take a careful stance on introducing or advising clients in relation to third-party litigation funding.

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

Not at the present time. However, if third-party funding becomes more common or prevalent in Korea, it is likely that the Ministry of Justice and the Korean Bar Association will actively oversee third-party funding activities.

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

This remains uncertain, however, in view of the current stance of the Attorney-at-Law Act, third-party funders will be restricted in insisting on their choice of counsel (see question 1).

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

In principle, all civil case hearings are open to the public, unless the court determines that a public hearing is detrimental to national security or public policy.

In terms of being able to participate in hearings or court-administered settlement proceedings, generally, a third-party funder would not be permitted to participate because of a lack of adequate legal interest as required by law.

In the case of arbitration, third-party funders may be able to participate with mutual consent of the parties and permissions from tribunals.

8 Do funders have veto rights in respect of settlements?

While it may vary depending on terms and conditions of relevant funding contracts, we do not expect that the funders should have veto rights.

9 In what circumstances may a funder terminate funding?

The right to terminate funding would be governed by the relevant provisions of the funding contract.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

In principle, assuming that the funding arrangement is in compliance with relevant law, the funder's role should be limited to funding the cost of the litigation or arbitration. For the same reasons, funders are not expected or required to take any active role in the litigation process.

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

Conditional or contingency fee arrangements are permitted for civil cases in Korea. However, if a dispute arises in connection with the fee arrangement, the court may reduce the amount of the agreed contingency fee if the courts find that the amount is unreasonably excessive and violates equity and the principle of good faith.

In regard to criminal cases, the Supreme Court of Korea recently held that contingency fee arrangements are not permissible.

12 What other funding options are available to litigants?

For litigants with limited resources to pay for the costs of a lawsuit, the court may grant litigation aid, either ex officio or upon request of the litigant.

No similar funding options are available for arbitration.

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

A commercial claim in a civil lawsuit will typically take between eight and 12 months at the first instance, from the filing of a complaint to judgment.

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In case of arbitration, although it may vary depending on the nature of the case and the administering institution, it generally takes approximately 12 to 16 months for an arbitration award to be rendered.

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

Overall, less than 10 per cent of first-instance judgments are appealed. However, in cases heard before three-judge panels (ie, cases with claim amounts over 200 million won), the appeal rate is over 40 per cent.

Appeals usually take between six months to one year, but an appeal may take longer depending on the nature and complexity of the case. There is no appeal process for arbitration in Korea.

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

Although no official data is available, contentious enforcement proceedings are quite common in civil cases.

Enforcement of judgments is relatively easy: once a final and conclusive judgment is obtained, the successful party can enforce it against the assets of the unsuccessful party by initiating proceedings for execution. In addition, the court may declare a judgment to be provisionally enforceable before a final and conclusive judgment will be rendered.

Korean courts allow enforcement of foreign court judgments on the principle of reciprocity. Also, the courts are receptive to the recognition and enforcement of foreign arbitral awards, in particular, where the award is from a jurisdiction that is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

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

Class actions are not permitted, except in limited cases based on the type of claim. These are claims for certain types of securities-related damages under the Securities Related Class Action Act; and class action suits against an enterprise that has committed an act causing potential or actual harm to the consumers' right to life, body or property, and to seek injunctive relief under the Consumer Basic Law. The Korean government recently announced that it would expand scope of class actions under relevant laws in order to more fully protect consumers and introduce necessary measures including new legislations and amendments to existing laws.

In addition, if the rights or liabilities forming the object of a lawsuit are common to many persons or are generated by the same factual or legal causes, such persons may join in the lawsuit as co-litigants under the Civil Procedure Act of Korea. However, only those participating in the lawsuit would be subject to the outcome of the case.

There is law or regulation that regulates third-party funding for class actions or group actions, and thus, such arrangements will be subject to the same general restrictions under Korean law.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The courts in principle order the unsuccessful party to pay the costs of the successful party in litigation. However, in calculation of the litigation costs, the courts will follow the calculation methods and the limits set in Supreme Court Regulation, resulting in recuperation of only a portion of attorneys' fees in addition to the stamp duties, etc. In line with this, without any further change of relevant law and regulation, the courts are unlikely to order the unsuccessful party to pay the litigation funding costs of the successful party.

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

Adverse costs are likely to be ordered against the unsuccessful party to the litigation (or arbitration) rather than the third-party funder.

19 May the courts order a claimant or a third party to provide security for costs?

Generally, no. However, if the claimant has no domicile or place of business in Korea, or it is clear that there is no basis for the claim based on the submissions, the courts will order security for costs upon a request by the respondent, pursuant to article 117 of the Civil Procedure Act of Korea.

Whether there is a need for security is not determined based on whether the claim is funded or not.

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

While there is no precedent or case that has been reported, we do not believe this would influence the court's decisions.

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

Insurance for attorney's fees and insurance for non-payment of a judgment debt by the defendant is not legally prohibited under Korean law. However, any insurance contract that insures an event that has already occurred and is already recognised by the contracting parties and the insured party is null and void pursuant to article 644 of the Korean Commercial Code. The Supreme Court of Korea has ruled that an insurance event must be uncertain at the time of entering into the insurance contract and that any insurance contract in violation of article 644 of the Korean Commercial Code shall be null and void.

Insurance for attorneys' fees are offered by some insurers, but, in general, insurance related to litigation and legal disputes are not common in Korea.

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22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Currently, no particular legislations exist requiring a litigant to disclose a litigation funding agreement.

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

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

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

In a Supreme Court case (Supreme Court Judgment 2013Da28728 dated 24 July 2014) involving a dispute between litigants and their funder, the funder (the management company of an apartment complex) entered into a funding agreement with the litigants (the representative body of apartment residents) by agreeing to pay litigation costs on behalf of the litigants in return for the prospective rights of repair works, authorisation to select contractors and guarantee to renew management contracts for the apartment complex in case of a successful outcome in the litigation. After the litigation was settled, a subsequent dispute arose between the litigants and the funder. The court held that the funder's role of financing the litigation costs, de facto retaining lawyers and managing claims constituted 'representation' under article 109(1) of the Attorney-at-law Act, and therefore, the funding agreement was declared null and void.

In the above case, the Supreme Court of Korea interpreted 'representation' in article 109(1) of the Attorney-at-law Act very broadly, which may reflect a conservative approach of the Korean judiciary towards third-party funding in Korea.

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

Not at this point in time. However, this issue should be revisited when legislation and regulations regarding litigation funding are introduced.

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Mauritius

Rishi Pursem and Bilshan Nursimulu

Benoit Chambers

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

We consider that third-party litigation funding is permitted in Mauritius, although it is neither provided for nor prohibited by any legislation or otherwise regulated. Third-party litigation funding is not common and has not been the subject of any judicial pronouncement. Further, the common law torts of champerty and maintenance have very rarely been invoked in case law and never in the context of third-party litigation funding. It is doubtful whether the courts would find that those torts form part of Mauritius law today, but to the extent that they do, the courts are likely to be guided by the development and eventual abandonment of those concepts in England.

Although third-party litigation funding is not commonly used in Mauritius, it is increasingly being considered, especially by parties to complex arbitration matters and enforcement proceedings before the Supreme Court of Mauritius where the value of the claim involved is significant. In those cases, litigants have recourse to funders established internationally, England being the most popular market.

To date, however, there is no public information available on cases in which parties have resorted to third-party litigation funding.

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

In the absence of any legislation or regulation governing third-party litigation funding, there is no limit on the funders' fees and interest.

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

There is no legislative or regulatory provision that is applicable to third-party litigation funding. Where the litigation funding involves an assignment of a litigious right and the funder steps in the shoes of the litigant (and thus ceases to be a third party), article 1699 of the Mauritius Civil Code provides that the person against whom the litigious right has been assigned may obtain a release from the assignee by reimbursing him or her the actual price paid for the assignment, plus costs, reasonable expenses and interest calculated from the date on which the assignee paid the price for the assignment made to him or her.

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

The general rules provided in the respective Codes of Ethics for attorneys and barristers would be applicable but there is no specific rule in relation to third-party litigation funding. Unless the litigious right is assigned to the third-party funder, the lawyers' client remains the litigant and they owe their duty of care and confidentiality towards the latter and not to the third-party funder, despite any agreement that the funder will be responsible to pay their fees. Attorneys and barristers may, however, receive instructions from a third party designated and mandated by their client to represent them.

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

The Financial Services Commission regulates the provision of financial services (other than banking, which is regulated by the Bank of Mauritius) in Mauritius but the scope of the Financial Services Act does not include third-party litigation funding. Neither the Financial Services Commission nor the Attorney-General's office has so far expressed an interest in regulating the third-party litigation funding sector. However, it is expected that discussions on the regulation of third-party litigation funding will become necessary in the near future in light of the growth of the international arbitration sector in Mauritius and the government's effort over the last decade to promote the use of Mauritius as a jurisdiction of choice in the field of international arbitration by passing the International Arbitration Act (inspired from the United Nations Commission on International Trade Law (UNCITRAL) Model Law), the establishment of a permanent branch of the Permanent Court of Arbitration of The Hague in Mauritius, the hosting of the Congress of the International Council for Commercial Arbitration in 2016 and the launch of the MIAC Arbitration Centre in July 2018.

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

In the absence of any legislation or regulation governing third-party funders, the relationship between the latter and their clients is purely contractual. However, a contractual clause providing that the third-party litigation funder will choose the counsel to appear in a given case may be contrary to the litigant's constitutional right to a fair hearing, which encompasses the right to choose his own counsel. There has not yet been any judicial pronouncement on that question. In our opinion, the litigant's right to choose his or her own counsel is a fundamental right that he or she cannot contractually renounce.

In practice, the litigant generally retains the services of his lawyers before considering third-party funding and at that stage, the funder may take into account the experience and reputation of the counsel retained by the litigant in deciding whether or not to fund the case.

If there is a divergence of views between the litigant and the funder during the court or arbitral proceedings about whether there should be a change of counsel, our view is that the litigant's decision would prevail for the reasons given above.

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

Funders and other members of the public may attend hearings in open court. However, they will only be allowed to attend private hearings (for example, in arbitration matters) and settlement proceedings with the consent of all parties involved in the matter in question. Further, the extent of their participation in hearings and settlement proceedings and their ability to give instructions to lawyers on behalf of their clients, will depend on their clients' consent. In the event of a divergence of views between the funders and their clients with respect to instructions to be given to lawyers or settlement discussions, the lawyers will be bound by the instructions of their clients as opposed to that of the funders.

8 Do funders have veto rights in respect of settlements?

To the extent that funders are not themselves parties to the dispute, they do not have veto rights in respect of settlements. The funding agreement may provide that the litigant must inform and consult the funder with respect to settlement discussions and negotiations. In our view, the funding agreement may also validly provide for the funder's right to terminate the funding in the event that the litigant adopts an unreasonable attitude with respect to settlement discussions and negotiations.

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9 In what circumstances may a funder terminate funding?

In the absence of any legislation or regulation governing third-party funding, the termination of the funding will only be subject to the provisions in the contract between the funder and their client. In determining the validity of those provisions, one would consider that they should not have the effect of depriving the litigant of their fundamental rights to a fair trial, for example, by taking control over the proceedings and imposing their decisions on the litigant with respect to the conduct of the case. However, in our opinion, the funding agreement can validly provide a termination clause that takes effect in the event that the litigant's attitude in the conduct of the proceedings is unreasonable.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

The extent to which funders may or should take an active role in the litigation or arbitration process is subject to the provisions of the funding agreement. The principles that are likely to apply to the validity of those provisions are explained above.

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

Yes. Litigation attorneys and barristers can enter into conditional or contingency fee agreements, provided that their respective contingency fees do not exceed 10 per cent of the sum of the value of the result obtained by the client, whether such a result is obtained through a judgment, arbitral award or negotiations.

12 What other funding options are available to litigants?

Legal aid is available in relation to criminal cases, family law disputes and landlord and tenant matters. Litigation funding is otherwise very rare. Although there is no legal prohibition of legal expenses insurance, it is not generally provided on the market.

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

Proceedings before the Commercial Division of the Supreme Court generally take between two and three years to complete and obtain judgment, although the estimated time frame depends largely on the volume of evidence involved, number of witnesses, the need for case management hearings and interlocutory rulings, etc. The filing of documents and written motions are effected through the court's electronic system, which avoids the expense of attorneys or barristers having to attend court for those matters. Where there is a need for case management hearings, the attorney generally makes the relevant motion on the court's electronic system and if the court accedes to the attorney's request, the court will issue a notice on the electronic system that the case will be called in court on a given date.

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

In our experience, about 50 per cent of judgments of the Commercial Division of the Supreme Court relating to complex commercial disputes are appealed. An appeal lies to the Court of Civil Appeal and generally takes about one year to be heard and thereafter six to 12 months to obtain a judgment. A further appeal may lie to the Judicial Committee of the Privy Council and the proceedings in that respect generally take 12 to 18 months.

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

In our experience, a relatively low percentage of judgments delivered by the Mauritius courts give rise to contentious enforcement proceedings in Mauritius.

With respect to foreign judgments and arbitral awards (both domestic and foreign), more than half of them are, in our experience, commonly subject to contentious proceedings. The exequatur proceedings for foreign judgments and domestic arbitral awards are governed by the provisions of the Civil Procedure Code and take place on the basis of affidavit evidence before the Judge in Chambers, which proceedings generally last about six to 12 months.

The enforcement of international arbitral awards (where the seat of arbitration is Mauritius) and foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Supreme Court (International Arbitration Claims) Rules 2013. The award creditor needs to file an application for enforcement with the office of the Chief Justice, who upon verification is satisfied that the application complies with the formal requirements in the Rules, issues a provisional order for the recognition and enforcement of the arbitral award as a judgment of the court. The award debtor may apply to set aside the provisional order within 14 days (or such other period provided in the order) of the service of the order on him or her. The award cannot be enforced until the expiry of the period given to the award debtor to apply to set aside the provisional order or such application is made, until after the determination of that application.

As regards the general methods of enforcement, where the judgment or award debtor is a company registered in Mauritius, failure to comply with the judgment would generally prompt an application to wind up the company and appoint a liquidator to realise the company's assets for distribution to creditors. That procedure before the Bankruptcy Division of the Supreme Court is based on affidavit evidence and generally takes about one year to complete.

Other means of enforcement include seizure of the judgment debtor's assets, including attachment of earnings and other receivables in the hands of third parties. Such matters are generally dealt with by the summary procedure that is available before the Judge in Chambers on the basis of affidavit evidence.

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

There is no procedure in Mauritius permitting 'class actions' or 'group actions' where a group of litigants represent members of a wider class or group who are not party to the proceedings. However, different persons may jointly enter a case based on a common cause of action. Alternatively, those parties may enter separate cases and retain their respective attorneys and counsel to appear for them; when the respective cases are in shape for hearing, the court may allow them to be consolidated and heard together. There is no legal prohibition for those cases to be funded by third parties.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The courts can order adverse costs and they do so almost invariably. However, the successful party is generally entitled to nominal costs only, except in matters falling under the purview of the International Arbitration Act, which provides that the successful party should be awarded actual costs.

There is no judicial pronouncement on whether the unsuccessful party can be ordered to pay the litigation funding costs of the successful party and this is a matter that remains to be determined by the courts in the absence of any specific legislation in that respect. It is unlikely that such a pronouncement will be required in court litigation cases where nominal costs are awarded. However, the issue will be of interest and importance in relation to matters falling under the International Arbitration Act.

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

As matters stand, in the absence of specific legislation governing third-party litigation funding, there is no basis on which the Mauritius courts can hold a third-party litigation funder liable for adverse costs.

However, if the funder's client is ordered to pay adverse costs, the client may have an action against the funder for the latter to indemnify him or her and pay the adverse costs in his or her place on the basis of the provisions of the contract that is in place between the funder and the client. The funder's client will need to lodge a separate case to obtain that remedy against the funder.

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19 May the courts order a claimant or a third party to provide security for costs?

The Mauritius courts can order a claimant to provide security for costs and does so almost invariably when the claimant is not a resident in Mauritius and does not own immovable property in the jurisdiction that is of sufficient value to secure the payment of any costs that may be awarded to the defendants.

The amount of security for costs is calculated on the basis of an estimate of the reasonable necessary expenses that the defendants may incur to resist the claim, such as fees of lawyers, registration fees for documents that may have to be produced and travelling and accommodation expenses of a witness who may have to travel to Mauritius from abroad. However, the essential policy of the courts is that the amount ordered should not be oppressive and should be fixed at a level that will not stifle the claimant in proceeding further. The amount ordered is normally deposited in court unless the claimant provides a bank guarantee in the sum awarded as security.

The third-party funder can provide security for costs in the place of the claimant. However, if the funder is not willing to do so, there is no basis on which the courts can order him or her to provide security for costs. The claimant may make a separate application to the court to order the funder to pay security for costs in its place if the provisions of the funding agreement provide so.

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

There is no judicial pronouncement on this matter. However, in our view, it is unlikely that the court's decision to order the claimant to pay security for costs will be influenced by the fact that the claim is funded by a third party, especially given that there is no basis on which the court can order the third party to provide such security.

In the event that the third party willingly provides the required security in the place of the claimant, it follows that the court will not order the claimant to provide security.

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

After-the-event insurance, legal expenses insurance and insurance for non-payment of a judgment debt are not prohibited by any legislative provision. However, they are not commonly used and they are generally not available on the local market.

In light of the recent growth and development of arbitration in relation to high-value claims and involving significant legal expenses, litigants have shown an increasing interest in ATE and legal expenses insurance that is available on the international market. There are, however, no public statistics on the use of such forms of insurance.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no legislation or ethical rule requiring a litigant to disclose a litigation funding agreement to the opposing party or to the court. Nor is there any basis under Mauritius law on which the court can order a litigant to disclose that information. Similarly, there is no requirement in Mauritius for the litigant to disclose a contingency fee agreement with his or her lawyers.

The position might be different in arbitration where the rules of the arbitral institution might provide for an obligation to disclose a litigation funding agreement or for the arbitral tribunal to compel such disclosure. For example, the rules of the MCCI Arbitration and Mediation Centre (MARC) effective from 21 May 2018 require the funded party to notify in writing all other parties, the arbitral tribunal and the MARC Secretariat of the fact that an agreement or arrangement for funding has been made and the name of the third-party funder.

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

The general principle that obtains in Mauritius is that communications between litigants or their lawyers and third parties (such as litigation funders) do not qualify for protection by litigation privilege. There has, however, not been any recent judicial pronouncement on this question. The Mauritius courts are likely to be guided by the development of the law in England and in particular, decisions that have established that certain communications with third parties may be privileged to the extent that they were exchanged for the purpose of obtaining advice in respect of litigation or evidence in relation to the dispute. The Mauritius courts are, however, not bound to follow the English decisions.

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

Our searches have revealed no reported disputes between litigants and their funders in Mauritius.

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

Given that litigation funding is not commonly provided by local players, the trend has been for litigants to increasingly consider litigation funding on the international market. In those cases, funding agreements are likely to be governed by foreign law and subject to the regulatory regime that may apply in the jurisdiction in which the funder is based or to which the agreement is subject. If the agreement is to be enforced in Mauritius, it may be subject to provisions generally applicable under Mauritius law regarding the invalidation or revision of unfair contract terms.

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Netherlands

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

Third-party litigation funding is allowed in the Netherlands. It is already common in mass claims, which are often litigated or settled through special claims vehicles. With regard to individual claims, third-party litigation funding is not very widespread, but the market is emerging. This applies to both court litigation as well as arbitration.

There seems to be no particular interest from the judiciary as to whether or not litigation in the courts is funded by a third party; a possible explanation is that, as explained in question 17, costs awarded in proceedings in state courts are fixed and bear no relationship to the real cost incurred by a litigant. At present, the legislator does not seem inclined to regulate third-party funding. However, as the market is emerging and third-party litigation funding will thus become more common, some form of regulation is to be expected, most likely in the domain of consumer claims.

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

There are, in principle, no limits on the fees and the interest third-party funders can charge, other than the general limits of enforceability of contracts and the powers of courts to mitigate the effect of or amend contract clauses that should qualify as wholly unreasonable. These powers are rarely exercised in practice. The ultimate test for the validity of an agreement on fees and interest is whether the agreement runs contrary to good morals or public policy, in which case it is null and void. There is no published precedent for litigation funding, but one could imagine this could apply to a usurious arrangement.

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

No.

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

There are no specific professional or ethical rules applying to lawyers advising clients in relation to third-party litigation funding, but general professional and ethical rules apply. In this regard, a lawyer leaves no doubt as to whom he or she is representing; either the litigant or the funder, or both. If representing both with regard to the drafting of the funding agreement a lawyer should, for example, be aware of possible conflicting interests and confidentiality obligations.

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

The Ministry of Justice and Security has demonstrated an interest in third-party litigation funding. The Ministry observed in 2013 that the market is emerging, but did not take steps to regulate it. The Ministry's main concerns seem to be the accessibility of the legal system and the protection of the litigant in relation to the funder, especially if the litigant is a consumer.

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

It is generally assumed at present that third-party funders are free to insist on their choice of counsel. Although the European Court of Justice is very reluctant to accept clauses in legal expenses insurance agreements limiting the insured's choice of counsel, we note, however, that such clauses are agreed upon before the occurrence of a specific dispute has arisen and that third-party litigation funding will in general be agreed upon thereafter.

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

As a general rule, court hearings are open to the public. The law only provides for a limited number of exceptions, but these hardly apply to commercial disputes. Third-party litigation funders may, therefore, generally attend court hearings. Arbitration hearings are, on the contrary, held in camera and, absent the permission of the parties to the arbitration, the third-party funder may not attend such hearings. There is no rule that would prevent third-party funders from participating in settlement discussions.

8 Do funders have veto rights in respect of settlements?

In the funding agreement, the parties may agree that the third-party funder has a veto right. Parties may also agree that if the litigant refuses to accept a settlement that the funder considers appropriate, the litigant shall reimburse all costs of the funder, as well as the amount the funder would have received in case of a settlement. In a 2011 decision (ECLI:NL:GHAMS:2011:BU8763), the Amsterdam Court of Appeals held that such an arrangement is not invalid per se.

9 In what circumstances may a funder terminate funding?

The circumstances in which the third-party funder may terminate funding would normally be agreed in the funding agreement. Absent any specific provision, it is not a given that the funder may terminate the funding agreement at will, in view of the potential exposure of the litigant; general principles of contract law will apply, under which termination would be justified in case of a default by the litigant. A rescission with immediate effect may be called for in the event of error or deceit.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

As the third-party funder will generally not formally be party to the proceedings, one has difficulty imagining how the funder could take a formal role in the litigation process. Behind the scenes, the third-party funder may assist the litigant and counsel. The funder may also have an informal role in the litigation process and could, for example, assist with or directly enter into settlement discussions with the opposing party.

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

The general rules of professional conduct disallow Dutch lawyers from entering into conditional or contingency fee arrangements, except in case of personal injury claims where these are currently allowed, subject to a number of conditions. Litigation lawyers may, however, always conclude fee arrangements at a reduced hourly rate, provided at least the actual costs are covered, subject to subsequent increase in the event of victory or successful settlement. In this respect, an agreement that

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the fee will be increased with a percentage of the amount awarded is allowed. In addition, lawyers may agree to provide their services on the basis of generally accepted and commonly used debt collection fee rates. Unlike litigation lawyers, litigation funders may enter into conditional or contingency fee arrangements with the litigant.

12 What other funding options are available to litigants?

Legal expenses insurance policies, although common in the Netherlands for consumers, are less popular with companies and generally contain a relevant number of exclusions. For mass claims, special litigation vehicles are created. These vehicles can be funded by third-party litigation funders or by a number of aggrieved parties; their 'investment' is limited to a fraction of the costs of litigation that the aggrieved party would incur when pursuing an individual claim. In a 2017 decision (ECLI:NL:RBAMS:2017:6607) the District Court in Amsterdam confirmed that the assignment of a (tort) claim to a litigation funder is accepted in principle as not being contrary to good morals or public order.

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

In some 60 per cent of all commercial disputes, the first instance trial is decided in less than 12 months. These cases will, on average, be limited to a statement of claim followed by a statement of answer and a court hearing. Approximately 85 per cent of all commercial claims will be decided at first instance within 24 months.

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

Between 10 and 15 per cent of all first-instance judgments in commercial claims are appealed. Less than 50 per cent of these appeals are decided within 12 months. Approximately 80 per cent of all appeals are decided within 24 months.

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

Judgments rendered by Dutch courts will never require (contentious) enforcement proceedings. Arbitral awards rendered in the Netherlands can be enforced after an exequatur has been granted by the court. Exequatur proceedings are in principle ex parte proceedings, but the party that fears imminent enforcement may request the court to schedule a hearing before rendering an exequatur, if there are grounds for the annulment of the arbitral award. Foreign judgments and arbitral awards are often recognised and declared enforceable in the Netherlands. The Brussels I and Brussels I-bis Regulation, the Hague Convention on Choice of Court Agreements and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) are applicable in the Netherlands; the latter Convention only applies if the award was rendered in one of the 159 state parties where the Convention is currently in force.

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

Class actions and group actions are permitted. Under the Collective Settlement of Mass Claims Act (2005), the Amsterdam Court of Appeals can declare a collective settlement binding on all the aggrieved parties, whether Dutch or foreign, on an opt-out basis. The settlement agreement must be entered into by a special litigation vehicle duly representing the interests of the aggrieved parties and a party that has committed itself to compensate the aggrieved parties, such entity not necessarily being the party that caused the damage. This mechanism has often been applied with great success in international mass claims. The special litigation vehicle may be funded by third parties. Collective redress in group actions is presently not possible, but in 2016 the Justice Ministry submitted a draft bill for the revision of the Collective Settlement of Mass Claims Act (2005) enabling collective redress in group actions as well.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

In commercial court litigation the unsuccessful party will be ordered to pay the costs of the victorious party. The costs of the prevailing party subject to reimbursement are, however, very limited; the court's cost order will cover the actual costs of service of the writ of summons and the court fees, but legal fees are only compensated on the basis of a flat rate, which in most cases does not remotely cover the actual cost incurred. Only in IP litigation, or in rare cases where an abuse of law by the unsuccessful party was ascertained, can the unsuccessful party be obliged to compensate the full costs of the prevailing party.

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

As long as third-party litigation funders are not a party to the litigation, they cannot be held liable for adverse costs.

19 May the courts order a claimant or a third party to provide security for costs?

A third-party funder that is not a party to the litigation or the arbitration proceedings cannot be ordered to provide security for costs. Courts may only order that security for costs be provided by foreign claimants who reside in a jurisdiction where enforcement of a Dutch judgment is not provided for under any treaty; such costs will, however, always be limited to the costs that may be imposed on the unsuccessful party as discussed in question 17. Although the Dutch Arbitration Act does not contain any provision with respect to security for costs in relation to arbitral proceedings, it is generally accepted that tribunals may order security for costs. However, in practice, this rarely happens. Any security that must be provided pursuant to an order from the tribunal is calculated on the basis of how the proceedings are expected to evolve. In most cases, a party ordered to provide security for costs shall abide by the order by providing a bank guarantee for the set amount.

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

The fact that the claim was funded by a third party does, in itself, not influence the decision by a court or a tribunal, but may, in practice, contribute to solving the security issue.

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

ATE insurance is not used in the Netherlands, probably because the risk of significant adverse cost decisions is virtually non-existent, since costs are fixed and liquidated, as explained in question 17.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Dutch law does not explicitly provide for the disclosure of the litigation funding agreement to the opposing party, the court or arbitral tribunals. Particularly if the litigant should also claim the funding cost, the litigant may be compelled to disclose the funding agreement. Disclosure will often follow upon the opponent's request to the court, but may also be ordered out of the court's or the tribunal's own motion. The draft bill (see question 16) provides that the court may order disclosure of the funding agreement exclusively to the court. This should enable the court to assess the agreement's impact on the litigation process and the fairness of the funder's fees in mass claims cases.

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

Communications between litigants and funders are not protected by privilege. In the Netherlands, privilege lies with the lawyer rather than with the client; communication between a litigant and his or her lawyer is therefore protected by privilege. If the litigant's lawyer also represents the funder, communications between the lawyer and the funder may, as a consequence, also be privileged.

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

Very few disputes between litigants and their funders have resulted in published case law. In the above-mentioned 2011 decision (see question 8), the Amsterdam Court of Appeals held that a specific funding agreement with a consumer was valid, but that the third-party funder is under a duty of care to apprise the litigant of the ins and outs of the funding agreement, in particular, the fee structure, especially if the litigant is a consumer.

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

The case law of the Amsterdam Court of Appeals makes clear that collective settlements under the Collective Settlement of Mass Claims Act barely need to have Dutch elements, which makes these an inexpensive and attractive alternative to US litigation and the Dutch decision may be automatically recognised within the European Union. However, the current legislative initiative (see question 16), which will enable collective redress in class actions requires a relevant link to the Dutch jurisdiction.

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New Zealand

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

Third-party litigation funding is permitted. Although the common law torts of maintenance (assisting a party in litigation without justification) and champerty (assisting in consideration of a share of proceeds of the litigation) have not been abolished in New Zealand, the recent attitude of the New Zealand courts to third party-funding can be described as 'cautiously permissive'. To describe this approach, a distinction needs to be drawn between representative proceedings under Rule 4.24 of the High Court Rules (which 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), and ordinary non-representative proceedings.

Representative proceedings

A representative proceeding requires that either the representatives sue with the consent of the other persons who have the same interest, or the court directs this on an application. The Court of Appeal has confirmed that the existing procedure does not require the Court to give prior approval for a funding arrangement (*Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489 at [79]). Instead, the Court will ensure that in granting leave it is not facilitating an abuse of process. If a representative proceeding is based on clearly misleading funding arrangements or amounts to a bare assignment of claims, then the Court will not grant leave knowing that its processes are being used to facilitate unlawful conduct. In this regard, the courts will exercise a greater supervisory role over the setting up of representative proceedings (ie, the funding arrangements and communications with prospective class members) than where a party bring an ordinary proceeding that is funded.

Non-representative proceedings

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 its supervisory role in 'representative' proceedings (see above). 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 (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at paragraphs 28 to 29). 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 (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at paragraph 46).

Scope for intervention

Under the High Court Rules or its inherent powers, the High Court may intervene in both representative or non-representative funded proceedings 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, those that are manifestly groundless, without foundation or serve no useful purpose, and those that are vexatious or oppressive (*PricewaterhouseCoopers v Walker* [2016] NZCA 338 at paragraph 14(e)); or
- where a funding arrangement (including an assignment of a security agreement) amounts to an assignment of a bare cause of action to a third-party funder in circumstances where this is not permissible (ie, the exceptions to maintenance and champerty do not apply). In assessing whether litigation funding 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 (*Waterhouse* and *PricewaterhouseCoopers*). Even where such concerns arise, the provision of appropriate undertakings by a funder may be effective to allay them. In *PricewaterhouseCoopers*, 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 (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 (paragraphs 77 to 91) that the belated provision of undertakings given by the funder to the Court:
  - not to rely on clauses in the security agreement giving it greater control than it had under the funding agreement; and
  - to pay a proportion of proceeds of a successful claim for the benefit of unsecured creditors (where the funder was otherwise entitled to all of these under the security agreement) satisfied concerns as to the permissibility of the assignment.

Given the private nature of arbitration, the treatment of third-party litigation funding in domestic arbitration in New Zealand is largely unknown. The relevant legislation (the Arbitration Act 1996) does not contain any provisions relating either directly or indirectly to litigation funding (or even class arbitrations). Instead, an arbitrator has the power to conduct the arbitration, or to control the conduct of the arbitration, subject to the agreement between the parties and the rules of natural justice (article 19, Schedule 1). An arbitrator may also order 'any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently' (Clause 3(1)(j) of Schedule 2). These broad powers would encompass the ability to regulate funded domestic arbitrations with respect to those referred to in the following questions.

In addition, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court or district court assistance in the exercise of the powers conferred on the arbitral tribunal relating to the conduct of arbitral proceedings (Clause 3(2) of Schedule 2). This ability would allow either the arbitral tribunal of its own motion, or one of the parties with its approval, to request assistance from the High Court or district court in the event of an issue arising in the context of a funded domestic arbitration.

Litigation funding is becoming more commonly used in New Zealand, although is not as commonly used as in other common law jurisdictions (such as the United Kingdom and Australia). In recent years, a variety of proceedings funded by third parties have been brought, with allegations in relation to:

- losses on share investments resulting from misleading statements in a share prospectus (*Saunders v Houghton* [2014] NZHC 2229);
- building products (*White v James Hardie New Zealand* [2017] NZHC 2112]);

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- losses resulting from kiwi fruit being affected by the entry of disease into the country (*Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559);
- illegitimate fees charged to consumers by banks (*Cooper v ANZ* [2013] NZHC 2827);
- insurance claims arising out of earthquakes (*Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2017] NZCA 489, [2018] 2 NZLR 312); and
- breaches of directors' duties owed to companies (*Walker v Forbes* [2017] NZHC 1212).

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

There are no limits prescribed by either legislation or the common law. In the context of a non-representative funded action, the Supreme Court of New Zealand 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 funder remuneration (paragraph 48, *Waterhouse*). 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 (*Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 70).

That said, in assessing whether litigation funding arrangements amount to an assignment that is not permitted, the courts will have regard to the profit share of the funder (see question 1).

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

No. Only the common law is applicable. In particular, the common law torts of champerty and maintenance still exist in New Zealand.

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

No specific rules apply. The general professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 apply.

In *Houghton v Saunders* (2011) 20 PRNZ 509, the High Court, at paragraph 75, found the following guidelines 'helpful':
- there should be a direct client-solicitor relationship between the members of the represented group and the lawyer acting for the represented group in the litigation;
- the lawyer acting for the represented group must be responsible for advising the named claimants and members of the represented group about the merits of the case and all material developments in the case. That advice must be prepared and provided without interference by the litigation funder; and
- the litigation funder must not provide expert evidence in the litigation. Expert witnesses must be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.

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

No public bodies have specific interest in or oversight over third-party litigation funding, apart from the courts.

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

It does not appear that this issue has come before the courts to date. It is very unlikely that third-party funders have such a legal entitlement, because choice of counsel is the exclusive right of the client (ie, the plaintiff). This right is reflected in the professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

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

There is no restriction on representatives of funders attending hearings or settlement discussions, unless excluded by order of the court. Funders do not have a right to participate in hearings, and attempts to do so might raise concerns as to inappropriate control or abuse of process. Funders may participate in settlement negotiations, but cannot influence or make settlement decisions unless this is provided for under the funding agreement.

8 Do funders have veto rights in respect of settlements?

Only if such rights are provided for under the funding agreement. The courts take a fairly liberal approach to such veto rights. In *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraphs 70 to 73, 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, reputationally this will provide a fetter on the funder's ability to act unreasonably.

9 In what circumstances may a funder terminate funding?

In the first instance, this will depend on the terms of the funding agreement (which often provides for termination upon notice). In the unlikely event that the funding agreement does not make express provision for termination, the Contractual Remedies Act 1979 will apply by default. A funder would be able to cancel (prospectively) a funding agreement in the following circumstances:
- for misrepresentation by the plaintiff(s) prior to the agreement that has induced the funder to enter the agreement;
- if a term of the funding agreement is broken by the plaintiff(s); or
- if it is clear that a term in the funding agreement will be broken by the plaintiff(s).

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

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Funders may not take any active role in the litigation process if that would amount to an abuse of process (see question 1). That said, it should be noted that, in the context of a funded representative action, the High Court has stated that concerns as to champertous pursuit of claims have to be tempered by the reality that funded arrangements are commercial arrangements and it 'would be somewhat naïve to expect that he who pays the piper will not have some ability to call the tune' (*Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 66).

There are no ways in which funders are required to take an active role.

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

Litigation lawyers may enter into conditional or contingency fee agreements, but only of a certain type. 'Conditional fee agreements' (where payment depends on whether the outcome of the matter is successful) are permissible under sections 333 to 335 of the Lawyers and Conveyancers Act 2006 if the fee arrangement amounts to:
- the normal fee that would have been charged for the services provided; or

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- the normal fee is 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 therefore amounts to the tort of champerty).

12 What other funding options are available to litigants?

Government-funded legal aid for litigants who cannot afford lawyers is available through the Ministry of Justice for certain civil disputes (including debt recovery, breaches of contract, defamation and bankruptcy proceedings). A litigant must apply for such aid. Whether aid is granted depends on a number of factors including:

- any arrears from a previous legal aid debt;
- the income of the litigant;
- the assets of the litigant; and
- the merits of the legal case.

Legal aid is considered a loan and a litigant may have to repay some or all of the legal aid, depending on how much they earn, the property they own and whether they receive any money or property as a result of the case.

Litigants may explore other funding options, including specialised insurance products. Such products are not yet widely available (or even promoted as being available) in New Zealand.

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

This will depend on the nature and complexity of the claim, the number of parties, the level of court in which it is filed and the workload of that court. Given the typical quantum of funded claims, almost all of these will be filed in the civil jurisdiction of the High Court.

The statistics for the last three years available are as follows:

- 1 January to 31 December 2017: the average age at disposal was 759 days;
- 1 January to 31 December 2016: the average age at disposal was 669 days; and
- 1 January to 31 December 2015: the average age at disposal was 650 days.

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

This can be estimated as a function of the number of cases disposed of and the number of appeals brought.

In the civil jurisdiction of the High Court, the statistics for the last three years available are as follows:

- 2017: 2,352 cases were disposed;
- 2016: 2,360 cases were disposed; and
- 2015: 2,456 cases were disposed.

New civil appeals to the Court of Appeal:

- 2017: 234, which means that 9.95 per cent were appealed;
- 2016: 214, which means that 9.07 per cent were appealed; and
- 2015: 248, which means that 10.09 per cent were appealed.

The length of time an appeal takes depends on the nature and complexity of the appeal, the number of parties and the workload of the Court of Appeal. On average, an ordinary civil appeal might take at least one year to be disposed of, from the date of filing until the date of judgment.

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

There are no statistics available on this issue. Whether enforcement proceedings are required will depend on the defendant's financial position in each case.

In the High Court, following the sealing of judgment, a range of enforcement options are available against the judgment debtor and the judgment debtor's personal or real property (Part 17 of the High Court Rules). These are as follows:

- order for examination of the debtor;
- attachment orders over salary or wages due and payable by an employer;
- charging orders over real or personal property;
- sale orders over land and chattels;
- possession orders over land and chattels;
- arrest orders;
- sequestration orders over rents and profits from real and personal property; and
- imprisonment until security deposited or bond executed.

Generally, an enforcement procedure in respect of real property (such as a sale order) is the most difficult to implement.

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

The High Court Rules allow for 'representative actions' rather than 'class actions' or 'group actions' per se. Rule 4.24 provides:

> *One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding –*
> *(a) with the consent of the other persons who have the same interest; or*
> *(b) as directed by the court on an application made by a party or intending party to the proceeding.*

The threshold for the 'same interest' requirement is low: there must be a common issue of fact or law of significance for each member of the class represented (see *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at paragraphs 53 and 151). In addition:

- all members of the class must have been able to claim as plaintiffs in separate actions in respect of the event concerned, with no defences applicable to only some of the class;
- the action must be beneficial to all of the class; and
- the action must cover the whole or virtually the whole of the class of potential plaintiffs and consent of all represented members of global damages to the representative plaintiff must be given (*Credit Suisse*, paragraph 151).

Sub-paragraph (a) allows a group of identified plaintiffs with the 'same interest' to sue together if they consent to this. The plaintiffs are then listed together in the same statement of claim.

Sub-paragraph (b) requires the party or intended party to make an application to the Court for a representative order. In granting a representative order, it is standard practice for the Court to impose a final 'opt-in' date for qualifying members of the class (*Cridge v Studorp Limited* [2017] NZCA 376 at paragraph 41). This has the benefit of protecting members of the represented group against a limitation bar arising after the date of their election to opt in to the proceeding (*Credit Suisse*, paragraphs 65 to 66 and 129). An 'opt-out' date is also possible, which has the effect of reducing the original class size.

Representative actions may be funded by third parties, although there are greater restrictions on these than on non-representative actions. In *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 79, the Court of Appeal concluded (in the context of a representative action) that litigation funding arrangements will not be tortious or otherwise unlawful maintenance and champerty where:

- the court is satisfied there is an arguable case for rights that warrant vindicating;
- there is no abuse of process; and
- the proposal is approved by the court.

Funding arrangements have been approved in earlier cases (*In re Nautilus Developments Ltd* [2000] 2 NZLR 505 (HC) and *In re Gellert Developments Ltd (in liquidation)* (2001) 9 NZCLC 262,714). It remains unclear whether such approval must, as a matter of course, be obtained in advance of proceedings, or simply in the event that the proposal is challenged by the defendant.

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17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Yes. The courts may order the unsuccessful party to pay the costs (and certain disbursements) of the successful party in litigation. All matters of costs are at the discretion of the High Court (Rule 14.1), 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 (Rule 14.2(a)).

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 (Rule 14.2(c) and (d)).

According to Rule 14.6(3), the Court may award increased costs where:

- the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under the highest scale band;
- the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by:
  - failing to comply with the rules or with a direction of the court;
  - taking or pursuing an unnecessary step or an argument that lacks merit;
  - failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument;
  - failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under the rules; or
  - failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under Rule 14.10 or some other offer to settle or dispose of the proceeding;
- the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or
- some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

According to Rule 14.6(4), the Court may award indemnity (ie, actual) costs where:

- the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding;
- the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party;
- costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding;
- the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it;
- the party claiming costs is entitled to indemnity costs under a contract or deed; or
- some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

Litigation funding costs do not constitute either 'costs' or 'disbursements' within the meaning of the above costs' regime. The only basis on which the High Court might order the unsuccessful party to pay the litigation funding costs of the successful party would be pursuant to its inherent jurisdiction; there does not appear to be precedent for this.

18 Can a third-party litigation funder be held liable 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 (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at paragraph 52) or impropriety (*Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at paragraph 33). Further, the level of such costs are not limited to the amount of funding provided (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at paragraph 53).

According to the leading case on costs against non-parties (*Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at paragraph 25):

> *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 defendant or defendants to face a plaintiff who is impecunious or insolvent. A third, and very rare, instance might be where it should have been clear at the time of filing that the funded claim was simply not tenable and litigation should have been avoided (*Poh v Cousins & Associates* Unreported, HC Christchurch, CIV 2010-409-2654, 4 February 2011 at paragraph 61).

Indemnity or increased costs will not be awarded merely because a litigation funder with a profit motive stands behind the losing party (*Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67 at paragraph 135).

19 May the courts order a claimant or a third party to provide security for costs?

Yes. Under Rule 5.45 of the High Court Rules, on the application of a defendant, a judge may order the giving of security for costs if:

- a plaintiff is resident outside New Zealand;
- a plaintiff is a corporation incorporated outside New Zealand;
- a plaintiff is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
- 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.

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 (*Saunders v Houghton (No 1)* [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 36 and *Walker v Forbes* at paragraphs 92 to 94).

Calculation of the sum is a matter for the Court to assess in all the circumstances.

Those circumstances 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
- probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant's estimated actual (ie, 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 such 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 guarantee directly enforceable by the defendant.

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Update and trends

On 10 May 2018, the Law Commission (an independent law reform agency established by the Law Commission Act 1985) 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 (see: www.lawcom.govt.nz/news/review-class-actions-and-litigation-funding).

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'.

After the terms of reference for the review have been settled, 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:

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

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

When completed, this report is tabled in Parliament and the government responds by deciding whether to accept or reject some or all of 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.

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

Yes. A third-party funded claim does have an influence, and may justify increased security for costs. In *Houghton v Saunders* [2015] NZCA 141, the Court of Appeal stated at paragraph 11:

> *[The fact a party is supposed 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.

It was confirmed by the High Court in *Highgate on Broadway Ltd v Devine* [2013] NZHC 2288, [2013] NZAR 1017 at paragraph 22(d) that the fact the plaintiff is funded is a ground for the order of security.

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

Yes. ATE is permitted in New Zealand. In our experience, it is commonly used by funders.

Generally, the only types of parties who would use other types of insurance to cover legal (defence) fees would be company director defendants (directors and officers' insurance) and professional defendants, such as lawyers, accountants, architects and engineers (professional indemnity insurance).

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Upon the commencement of funded proceedings, a litigant must disclose the following matters to the other party or parties:

- the fact 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, but only if those terms in some way give legal control over the proceedings to the funder (eg, the ability to withdraw finding if the funded party refuses to obey instructions given) (paragraphs 67 to 69 and 72, *Waterhouse*).

The litigation funding agreement itself must be disclosed 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 (paragraphs 73 to 74, *Waterhouse*).

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 (paragraph 63, *Waterhouse*).

Disclosure is subject to redactions being made relating to confidentiality, and litigation-sensitive and privileged matters.

In domestic arbitrations, an arbitral tribunal may order the discovery and production of documents or materials within the possession of power of a party (Schedule 2, Rule 3(1)(f) to the Arbitration Act 1996). This is broad enough to encompass a litigation funding agreement, although an arbitral tribunal would be cognisant of the need to protect confidentiality and privilege.

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

Yes. The Evidence Act 2006 provides that the following communications and materials are protected by privilege of three kinds:

- privilege for communications with legal advisers that are intended to be confidential and are made in the course of, and for the purpose of, the person obtaining professional legal services from the legal adviser or the legal adviser giving such services to the person (section 54);
- privilege for a communication or information (section 56), where a person who is, or on reasonable grounds contemplates becoming, a party to the proceeding, has a privilege in respect of:
  - a communication between the party and any other person;
  - a communication between the party's legal adviser and any other person;
  - information compiled or prepared by the party or the party's legal adviser; or
  - information compiled or prepared at the request of the party, or the party's legal adviser, by any other person. In all these cases, the communication or information must be made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding; and
- privilege for settlement negotiations or mediation (section 57): a person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was:
  - intended to be confidential; and
  - made in connection with an attempt to settle or mediate the dispute between the persons.

Further, a person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a

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confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute (section 57(2)).

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

There do not appear to be any such disputes reported as at the time of writing.

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

It appears that some funded litigation has occurred in the main Pacific Islands. The civil procedure rules of the Cook Islands, Fiji and Samoa all permit 'representative actions', rather than 'class actions' or 'group actions' per se.

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Poland

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

Third-party litigation funding is permitted in Poland on the basis of the rule of freedom of contract. Since third-party litigation funding has not yet become popular in Poland, there are no court rulings that allow us to establish the Polish courts' attitude towards third-party litigation funding.

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

Polish law does not lay down specific rules limiting the fees of third-party funders. If Polish law governs the funding agreement, funders and litigants may determine their legal relationship at their own discretion within the general limits of freedom of contract laid down by Polish law. These limits follow the nature of the contractual relationship, good customs and the provisions of law.

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

No specific legislative or regulatory provisions applicable to third-party litigation funding have been adopted in Poland.

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

No specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding. The rules of ethics applicable to qualified lawyers do not distinguish funders from other third parties. Lawyers are obliged to act in the best interest of their clients and may not be under any third-party influence, including that of funders. Lawyers may take instructions from their clients only. All information the lawyers obtain in relation to the case is confidential.

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

According to publicly available information, so far, no public bodies, including the financial regulator and the Minister of Justice, have any particular interest in or oversight over third-party litigation funding.

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

The choice of attorneys belongs only to litigants. Nonetheless, it seems that it would not violate Polish law if funders and litigants agreed that the choice of a reputable attorney indicated by the funders would be a condition for funding the case.

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

Funders may attend all hearings that are open to the public. In Polish domestic litigation, the general rule is that the public may attend all hearings, unless the court orders a closed hearing. The court orders a closed hearing if hearing the case with the public in attendance would be a threat to public policy or morality, or if there is a possibility that protected confidential information or company secrets might be revealed.

According to the rules of the 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, hearings held in arbitration proceedings are closed unless the parties agree otherwise. Thus, funders may attend the hearing only upon the consent of both parties.

Funders may participate in out-of-court settlement proceedings. There are no restrictions on attending institutionalised settlement proceedings before the court, which are in general open to the public. Funders may not attend institutionalised mediation proceedings, which are confidential. The parties and their lawyers are not allowed to disclose any facts made known to them in mediation proceedings to any third parties, including funders, without the consent of both parties.

8 Do funders have veto rights in respect of settlements?

Funders do not have veto rights in respect of settlements.

9 In what circumstances may a funder terminate funding?

Polish law does not determine in which circumstances funders may terminate funding. If Polish law governs a funding agreement, the agreement should indicate the circumstances in which a funder may terminate funding.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Polish procedural rules do not envisage that the funders may take any active role in the litigation process.

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

According to the rules of ethics applicable to qualified lawyers, they are not permitted to enter into conditional or contingency fee agreements if the whole fee is payable only if the case is won. However, lawyers may enter into an agreement upon which a part of fee is due regardless of the outcome of the case, while the remaining part of the fee is paid if the case is won. The rules of ethics do not give a clear-cut answer as to what the proportion between these two parts of the fee should be.

Specific provisions apply to lawyers representing clients in class action proceedings. Lawyers may be entitled to a conditional or contingency fee only; however, the fee cannot exceed 20 per cent of the award. It is disputable whether these provisions only limit conditional and contingency fees, or the sum of the conditional or contingency fee and fee due regardless of the outcome of the case.

12 What other funding options are available to litigants?

An alternative funding option available to litigants in domestic litigation is to apply to the court for legal aid by way of releasing the party from the duty to pay court costs and to appoint an attorney for the party whose fee would be paid by the state. Court costs include court fees, the costs of the opinions of court-appointed experts and witnesses' costs. Providing the litigant with legal aid does not release the litigant from all expenses. Even if a litigant was provided with legal aid, he or she may be liable for adverse costs if the opposite party wins the case.

The court will provide legal aid to a litigant who, as an individual, cannot bear court costs without affecting his or her ability to support himself or herself and his or her family. A litigant who is a legal person will be provided with legal aid if it has no sufficient funds to bear court

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costs. However, experience shows that courts are reluctant to provide entrepreneurs with legal aid even if they are on the verge of insolvency.

If legal aid is granted, the State Treasury will cover court costs and attorney's fee instead of the litigant. The fees of court-appointed attorneys are regulated by law. The adverse party will be ordered to reimburse the State Treasury if it loses the case.

Litigants cannot be granted legal aid in class action proceedings. However, if consumers bring a class action, they will not incur court costs if the consumers' ombudsman agrees to join the proceedings on the side of consumers as the class representative. The body may decide to join the case at its own discretion. As the class representative, it may also be liable to pay adverse costs if the case is lost, and be ordered by the court to provide security for those costs.

Legal aid is not available to litigants in arbitration proceedings pursuant to rules of Court of Arbitration at the Polish Chamber of Commerce in Warsaw and Court of Arbitration at the Polish Confederation Lewiatan.

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

According to the information published by the Polish Ministry of Justice, the average length of legal proceedings in commercial cases heard before district courts that ended in the first quarter of 2018 was just under 16 months. District courts generally adjudicate in cases exceeding 75,000 zlotys at the first instance; thus, a third-party funded case will most probably be heard by these courts. In 89.9 per cent of cases heard before district courts, it took no more than three years to reach a decision at first instance. This data does not include the duration of order for payment proceedings that usually precede the main proceedings. For payment proceedings, the court orders the defendant to pay the money sought by the claimant or to deny the claim within 14 days. The average duration for an order for payment proceedings is four months. As regards total length of time, an average commercial case before district courts takes just under 20 months to reach a decision at first instance.

The length of proceedings at first instance depends on the complexity of the case, the number of witnesses, and the number of court-appointed experts. The place where the case is heard may also have an impact on the duration of case. For example, because of the high number of cases heard by courts in Warsaw, proceedings before these courts are significantly longer. In the first half of 2018, the average duration of proceedings in commercial cases before the District Court in Warsaw was just under 22-and-a-half months, and the average duration for an order for payment proceedings, which usually precedes the main proceedings, was just over four months. As regards total length of time, an average commercial case heard before this court took just over 26-and-a-half months to reach a decision at first instance. (The averages presented above were calculated on the basis of data published by the District Court in Warsaw.)

Class action proceedings at first instance last longer because of the additional stages of these proceedings involving the verification of the admissibility of class action, and the summons of potential litigants to join the class action on the side of the class representative. These stages may delay the whole proceedings by two years or more.

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

According to statistics published by the Polish Ministry of Justice, in the first half of 2018, district courts made decisions in 8,175 commercial cases at first instance, while 4,765 appeals were filed with appellate courts against the first-instance rulings of district courts. However, experience shows that in high-profile or high-value cases, a losing party even more often appeals against the ruling.

Calculations made on the basis of information published by the Appellate Court in Warsaw show that the average length of appellate proceedings before this court in commercial cases that ended in the first half of 2018 was 17 months.

Appellate proceedings last much longer if the court decides to take additional evidence. Moreover, in specific circumstances, the court may refer the case back for reconsideration to the court of first instance, which considerably lengthens the whole proceedings. For instance, in regard to appellate proceedings before the Appellate Court in Warsaw, which ended in the first half of 2018, less than 9.5 per cent of commercial cases were referred back to district courts for reconsideration pursuant to data published by this court.

Appeals in commercial cases quite often succeeded in the first half of 2018. Appellate courts dismissed or entirely rejected 56.2 per cent of appeals in commercial cases. The remaining appeals resulted in the court of first instance's ruling being overruled, at least partially, or in the referral of the case back to the court of the first instance for reconsideration.

In specific situations, the party that loses appellate proceedings may appeal against the ruling of the appellate court to the Supreme Court. The appeal does not suspend the enforceability of the ruling unless the appellate court decides otherwise.

There is no publicly available detailed data for the duration of arbitration proceedings in Poland. According to the Polish Arbitration Survey 2016 carried out by Kocur & Partners law firm, in cooperation with Kozminiski University in Warsaw and the University of Economics in Katowice, among Polish arbitration practitioners and the largest companies operating in Poland, the duration of arbitration was graded 4.21 points on average on a scale of one to seven points, where seven stood for a short duration.

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

There is no official data as to what proportion of judgments made by Polish courts in domestic litigation require enforcement proceedings. Usually, solvent debtors pay the award voluntarily to avoid paying the costs of enforcement proceedings. Still, it is not uncommon for fraudulent debtors to dispose or conceal assets. In all enforcement proceedings in 2017, bailiffs recovered 18.6 per cent of the sum of all awards to be enforced. There are no official statistics regarding the effectiveness of enforcement proceedings in commercial cases.

In respect to arbitral awards, according to the Polish Arbitration Survey 2016, only 10 per cent of respondents indicated that the arbitral award was voluntarily complied with in all cases they were involved in, while 18 per cent of respondents claimed that it happened in the majority of cases. Twenty per cent of respondents indicated that the arbitral award was voluntarily complied with in around half of the cases. Some 22 per cent of participants admitted that the losing party voluntarily complied with the award in a minority of cases, while 15 per cent indicated that it happened in none of the cases. About 12 per cent of respondents answered that it is difficult to say, and 3 per cent indicated that no award was issued in any of the cases they were involved in.

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

Opt-in class actions are permitted in Poland in cases concerning product liability claims, unfair enrichment claims, disputes over breach of agreements and delicts, excluding in general claims for the protection of personal rights. Moreover, class actions are permitted in all cases concerning consumers' claims.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

In Polish domestic litigation, the rule is that the court orders the losing party to pay the reasonable costs of proceedings the winning party incurs, including court cost, the costs of appearing in person before the court and the fee of one attorney.

The reimbursement of an attorney's fee is limited and usually does not correspond to the fees actually paid to that attorney. In cases exceeding 5 million zlotys, the court will order the losing party to pay from 25,000 zlotys to 150,000 zlotys to cover the opposing attorney's fee for proceedings at the first instance. The limits to reimburse an attorney's fee for appellate proceedings and proceedings before the Supreme Court are in the range of 50 per cent to 100 per cent of fees for first instance proceedings. The courts rarely order the losing party to pay more than the minimal rate, regardless of the fees actually paid (eg, 25,000 zlotys in cases exceeding 5 million zlotys).

If a part of a claim is awarded, the court may order the losing party to pay a proportional part of the adverse costs or decide that each party has to pay its own costs. If only a minor part of the claim is denied, the losing party has to reimburse the adverse costs in full within the

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aforesaid limits. In certain justified circumstances, the court may order the losing party to pay only part of adverse costs or no adverse costs at all. The winning party may be ordered to pay adverse costs if the defendant accepts the claim in the first response addressed to the court and, simultaneously, did not give the claimant any reasons to file the statement of claim.

Different rules apply in arbitration. According to the rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, the arbitral tribunal decides which party should cover the adverse costs, taking into account the outcome of the case and other relevant circumstances. The adverse costs include arbitration and registration fees, expenses incurred in relation to the arbitration proceedings and reasonable attorneys' fees. The arbitrational tribunal decides what fees are reasonable in each given case. The Court of Arbitration at the Confederation of Lewiatan has adopted similar rules.

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

A third-party litigation funder may not be held liable for adverse costs.

19 May the courts order a claimant or a third party to provide security for costs?

In domestic litigation, the court orders the claimant to provide security for costs if the claimant comes from a country outside the European Union. Moreover, the court may order the class representative in class action proceedings to provide security for costs. The court cannot order a third party, including funders, to provide such security.

Upon the defendant's motion, the court is obliged to order the claimant to provide security for costs if the claimant has its place of residence, 'usual stay' or a registered office outside the European Union. However, there are a number of cases in which a foreigner cannot be obliged to provide security. In particular, a foreigner cannot be ordered to provide security if it has assets in Poland sufficient to cover the costs of the proceedings, or the parties subject the case to the jurisdiction of Polish courts or the ruling of a Polish court in regard to costs is enforceable in the country where the claimant has its place of residence, 'usual stay' or registered office. In addition, Poland has entered into a number of treaties that release foreigners from the duty to provide security for costs (eg, with China and Russia).

The court calculates security taking into account the anticipated costs the defendant may incur in the first-instance proceedings and the appellate proceedings, except for the costs of counterclaim. The costs that may be incurred in proceedings before the Supreme Court should also be included if an appeal to the Supreme Court is permitted in a given case. Since the aim of the security is to ensure the enforcement of the claimant's payment of adverse costs, the amount of security should in general correspond to the hypothetical amount of adverse costs that the court would order the claimant to pay if it loses the case. The security should be deposited in cash or by wire transfer to the designated bank account of the Polish Ministry of Finance, unless the court decides otherwise. If the security is not paid, the statement of claim will be rejected by the court.

In class action proceedings, upon the defendant's motion, the court may order the class representative to provide security for costs. The security cannot exceed 20 per cent of the claim. The security should be provided in cash or by wire transfer within the term indicated by the court, which should be no shorter than one month.

The defendant seeking security has to convince the court that there is a high probability of the claim being dismissed and that the defendant most likely will not be able to enforce the reimbursement of its costs without the security. In arbitration proceedings before the leading courts of appeal in Poland, the Polish Chamber of Commerce in Warsaw, and Court of Arbitration at the Confederation of Lewiatan, the arbitral tribunal may not order a claimant to provide security for costs.

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

Third-party litigation funding is irrelevant for the court in respect of deciding on security for costs.

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

ATE legal expense insurance is not used in Poland. It is disputable if Polish law even permits ATE insurances. There is a risk that they might be deemed as unenforceable or as an illegal wager. Before-the-event legal expenses insurances are permitted, but are not popular.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

It is not obligatory for the litigant to disclose a litigation funding agreement to the opposing party or to the court. The court cannot order the disclosure of funding.

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

The communication between litigants or their lawyers and funders is not privileged. Nonetheless, Polish law permits litigants and funders to conclude a non-disclosure agreement that would secure confidentiality between them. The breach of the confidentiality established by such an agreement may be deemed a criminal offence pursuant to Polish law in certain circumstances. The parties may also agree on contractual penalties in the case of a breach of confidentiality. The non-disclosure agreement does not release the parties from the duty to disclose information to authorised public bodies if the disclosure of information is mandatory under provisions of law. Moreover, information covered by a non-disclosure agreement may be used in court as evidence.

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

According to publicly available information, no disputes between litigants and their funders have been reported.

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

The practitioners of litigation funding should be aware that Poland is relatively affordable for litigants in relation to high-value claims.

In domestic litigation, the court fee to file a lawsuit is generally 5 per cent of a claim. The fee for filing a lawsuit in class action proceedings is 2 per cent of the claim. The same fees apply for filing an appeal. Each fee cannot exceed 100,000 zlotys.

In arbitration proceedings before the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, if the claim exceeds 1 million zlotys, the arbitration fee equates to 62,200 zlotys plus 0.9 per cent of surplus over 1 million zlotys. This percentage of surplus being a part of fee is reduced to 0.6 per cent in regard to a surplus over 10 million zlotys, and to 0.3 per cent in regard to a surplus over 100 million zlotys. Arbitration fees at the Court of Arbitration at the Confederation of Lewiatan are similar.

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Singapore

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

Third-party funding is now permitted in Singapore in the context of international arbitration proceedings and related court and mediation proceedings, including proceedings for, or in connection with, the enforcement of arbitration awards.

This significant development follows amendments introduced in 2017 to the Civil Law Act (CLA) and represents an exception from the traditional position, under which the torts of maintenance (the improper support of litigation in which the supporter has no legitimate concern, without just cause or excuse) and champerty (when the maintaining party pays some or all of the costs of a party in return for a share of the proceeds of the claim) prohibited third-party funding of contentious proceedings. The Ministry of Law ran a consultation to seek feedback on the CLA in early 2018, the results of which may impact future legislative updates.

As at September 2018, we are aware of only one publicised instance of a 'live' Singapore-seated arbitration being financed by a third-party finance provider, although funders have received many more proposals. This number is expected to rise as parties and funders become more familiar with the third-party funding framework in Singapore.

Outside the sphere of international arbitration and related court proceedings, there are limited exceptions under which third-party funding may be permitted. *In Re Vanguard Energy* [2015] SGHC 156, the Singapore High Court found that the sale by a liquidator of a cause of action and the proceeds of such actions are permitted under the statutory insolvency regime (section 272(2)(c) of the Singapore Companies Act). More broadly, the High Court in that case also considered (albeit on an obiter basis) that the assignment of a bare cause of action, or 'the fruits of such actions', might be permissible if:

- it is incidental to a transfer of property;
- the assignee has a legitimate interest in the outcome of the litigation (the question here being whether the funder's interest in the litigation justifies his or her intervention); or
- there is no realistic possibility that the administration of justice may suffer as a result of the assignment, which will be viewed in light of prevailing public policy, with particular regard to ensuring the administration of and access to justice as well as the interests of vulnerable litigants.

In a recent ruling, the Singapore High Court allowed the liquidators of two subsidiaries of PT Trikomsel Oke Tbk to proceed with a commercial third-party funding arrangement. This ruling confirms that commercial funding of claims arising out of an insolvency is permitted in Singapore.

The third-party funding regime will be further expanded if the Insolvency, Restructuring and Dissolution Bill is passed. This will allow third-party funding in claims by liquidators against persons who have misappropriated a company's assets.

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

Singapore law does not expressly provide any specific limits on the fees and interest funders can charge. This will largely be a matter to be negotiated between the funder and funded parties.

However, sections 5A(2) and 5B(2) of the CLA provide that a funding contract should not be contrary to public policy. It is therefore possible that the Singapore courts may take into account the level of fees and interest in considering whether a funding contract is in line with public policy. Judicial guidance as to the level of fees and interest that may be charged might therefore be forthcoming in the long-term as the funding market develops in Singapore.

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

The CLA and the Civil Law (Third-Party Funding) Regulations 2017 (Regulations) are the primary sources of legislation and regulations applicable to third-party funding.

The CLA abolishes the common law torts of champerty and maintenance and confirms that third-party funding is not contrary to public policy or illegal where it is provided by eligible parties in prescribed proceedings. The Regulations provide further detail on conditions under which third-party funding will be permitted; in particular:

- in order for a party to be eligible to provide funding under the CLA, the funding of dispute resolution proceedings must be its 'principal business' (in Singapore or elsewhere), and the third-party funder must have 'a paid-up share capital of not less than S$5 million';
- the prescribed categories of proceedings in which third-party funding can be used is limited to international arbitration proceedings; and
- court litigation proceedings and mediation arising out of or in connection with international arbitration proceedings (eg, applications for the enforcement of awards, or mediation undertaken prior to or during an arbitration).

The Singapore Institute of Arbitrators has issued non-binding guidelines for third-party funders, with the aim of promoting best practice among funders who intend to provide funding to parties in Singapore-seated international arbitrations. These guidelines set expectations of transparency and accountability between the third-party funder and the funded party, and encourage funders to behave with high ethical standards towards funded parties so as to uphold the integrity of the international arbitration practice in Singapore. It is expected that these guidelines will provide useful guidance to funders and funded parties alike.

The Singapore International Arbitration Centre (SIAC) has issued a Practice Note on arbitrator conduct in SIAC cases that involve external funding. The Practice Note addresses arbitrator impartiality, independence and disclosures, disclosure of the involvement of funders and costs and security for costs in the context of third-party funding.

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

Singapore lawyers and foreign lawyers based in Singapore are subject to the requirements and duties of the Legal Profession Act (LPA) and the Legal Profession (Professional Conduct) Rules 2015 (Legal Profession Rules). The 2017 amendments to the CLA were accompanied by related amendments to both the LPA and the Legal Profession Rules.

Section 107 of the LPA prohibits solicitors from holding any interest of any party in any suit, action or other contentious proceeding, or acting in any suit, action or other contentious proceeding on a basis that contemplates payment only in the event of success. However, these amendments do not prohibit solicitors from:

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- introducing or referring a third-party funder to a client, provided the solicitor does not receive any direct financial benefit (excluding their usual fees, disbursement or expense for the provision of legal services to the client);
- advising on or drafting a third-party funding contract for such client or negotiating the contract on their behalf; or
- acting on behalf of the client in any dispute arising out of such a contract.

The Legal Profession Rules deal with third-party funding in two main areas:

- disclosure: lawyers must now disclose to the court or tribunal and to every other party to proceedings:
  - the existence of any third-party funding contract related to the costs of such proceedings; and
  - the identity and address of any funder involved, at the date of commencement of proceedings, or as soon as practicable after the third-party funding contract is entered into; and
- financial interest: lawyers are prohibited from receiving direct financial benefits (including referral fees, commissions or any share of the proceeds) from third-party funders, or holding directly or indirectly any share or ownership interest in any third-party funder that they have referred to a client, or that has a third-party funding contract with their client. The above prohibition extends to any arrangement in which a lawyer's fee is contingent on the outcome of the proceedings. However, it does not extend to the lawyer's fee if it is not so contingent.

The Law Society of Singapore has also issued a Guidance Note that sets out best practices for lawyers that refer, advise or act for clients who obtain third-party funding.

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

There are no public bodies specifically designated as having particular interest in or oversight of third-party funding. However, the CLA provides that the Minister of Law may make regulations necessary or convenient to be prescribed relating to third-party funding. The Law Society of Singapore also has oversight over the conduct of Singapore lawyers and foreign lawyers based in Singapore, including in relation to their conduct on matters involving third-party funding.

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

The CLA and Regulations do not restrict a funder's right to choose counsel. In practice, funders are likely to be able to influence the choice of counsel via their decision on whether or not to fund a particular case. For example, funders could decide not to offer funding if they are unhappy with the choice of counsel. Depending on when a funder becomes involved, they could take an active role in the selection of counsel, or require such rights in funding agreements.

As to whether counsel may take up appointments proposed by funders, as discussed above, Singapore lawyers and foreign lawyers based in Singapore are subject to the requirements and duties of the LPA and the Legal Profession Rules that include general provisions on independence and integrity, confidentiality and referral payments in the context of client introductions and work referrals by a third party (which would include a third-party funder).

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

Funders are likely to be able to attend arbitration proceedings provided that all of the parties and the tribunal agree, and subject to funders being party to the necessary confidentiality provisions. In terms of litigation, court hearings in Singapore are generally public and therefore there would be nothing preventing a funder from attending the proceedings if it wished to do so. For court proceedings held in camera, however, specific consent from the other parties and the presiding judge or registrar would have to be sought and obtained before a funder is able to attend.

Singapore law is currently silent on the extent to which (if at all) a funder would be entitled to participate in hearings and settlement proceedings. In practice, however, the terms of the underlying funding agreement will usually allow funders some say in the strategy and decision-making process over the course of the proceedings.

8 Do funders have veto rights in respect of settlements?

This is not specifically addressed under Singapore law. The veto rights of funders (ie, their ability to approve or reject a proposed settlement) are primarily matters to be dealt with in individual funding agreements between parties and their funders.

9 In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate a funding arrangement is a matter that will be negotiated between the funder and the funded party and recorded in the relevant funding agreement. These circumstances may include, for example, where the funder becomes aware of fraud or wrongdoing by the funded party.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

See question 7. There is currently no legislative or regulatory guidance or requirements as to the role funders can take in the litigation or arbitration process in Singapore.

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

Conditional and contingency fee agreements are not permitted in respect of litigation in the Singapore courts or for lawyers based in Singapore participating in arbitrations.

12 What other funding options are available to litigants?

Litigation costs are generally funded by the litigants themselves. In certain civil matters, litigation costs can be state-funded where Singapore citizens and permanent residents are financially eligible for legal aid.

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

The length of time a claim takes to reach a decision at first instance depends on a number of factors, including the complexity of the claim. Typically, a commercial claim might take, on average, one to one and a half years to reach a decision at first instance in the Singapore courts. This may be quicker in the new Singapore International Commercial Court.

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

It is difficult to provide a reliable estimate, although we understand that significantly less than half of first-instance civil judgments will be appealed in the Singapore courts. On average, appeals usually take six to nine months to reach judgment.

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

While there are no statistics available on the proportion of judgments that require contentious enforcement proceedings, experience suggests that Singapore-based judgment debtors tend to pay their judgment debts where they are able to do so. Cases where contentious enforcement proceedings are required are more commonly seen in cases involving cross-border litigants, such as judgment debtors domiciled overseas. Where contentious enforcement proceedings are required, the ease of enforcement is dependent on various matters of practicality (eg, the location and accessibility of assets to be enforced against).

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

The only form of representative group litigation in Singapore is the action governed by Order 15, Rule 12 of the Rules of Court, which states that where numerous persons have the same interest in proceedings they may begin proceedings by, or against, any one or more of them representing the whole (or except one or more of them). Representative actions can be initiated by the parties without the approval of the court, although the court may terminate the action at its discretion. There are no special rules relating to the payment of solicitors' fees in representative proceedings.

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17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The general rule in Singapore is that costs follow the event, such that the unsuccessful party in an application or proceedings is usually ordered by the court to pay the successful party's reasonable legal costs. However, the order for costs, and the quantum of costs to be ordered, is entirely at the court's discretion in both principle and amount. There are a number of factors that the court can consider when exercising its discretion.

While the issue has not directly arisen for the court's consideration, costs ordered by the court could conceivably include the litigation funding costs of the successful party insofar as these represent the reasonable legal costs of the successful party. The English courts, for example, have awarded litigation funding costs (and upheld tribunal cost orders providing for the same), and it is possible that the Singapore courts will take a similar approach under the appropriate circumstances.

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

As a general rule, courts in Singapore are not precluded from awarding costs against a third party. However, such orders are exceptional, and will turn on the question of whether in all the circumstances it is 'just' to make such an order, looking in particular at whether there is a 'close connection' between the non-party and the proceedings, and whether the third-party caused the costs in question to be incurred.

Singapore courts have noted that the discretion to award costs against a third party may be exercised where that party either funds or controls legal proceedings with the intention of ultimately deriving a benefit from them. It is therefore possible that adverse costs orders could be made against a third-party funder in the context of litigation proceedings before the Singapore courts (see question 3 in relation to court proceedings that can be subject to funding).

In arbitration, tribunals derive their jurisdiction from an arbitration agreement between parties, and their jurisdiction is limited to those contracting parties. Accordingly, arbitral tribunals seated in Singapore have no power over third parties and cannot order them to pay adverse costs. Having said that, the SIAC Practice Note on arbitrator conduct provides that, in cases involving external funding, a tribunal may take into account the existence of an external funder in deciding on the quantum of costs to be awarded.

19 May the courts order a claimant or a third party to provide security for costs?

Defendants in Singapore can apply for an order that claimants provide security for their costs under Order 23 of the Rules of Court provided that certain grounds are met, including, for example, that the claimant resides out of the jurisdiction, or is suing for the benefit of some other person and there is reason to believe that he or she will be unable to pay the costs of the defendant if ordered to do so.

Section 388 of the Companies Act also provides that, where a claimant is a corporation, the court may order security for costs, and stay proceedings until it is paid, if there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in its defence.

In deciding whether to grant security for a defendant's costs, the court will consider factors such as whether the claimant's claim has a reasonable prospect of success, the ease of enforcing any such order (including the location of the claimant's assets, for example), and whether such an order would stifle the claimant's claim. The court has complete discretion as to the amount of security to be given and will fix a sum having regard to all the circumstances of a case. It is not always the practice to order security on a full indemnity basis. The court may be assisted, for example, by lawyers' estimates and skeleton bills of costs. It is for the applicant to provide materials to enable the court to come to a view on the quantum to be ordered as security. Payment is usually made into court, or, exceptionally, may be given by providing a bond.

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

The High Court of Singapore has indicated that it would not hesitate to make an order for security for costs to deter 'interested parties . . . trying their luck by fielding unmeritorious or dubious claims using [an] impecunious corporation as a shield which may then leave the defendant who ultimately emerges victorious with unpaid costs' (*Frantonios Marine Services Pte Ltd and anor v Kay Swee Tuan* [2008] 4 SLR(R) 224). While the decision in question predates the recent relaxation of rules on third-party funding, it is possible that the Singapore courts would still be prepared to order security for costs in funded cases, where the circumstances justify such an order.

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

ATE insurance has been available in Singapore since 2009, although we understand that its use is not widespread at the present time.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Under Rule 49A of the Legal Profession Rules, a legal practitioner must disclose to the court or tribunal, and to every other party to the proceedings, the existence of any third-party funding contract related to the costs of those proceedings, and the identity and address of any third-party funder involved in funding the costs of those proceedings. An opponent or the court may therefore compel disclosure of a funding arrangement on this basis.

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

In Singapore, such communications may be protected by legal advice privilege or litigation privilege.

Communications between a client and its lawyer and a client's lawyer and third parties acting as agents for a client, attract legal advice privilege if made for the purpose of obtaining legal advice. Where the communication or document was prepared in circumstances where there is a reasonable prospect of litigation, that communication or document will also be privileged, even if it is passed between a lawyer and a third party that was not acting as the client's agent. The latter form of privilege is known as litigation privilege.

Where communications or documents are privileged on either of the above bases, the client may also share the privileged material with a third party such as a funder on the basis that the funder has a common interest in the subject matter (being an interest in the matter), without losing privilege.

While the issue has not arisen for judicial determination, the Singapore courts are likely to give serious consideration to a claim for legal privilege over communications between litigants or their lawyers and funders on the basis that these bear the characteristics discussed above.

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

There have been no public reports of such disputes.

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

Singapore's Ministry of Law has made clear that the amendments to the CLA and the Regulations are the start of a broader review of the Singapore civil justice system, with the intention that these amendments 'allow the framework to be tested within a limited sphere by parties of commercial sophistications' so that 'the framework may be broadened in future after a period of assessment'. The Ministry of Law further observed that, in future, 'event-triggered fee arrangements, including contingency fee arrangements, will be studied'.

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Spain

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Rockmond Litigation Funding Advisors

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

Spanish law neither expressly permits nor prohibits third-party litigation funding. The figures of champerty and maintenance are foreign to Spain. Many legal authorities have studied how litigation funding can fit into Spanish law, and have observed that article 1255 of the Spanish Civil Code states that contracting parties can establish the pacts, clauses and conditions that they deem convenient, as long as they do not violate the law, morality, nor the public order. Thus, one can infer that as long as third-party funding agreements do not violate the law, morality nor the public order of Spain, such agreements are lawful. In addition, the buying and selling of claims is permitted in the Spanish Civil Code, and article 1534 allows the withdrawal from a litigious credit and understands that it exists once the suit has been answered, and not before.

Third-party funding agreements have not been very common in the past, but this trend is slowly changing. Also, international arbitrations with a Spanish element or in which Spain is a party are also the object of third-party funding. The past years have seen an increase in Spain as a party in international arbitration proceedings, especially under the Energy Charter Treaty.

The attitude of Spanish courts has been to allow third-party funding agreements. For example, Commercial Court No. 3 of Madrid approved on 4 November 2014 the liquidation plan of Petersen Energía Inversora, SAU and Petersen Energía, SAU, two Spanish Companies under insolvency proceedings. The plan included that both companies would enter litigation funding agreements to begin proceedings against the Republic of Argentina. Furthermore, Amanda Cohen Benchetrit, specialist judge on commercial law and adviser to the Directorate General of International Legal Cooperation of the Ministry of Justice of Spain, points out in her article, *Legal situation in Spain and the EU: possibilities for future regulation*, which was published on the website of the Spanish National Bar Association, that she believed that an explicit regulation of third-party funding was not necessary. However, she stated it might be necessary to regulate other more contentious issues such as disclosure of third-party funding agreements and their terms, and conflict of interest.

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

No. Spanish law does not contemplate limits on the fees and interest funders can charge. However, if one were to consider third-party funding as a type of loan, Spain does indeed have provisions protecting borrowers from usury that would have to be considered. However, the consideration of third-party funding as a loan is a subject of debate and does not hold water in the view of a sector of Spanish legal doctrine, according to Cohen Benchetrit.

But leaving the consideration of third-party funding as a type of loan aside, in 2008, jurisprudence of the Supreme Court of Spain established that the prohibition of perceiving percentage-based fees only in the case of winning at trial was contrary to competition law, which strictly forbids direct or indirect price fixing. This historic ruling thus liberalised fees charged by lawyers and opened the door to third-party funders since there is nothing that prohibits a third-party from receiving a sum in exchange for sharing or assuming the cost of litigation.

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

No. In Spain there are no specific legislative or regulatory provisions applicable to third-party litigation funding. Litigation funding is very new in the Spanish legal world and it is slowly developing. Prominent and highly influential legal institutions and experts are debating whether it would be better to draft legislative provisions to regulate the issue, in accordance with continental law or, on the other hand, to let the market regulate itself, albeit with some exceptions, as we have seen in common law jurisdictions. Third-party litigation funding could be regulated in a European framework but considering the different legal systems of the EU member states, this regulation would not be an easy task.

In our opinion, excessive regulation can pervert the nature of third-party funding, which should be a tool that the market offers to claimants and defendants and that both parties, funders and clients, should adapt to each specific case. That said, a minimum framework should be established with the main rules in order to establish the parameters, leaving to the parties involved the negotiation of the major content of the relationship.

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

Spanish lawyers are always subject to the professional and ethical rules of the Spanish National Bar Association, and must always respect the ethical principles regarding Professional Secrecy, Conflict of Interest, and Independence in all of their professional undertakings. However, there is no specific set of ethical rules that applies to lawyers advising clients in relation to third-party litigation funding. Our opinion is that lawyers should exercise caution to not enter conflict of interest when, in addition to advising their clients on a case, they are going to advise them on the financing contract.

Notwithstanding, third-party funding is an extra legal tool that should be based precisely on professional and ethical rules in order to provide an honest service to the client that makes the market confident and comfortable, and the relationship between the parties stronger. The reputation in this market is one of the most important things that the professionals of the sectors should take care of. Hence, professional or ethical rules should always be borne in mind.

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

For the time being, Spanish public bodies have not expressed a particular interest in or oversight over third-party litigation funding. Pacts of this nature would always be subject to article 1255 of the Spanish Civil Code and thus have to abide by the laws, morality and public order of Spain. Precisely because champerty is unknown in Spain, third-party funding agreements in the country have greater flexibility in the definition of their terms.

Moreover, the debate is still open (see question 3) and many bodies, such as, for example, the Spanish National Bar Association, are housing conferences of sector experts, including judges, in order to sharpen their view of third-party litigation funding.

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

Third-party funders in Spain would be able to recommend their choice of counsel, but the final decision would always lie with the funded party to avoid any kind of conflict of interest. However, funders should have the possibility to recommend or advise the funded party on whom they believe is the best choice of counsel bearing in mind their experience in the field.

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

In Spain, there is no rule that prohibits a funder from attending hearings and settlement proceedings. Regarding the participation of the funder in hearings and settlement proceedings, we consider that this participation should be, given the case, indirect and never a direct participation because it is the funded party who has the legitimacy before the court.

8 Do funders have veto rights in respect of settlements?

In Spain, funders do not have a veto right in respect of settlements. The decision on whether or not to enter into a settlement agreement always lies with the funded party. However, should a dispute arise between the funder and the funded party in respect of settlements, and given the absence of specific legislation in Spain on this topic, it would be advisable that the litigation funding contract contemplate the need to obtain a binding opinion from a third party, as contained in article 13.2 of the Code of Conduct for Litigation Funders (in its January 2018 version) of the Association of Litigation Funders of England and Wales.

9 In what circumstances may a funder terminate funding?

It is reasonable to consider that the funder would be able to terminate a funding agreement if the terms of the funding contract were violated by the client or by the lawyer. Otherwise, an early termination without contractual cause can inflict several damages on the client if alternative funding has not been sought in due time. The litigation funding contract should stipulate the circumstances under which a funder would be able to terminate funding. As such, it would be advisable that it contemplate the conditions set forth in article 11.2 of the Code of Conduct for Litigation Funders (in its January 2018 version) of the Association of Litigation Funders of England and Wales, under which a funder would be able to terminate funding: when the funder:

- reasonably ceases to be satisfied about the merits of the dispute;
- reasonably believes that the dispute is no longer commercially viable; or
- reasonably believes that there has been a material breach of the LFA by the Funded Party.

Should a dispute arise between the funder and the funded party on terminating funding, we also recommend that the litigation funding contract contemplate the need to obtain a binding opinion from a third party, as contained in article 13.2 of the Code of Conduct for Litigation Funders (in its January 2018 version) of the Association of Litigation Funders of England and Wales.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Given the absence of specific legislative or regulatory provisions on third-party funding, there is ample freedom in determining the role played by the funder. This role would have to be agreed upon by the funded party and the lawyer and defined in the third-party contract subscribed by all three. The only limitation to any active role played by the funder would be the principles established in article 1255 of the Spanish Civil Code: respect of the laws of Spain, morality, and the public order.

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

Yes. Jurisprudence of the Spanish Supreme Court ruled that the prohibition of perceiving percentage-based fees only in the case of winning at trial was contrary to competition law. This historic ruling eliminated article 16 of the Spanish National Bar Association's Code of Conduct, which limited the fees that lawyers could charge clients. From then on, litigation lawyers are free to enter into conditional or contingency fee agreements. These kinds of fees allow the client and the funder to set up a different way of financing by decreasing the upfront legal costs that the latter may cover and thus, allowing the client to get better conditions of financing.

12 What other funding options are available to litigants?

Litigants in Spain can request financing from banks or other financial entities. However, it is important that they bear in mind that these kinds of entities are not familiar with these types of operations and it could therefore be difficult to access this type of funding. Moreover, litigants can also contract different types of insurance to cover the risk of adverse costs, for example. This kind of insurance is becoming more important since it allows the funder and the funded party to control the risk if the claim is eventually lost.

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

In Spain, commercial and civil claims usually take, on average, 382 days to reach a decision at first instance, according to the *Study on the functioning of judicial systems in the EU Member States*, published by the European Commission for the Efficiency of Justice in Strasbourg on 5 April 2018 (page 203).

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

According to the judicial statistical data provided by the General Council of the Spanish Judicial Authority (Consejo General del Poder Judicial), in 2017, the proportion of first-instance judgments that were appealed stood at 17.8 in commercial courts (*Juzgados de lo Mercantil*).

With regards to the length of time that appeals usually take, according to the judicial statistical data provided by the General Council of the Spanish Judicial Authority, the average length of time of an appeal in 2017 was about seven months.

Finally, and according to the same data provided by the General Council of the Spanish Judicial Authority, the percentage of appeal judgments totally confirming the ruling in first instance increased to 72.2 per cent in 2017.

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

The majority of judgments require contentious enforcement proceedings. However, this does not happen when the unsuccessful party voluntarily complies with the judgment within 20 days from the moment the judgment has become final. Notwithstanding the above, the causes to oppose contentious enforcement proceedings are very specific. The procedure itself is not very difficult.

On the other hand, we should underscore that once a judgment has been made in first-instance, it is possible to request its provisional enforcement, with the consequential benefits for the plaintiff who does not have to wait until the end of possible appeals to be satisfied in his or her claims. That said, provisional enforcement is undertaken with the necessary caution and guarantee measures in the event an appeal judgment was to revoke the first-instance ruling.

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

Class actions are not contemplated in Spanish law, and therefore cannot be funded by third parties. The regulation of class actions is one of the main justice system reforms that is being called for by lawyers, judges and members of academia.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The general rule in the Spanish legal system is that the unsuccessful party pays the costs of the successful party. The expenses that are included in these costs are regulated by Spanish procedural law and include, for example, lawyer and court representative fees, technical reports and public fees. These expenses could generally coincide with the costs linked to the funding of a litigation. However, the amount of

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adverse costs is moderated by the courts, and normally do not surpass the parameters established by the Bar Associations of each Spanish province. Therefore, it is not guaranteed that the unsuccessful party will have to pay for the entirety of the costs and expenses incurred by the successful party.

Notwithstanding the above, in order for the unsuccessful party to be condemned to the payment of the costs of the successful party, the judgment has to fully esteem the presented claim. Should the judgment partially esteem the claim, each party pays for their own costs.

As we have stated above, and in view that Spanish courts use the parameters published by the provincial Bar Associations when ordering the unsuccessful party to pay adverse costs, rule that is accompanied and reinforced by jurisprudence, it is doubtful that a court would order the unsuccessful party to pay costs that exceed that amount. Thus, it is highly unlikely that an unsuccessful party in Spain will ever have to pay the costs of litigation funding to the successful party.

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

Given the current situation in Spain and the absence of specific legislation on this topic, as we have seen in the previous questions, a third-party litigation funder can be held liable for adverse costs if that was stipulated in the litigation funding contract. In principle, the funder would be responsible for paying adverse costs in the event that the funded party were unsuccessful.

Thus, in the event of losing, the funded party would have to pay the costs of the successful party. In order for the unsuccessful party to pay for the costs of the successful party, the judgment has to fully esteem the claim of the opposing party, or what is the same, fully object the opposition of the other party (see question 17). In the event that the judgment only esteems part of the claim, each party would pay for their own costs.

19 May the courts order a claimant or a third party to provide security for costs?

Spanish legislation does not contemplate courts ordering a claimant or a third party to provide security for costs in the event of being condemned to pay costs.

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

To date, Spanish legislation does not contemplate this case in providing security for costs (since it does not contemplate, in general, the need to provide security for costs (see question 19). Thus, a court would not be influenced on its decision on security for costs if a third-party funds the claim. However, this is an issue that could change in the future under specific legal or regulatory provisions.

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

The issue of insurance related to claims and their expenses is quite new in Spain, and remains very uncommon. An ATE insurance is permitted and courts will not oppose parties from contracting it.

Spain does have a legal defence insurance (*Seguro de Defensa Jurídica*) whereby the insurer is obliged to, within the limits established in the contact and by the law, take care of the expenses of the insured as a consequence of the latter's involvement in a judicial, arbitral or administrative procedure. The insurer is also obliged to provide the insured with judicial and extrajudicial legal aid that derives from the insurance coverage.

Despite the fact that the legal defence insurance must be the object of an independent contract, it may be included in a separate chapter within a single policy. To date, legal defence insurance is very much linked to insurance policies for cars and light motor vehicles, and is very rarely seen as a stand-alone insurance.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

In Spanish law, there is no obligation for the litigant to disclose a litigation funding agreement to the opposing party or to the court. As previously discussed, this is an issue that could be the object of future legal or regulatory provisions, as expressed by Cohen Benchetrit. Only the court can compel disclosure of a funding agreement. The opponent would only be able to request it, and the final decision would lie with the court.

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

Yes. Communication between litigants or their lawyers and funders is protected by privilege, and can only be waived under the indication of regulatory or supervisory authorities to which either the litigants, their lawyers or funders are subject, or pursuant to any court order or order by another competent authority or tribunal.

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

To date, we are unaware of any disputes that have arisen in Spain between litigants and their funders.

However, any dispute that were to arise in the future between litigants and their funders would probably reach the courts. We would therefore have to wait between five to seven years to see what the position of Spanish courts, and specifically the Supreme Court, would be on the subject.

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

There is no specific regulation on third-party funding in Spain. Therefore, as long as financing agreements do not violate the principles contained in article 1255 of the Spanish Civil Code, that is, that they abide by the law, morality, and the public order of Spain, there should not be any problem in creating tailor-made financing contracts.

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Switzerland

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

The Swiss Federal Supreme Court held in 2004 that litigation funding by third-party funders is permissible in Switzerland if the funder acts independently of the client's lawyer (decision BGE 131 I 223). The Court stated that it could even be advantageous for a claimant to have his or her claim assessed by an independent expert who intends to cover the financial risk of the envisaged litigation process and who is thus complementing the claimant's lawyer's view.

In 2014, the Court expressly confirmed its earlier decision. It further concluded that, in the meantime, litigation funding has become common practice in Switzerland, and it held that it is part of the lawyer's professional conduct as provided by the Federal Act on the Freedom to Practise in Switzerland (BGFA) to inform claimants about a potential litigation funding option as the circumstances require (Supreme Court decision 2C_814/2014).

Thus today, litigation funding in Switzerland is an accepted practice and has been judicially endorsed by the Federal Supreme Court twice in recent years. In light of its rather comprehensive and detailed legal analysis, the Court established in Switzerland quite a clear and favourable environment for third-party litigation funding.

Nevertheless, third-party litigation funding is still not broadly used in Switzerland. The reasons for this might be the relatively late establishment of litigation funders in Switzerland compared with other jurisdictions and, notwithstanding the Swiss Federal Supreme Court's verdicts, a certain reluctance for the option of third-party litigation funding on the part of some Swiss lawyers.

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

There is no explicit limit on what is an acceptable compensation for the funder's services. However, as a general rule stated by the Swiss Penal Code (article 157), a third-party funding agreement – as any other agreement under Swiss law – must not constitute profiteering (ie, exploitation of a person in need).

The Federal Supreme Court has not explicitly stated a limit, but has indirectly approved the common practice in Switzerland with success fees ranging from 20 to 40 per cent of the net revenue of the litigation process. In its legal analysis, the Court cited a source who described a success fee of 50 per cent as 'offending against good morals and thus illegal', however, without confirming or even commenting on this opinion.

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

There are no specific provisions in the Federal Code of Civil Procedure (CCP) or in any other Swiss legislation. However, the Federal Supreme Court held that a range of existing general provisions in various parts of the Swiss legislation (eg, article 27 of the Civil Code, article 19 of the Code of Obligations and article 8 of the Unfair Competition Act) would be applicable should a litigation funding agreement violate certain principles of Swiss law.

With regard to regulatory provisions, the Court explicitly stated that third-party litigation funding cannot be regarded as an insurance offering as defined by the Swiss Insurance Supervision ACT (ISA). Furthermore, the core offering of a funder does not, in general, fall under the Swiss financial market laws (eg, Banking and Insurance Acts, the Anti-Money Laundering Act and the Collective Investment Scheme Act). However, depending on the funding structure, funders might qualify as asset managers of collective investment schemes and must be authorised by the Swiss Financial Market Supervisory Authority (FINMA).

In light of the rules pertaining to lawyers' professional conduct in Switzerland, which do not allow for lawyers to be paid on the basis of contingency fees only, it has to be kept in mind that any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer would violate the respective provisions.

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

The lawyer's professional conduct in Switzerland is provided in article 12 of the BGFA. According to the Federal Supreme Court decisions mentioned in question 1, the lawyer's independence in acting on behalf of the litigant is crucial; this also applies to cases involving a third-party funder. However, the Court also stated that by a clear separation of the roles between the lawyer and the funder, a lawyer who advises his or her clients in relation to a funder has no conflict of interest in principle. In addition, the Court held that it is part of the lawyer's professional conduct to support his or her clients in negotiations with the funder; obviously, always advising in the interest of the client.

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

The Federal Supreme Court clarified this question with regard to the point that litigation funding is not deemed to be an insurance offering as defined by the ISA and is thus not regulated by FINMA (see question 3). As the core offering of a funder generally does not fall under the Swiss financial market laws, there is no known interest of the Swiss financial regulator to oversee litigation funding reported.

In its 2013 report on collective redress, the Swiss Federal Council suggested promoting litigation funding in Switzerland in general, without pointing at a specific need for regulation or oversight.

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

Independence in acting on behalf of the litigant (see question 4) is an important principle of the lawyer's professional conduct in Switzerland. In light of the established third-party litigation funding concept, this means that, in general, the litigant's lawyer must be able to act freely from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder's right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that if the litigant intends to replace his or her lawyer, funding will only be further granted if the new lawyer will be accepted by the funder.

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

In domestic litigation, court hearings are generally public and funders can attend without having to obtain specific permission. On the other hand, settlement and organisational proceedings are conducted in private. However, if the counterparty does not object to it, a litigant might

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invite his or her funder to participate in such proceedings based on a respective clause in the funding agreement.

This also applies to arbitration. While the respective hearings and proceedings are generally private, funders may participate if there is no objection by the counterparty.

However, it must be kept in mind that the majority of cases funded by third-party funders in Switzerland so far have been carried out without disclosing the funder's engagement. As such, the relevance of the funder's permission to attend or participate is limited.

8 Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in the funding agreement. This is generally permissible under the Swiss Code of Obligations and interferes with neither the independence of the litigant's lawyer nor with any other provision of Swiss law. Moreover, it is quite usual that litigants and funders agree in advance on certain minimum and maximum amounts concerning the limitation of the funder's veto right and his or her right to oblige the claimant to accept a particular settlement.

9 In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. Usually, such circumstances fall into two categories. On the one hand, there are events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or authority decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown facts;
- a change in the case law that is decisive for the current litigation process;
- a loss of evidence or evidence that is accepted and tends to be negative; and
- a major change in the creditworthiness of the respondent.

In practice, a funder would, under such circumstances, terminate the funding agreement and bear any costs incurred or caused until the termination, as well as costs that occur as a result of the termination.

While these clauses prevent the funder from continuing to fund litigation processes that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such a case, the funder can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, given these circumstances, the litigant is usually obliged to reimburse the funder for its costs and expenses.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

As the Federal Supreme Court emphasised the independence of the claimant's lawyer from the litigation funder, a direct approach of the funder in order to instruct the lawyer during the proceedings is not permissible. The lawyer would violate the professional conduct as provided by the BGFA if his or her actions were based on a funder's, rather than on his or her client's, instructions.

Therefore, any rights and actions the funder intends to exercise during the course of the litigation process have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation process and any rights to veto the actions a litigant is usually free to take.

In consequence, the litigant is usually obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written permission of the funder.

Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding (see question 3), funders only need to take an active role as provided by the litigation funding agreement. In addition, the involvement of a litigation funder is not disclosed to the court nor the counterparty in the majority of cases, which also considerably limits the funder's role within the litigation process.

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

The lawyer's professional conduct as provided by BGFA prohibits fee agreements in which the lawyer's fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are inadmissible. Only if the lawyer charges a basic fee (flat or on an hourly basis) for the services that cover the actual costs of the lawyer's practice, is he or she allowed to agree on a premium in the event of a successful outcome in addition to the basic fee.

Consequently, the litigation funding agreement must neither directly nor indirectly provide a model resulting in a conditional or contingency fee for the lawyer. However, it is permissible to add a success fee for the lawyer, within the limits described above, in the funding agreement.

12 What other funding options are available to litigants?

Legal cost insurances are widely available in Switzerland. However, the extent and limits of coverage depend upon the specific policy as these insurances usually only cover the costs of certain types of claims. Furthermore, the insurance policy usually has to be arranged before a person or entity becomes aware of the need to litigate. After-the-event (ATE) litigation insurance is not common in Switzerland (see question 21).

A claimant may also seek legal aid 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. However, both conditions are handled rather strictly by Swiss courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs and to provide security, an exemption from court costs or the appointment of a lawyer by the court if necessary to protect the rights of the party. In theory, legal aid is also available to companies, provided, among other things, that the object in dispute is the company's only remaining asset.

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

In general, a commercial litigation before a court of first instance in Switzerland takes between one and two years. If the case is rather complex or if the court accepts an extended range of evidence to be heard, the litigation process may take considerably longer. In domestic arbitration, the duration is normally between one and three years.

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

There is no comprehensive statistical data available regarding the proportion of appealed first-instance judgments. There is also a considerable difference in the respective practice of the various cantons of Switzerland. As a general rule, approximately one-third of judgments are appealed before second instance. On average, the second instance takes between one year and 18 months. Only a small proportion of these judgments are appealed before the Federal Supreme Court. An average appeal here usually takes less than one year.

Challenges to an arbitration award are heard exclusively by the Swiss Federal Supreme Court and are generally adjudicated within a time period of four to six months from the date of the challenge.

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective number seems to be rather low.

The enforcement of Swiss judgments is governed by the CCP and by the provisions of the Federal Debt Enforcement and Bankruptcy Act (DEBA). A judgment rendered by a Swiss court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement or it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

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In general, the enforcement of an enforceable judgment or arbitral award in Switzerland is not seen as particularly burdensome, expensive or unsecure. Also, it is important to note that an enforceable Swiss judgment allows for an attachment of known assets of the debtor located in Switzerland.

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

Class actions are not part of Switzerland's civil procedural law practice. The only form of collective redress available under the CCP is the joinder of parties. Unlike class actions, the parties to the joinder may not seek damages on behalf of others who have not joined the proceedings. The funding of such litigation processes by a third party is comparable to the funding of individual claims, and is thus permissible without any restrictions.

In its 2013 report on collective redress, the Swiss Federal Council suggested a number of measures to support the effective and efficient procedural handling of a large number of identical claims against the same respondent or respondents and to allow for a facilitated enforcement of consumer rights in particular. The authors of the report also suggested the promotion of litigation funding by third parties to cover the costs of the envisaged collective redress proceedings.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

As a general principle of the CCP, court fees as well as all other expenses arising from the litigation, including the opposing lawyer's fees, are borne by the losing party. If a party prevails only in part, the fees and expenses will be split proportionally between the parties. In the event of a settlement, the costs are charged to the parties according to the terms and conditions of the settlement agreement.

The Swiss courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before cantonal courts and the Swiss Federal Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party and there is little legal basis for such an argument in Swiss law, neither in the rules pertaining to material damages nor in those regarding procedural costs (eg, adverse costs). A potential ground for a respective decision could be seen in article 95(3a) of the CCP ('necessary expenses'): where a claimant has turned to a litigation funder for reasons of dire financial necessity as a result of the defendant's refusal to settle an outstanding invoice, one might argue that the counterparty should be liable for this involuntary financial situation since, if the claimant won the case, the counterparty was wrong not to pay the invoice in the first place. In the spirit of this argument, a claimant for which, financially speaking, the assistance of a litigation funder is the only way to receive what turns out to be rightfully his or hers, should have the funder's share of the successful claim compensated by the counterparty – or at least a part, taking into account a deduction for the 'risk-free' character of proceedings when being funded compared to unfunded proceedings.

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

The CCP does not provide for a basis for the court to order a third-party funder to pay adverse costs and to hold him or her liable for such costs. In the litigation funding concept developed and observed in Switzerland, the funder's contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect.

In theory, there are two ways in which a litigation funder can be held liable for these costs by the prevailing respondent.

If the unsuccessful claimant assigns his or her claim against the funder to cover the adverse costs imposed on him or her by the court to the respondent (and the litigation funding agreement allows for such an assignment), the respondent can take the assigned claim against the funder to the competent court.

If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow for an assignment), then the respondent has to take legal action against the claimant. In practice, the Swiss courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the DEBA that govern the enforcement of a judgment related to the payment of money, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

19 May the courts order a claimant or a third party to provide security for costs?

There are two different types of security for costs that Swiss courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs based on the CCP. In addition, the claimant must advance the costs for taking the evidence he or she requested.

At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party's costs if the claimant has no residence or registered office in Switzerland, appears to be insolvent, owes costs from prior proceedings, or if, for other reasons, there seems to be a considerable risk that compensation will not be paid. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Switzerland has entered into a treaty that excludes respective security bonds.

The CCP does not provide for a basis to request such security from the funder of a claim and there have been no cases reported where Swiss courts considered such a request.

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

In most of the cases funded so far by third-party funders in Switzerland, the funder's engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts decided on advances and securities solely focusing on the claimant's status (see question 19) and did not take the existence of the third-party funder into account.

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

ATE litigation insurance is not common in Switzerland. Although no legal or regulatory restrictions limit the respective product, there is, currently, no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases.

By contrast, legal cost insurance is commonly used in Switzerland. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy, but usually only for certain types of claims.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

The CCP does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that he or she is supported by a third-party funder. It also does not provide a basis for a Swiss court to order a litigant to do so.

While some authors have argued that a litigant might have, under specific circumstances, such an obligation in domestic arbitration, there have been no cases reported where a litigant had to disclose the litigation funding agreement in a Swiss-based arbitration.

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

While any legal advice given by a Swiss or non-Swiss lawyer to a litigant is privileged and does not have to be disclosed to the other party or the court, the communications between litigants or their lawyers and third-party funders do not fall within the legal privilege.

However, there have been no cases reported where such communications had to be disclosed by order of a Swiss court.

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

No disputes between litigants and funders have been recorded in Switzerland so far.

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

No.

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United Arab Emirates

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Gowling WLG

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

There are a number of judicial authorities within the United Arab Emirates and it is necessary to look at each separately when considering third-party funding.

Commercial disputes arising in the United Arab Emirates will be resolved by the local civil law courts unless the parties have opted into another jurisdiction or signed a valid arbitration agreement.

The United Arab Emirates consists of seven emirates. 'Local courts' or 'onshore courts' (see below) refer generically to the courts of the seven emirates.

In addition, the United Arab Emirates has a number of free zones where companies can set up and do business under the rules of the free zone. These rules are different from those that apply to companies doing business elsewhere in the United Arab Emirates. Businesses located in the free zones are commonly referred to as being in 'offshore' United Arab Emirates, with areas outside the free zones being known as 'onshore' United Arab Emirates.

Two free zones in the United Arab Emirates have their own courts, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). The rules of those courts determine the circumstances in which the courts have jurisdiction. Additionally, contracting parties, whether registered in these free zones, in onshore United Arab Emirates or outside the United Arab Emirates altogether, can agree that the DIFC or ADGM courts have jurisdiction to resolve their commercial disputes.

The DIFC and the ADGM also have their own common-law based laws. The DIFC's laws are modelled closely on the principles of English common law. English common law is directly applicable in the ADGM, as are certain United Kingdom statutes.

Parties doing business in the United Arab Emirates also have the option to agree that disputes will be resolved by arbitration. Parties can choose between having the arbitration seated in onshore United Arab Emirates, in the DIFC or in the ADGM. In the case of an onshore seat the arbitration will be governed by the recently enacted UAE Federal Arbitration Law (Law No. (6) of 2018). Arbitration seated in the DIFC will be subject to the DIFC Arbitration Law (DIFC Law No. 1 of 2008) while arbitration in the ADGM is governed by the ADGM Arbitration Regulations 2015.

There are no rules or laws that prohibit litigation funding in the United Arab Emirates. Indeed, there is a strong argument that litigation funding is consistent with the key jurisprudential principle in sharia law that a transaction should benefit public interest (*maslaha*) in the sense that funding can give parties of limited financial means a method of funding meritorious claims that they might otherwise be unable to pursue.

Case reporting of local court decisions is confined to important decisions of the Courts of Cassation and so the attitude of the local courts to third-party funding is difficult to discern. However, there has been no indication from reported cases that it is either discouraged or regarded unfavourably although it is still relatively uncommon in the local courts.

Some commentators have suggested that the sharia law prohibition on speculative or highly uncertain transactions (*Gharar*) may apply to third-party funding arrangements in onshore UAE. However, funders usually carry out extensive due diligence on the merits of a case before agreeing to funding, and in those circumstances it seems unlikely that the *Gharar* prohibition would apply. The risk can be further mitigated by careful drafting of the funding agreement, with the risks and benefits to both parties being clearly identified so that it is clear that neither party is taking excessive risk.

Third-party funding in the DIFC court is permitted and the DIFC court issued a Practice Direction on Third Party Funding in March 2017. The rules in the DIFC Practice Direction largely mirror the position in England and Wales but they are not identical.

Third-party funding in the ADGM courts is permitted by Part 9 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (ADGM Courts Regulations), unless the matter relates to proceedings that cannot be the subject of an enforceable conditional fee agreement, or to any proceedings specifically prescribed by the Chief Justice.

Third-party funding is not addressed specifically in the arbitration laws applicable in onshore United Arab Emirates, the DIFC or the ADGM but there is no reason to suppose that it would not be permitted under the general laws applicable in those jurisdictions. The fact that third-party funding is specifically permitted in litigation in the DIFC and ADGM courts is a good indicator that it would not be prohibited in arbitration seated in the DIFC or ADGM.

The reference to third-party funding in the draft new Dubai International Arbitration Centre (DIAC) Rules is another recognition of the legitimacy of third-party funding in an arbitration context.

The new Federal Arbitration Law in the United Arab Emirates is based on the 2006 United Nations Commission on International Trade Law (UNCITRAL) Model Law, with some adaptations to fit the local legal framework. The grounds for challenge of an arbitration award closely follow the equivalent provisions in the Model Law, with some additional grounds for challenge based on irregularities in the arbitral proceedings. Much will depend on how the new law is interpreted by the onshore courts, but the new law should generally lessen concerns over enforcement of onshore UAE-seated arbitration awards against assets in onshore United Arab Emirates. This should make the funding of arbitration in the United Arab Emirates a more attractive prospect than it was previously.

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

There are no specific laws or rules that limit the fees that third-party funders can charge where the proceedings are in the onshore courts. Interest may be recoverable under onshore UAE law in certain specified circumstances, but compound interest will not be recoverable.

UAE law recognises the principle that parties are free to contract on the terms they wish. The courts have power to intervene in certain circumstances but these are unlikely to apply in a third-party funding context. Contracts in the United Arab Emirates must be performed in accordance with the requirements of good faith.

There are no limits in the DIFC Practice Direction on the fees and interest funders can charge. However, DIFC law is modelled on English law and so funders should be mindful of the English law rules of maintenance and champerty. Modern English law recognises that third-party funding does not of itself amount to either maintenance or champerty. However, if the funding agreement contains an element of impropriety, such as the exercise of disproportionate control or the recovery of excessive profit, it could breach the rules and be void.

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The ADGM Courts Regulations provide that the sum to be paid by the funded party must consist of 'any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of services' and 'that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Chief Justice'. This suggests that damages-based payments to the funder will not be permitted.

The ADGM court applies English common law directly and so the comments regarding maintenance and champerty are also relevant.

The arbitration laws applicable in onshore United Arab Emirates, the DIFC and the ADGM do not specifically provide for third-party funding. However, for arbitrations with a DIFC or ADGM seat see the comments about maintenance and champerty above.

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

There is currently no legislation or regulation for third-party funding of cases in the onshore UAE courts.

The DIFC Practice Direction and the ADGM Court Regulations referred to in question 1 provide for third-party funding.

The UAE Federal Arbitration Law, the DIFC Arbitration Law and the ADGM Arbitration Regulations are silent on third-party funding.

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

There are no specific rules applying to lawyers advising on third-party funding for cases in the onshore courts.

Expatriate lawyers who practise in the United Arab Emirates and are registered and regulated by professional supervisory authorities in their home countries may still be required to comply with their own relevant ethical rules.

The Mandatory Code of Conduct for Legal Practitioners in the DIFC courts and the ADGM Courts Rules of Conduct 2016 make no specific mention of third-party funding.

No specific professional or ethical rules apply in relation to third-party funding in arbitration.

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

There are currently no public bodies in the United Arab Emirates with a particular interest in or oversight over third-party funding. However, the Government of Dubai Legal Affairs Department may have an interest in third-party funding to the extent that it relates to any issue falling within the (non-mandatory) Charter for the Conduct of Advocates and Legal Consultants in the Emirate of Dubai 2015.

The DIFC Authority was established to oversee the development, management and administration of the DIFC. The Authority may have an interest in third-party funding if it is likely to bring more cases before the DIFC courts but there is currently no specific oversight over third-party funding in either the DIFC or ADGM courts or in arbitration, although we anticipate that this may change as interest in third-party funding continues to grow.

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

The quality of the lawyers conducting the litigation or arbitration will, as in other jurisdictions, be an important factor in the funding decision. However, funders will not generally insist on use of a particular counsel, consistently with the principle that litigation funders do not control the litigation.

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

Proceedings in the onshore UAE courts are public so third-party funders are in principle free to attend the hearings. However, the proceedings are in Arabic and involve very little in the way of advocacy. Hearings are generally limited to the submission or exchange of written memoranda by or between the parties' advocates.

The majority of hearings in the DIFC and ADGM courts are public (unless the court orders otherwise) and so there is no reason why funders could not attend, although participation would not generally be permitted. All hearings are conducted in English.

The extent to which a funder may be able to participate in settlement discussions will largely depend on the terms of the funding agreement. Funders must be careful to avoid exercising disproportionate control in order to avoid breaching the rules against maintenance and champerty referred to in question 2.

Arbitration hearings are private but if both parties agreed to the funder attending the hearing then this may be possible provided the tribunal did not have objections. It is very unlikely that the funder would be able to participate in hearings.

8 Do funders have veto rights in respect of settlements?

There are no specific rights to veto and the ability to do so would depend on the terms of the funding agreement. There is nothing in principle to prevent a funding agreement giving the funder the right to make continuance of funding conditional on acceptance of reasonable settlement proposals. However, where the funding agreement is subject to UAE law the UAE Civil Code will require it to be performed in accordance with the requirements of good faith.

9 In what circumstances may a funder terminate funding?

The funding agreement is likely to confirm the circumstances in which it can be terminated by the funder. These circumstances will usually include changes in the prospects of success during the course of the proceedings.

If the funding agreement is subject to UAE law then the UAE Civil Code will apply to it. Article 267 provides that a contract can only be varied or cancelled 'by mutual consent, or an order of the court, or under a provision of the law.'

It is advisable for the funding agreement to state expressly that agreement to the termination provisions constitutes 'mutual consent' for the purpose of article 267.

There are no specific provisions dealing with the termination of funding in DIFC or ADGM court proceedings or in arbitration. However, given that the DIFC and the ADGM courts are common law courts and follow (or apply) English law it would be sensible to adopt termination provisions that are compliant with the Association of Litigation Funders' Code of Conduct in England and Wales.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

The role a funder will take in the process will depend on the terms of the funding agreement. Most funding agreements will set out the due diligence process the funder will undertake before committing to funding, as well as the ongoing monitoring. It is important that funders do not reserve the right to control the proceedings (see question 2 regarding maintenance and champerty), but they will generally require to have input at key stages of the litigation process.

A funder will not be required under any law or regulation to take an active role in cases in the United Arab Emirates, whether in onshore or DIFC-ADGM litigation or in arbitration seated onshore or offshore in the United Arab Emirates.

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

UAE law prohibits contingency or success fee arrangements between lawyers and clients (although this prohibition does not apply to any agreement between a funded party and the funder).

Contingency fee arrangements are generally prohibited in DIFC court proceedings, although conditional fee arrangements (CFAs) are permitted (where a lawyer receives an uplift in fees in the event of success but not a share in the proceeds).

CFAs are permitted in the ADGM provided they comply with the requirements in section 222 of the ADGM Court Regulations. Damages based agreements are also permitted, subject to the requirements of section 224.

There are no provisions addressing the position in arbitral proceedings. However, given the position summarised above it is likely that CFAs would be permitted in arbitration seated in the DIFC or ADGM (but not in onshore United Arab Emirates) and that contingency fee agreements would not be permitted wherever the UAE seat.

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12 What other funding options are available to litigants?

There is no developed system of state sponsored legal aid in the United Arab Emirates but both the Dubai Legal Affairs Department and the DIFC Academy of Law have well-organised pro bono schemes that can be available to potential claimants depending on their circumstances and the type of claim involved.

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

It usually takes at least 12 months to get a decision from the court of first instance in the onshore UAE courts. The proceedings can last longer if the court decides to appoint one or more court experts to investigate technical issues.

In the DIFC and ADGM courts a claim is likely to take approximately 12 months to get to trial but this will depend on the complexity of the case and the court's availability.

The ADGM court opened in December 2015 but the first claim was not issued until August 2017 and to date there have only been three judgments handed down by the ADGM court. It is therefore difficult to determine timings. However, the ADGM courts have expressed their commitment to helping parties to resolve disputes in a timely manner.

Arbitration timelines depend on the availability of parties and the arbitrators, the complexity of the issues and the institutional rules or ad hoc procedures adopted by the parties. However, a time frame of 12 to 18 months from commencement to award would generally be realistic for arbitrations seated in the DIFC or ADGM.

Arbitrations seated in onshore United Arab Emirates are now subject to the new UAE Federal Arbitration Law, which has introduced a number of modernising and streamlining initiatives in line with the United Arab Emirates' ambition to adopt best international arbitration practice. Disregarding other potential variables, arbitration in onshore United Arab Emirates is now likely to be comparable in terms of timescale to arbitration in either of the two offshore seats.

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

In the onshore courts appeals to the Court of Appeal and from there to the Court of Cassation are routine for larger value claims. Appeals can take up to one year before each appeal court.

There are no available statistics about the proportion of judgments of the DIFC and ADGM courts that are appealed. As at September 2018, the ADGM courts are yet to receive an appeal. Given the efficient case management procedures in both courts, appeals are likely to be dealt with quickly.

Awards in arbitrations seated in the DIFC or ADGM are final and cannot be appealed. The only recourse against an award is by an application for setting aside.

In arbitrations seated in onshore United Arab Emirates the new Federal Arbitration Law provides that an arbitral award can only be challenged by an application for setting aside the award on the grounds specified in article 53 (see question 15).

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

There are no reported statistics but we would estimate that more than half of judgments issued by the onshore UAE courts require enforcement proceedings where the assets are located onshore in the United Arab Emirates.

Judgments cannot be enforced against assets and property that is owned by the United Arab Emirates or the governments of the seven emirates. Therefore, if a judgment is against a government (or quasi government) entity then the creditor has to rely on voluntary payment.

Where the debtor is not a government entity then applications can be made to the local UAE execution courts to attach funds in the debtor's bank accounts up to the value of the judgment, and have them paid to the creditor. Assets such as property, machines and vehicles can also be attached and sold at auction with the proceeds being paid to the creditor (after the courts' expenses).

When assets cannot be located, an application can be made to the court for an arrest order against the manager of a company against which a judgment has been issued.

The conditions for the enforcement of foreign judgments in the onshore courts are listed under article 235 of the UAE Civil Procedure Law. It is likely to be difficult to enforce a foreign court judgment in the onshore courts unless there is a mutual recognition and enforcement treaty between the United Arab Emirates and the relevant foreign jurisdiction.

There are no reported statistics on the proportion of judgments requiring enforcement in the DIFC and ADGM courts.

The DIFC court's judgments are relatively easy to enforce in onshore Dubai under the Judicial Authority Law. The DIFC court is categorised as a court of the United Arab Emirates and it therefore benefits from the reciprocal enforcement treaties entered into by the United Arab Emirates, including those with the Gulf Cooperation Council, France and India. The court has also entered into memoranda with various countries, including England and Wales, Australia and Singapore to govern reciprocal enforcement. Overall, the DIFC court has established robust enforcement procedures and they are favourably looked upon within the region.

The ADGM courts have also entered into various memoranda to aid the enforcement of judgments, including a memorandum of understanding with the Abu Dhabi Judicial Department and the Federal Ministry of Justice. This is expected to aid enforcement in onshore Abu Dhabi.

Enforcement of a DIFC or ADGM arbitral award can only be refused on the narrow grounds set out in the DIFC Arbitration Law and ADGM Arbitration Regulations. Decisions on enforcement are made by the DIFC and ADGM courts respectively and they can be expected to deal with matters expeditiously.

DIFC arbitration awards that have been recognised and enforced by the DIFC court can be enforced and executed in onshore Dubai under the Judicial Authority Law. The ADGM court memorandum of understanding referred to above will assist with enforcement and execution of ADGM arbitration awards in onshore Abu Dhabi.

In arbitrations seated in onshore United Arab Emirates the new Federal Arbitration Law provides that enforcement of an award can only be challenged on the limited grounds specified in article 53, which broadly follow the equivalent provisions in the 2006 UNCITRAL Model Law, with some additional grounds for challenge based on irregularities in the arbitral proceedings. The Model Law provisions are themselves based on the recognition and enforcement grounds under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Applications to enforce awards are made directly to the Court of Appeal, with one appeal to the Court of Cassation. Applications must be dealt with by the Court of Appeal within 60 days.

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

The onshore UAE courts do not have a system for filing class or collective actions and all claims must be filed separately.

The DIFC courts permit representative party actions where more than one person has the same interest in a claim. However, certain types of claims are excluded from representative actions. In addition, the DIFC courts permit group litigation and the court may order the management of claims that give rise to common or related issues of fact or law. There is nothing in the DIFC Practice Direction on third-party funding that suggests that such actions could not be funded by third parties.

The ADGM Court Procedure Rules provide for group litigation orders where there are common or related issues of fact or law. Provided the group action does not relate to a type of proceedings for which funding is not permitted by the ADGM Courts Regulations it may be funded by third parties.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The onshore UAE courts only make nominal awards for costs. The award is not intended to compensate the winning party for the costs incurred in having won the claim.

The DIFC court may order the unsuccessful party to pay the costs of the successful party. The DIFC Practice Direction on third-party

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funding does not make clear whether the litigation funding costs of the successful party will be recoverable from the unsuccessful party. We are not aware of any reported decision on this point.

The ADGM court may make such an order on costs as it considers just. The ADGM Courts Regulations provide that a costs order made in any proceedings may, subject to court procedure rules, include payment of any amount payable under a litigation funding agreement.

The DIFC Arbitration Law and the ADGM Arbitration Regulations require the arbitral tribunal to fix the costs of the arbitration in the award, though there is no express obligation to order payment of those costs by either of the parties. Arbitrators will normally do so though and costs are likely to be awarded to the successful party in the absence of unusual circumstances.

We are not aware of any DIFC or ADGM seated arbitrations in which the unsuccessful party was ordered to pay the litigation funding costs of the successful party.

However, the judgment of the *English Commercial Court in Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) addressed this issue, finding that the definition of 'other costs' in section 59(1) of the English Arbitration Act 1996 could include third-party funding costs. English court judgments have persuasive authority in the DIFC courts and the ADGM courts directly apply English common law, so it may well be that this judgment would be followed by the DIFC or ADGM courts depending on the interpretation given to the definitions of costs in the relevant arbitration law and regulations.

In arbitrations seated in onshore United Arab Emirates, the new UAE Federal Arbitration Law provides that the arbitral tribunal shall assess the costs of the arbitration and may order that any or all of the costs are to be borne by one of the parties. The Law provides that the costs of the arbitration shall comprise the fees and expenses of the tribunal and the costs of experts appointed by the tribunal. There is no express reference to legal costs (unlike in the arbitration laws and regulations of the DIFC and ADGM) and so it will be important to review the applicable arbitration rules and any agreement between the parties when considering the recoverability of legal costs.

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

The onshore United Arab Emirates courts will not make costs orders against third parties.

The DIFC Practice Direction on third-party funding provides that the DIFC courts have inherent jurisdiction to make costs orders against third parties, including funders, where the court deems it appropriate.

We are not aware of any reported decisions that address this point. However, we would expect the DIFC court's position to mirror that of the English courts, who have shown themselves willing in appropriate circumstances (such as the unsuccessful funded party being impecunious and unable to pay the other party's costs) to hold a funder liable for costs, capped at the level of funding provided.

Part 9 of the ADGM Courts Regulations contains no express powers to make costs orders against third-party funders and there are no reported decisions in the ADGM courts that hold a funder liable for costs.

However, given that the ADGM court applies English law common law it is likely that the ADGM court would follow English case law and so may hold a funder liable for adverse costs in appropriate circumstances.

It is very unlikely that a funder in an arbitration case would be held liable for adverse costs as an arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement.

19 May the courts order a claimant or a third party to provide security for costs?

The onshore United Arab Emirates courts are civil law courts and do not order security for costs, which is predominantly a common law concept.

The Rules of the DIFC courts provide that security for costs orders may be made against claimants. They also provide that an order may be made against someone other than the claimant where the court is satisfied that it is just to make an order and one or more of the circumstances listed in the relevant rule applies, including the situation where a person has contributed to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings. The DIFC Practice Direction on third-party funding reinforces this and states that the court has an inherent jurisdiction to make costs orders against third parties, including funders, where the court deems it appropriate.

The ADGM Civil Procedure Rules provide that a defendant may apply for security for costs under the conditions set out in any relevant practice direction and such an application may seek an order against someone other than the claimant.

An arbitral tribunal has no jurisdiction to make costs orders against a party other than the parties to the arbitration agreement and so could not order a third-party funder to provide security for costs.

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

See question 19. The onshore UAE courts do not make orders for security for costs.

The DIFC Practice Direction on third-party funding provides that when the DIFC court is making decisions on security for costs it may take into account that a party has funding, but the fact that a party is funded shall not by itself be determinative.

The ADGM's Practice Direction on security for costs sets out the factors for the court to consider and does not refer to the funding of the claim.

There are no express powers for arbitrators to award security for costs under the relevant arbitration laws and regulations.

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

ATE insurance and other types of costs insurance are not commonly used in the United Arab Emirates, whether in litigation or arbitration.

ATE insurance would in principle be permitted, but the growth of an ATE market in the United Arab Emirates will depend on the availability of suitable products.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

A litigation funding agreement does not need to be disclosed in onshore court proceedings and disclosure cannot be compelled.

The DIFC Practice Direction on third-party funding provides that a litigant must provide notice of the fact of funding to every other party and must disclose the identity of the funder, but not the funding agreement itself unless the court orders otherwise.

In the ADGM court a litigant who enters into a litigation funding agreement must put every other party on written notice of that fact but is not required to disclose the identity of the funder or the funding agreement.

There is no general requirement to disclose information about third-party funding in arbitration, although tribunals may be able to order disclosure, for example to avoid the risk of any potential conflict between the funder and any of the arbitrators.

Update and trends

The recognition and regulation of litigation finance by both the DIFC and ADGM courts demonstrate that it is now seen as a mainstream feature of litigation in those courts. The United Arab Emirates has also taken a significant step towards its goal of becoming the main hub for international arbitration in the Middle East with the recent passing of the new Federal Arbitration Law. This modernised law should give greater certainty to funders, both as to the procedural conduct of arbitrations seated in the United Arab Emirates and as to the prospect of successful enforcement of any award. The legal and financing communities will be eagerly awaiting the first decisions of the UAE courts under the new Arbitration Law for confirmation of a supportive approach to its interpretation and implementation.

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

There is no concept of legal privilege in the onshore courts. There are however a number of relevant laws relating to confidentiality which may in practice have a similar effect including Federal Law No. 23 of 1991 regarding the regulation of the legal profession.

The DIFC and ADGM courts recognise the concept that certain documents and correspondence will be privileged from disclosure.

A funder is likely to be given access to privileged material before deciding whether to fund the case. The litigant and the funder should therefore enter into a non-disclosure agreement before confidential and privileged material is disclosed. The NDA should specify that the litigant and the funder have a common interest giving rise to common interest privilege.

Privilege in communications between litigants and their lawyers is likely to be recognised by an arbitral tribunal in the United Arab Emirates whether the arbitration is seated on- or offshore.

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

There have been no reported disputes in the onshore courts.

There was a case in the DIFC courts in 2014 (Claim No: CFI-036-2014) that involved Vannin Capital. Vannin had provided funding for claimants in litigation who subsequently discharged their lawyers without finalising a replacement payment receipt mechanism under the funding agreement. Vannin filed a claim with the DIFC court to protect and preserve its interest in the funding agreement. Vannin obtained an order for a sum of around US$11 million to be paid into court and held until the court's further instruction as to who any payments should be made to and in what amount.

There have been no reported disputes in the ADGM. However, the courts only opened in December 2015.

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

As a general point parties seeking funding should carry out adequate due diligence on prospective funders to satisfy themselves about their reputation, financial standing and values.

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United States – New York

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

In New York, third-party litigation funding is permitted, subject to a number of caveats that will be discussed in the questions below.

Third-party litigation funding is still a relatively new concept in the United States compared with, for example, the United Kingdom, but case law suggests growing acceptance by the courts in the United States. In the traditional third-party litigation funding model, the third-party litigation funder makes a non-recourse loan to the holder of a claim to cover legal fees or costs in exchange for a portion of the proceeds (whether through court action or settlement) arising from the holder's enforcement of its claim. The acceptance of litigation funding can be seen through the case law mentioned below, which has, on the whole, protected claimant-funder disclosures, held funder participation not to constitute impermissible interference between lawyer and client, and held that funder's returns do not constitute usury.

When addressing the related issue of third-party funding of law firms, New York Supreme Court Justice Shirley Kornreich extolled the value of 'the sound public policy of making justice accessible to all regardless of wealth' and recognised that the expense of litigation can otherwise deter litigation against 'deep pocketed wrongdoers'. See *Hamilton Capital VII LLC I v Khorrami LLP*, 48 Misc 3d (1223(A), 9 (NY Sup Ct 2015).

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

There are no explicit limits on the fees and interest that a funder can charge. NY Banking Law section 14-a provides that interest on a loan cannot exceed 16 per cent. The permissible interest rate can go up to 25 per cent if the loan value is from US$250,000 to US$2.5 million, without any limit for loans in excess of US$2.5 million. However, since third-party litigation funding is generally provided on a non-recourse basis, the funding is treated as a purchase or assignment of the anticipated proceeds of the lawsuit, and therefore not subject to the usury statute and the limits on interest rates. See New York City Bar Association's Committee on Professional Ethics (NYCBA) Formal Opinion 2011-2; *Lynx Strategies LLC v Ferreira* 957 NYS2d 636 (NY Sup Ct 2010) (third-party investment for share of proceeds is not usury); but see *Echeverria v Estate of Lindner*, 2005 NY Slip Op 50675(u), at *4-5 (NY Sup Ct 2005) (non-recourse agreement was a 'loan', not an investment, because recovery was certain under strict liability statute and interest rate was, therefore, usurious).

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

There are no statutes or regulations in New York directly applicable to third-party litigation funding, let alone any that expressly prohibit, or that would have the effect of prohibiting, third-party litigation funding.

One question that is often asked is if champerty prohibits third-party litigation funding. Since federal law does not address champerty, state law governs. There is significant variation between the states on this issue, with each state having its own definition of conduct that is champertous (although several states no longer prohibit, or never prohibited, champerty).

New York has laws, long on the books, which prohibit champerty. New York courts interpret champerty to occur when a party purchases a note, security, or claim 'with the intent and for the primary purpose of bringing a lawsuit'. See *Justinian Capital SPC v WestLB AG*, 28 NY3d 160 (NY 2016); and *Credit Agricole Corp v BDC Finance, LLC*, 2016 WL 6995892, 2016 NY Slip Op 32368(U) (NY Sup Ct 30 November 2016) (the champerty 'statute does not bar a transfer or assignment when its goal is the collection of a legitimate claim'). The prohibition against champerty is 'limited in scope' and has historically been 'directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs'. See *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp*, 13 NY3d 190 (NY 2009).

No court in New York has found the traditional third-party litigation funding model to be champerty.

The Court of Appeals of New York has analysed the champerty statute in the context of transactions in which a party acquires a note or security and then brings a lawsuit in its own name on the basis of that note or security. These cases help illustrate why third-party litigation funding is not champerty under New York law. The difference between champertous and non-champertous conduct turns on the party's intent when entering into the transaction. Compare *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp* (it was not champerty where the party purchased a note and brought an action as a way to enforce its rights under the note) and *Justinian Capital SPC v WestLB AG* (it was champerty where the sole purpose of acquiring the note was so the plaintiff could bring the action).

In both of these cases, the transactions were structured very differently from how a traditional third-party funding agreement is structured. For example, a third-party litigation funder does not acquire the asset itself, nor does it bring a lawsuit in its own name. Instead, the party whose lawsuit is being funded is, and remains to be, the original owner of the asset that is the subject of the litigation. Furthermore, the nature of the funder's interest is to the proceeds of the litigation, not the underlying asset itself.

In the unlikely event a court was to consider third-party litigation funding to be champerty, the statute prohibiting champerty was amended in 2004 to add a safe harbour provision (NY Judiciary Law 489(2)). The safe harbour provision exempts any transaction in excess of US$500,000 from the prohibition against champerty. See *Justinian Capital SPC v WestLB AG*. This would serve to protect just about any litigation funding arrangement from being prohibited as champerty.

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

In New York, a lawyer's conduct is governed by the New York Rules of Professional Conduct (NYRPC). A lawyer who violates the NYRPC could be subject to disciplinary action, which could lead to his or her disbarment (rescindment of his or her right to practise law).

The NYRPC rules that a lawyer needs to consider in connection with third-party litigation funding relate to (i) the lawyer's obligation to provide candid advice about the benefits and risks of litigation funding; (ii) avoiding conflicts of interest; (iii) maintaining client control over the proceeding; and (iv) the disclosure of information to the funder.

Rule 2.1 specifies that:

> *In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as*

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moral, economic, social and political factors that may be relevant to the client's situation.

This means that a lawyer may not render advice based on the best interests of anyone other than his or her client. Accordingly, if a client is seeking litigation funding, a lawyer must 'provide candid advice regarding whether the arrangement is in the client's best interest', and should discuss the costs and benefits, as well as alternatives. See NYCBA Formal Opinion 2011–2.

Where the third-party litigation funder is paying the client's legal fees, the lawyer must ensure that the payment structure does not create a conflict of interest. The lawyer can meet his or her ethical obligations by obtaining informed consent from the client and ensuring that the funder does not interfere with the lawyer's independent judgement or the client–lawyer relationship (NYRPC 1.8(f)(2)). The rules prohibit a lawyer from representing a client if, for whatever reason, there is a risk that the lawyer's professional judgement will be adversely affected by the existence of the funder (NYRPC 1.7(a)).

At all times, it is the client who must control the litigation. While the client may permit the funder to be involved in the strategy or other aspects of the lawsuit (subject to any risks discussed throughout this chapter), such involvement is only allowed with the client's explicit and informed consent (NYCBA Formal Opinion 2011–2). Except as authorised by law, a funder's influence must never amount to interfering with, directing or regulating the lawyer's judgement, or compromising his or her duty to maintain client confidences (NYRPC 5.4(c)).

Thus, regardless of the funder's financial interest, a lawyer has a duty to abide by the client's decision regarding litigation objectives and whether to settle a matter (NYRPC 1.2).

In addition, as is discussed in more detail in question 23, an attorney cannot disclose any information to any party, including a funder (or potential funder) without obtaining the client's informed consent to disclose such information (NYRPC 1.6(a)(1)).

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

There are no governmental bodies that currently regulate or oversee third-party litigation funding in New York state.

Various lobbying organisations and legislative agencies in the US, and in New York, have suggested that further regulation is warranted, and have proposed that the Securities and Exchange Commission, Federal Trade Commission or even the Consumer Financial Protection Bureau would be well-placed to oversee third-party funders and ensure that third-party funders transact in a manner that protects the attorney–client relationship and the integrity of the judicial system and comports with the public interest. However, no such regulatory oversight has been enacted federally or in New York state.

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

From a legal and ethical perspective, the client must select his or her own counsel and have control over the litigation (NYRPC 1.2). However, from a practical standpoint, the funder is deciding whether to enter into a contractual agreement with the client and if the funder does not approve of the attorneys that the client wishes to retain, the funder is fully within its rights to decline to fund the litigation.

The quality of the attorneys is a significant factor in a funder's decision whether to fund the litigation. Thus, any client seeking litigation funding should expect that the funder will insist on counsel with experience, expertise and a proven record of success.

Once the funding agreement is signed and the client has retained its lawyers, the client controls the engagement. If the funder becomes displeased with the client's attorneys, the funder can speak with the client about its concerns, but the client decides whether, and with whom, to replace the attorneys. If the client does not follow the funder's wishes, the funder's only recourse will be governed by the terms of the funding agreement, which may allow the funder to cease funding the litigation.

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

Court hearings in New York, and in the United States as a whole, are generally open to the public and anyone, including the funder, may attend as an observer. The funder is not considered a party and therefore would not be entitled to participate in any judicial proceeding or otherwise be represented at a hearing or other court appearance.

Settlement conferences normally only include the parties to the litigation. Courts generally want to encourage settlement and, for this reason, settlement communications are treated as confidential and not discoverable in future litigation or by other parties. The funder should have no expectation of being able to participate in these discussions, though both parties could presumably consent. Further, even though the funder does not get a seat at the negotiating table as a matter of right, nothing prohibits a client from consulting with its funder about a proposed settlement or the funder from offering his or her thoughts to the client and its lawyers regarding settlement.

In arbitration, the hearing and settlement proceedings are both confidential and, absent agreement of the parties, the funder would not be entitled to attend.

8 Do funders have veto rights in respect of settlements?

There is no law in New York that directly addresses a funder's veto rights in respect of settlement. In general, the funding agreement, including rights in respect of settlement, is defined by contract. As a matter of contract law, there is no reason why a client could not grant a funder the right to veto the client's acceptance of a settlement agreement.

That being said, an attorney is ethically obligated to 'abide by a client's decision whether to settle a matter' (NYRPC 1.2(a)). Thus, even if the funder was granted veto authority over settlement decisions, if the client wants to accept a settlement in the face of a funder's exercise of its veto rights, the lawyer must follow the client's instructions and accept the settlement. The New York City Bar has considered this question and noted that absent client consent, a lawyer is not permitted to allow anyone to direct or influence litigation strategy, including whether to settle (NYCBA Formal Opinion 2011–2).

9 In what circumstances may a funder terminate funding?

In general, the funding agreement, including the right to terminate, is defined by contract. If the terms of a contract call for continued funding, the funder has an obligation to continue funding, barring grounds for voiding that obligation. Such grounds may include fraudulent inducement or omission of material fact. A funder may also be excused from continued funding under the agreement if the contracting party materially breaches the agreement.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Funders are not required to take an active role in the litigation process.

While not required to take an active role, in addition to providing the financial resources to support the litigation, there are many ways in which funders can serve as a valuable resource to counsel and to the client. By serving as an adviser or sounding board, the client (and the client's lawyers) can draw on a funder's broad experience and financial acumen to, among other things, consider the strategy and tactics as to the litigation, assess strengths and weaknesses in the case as the litigation proceeds and evaluate settlement proposals.

A funder can also review certain materials about the litigation and provide its thoughts to the client and the client's lawyers. The materials that the funder can review, however, will likely be limited by a protective order in the litigation that will restrict access to the other side's document production. The materials the funder can review may also be limited by concerns of potential waiver of attorney–client privilege or work product protection (see question 23).

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

Litigation lawyers may enter into contingency fee arrangements.

12 What other funding options are available to litigants?

Litigants have a wide range of funding options available to them. In addition to a full litigation funding agreement, where the funder covers all costs and legal fees, the litigant can enter into a partial funding agreement, where the funder funds only a portion of the litigation and the litigant (or the litigant's attorneys on a contingent basis) agrees to pay the rest of the costs and fees for the litigation. A litigant (or the

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litigant's attorneys) may also obtain portfolio funding, whereby the funder provides capital on a non-recourse basis to the litigant (or the litigant's attorneys), which is repaid from the proceeds of cases in that portfolio of cases.

A funder may also purchase an interest in the litigant (as well as certain rights to serve on the litigant's board) in exchange for a percentage of any recovery, which may address certain concerns about waiver of attorney–client privilege and work product.

A litigant can, of course, seek to take a recourse loan, using the proceeds of the litigation as collateral that must be repaid regardless of the results of the action.

With respect to a law firm obtaining a non-recourse loan from a funder to be repaid from the law firm's future legal fees, it is worth noting that the New York City Bar Association issued a recent advisory opinion that called into question the appropriateness of such arrangement. NYCBA Formal Opinion 2018-5. The NYCBA concluded that such arrangement is impermissible fee splitting. The NYCBA's opinion is inconsistent with settled New York caselaw on this point (See, eg, *Hamilton Capital VII LLC I v Khorrami LLP*, 48 Misc 3d (1223(A), 9 (NY Sup Ct 2015) (law firm financing is not impermissible fee splitting, and further it 'promotes the sound public policy of making justice accessible to all, regardless of wealth.')), and there has been widespread criticism of this opinion. See, for example, www.law.com/newyorklawjournal/2018/08/31/new-ethics-opinion-on-litigation-funding-gets-it-wrong/. In any event, the NYCBA distinguished this from the traditional litigation funding model – whereby the client obtains funding itself – which the NYCBA had previously held to be acceptable. NYCBA Formal Opinion 2011-2.

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

In the US District Court for the Southern District of New York, a commercial claim can be expected to take over 31 months from filing to a hearing on the merits of the case. Since many cases are resolved before trial through motion practice or settlement negotiations, the median length from filing to disposition of a case is 6.4 months. These statistics are available at www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2018.pdf.

For complex commercial claims, the timeline in New York state court would be similar. Most of these claims will be heard before the Commercial Division of the New York Supreme Court, which is a specialised division that focuses on creating uniformity and predictability in complex commercial disputes.

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

Approximately 10 per cent of filed cases are appealed. In cases that have gone to trial, nearly 40 per cent are appealed. See Eisenberg, Theodore, 'Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes' (2004), Cornell Law Faculty Publications, Paper 359, available at http://scholarship.law.cornell.edu/facpub/359.

In the Court of Appeals for the Second Circuit, which encompasses New York, the median time from filing an appeal to disposition is 11 months (see www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2018.pdf).

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

In our experience, defendants generally satisfy a judgment against them without the need for enforcement, let alone contentious enforcement proceedings.

However, if a defendant is unwilling to satisfy a judgment against it, both federal and New York courts have robust and well-established mechanisms to empower the plaintiff to locate, freeze and seize the defendant's assets to satisfy the judgment.

The ease or difficulty in enforcing a judgment is influenced by a myriad of factors, including:

- the judgment debtor's willingness and resources to resist enforcement proceedings;
- the size of the judgment;
- the location of the judgment debtor's assets;
- what, if any, steps the judgment debtor has taken to conceal its assets; and
- the extent to which the judgment creditor has mitigated against the risk of an unsatisfied judgment by careful selection of targets through pre-suit investigation and by learning as much as possible about the judgment debtor during discovery in the underlying litigation.

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

Class actions are permitted and third parties may fund them. In fact, third parties have funded many of the larger class actions. See, for example, *Kaplan v SAC Capital Advisors LP*, No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (SDNY 10 September 2015) (a securities class action on behalf of shareholders seeking over US$680 million arising from an insider trading scandal was funded by a third party). In 2017, the United States District Court for the Northern District of California issued a standing order that specifically requires the disclosure of a party funding a class action litigation (ND Cal Standing Order No. 19 (17 January 2017)). This rule does not apply to general civil litigation and there is no such rule directed specifically to disclosure of funders in any other courts, including those in New York.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

In responding to this question, we think it best to distinguish between 'costs' (disbursements related to expenses other than legal fees) and 'fees' (legal fees). As a general rule, in US litigation, the losing party does not pay the attorneys' fees of the prevailing party except in specific types of cases, or where otherwise required by a contract between the parties. For instance, consumer protection or civil rights lawsuits allow for the collection of attorneys' fees, as do patent-related matters in exceptional cases. In addition, a court has the discretion to order the unsuccessful party (or its attorney) to pay to the prevailing party its attorneys' fees or other financial sanctions, if the unsuccessful party engaged in frivolous conduct in connection with the litigation (22 NYCRR 130-1.1; see also Fed R Civ P 11). New York has defined conduct to be frivolous if '(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation . . . ; or (3) it asserts material factual statements that are false' (22 NYCRR 130-1.1(c)).

Further, 'costs' are awarded to the prevailing party in both the New York state system and the federal system. In the state system, costs are set by statute and are a small and arbitrary amount based on factors such as timing and amount of resolution, with a maximum amount of a few hundred dollars. In federal court, however, awarded costs can be significant. Chargeable costs include some court and transcript fees, witness fees and document copying costs (28 USC section 1920). Expert witness fees, which depending on the nature of the litigation can be large, are generally not chargeable beyond the small statutory daily attendance fee. In some cases, document copying costs have been held to include a portion of the prevailing party's e-discovery costs, which can be substantial. See *Balance Point Divorce Funding, LLC v Scranton*, 305 FRD 67 (SDNY 2015).

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

No published case applying New York law has held a third-party litigation funder liable for adverse costs (including attorneys' fees in applicable circumstances).

This does not mean that the terms of the funding agreement may not make the funder responsible for the payment of any adverse costs order. Best practices dictate that the funding agreement address whether the funder is or is not responsible for the payment of any adverse costs order (including any responsibility for attorneys' fees).

19 May the courts order a claimant or a third party to provide security for costs?

Courts do not order a party to provide security except if the party is seeking a preliminary injunction or a temporary restraining order in

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Update and trends

The use of third-party funding is continuing to expand in civil litigation throughout the United States and New York. As the industry grows, and as litigation funding becomes a factor in more cases, we cannot rule out continued, and perhaps growing, resistance by critics of litigation funding, but the growing trend, certainly in New York, seems to be towards acceptance of litigation funding. Such acceptance may come with governmental regulation or oversight; but, to date, there are no such regulations or oversight targeting litigation funding in New York.

Both small and large companies are increasingly seeking third-party funding. This includes companies with the capital to self-fund, but who would rather offset some of the costs of the litigation to third parties. There are also accounting benefits for obtaining litigation funding compared to paying the costs themselves.

The growth of litigation funding has led to many new funders entering the Unites States market. It has also increased the different types of funding available. From the traditional case-based funding model to portfolio financing, litigants can work with funders to obtain funding that is tailored to their particular needs.

In addition, there is an emerging trend where a funder agrees to finance a portfolio of a law firm's cases. In such arrangements, the funder commits to provide third-party funding to a law firm's clients in matters in which the firm will work on a contingent basis as to some or all of its fees. In such circumstances, it is common for a client to engage the law firm on a contingent basis as to some or all of the law firm's legal fee and the client to enter into a distinct agreement with the funder to advance to the client, on a non-recourse basis, the costs of the litigation (eg, expert fees, e-discovery costs and court costs). Such an arrangement allows the law firm to represent clients that have meritorious claims that might otherwise flounder owing to concerns related to costs compounded by the inevitable uncertainties of litigation.

advance of the adjudication of the dispute on the merits. See, for example, NY CPLR section 6312(b); Fed R Civ P 65(c). The court will set the amount of security required to 'an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained' (Fed R Civ P 65(c)).

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

No. The applicable rules provide that the security should be calibrated to the amount of the potential damages that would be incurred if a party is wrongfully enjoined, not the resources of the party seeking an injunction.

Moreover, in many cases, the court would not necessarily be aware of the existence of third-party funding.

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

ATE insurance indemnifies the client for legal costs in the event the client loses its case. ATE insurance, which is purchased after the dispute has arisen, can protect against paying the other side's adverse costs and can reimburse the client for its own attorneys' fees and out-of-pocket expenses.

There is no statute in New York that prohibits ATE insurance. That being said, as in most states, insurance in New York is, generally speaking, a heavily regulated field, with licensing and other rules that may affect who can issue or purchase ATE insurance.

In our experience, ATE insurance is not commonly used in New York. But as lawyers and clients in New York become more familiar with ATE insurance, we would expect interest in this product to grow, including with clients who may have the resources to pay legal fees and costs on their own, but want to offset fees and costs if they lose the case.

We are not aware of other types of insurance, in the context of fees or expenses, commonly used by claimants in New York. But as interest in litigation funding grows, we would not be surprised if interest in ATE insurance grows with insurance alternatives entering the market.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There have been efforts to require the disclosure of the existence and identity of a litigation funder. For example, in the United States District Court for the Northern District of California, a party must disclose the identity of a funder in class action cases only (see question 16). The Court rejected a broader proposed order that would have required the disclosure of the funder in all cases in that district. No New York Court requires such disclosure.

Furthermore, there is no statutory obligation in New York requiring a party to disclose the existence of a litigation funder or a litigation funding agreement to the opposing party or to the court.

However, an opposing party could compel the disclosure of a litigation funding agreement if the court determines that the agreement is relevant to the case and it is not otherwise protected from disclosure. The only New York court that has addressed the disclosure of a funding agreement ruled that the funding agreement was not relevant to the lawyer's adequacy as class counsel in a securities class action lawsuit (*Kaplan v SAC Capital Advisors LP*, No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (SDNY 10 September 2015) (explicitly declining to address if disclosure of the agreement would be entitled to work product protection)). Determining the adequacy of class counsel is a very narrow and fact-specific analysis, so this decision's applicability to more traditional third-party litigation funding may be limited.

If a court determined that the funding agreement was relevant to the case, then a party would be required to disclose the funding agreement if it were not protected from disclosure by attorney-client privilege or work product protection (see question 23).

If deemed relevant, a client would likely be compelled to disclose at least some information about the identity of the third-party funder. See, for example, *In re Nassau County Grand Jury Subpoena Duces Tecum, Dated 24 June 2003*, 4 NY 3d 665, 678-79 (NY 2005) (information regarding the payment of fees by a third party is not protected as an attorney–client privileged communication).

New York courts have not addressed whether work product protection would protect against the disclosure of the funding agreement. They have, however, recognised that the terms of a joint defence agreement, which is an agreement to share information between multiple defendants to the same litigation, is considered work product. See *RFMAS Inc v So*, No. 06 Civ 13114 VM MHD, 2008 WL 465113 (SDNY 15 February 2008).

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

In certain circumstances, the attorney–client privilege and the work product doctrine protect against the disclosure of communications and information shared between attorney, client and funder. There has been very limited analysis of these protections by New York courts as they relate to third-party litigation funding. We suspect that New York courts may find that attorney–client privilege will not protect communications with a funder from disclosure. Further, New York courts will likely find that work product protection will protect from disclosure certain communications and information provided to a funder.

Communications between an attorney and client for purposes of providing legal advice are privileged in all US jurisdictions, including New York. If attorney–client communications are disclosed to a third party, the privilege can be deemed to have been waived as to the communications themselves and even in some cases as to the subject matter of the communications. However, if the communications are shared with a third party with whom the client has a 'common legal interest', there is no waiver of the privilege.

In the context of third-party litigation funding, whether disclosure of communications with a funder waives attorney–client privilege turns on whether a client has a common legal interest with the funder. There has only been one decision in New York addressing this question and it did not extend the common interest doctrine to litigation funders. There the court declined to protect information shared with a litigation funder. It noted that '[a]lthough the two may have a common financial interest in the outcome of this litigation, that relationship does not fall into the narrow category primarily reserved for co-litigants pursuing a shared legal strategy'. See *Cohen v Cohen*, No. 09 CIV 10230 LAP, 2015 WL 745712, at *4 (SDNY 30 January 2015). In so ruling, the court found

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that, since the litigation funder was not a party to the litigation and there was no suggestion that she had a legal claim against the defendant, there could not be a common legal interest. The work product doctrine is separate and distinct from attorney–client privilege.

The work product doctrine protects from disclosure documents prepared, and information collected, in anticipation of litigation. The work product doctrine seeks to prevent such documents and information from falling into the hands of the party's adversary. Unlike attorney–client privilege, disclosing work product to a third party does not waive work product production where such disclosure did not substantially increase the likelihood that the work product would fall into the hands of an adversary in the litigation. See *In Re Steinhardt Partners LP*, 9 F3d 230 (Second Circuit 1993).

Since New York courts have not addressed the applicability of work product protection to the disclosure of information given to a third-party litigation funder, we look to other jurisdictions for guidance. Courts in those jurisdictions have generally found such information to be protected as work product. See *Miller UK Ltd v Caterpillar Inc*, 17 F Supp 3d 711, 736 (ND Ill 2014) (the disclosure of a memorandum describing the strengths and weaknesses of a case to a funder was protected as work product). This would specifically include documents prepared with the intention of disclosing to potential investors to aid in future litigation. See *Mondis Tech Ltd v LG Elecs Inc*, No. 2:07-cv-565, 2011 WL 1714304, at *3 (ED Tex 4 May 2011) (documents prepared with the intention of disclosing to potential investors in aid of future litigation was protected)); *Lambeth Magnetic Structures, LLC v Seagate Tech (US) Holdings, Inc*, No. 16-cv-00538 (WD Pa 19 December 2017) (same). We expect, but are not certain, that New York courts will adopt the same reasoning and protect work product disclosed to third-party litigation funders.

In the end, a balance needs to be struck between obtaining sufficient information to make decisions about whether, or to what extent, to fund a case and the risk of waiver, which could lead to the disclosure of information that could harm the case, and the funder's investment in it, by putting at risk the attorney–client privilege. Given the lack of definitive case law in New York on this issue, to avoid the risk of waiving attorney–client privilege, a funder should tread lightly in requesting communications between the client and attorney that would otherwise be protected as privileged communications.

On the other hand, work product protection will likely allow the client to disclose to the funder documents prepared in aid of the litigation that should be sufficient to allow a funder to make an informed funding decision and to remain apprised of key developments over the life of the case.

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

We are not aware of any reported disputes in New York between a litigant and a funder in cases where the funder has lent money to the holder of a claim to cover the legal fees and costs in exchange for a portion of the proceeds arising from the holder's enforcement of its claim.

There may be several reasons why there have been no reported disputes in New York. Most funding agreements have strict confidentiality provisions. And since most funding agreements have arbitration clauses, if there is a dispute between a litigant and a funder, that dispute would be confidentially arbitrated.

It is worth noting that there have been several reported disputes in New York (or by courts applying New York law) in the context of consumer legal funding, where a consumer legal funder provides a non-recourse advance to a plaintiff (commonly in a tort case) to cover the plaintiff's living expenses during the pendency of the case in exchange for a portion of the proceeds from the case. See *Lynx Strategies LLC v Ferreira*, 957 NYS2d 636 (NY Sup Ct 2010) (confirming an arbitration award in favour of the funder where the plaintiff and plaintiff's law firm did not pay the funder its share of the settlement proceeds); *Obermayer Rebmann Maxwell & Hippel LLP v West*, Civ No. 15-81, 2015 WL 9489791 (WD Pa 30 December 2015) (applying New York law and holding that failure to pay the funder its share of the proceeds was breach of a funding agreement); and *MoneyForLawsuits V LP v Rowe*, No. 4:10-CV-11537, 2012 WL 1068171 (ED Mich 23 January 2012) (same).

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

As legal costs continue to increase, as client budgets for litigation shrink, and as lawyers and clients learn more about litigation funding, interest in litigation funding is growing in the US, and more and more funders are entering the market. In selecting funders with which to do business, clients and counsel should look for funders that have:

- established track records of funding cases through to completion;
- ample resources to handle the expense of litigation;
- the fortitude to weather the uncertainties that are an inevitable feature of litigation;
- the ability to make funding decisions without inordinate delay; and
- the ability to offer sound advice along the way, while still respecting the autonomy of the client and the ethical duties of the lawyer to his or her client.

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United States – other key jurisdictions

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Woodsford Litigation Funding

The United States is a federal system, with overlapping federal and state jurisdictions, including 96 federal judicial districts and 50 individual US states. As such, attorneys and parties contemplating commercial litigation finance transactions in the United States must pay particular attention the potential jurisdictions that may be implicated by a particular transaction, including:

- the governing law of the litigation finance agreement;
- the location of the parties;
- the venue of the particular litigation; and
- the jurisdiction in which a judgment may eventually need to be enforced.

Further, because litigation finance remains relatively new, and the law is still in development, those considering a litigation funding transaction in one jurisdiction would be well advised to consider the applicability of precedents from other jurisdictions.

This brief addendum is not intended to be a comprehensive guide to litigation finance in the United States outside of New York. Rather, it endeavours to highlight some of the notable rules and precedents in a few important jurisdictions beyond New York, which have developed recently as litigation finance has become more common in the United States. The focus is largely on permissibility of commercial litigation finance generally, and any rules regarding disclosure of funding and the scope of protection afforded communication with funders; consumer litigation finance transactions may implicate other regulations that are beyond the scope of this addendum.

US federal

Because litigation funding related issues typically involve state law matters (state bar rules, contract law, status of champerty provisions, etc) or procedural matters governed by local practice, there is little federal law on funding. However, the United States Congress introduced the Litigation Funding Transparency Act of 2018, which, if enacted, would require disclosure of funding (and a copy of the funding agreement) in any federal class action or federal multi-district litigation proceeding. The proposed law is still in early stages of being considered and remains in consideration with the Judiciary Committee, so it remains to be seen whether the law will eventually be enacted.

California

In California, litigation finance is generally permitted by state law. Indeed, unlike many eastern states, the doctrines of champerty and maintenance were never adopted into the state's laws. See *In re Cohen's Estate*, 152 P 2d 485 (Cal Dist Ct App 1944); *Abbot Ford, Inc v Superior Court*, 43 Cal 3d 858, 885 n 26 (Cal 1987) ('California . . . has never adopted the common law doctrines of champerty and maintenance.').

Practising attorneys in California, as in all states, are guided by rules of professional conduct and, importantly, such rules do not prohibit litigation finance transactions. See, for example, LA County Bar Assoc Ethics Committee Formal Opinion No. 500 (1999) (discussing the permissibility of funding arrangement under California law and legal ethics regime). Importantly, in mid-2018, it was announced that the California State Bar has approved the establishment of a task force that would, inter alia, consider revisions to the ethical rules on fee-sharing and non-attorney ownership. While it is too early to predict how the task force might impact litigation funding, it suggests that the regulatory landscape may start to change.

Regarding disclosure, there is no rule requiring disclosure of a party's funded status. However, for class action litigation in the federal courts, the Northern District of California recently revised its Standing Orders to require the disclosure 'any person or entity that is funding the prosecution' of 'any proposed class, collective, or representative action.' ND Cal Standing Order No. 19 (17 January 2017). Accordingly, for class or collective matters in the Northern District, a party's funded status should be disclosed at the initial stages pursuant to Rule 3-15, or, if arising later, in connection with a party's case management statement. For all other matters, there is no general obligation of disclosure.

Importantly, communications with a litigation funder have been shielded from disclosure and where subject to a properly executed non-disclosure agreement should not result in a waiver. See *Odyssey Wireless, Inc v Samsung Elecs Co*, 2016 WL 7665898, at *5-*6 (SD Cal, 20 September 2016). This is consistent with the general trend in most US jurisdictions.

Delaware

Litigation finance is generally permitted in Delaware. However, the doctrines of champerty and maintenance remain applicable. See *Charge Injection Techs, Inc v EI Dupont De Nemours & Co*, 2016 WL 937400, at *3 (Del Super Ct, 9 March 2016). As such, outright assignments of claims may be regarded as champertous and any funding transaction should be clear that the funding entity does not control the litigation. See id at *4-*5.

Regarding disclosure, there is no general rule requiring disclosure of a party's funded status. Moreover, one Delaware federal court has concluded that, in at least some contexts, litigation funding agreements are not relevant and potentially confusing and prejudicial. See *AVM Techs, LLC v Intel Corp*, 2017 WL 1787562, at *3 (D Del, 1 May 2017).

With regard to privilege, both state and federal courts in Delaware have held communications with litigation funders are protected from discovery. As Delaware's Court of Chancery has remarked, there is '[n]o persuasive reason . . . why litigants should lose work product protection simply because they lack the financial means to press their claims on their own[.]' See *Carlyle Inv Mgmt v Moonmouth Co*, 2015 WL 778846, at *9 (Del Ch, 24 February 2015); see also *Walker Digital, LLC v Google, Inc*, 2013 WL 9600775, at *1 (D Del, 12 February 2013) (claimant and funder share a common legal interest and communications protect as both attorney client privilege and work product); but see *Leader Techs, Inc v Facebook, Inc*, 719 F Supp 2d 373, 377 (D Del 2010) (no common interest inapplicable); but see *Acceleration Bay v Activision Blizzard*, 2018 WL 798731 (D Del 2018) (ordering disclosure where in the absence of signed NDA and using a 'but for' standard for work product).

Texas

In general, Texas common law never incorporated the doctrine of champerty. See *Bentinck v Franklin*, 38 Tex 458, 468 (1873). Texas courts have reviewed commercial litigation funding agreements and found them not to be champertous or otherwise a violation of public policy. See *Anglo-Dutch Petroleum Int'l v Haskell*, 193 SW 3d 87, 105 (Tex App 2006). However, the funding of certain categories of claims (eg, malpractice actions) may present public policy issues. See id. Further,

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lawyers or law firms contemplating litigation funding transactions should be sure to ensure that the contemplated structure does not misalign incentives or undermine the primary duty to their clients. See Texas Bar Opinion No. 576 (concluding that proposed arrangement was 'tantamount to fee splitting').

Regarding privilege, several federal courts in Texas have concluded that litigation funding information should be protected as work product and a non-disclosure agreement obviates waiver. See *United States v Ocwen Loan Servicing*, 2016 WL 1031157, at *6 (ED Tex, 15 March 2016); *Mondis Tech, Ltd v LG Elecs, Inc*, 2011 WL 1714304, at *3 (ED Tex, 4 May 2011).

Further, while there is no rule requiring disclosure of a party's funded status, one court has ordered the disclosure of the identity of a litigation funder, while simultaneously holding that communications with that funder remained confidential. See *United States v Homeward Residential, Inc*, 2016 WL 1031154, at *5 (ED Tex, 15 March 2016).

Illinois

Litigation finance is permitted in Illinois. While the common law prohibition of champerty has been abolished, there remains a statutory prohibition. See 720 Illinois Criminal Code 5/32-12. However, as set forth in a well-reasoned and comprehensive discussion in *Miller UK v Caterpillar*, 17 F Supp 3d 711 (ND Ill 2014), an ordinary commercial litigation finance transaction would not be problematic.

Regarding privilege, several federal courts have concluded that communications with a litigation funder pursuant to an non-disclosure agreement remain protected from disclosure. See *Viamedia, Inc v Comcast Corp*, 2017 WL 2834535, at *3 (ND Ill, 30 June 2017); *Miller UK Ltd v Caterpillar, Inc*, 17 F Supp 3d 711, 739 (ND Ill 2014).

Wisconsin

Litigation finance is permitted in Wisconsin. However, in early 2018, Wisconsin passed Wisconsin Act 235, which, inter alia, requires disclosure of all funding agreements in civil litigation. Specifically, the Act mandates that 'a party shall, without awaiting a discovery request, 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.'

Ohio

In Ohio, litigation finance is permitted and it is regulated by statute. See section 1349.55 (2008) of the Ohio Rev Code. The statue requires specific wording and disclaimers to be made in order for the finance agreements to be valid. The statute was promulgated in response to an Ohio Supreme Court decision which had previously invalided a funding agreement on champerty grounds. See *Rancman v Interim Settlement Funding Corp*, 789 NE 2d 217 (Ohio 2003).

In a decision that is likely more relevant to federal practice – and in particular – multi-district litigation than Ohio specifically, a recent district court ordered any funding be disclosed to the court in camera but made clear that any such disclosures should not be subject of ancillary litigation or discovery. See *In re National Prescription Opiate Litigation*, 17-MD-2804, Dkt No. 383 (7 May 2018).

WOODSFORD
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