

THE THIRD PARTY
LITIGATION
FUNDING LAW
REVIEW

Editor
Leslie Perrin

THE LAWREVIEWS

THE THIRD PARTY
LITIGATION
FUNDING LAW
REVIEW

SECOND EDITION

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Editor
Leslie Perrin

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PREFACE

Just as you start to think it might be safe to assume that everyone who needs to understand third party funding of litigation and arbitration really does understand it, you stand, as I did the other day, in one of London's finest clubs chatting socially to a Circuit Judge, who asks what you are doing these days and you reply that you invest capital in the costs of litigation in return for a share of the proceeds contingent on success. He looks you magisterially in the eye and asks, as if you would never have thought of it, 'isn't that unlawful?'

The task of proselytising third party funding, as anyone directly involved in it will tell you, goes on. Right across the global reach of third party funding, every meeting or conference, with lawyers or with potential claimants, can be expected to require a run through of the basics of how it is done. The process is not assisted by the silo mentality of most major law firms, where it is absolutely not possible to make the assumption that, having spoken to one, or even several partners, you have spoken to the firm.

This past year has also meant for most funders, a merry-go-round of encounters with investors, as blue-chip pension funds, family offices, endowments and seemingly all known fund management vehicles have realised that it might be possible to invest in an asset that is not only non-correlated with other asset classes, but also, where concentrations are properly managed, one where the individual assets in a portfolio are not internally correlated. Eye-catching returns are being reported by the listed funders, while rumours of similar performance circulate around the private funders.

Individual managers and underwriters of litigation risk with a track record of success are rarer than the proverbial hens' teeth though. Some observers estimate that in the entire world there are no more than about 35 people with a 10-year investment management record delivering the sort of results that investors are seeking. This has led to an aggressive global hiring spree by funders in an attempt to remedy this shortage, aimed at the cream of senior associates (and occasionally partners) from all types of firm, including the very largest.

As the pipeline to equity narrows at all law firms, but especially at the largest and most profitable, and that pathway comes to depend on ever greater commitments of time to the firm, over all else, many lawyers outside law firm equity have begun to be tempted by the stories they hear of the opportunities to earn an equity stake at a litigation funder where hard work and dedication are, of course, an absolute requirement, but where an 18-hour-day time commitment is not expected.

All this has led to a debate within funders as to what ingredients make up the ideal senior recruit from a law firm. Does it have to be a litigator? Not really. Third party funding can be seen as a corporate finance transaction where competitive advantage for a funder may lie in being able to field top-class transactional input to the way a deal is negotiated from the outset. Does it have to be a lawyer? No. Experienced finance professionals should play a role

in case assessment, not just in the process of understanding the true quantum of a claim but in establishing the return that will be required by the investors in given time and quantum outcomes.

Interesting business pressures are also mounting in consequence of the global nature of third party funding. Although the Association of Litigation Funders of England & Wales (of which I remain the chairman) continues to provide voluntary regulation to the third party funding sector that seems to be respected and understood in the senior ranks of the judiciary and beyond in the Ministry of Justice and in other government circles, it is becoming clear that some form of international trade association is now required, to give a collective global voice (albeit, not as a regulator) to the interests of the third party funding industry. It would not surprise me if such a body were to be launched in the coming months, possibly in the wake of the inquiry currently being run by the Australian Law Reform Commission (ALRC), which might only directly affect the Australian market but will achieve global significance because so many non-Australian funders are active in that market. The ALRC's final report is likely to be highly influential on what happens next, not only in the regulation of third party funding in Australia but also how the entire third party funding industry will organise its approach to marketing and opinion forming in the global market.

This all adds up to a remarkable 12 months since the first edition of the *Third Party Litigation Funding Law Review* was published. Awareness of the industry has spread, not just in the context of the funding of the legal costs of a single case from its inception through to resolution (what might be called Litigation Funding 101) but in the monetisation of judgments and awards. In civil law jurisdictions, monetisation of claims can also be achieved. In the common law countries, by and large, monetisation of a claim would still, even in these enlightened times, offend against maintenance and champerty.

Businesses have learned that there is a way out of the accounting bind that contingent claims against you must (as a matter of principle) be accounted for as a debit in your balance sheet but contingent assets can be ascribed no value until they are turned into cash. This fact of business life, combined with what could be described as 'litigation fatigue' (which requires no explanation!), means that monetisation transactions are very much on the rise.

A modest extension of the market in monetisations takes you squarely into consideration of secondary markets, where funders might sell their interest in an investment to (say) a hedge fund at a price that appeals to both sides of the transaction. The development of monetisations and the development of secondary markets might well be major themes for the year ahead.

Leslie Perrin

Chairman

Calunius Capital LLP and Association of Litigation Funders of England and Wales

November 2018

AUSTRALIA

*Jason Geisker and Jenny Tallis*¹

I MARKET OVERVIEW

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

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

The increasing use of litigation funding for a broad range of class actions⁵ is another well-established trend of the Australian funding market. By 2017, almost half of all class actions filed in the Federal Court of Australia were class actions supported by third party litigation funders.⁶ Although this trend is to be contrasted with a more subdued use of third party funding in class action filings in the state courts where, for example, only 10 out of the 85 class actions filed in the Supreme Court of Victoria were funded.⁷

Initially, the Australian litigation funding market was dominated by ASX-listed IMF Bentham Ltd, with an estimated market share of 69 per cent in 2015.⁸ IMF Bentham Ltd's

1 Jason Geisker is a principal and Jenny Tallis is a special counsel at Maurice Blackburn Lawyers.

2 IMF Bentham Litigation Funding Masterclass October 2015 presentation, p. 8.

3 IBIS World Industry Report OD5446, 2017, p. 3.

4 Burford Capital, 2018 Litigation Finance Survey, p. 22.

5 A class action is a procedure whereby a single representative can bring or conduct a claim on behalf of others in the same, similar or related circumstances (Part IVA Federal Court of Australia Act 1976 (Cth) Section 33C(1)).

6 Victorian Law Reform Commission, 'Access to Justice – Litigation Funding and Group Proceedings' Consultation Paper (July 2017), p. 8, para. 1.47.

7 Victorian Law Reform Commission, 'Access to Justice – Litigation Funding and Group Proceedings' Report (March 2018), p. xiv, paras. 12, 14.

8 IMF Bentham Litigation Funding Masterclass October 2015 presentation, p. 9.

first mover advantage has since been significantly eroded in Australia as other domestic and international funders compete for business. The Australian Law Reform Commission (ALRC) now estimates there are approximately 25 litigation funders active in the Australian market.⁹

II LEGAL AND REGULATORY FRAMEWORK

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

Prior to 2006, encouraging litigation and funding another's claim for profit were prohibited in Australia by the common law doctrines of maintenance and champerty.¹⁰ These doctrines prevented the courts from being used for speculative business ventures. Maintenance and champerty were the foundation for numerous challenges to the legitimacy of litigation funding before being progressively abolished as crimes and torts.¹¹ Even after the statutory abolition of maintenance and champerty, courts could still intervene in funded litigation where funding contracts were considered to be arrangements contrary to the public policy considerations upon which the previous prohibitions were based at common law.¹² More than 20 challenges to funding agreements were mounted in the eight years prior to the 2006 landmark decision of the High Court in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited*¹³ (*Fostif*).¹⁴

In a pivotal moment in the development of the Australian jurisprudence the High Court in *Fostif* held that third party litigation funding of a class action was not an abuse of process or contrary to public policy.¹⁵ The Court stated that notions of maintenance and champerty could not be used to challenge proceedings simply because they were funded by a litigation funder.¹⁶ Since *Fostif* litigation funding has become an entrenched part of the Australian legal system. It now plays a crucial role in providing greater access to the courts and bringing an equality of arms against often well-resourced respondents.

A further development under review by regulators is whether lawyers should be restricted from funding claims in the way that third party funders do. Presently Australian law practices are prohibited from entering into any arrangement for payment of damages-based contingency fees, where fees are calculated by reference to a percentage of the amount recovered¹⁷ but are entitled to enter into conditional billing arrangements whereby their ordinary fees are payable upon a successful outcome. These arrangements are known as 'no win no fee' agreements and sometimes permit an uplift of 25 per cent of the lawyer's ordinary fees where

9 Australian Law Reform Commission, 'Inquiry Into Class Action Proceedings And Third Party Litigation Funders' Discussion Paper 85 (June 2018), p. 16, para. 1.12.

10 Maintenance is assistance in prosecuting or defending a lawsuit by someone with no *bona fide* interest in the case. Champerty is an agreement to divide litigation proceeds between the owner and another party unrelated to the lawsuit who helps enforce the claim.

11 Civil Law (Wrongs) Act 2002 (ACT) Section 221; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW) Sections 3-4, 6; Criminal Law Consolidation Act 1935 (SA) Schedule 11 cl 1(3), 3; Wrongs Act 1958 (Vic) Section 32; and Crimes Act 1958 (Vic) Section 322A.

12 For example, see Wrongs Act 1958 (Vic) Section 32(2).

13 [2006] HCA 41.

14 Standing Committee of Attorney Generals, Litigation Funding Discussion Paper (May 2006), p. 4.

15 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* [2006] HCA 41.

16 *ibid.* at [84]–[86].

17 *ibid.* Section 183.

a successful outcome is achieved.¹⁸ For obvious reasons, such ‘no win no fee’ arrangements are often not commercially viable, particularly for larger or more complex claims such as class actions. Interestingly, in its 2017 report on Litigation Funding and Group Proceedings, the Victorian Law Reform Commission (VLRC) suggests that the damages-based contingency fee prohibition does not prevent lawyers from receiving a contingency fee via a common fund court order approving a litigation service fee in the context of class actions conducted in the Supreme Court of Victoria.¹⁹ Given that encouragement, it should only be a matter of time before the limits on contingency fee restrictions are tested through the courts.

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

In December 2014, the Victorian Court of Appeal held that the *TWE* class action was an abuse of process because it had been commenced with the predominant purpose of earning legal fees for the solicitor, rather than such fees being an incident or by-product of the vindication of legal rights and permanently stayed the proceeding.²⁰ In dismissing an appeal, the Court of Appeal stressed the importance of maintaining public confidence in the fairness of court processes.

Earlier in 2013, the same solicitor had trialled a different funding model for a class action brought against Banksia Securities.²¹ He again sought to act as the lead plaintiff’s solicitor, while also being a director and secretary of the litigation funder and holding an indirect shareholding in the funder. The litigation funding agreement entitled the litigation funder to 30 per cent of the amount received by way of an award or settlement of the proceeding, and to exercise control over the conduct of the proceeding.

In November 2014, the Supreme Court of Victoria restrained the solicitor and senior counsel from acting for the lead plaintiff in the *Banksia Securities* class action owing to conflicts of interest. Justice Ferguson considered that the main risk arising from the solicitor’s pecuniary interest in the outcome of the class action was that he might not fulfil, or might not be perceived to fulfil, his duties to the court or be independent and objective.²² Her Honour found ‘it would be inimical to the appearance of justice for lawyers to skirt around the prohibition on contingency fees by this means; particularly where the legal practitioner’s interest in the funder is sizeable.’²³

18 See, for example, Section 182(2)(b) of the Legal Profession Uniform Law 2015 (NSW).

19 Victorian Law Reform Commission, ‘Access to Justice: Litigation Funding and Group Proceedings’ Report, p. 63, para. 3.96.

20 *Treasury Wines Estates Limited v. Melbourne City Investments Pty Ltd* (2014) 318 ALR 121; [2014] VSCA 351 at [22].

21 *Bolitho v. Banksia Securities Ltd* (No. 4) [2014] VSC 582 (26 November 2014) at [53].

22 *ibid.* [53].

23 *ibid.* [51].

ii Present regulation of litigation funding

As providers of financial services and credit facilities, litigation funders are subject to the consumer provisions of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act). The ASIC Act contains protections against unfair contract terms, unconscionable conduct, and misleading and deceptive conduct.²⁴ These provisions provide avenues for redress against unfair or false and misleading terms or omissions in funding agreements.

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

In 2009, the regulation of litigation funding became the subject of national debate as a result of the Federal Court landmark case *Brookfield Multiplex Funds Management Pty Ltd v. International Litigation Funding Partners Pte Ltd (Multiplex)*, which determined that litigation funding agreements (including the funding agreement and retainer) in a funded class action constituted managed investment schemes within the meaning of Section 9 of the Corporations Act.²⁵ Managed investment schemes were required to be registered and managed by an entity holding an AFSL. Failure to comply was an offence under the Corporations Act.

A second landmark case involved a dispute between a funder and client, which raised similar questions regarding the nature and regulation of funding arrangements. In *Chameleon Mining NL (Receivers and Managers Appointed) (Chameleon)* the litigant sought to rescind a funding agreement under Section 935A of the Corporations Act and thereby avoid payment of the funder's commission.²⁶ The funded client argued that the funding agreement was a financial product and that the funder did not hold an AFSL. The High Court concluded that the funding agreement was a 'credit facility' rather than a financial product and, while it did not need an AFSL, the funder did require an Australian credit licence.

In the aftermath of these two landmark cases the federal government intervened, announcing that it would protect funded class actions from too heavy a regulatory burden.²⁷ In 2010, the Australian Securities and Investment Commission (ASIC) issued class orders granting transitional relief to the lawyers and litigation funders involved in funded class actions, exempting them from the managed investment regulatory obligations. ASIC subsequently granted transitional relief from financial product regulatory requirements of the Corporations Act.

The *Multiplex* and *Chameleon* cases also led to the introduction of a new conflict management regime. In 2012, regulations were enacted exempting litigation funders from

24 Australian Securities and Investments Commission Act 2001 (Cth), Sections 12BF-12BM, 12CA-12C, 12DA.

25 *Brookfield Multiplex Funds Management Pty Ltd v. International Litigation Funding Partners Pty Ltd* (2009) 180 FCR 11.

26 *Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45.

27 Treasury Press Release, Hon Chris Bowen, Minister for Financial Services, Superannuation and Corporate Law 'Government acts to ensure access to justice for class action members.' No. 039, 4 May 2010.

the managed investment scheme provisions of the Corporations Act subject to compliance with new conflict management requirements.²⁸ Litigation funders providing both single-party funding²⁹ (litigation funding arrangements) and multiparty funding³⁰ (litigation funding schemes) are now required to conduct reviews and maintain written procedures identifying and managing conflicts of interest.³¹

In April 2013, ASIC released a regulatory guide detailing how litigation funders may satisfy the obligations to manage conflicts of interest (the Guide).³² The Guide describes the actual, potential and present or future conflicts of interest that may arise in a litigation scheme because of a divergence of interests between the funder, lawyers and claimants. The Guide requires funders to have robust arrangements in place to identify and assess divergent interests and conflicts, and to respond as needed.³³ The regulations require funders to design their own conflicts management policy suited to the nature, scale and complexity of the litigation schemes funded in recognition that funding operations differ greatly.³⁴

iii Government reviews into the regulation of litigation funding

Despite the introduction of the 2012 ‘conflict management’ procedures and the Guide in 2013, the regulation of litigation funding remains a heavily debated reform issue. In 2014, the Productivity Commission delivered a comprehensive report regarding access to justice, which favoured two major reforms that would greatly impact litigation funding.³⁵ The two proposed reforms are (1) the introduction of a licensing regime for litigation funders³⁶ and (2) the removal of the ban on lawyers charging damages based contingency fees, thereby introducing another funding option for clients.³⁷ Both reforms (and an array of other proposals) have recently been under further consideration at state and federal level by the VLRC and the ALRC respectively.³⁸

VLRC

On 16 December 2016, the Victorian Attorney General, the Hon. Martin Pakula MP, commissioned the VLRC to report on litigation funding and the conduct of class actions, and to consider how regulators might better protect litigants from unfair risks or disproportionate cost burdens.³⁹ The VLRC report, ‘Access to Justice: Litigation Funding and

28 Corporations Amendment Regulation 2012 (No. 6) (Cth).

29 Corporations Regulations 2001 (Cth), r 5C.11.01(d).

30 *ibid.* rr 5C.11.01(b)–5C.11.01(c).

31 *ibid.* r 7.6.01AB.

32 ASIC Regulatory Guide 248, ‘Litigation schemes and proof of debt schemes: Managing conflicts of interest’.

33 *ibid.* RG248.31.

34 Corporations Regulations 2001 (Cth) r 7.6.01AB(2)(a).

35 Productivity Commission, ‘Access to Justice Arrangements’, Inquiry Report No 72 (2014).

36 *ibid.* vol 2, p. 633, Recommendation 18.2.

37 *ibid.* vol 2, p. 619, Recommendation 18.1.

38 Victorian Law Reform Commission, ‘Access to Justice – Litigation Funding and Group Proceedings’ Report (March 2010), pp. 17–19, paras. 2.23–2.31 and (Chapter 3); Australian Law Reform Commission, ‘Inquiry into Class Action Proceedings And Third Party Litigation Funders’ Discussion Paper 85 (June 2018), pp. 48–52, paras. 3.21–3.33 and pp. 83–91, paras. 5.9–5.41.

39 Victorian Law Reform Commission, ‘Access to Justice – Litigation Funding and Group Proceedings’ Consultation Paper, p. v.

Group Proceedings’, tabled in the Victorian parliament on 19 June 2018 (VLRC Report), recommends that, subject to careful regulation, legal practitioners be permitted to charge contingency fees so as to provide another funding option for clients who are unable to bring proceedings without financial assistance in appropriate cases. The VLRC Report also supports industry-wide, national regulation of litigation funders and recommends that Victoria advocate for stronger national regulation through the Council of Australian Governments.⁴⁰

ALRC

The following year, on 11 December 2017, the then Federal Attorney General, the Hon. Mr George Brandis SC, announced that the ALRC would be asked to conduct a similar review at the federal level regarding the prudential and character requirements for funders, capital adequacy and conflicts of interest and to report by 21 December 2018. The ALRC Inquiry, led by the Hon. Justice Sarah Derrington QC, is consulting broadly with judicial and expert panels, regulators, stakeholders and interested parties in the UK and Canada. A discussion paper released on 1 June 2018⁴¹ (ALRC Paper) attracted more than 70 formal submissions from a broad range of industry stakeholders including: funders, law firms, insurers, industry super funds, non-government organisations, business lobby groups, and regulatory bodies and professional associations. A post-submission seminar series has been conducted throughout Australia and a Post Submission Seminar Paper and Supplementary Note for Consultation has been released.⁴²

The ALRC Discussion Paper includes a proposal that contingency fee arrangements for solicitors should be permitted in Australian class action proceedings with some limitations. This would allow solicitors to receive a proportion of the sum recovered at settlement, subject to court approval, to ensure arrangements are reasonable and proportionate. One rationale for the proposal is so that medium-sized class action matters could proceed (between A\$30 million and A\$60 million).⁴³ The ALRC’s proposal is broadly supported by 71 per cent of submitters⁴⁴ and seems likely to be included in the final report. There are widely divergent responses under consideration regarding the detail of the proposed limitations, including that: the contingency fee be the one and only form of funding; the solicitors bear the onus of paying for the disbursements and providing an indemnity against adverse costs; and the solicitors are precluded from also recovering any professional fees on a time-cost basis.⁴⁵ Overall, it seems likely that some type of regime for contingency fees in class actions will be recommended by the ALRC, consistent with the earlier recommendations of the VLRC and the Productivity Commission.

The ALRC Paper also contains a draft law reform proposal that the Corporations Act be amended to require third party litigation funders of class actions to obtain a ‘litigation funding licence’ to operate in Australia (Proposal 3-1), so as to help protect the parties to

40 *ibid.* p. xvi, paras. 28–31.

41 Australian Law Reform Commission, ‘Inquiry into class action proceedings and third party litigation funders’ Discussion Paper 85, pp. 4–5, and p. 17, para. 1.17.

42 Australian Law Reform Commission, ‘Inquiry into Class Action Proceedings and Third-Party Litigation Funders Reform’ Post-Submissions Seminar and Supplementary Note for Consultation: Leave to Proceed.

43 Australian Law Reform Commission, ‘Inquiry into Class Action Proceedings and Third Party Litigation Funders’ Discussion Paper 85, p. 83, para. 5.10.

44 Australian Law Reform Commission, ‘Inquiry into Class Action Proceedings and Third-Party Litigation Funders’ Post-Submissions Seminar, p. 5.

45 *ibid.*

litigation from the risk of financial loss and to protect the reputation of the civil justice system.⁴⁶ The ALRC reasons that there is a broad licensing regime for financial sales advice and dealings in relation to financial products and no sound policy reason to exempt litigation funders.⁴⁷ The ALRC Post Submission Seminar Paper indicates that 65 per cent of submitters are broadly supportive of the ALRC's licensing proposals.⁴⁸ The type of licensing regime currently favoured by the ALRC is an AFSL licensing regime regulated by ASIC rather than a more costly bespoke regime.⁴⁹ The ALRC Paper also suggests that licensees would be required to satisfy minimum character and qualification requirements likely to include both financial and legal skills and knowledge requirements.

Perhaps the most controversial element of any new licensing regime for litigation funders is the extent of any capital adequacy requirements to be imposed. While litigation funders currently provide costs protection by the security for costs regime, the ALRC's view is that this does not negate the need for a capital adequacy requirement.⁵⁰ The ALRC is currently considering whether the base-level financial requirements under an AFSL licence should be in accordance with ASIC Regulatory Guide 166. These financial requirements would include a net asset requirement of about 5.5 per cent of adjusted liabilities and a cash requirement of A\$50,000. The asset requirement to hold 5.5 per cent of liabilities as a buffer differs from the approach adopted by some overseas regimes which require a flat capital amount. For example, in England and Wales, under the self-regulatory model managed by the Association of Litigation Funders of England and Wales, members of the association are required to have £5 million in capital and the capacity to cover aggregate funding liabilities for a minimum of 36 months.

Some foreign domiciled funders have raised concerns about new licence requirements that would require the transfer of capital to Australia. The ALRC is considering the application of exemptions for entities that are subject to comparable prudential regulation overseas (ALRC Paper at 3.62). One challenge is that many overseas funders are either not regulated in a comparable manner or are not regulated at all. While the detailed licensing provisions are still under review, it seems likely that the ALRC will recommend the introduction of a licensing regime for litigation funders of class actions.

III STRUCTURING THE AGREEMENT

i Typical structure

Funded litigation can involve a tripartite relationship between the litigation funder, the lawyer and the funded client, whereby the funder agrees to provide for all of the client's legal costs and disbursements in return for receiving a percentage of any damages recovered. This percentage typically ranges between 20 per cent and 45 per cent of the settlement proceeds

46 Australian Law Reform Commission, 'Inquiry into Class Action Proceedings and Third Party Litigation Funders' Discussion Paper 85, p. 50, para. 3.27.

47 *ibid.* p. 49–50, para. 3.26.

48 Australian Law Reform Commission, 'Inquiry into Class Action Proceedings and Third-Party Litigation Funders' Post-Submissions Seminar, p. 10.

49 *ibid.* p. 16.

50 Australian Law Reform Commission, 'Inquiry into Class Action Proceedings and Third Party Litigation Funders' Discussion Paper 85, p. 56, para. 3.49.

depending on the risks and time involved and the type of funding required.⁵¹ In class actions, the funder typically also assists with project management, administration and pre-claim investigation and sometimes also charges a project management fee. Litigation funders often agree to provide an indemnity to cover the risk of adverse cost orders in the event that the proceeding is unsuccessful. This may involve providing security for costs as agreed or ordered by the court.

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

Funding agreements often allocate project management responsibilities and day-to-day control over the litigation to the funder, allowing the funder the right to provide instructions and administrative support to the lawyers. In theory, the ultimate level of control given to the funder might be seen to give rise to potential conflicts between the interests of the client, in achieving the best possible outcome, and the interests of the funder, in resolving the claim for an acceptable return on its investment. In *Fostif* the Court of Appeal recognised that a high level of control by the funder is expected and permissible but cautioned that it would be contrary to public policy for the lawyers to fully abdicate to the funder the obligation to act for the representative party.⁵² Therefore, while it is permissible for a funder to maintain day-to-day control of a claim, the legal representatives are expected to consult with the client on key issues. In this regard funding agreements often preserve the right of the client to override the funder's instructions. They also commonly include dispute resolution procedures to manage potential conflicts between the funder and client. Unresolved disputes between funders and clients can require the lawyers to brief a senior counsel to provide a final and binding opinion on areas of dispute, such as, for example, the reasonableness of a proposed settlement offer.

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

ii Judicial intervention

Australian courts have recently shown some willingness to scrutinise the commercial terms of litigation funding agreements and, in limited instances, intervene if they consider funding commissions to be excessive. In *Earglow Pty Ltd v. Newcrest Mining Ltd* Justice Murphy

51 Victorian Law Reform Commission, 'Access to Justice – Litigation Funding and Group Proceedings' Consultation Paper, p. 115, para. 8.25.

52 *Fostif v. Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 223-224 (Mason P).

considered that the court had power to reduce a litigation funder's commission rate when approving a class action settlement.⁵³ His Honour held that the court was not limited to the binary choice of either approving or rejecting the settlement – instead, the court had power to approve the settlement, while at the same time varying, of its own motion, the amount payable to the funder (thus, in effect, overriding the contractual arrangements between the funder and group members). Justice Murphy considered that such power derived from a combination of Sections 23, 33V, 33Z and 33ZF of the Federal Court of Australia Act (FCA), and that it was, in many respects, analogous to the court's power to fix the amount of costs payable to the lawyers.

In deciding whether to exercise that power in the context of a class action settlement approval, Australian courts have shown a willingness to review and consider not only funding commissions, but also: legal costs, the amount that funded litigants will receive 'in hand', the risks assumed by the funder, the amount of adverse costs exposure, and the sophistication and experience of funded litigants. Applying these principles to the *Newcrest* settlement approval application, Murphy J concluded that the aggregate funding commission of A\$6.78 million, at rates of between 26 per cent and 30 per cent, was fair and reasonable. In reaching this conclusion, his Honour considered the published empirical research into the funding commission rates paid in Australian class actions, as well as a number of recent decisions in which settlements were approved, before concluding that those rates were at the lower end of the range. He also emphasised the need for transparency about matters relating to funding in judgments to allow proper benchmarking.

In the subsequent decision of *Mitic v. OZ Minerals Ltd* (No. 2) Justice Middleton agreed that the court had power to vary the amount payable to a litigation funder out of a settlement in a class action,⁵⁴ but preferred to base that view on Section 33V of the FCA, rather than on the other provisions referred to by Justice Murphy.⁵⁵

This issue appears not to be settled though. In *Liverpool City Council v. McGraw-Hill Financial Inc*⁵⁶ (now known as S&P Global Inc), Lee J approved a comparatively large funding commission of A\$92 million out of a total settlement of A\$215 million (about 43 per cent) through a funding equalisation order but, in doing so, considered that Section 33V(2) of the FCA did not give the court the power to interfere with the amount of a funding commission in order to make a settlement reasonable, or to alter a 'valid contract' between parties (including a funding agreement).⁵⁷ In considering whether the funding agreement constituted a valid contract, Lee J noted that there were no objections or applications to set aside the agreement and that a large portion of the class were sophisticated institutional investors. His Honour, did not ultimately decide on whether the court has an inherent power

53 *Earglow Pty Ltd v. Newcrest Mining Ltd* [2016] FCA 1433 at [7] and [157].

54 *Mitic v. OZ Minerals Ltd* (No 2) [2017] FCA 409.

55 In the *Tamaya Resources* class action ([2017] FCA 650 at [105]–[106]), Justice Wigney appeared to accept that the power existed, and so too did the Full Court in *Melbourne City Investments Pty Ltd v. Treasury Wine Estates Ltd* ([2017] FCAFC 98 at [90]).

56 [2018] FCA 1289.

57 *ibid.* at [51].

to alter a funding agreement.⁵⁸ Therefore, the question (and extent) of judicial power to vary terms of litigation funding agreements remains somewhat controversial and unresolved in Australia.⁵⁹

Looking ahead, the current ALRC inquiry into litigation funding is considering whether new requirements for leave to proceed and approval of litigation funding agreements (and potentially contingency fee arrangements) should be introduced as a precondition to any class action proceeding in the Federal Court of Australia. Whether the Court should be empowered to reject, vary or set the commission rate or contingency fee and grant leave on such terms as the court sees fit is also under review.⁶⁰ The ALRC contends that this would not be a US-styled certification process addressing claim merits, but if introduced says it would clarify the extent of judicial power to vary terms of litigation funding agreements, although no final recommendation has been made.

IV DISCLOSURE

The Federal Court's Class Action Practice Note requires the disclosure of legal costs and any litigation funding charges to current and potential clients in class actions, in clear terms, as soon as is possible.⁶¹ Broader disclosure to the court and other parties is also required in any class action.⁶² Funded applicants are entitled to redact these materials to conceal information that might confer a tactical advantage on another party.⁶³ Commercial terms such as the litigation budget, the commission and costs structure are generally redacted whereas the court is given a complete version.⁶⁴ On occasion the Federal Court has been prepared to order production of unredacted litigation funding agreements where relevant, for example, where funding rates were relevant to the respondent's application to set aside the proceeding as an abuse of process,⁶⁵ or where an application to de-class the proceeding on the ground that a closed class was said to be an abuse of process.⁶⁶

Conversely, parties have also successfully resisted production of funding agreements and documents associated with the funding relationship, such as investigative reports and

58 *ibid.* at [52] – [58].

59 See, for instance, observations of Justice MBJ Lee 'Varying Funding Agreements and Freedom of Contract: Some Observations' 1 June 2017, IMF Bentham Class Actions Research Initiative with UNSW Law: Resolving Class Actions Effectively and Fairly, p. 7. In other instances the Federal Court has indicated that under Section 33ZF of the Federal Court of Australia Act 1977 it has the power, for example, to effectively modify 'any contractual bargain dealing with the funding commission payable out of any settlement proceeds' in the course of a settlement approval: *Blairgowrie Trading Ltd v Allico Finance Group Ltd* (rec and mgr apptd) (in liq) (No. 3) (2017) 343 ALR 476, 504 (Beach J). See also *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [133]–[134], [157] (Murphy J); *Mitic v OZ Minerals Ltd* (No. 2) [2017] FCA 409 (21 April 2017) [26]–[31] (Middleton J).

60 Australian Law Reform Commission, 'Inquiry into Class Action Proceedings and Third-Party Litigation Funders Reform', Supplementary Note for Consultation: Leave to proceed, 13 September 2018, pp. 4–5.

61 Federal Court of Australia, Class Action Practice Note (GPN-CA) – General Practice Note 25 October 2016, p. 4, para. 5.3.

62 *ibid.* paras. 6.1, 6.4.

63 *ibid.* para. 6.4(b).

64 Federal Court of Australia, Class Action Practice Note (GPN-CA) – General Practice Note 25 October 2016, para. 6.1.

65 *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455.

66 *Dorajay Pty Limited v Aristocrat Leisure Limited* [2005] FCA 588.

correspondence between the funder and a funded party, on the ground of legal professional privilege under Section 119 of the Evidence Act 1995 (NSW) (the Evidence Act). In *Hastie Group Ltd (in liq) v. Moore* the respondent successfully obtained orders at first instance for production of an expert report that had been provided to the prospective litigation funder.⁶⁷ However, the NSW Court of Appeal overturned that decision and upheld a claim of legal professional privilege. It did so on the ground that the report was prepared for the dominant purpose of the provision of professional legal services in relation to proceedings or anticipated proceedings under Section 119 of the Evidence Act, having regard to the engagement letter attached. Importantly, the Court of Appeal also held that the disclosure of the report to a litigation funder was not sufficient to waive privilege in circumstances where it was clear that the report was being provided on a confidential basis.⁶⁸

V ADVERSE COSTS

Superior Australian courts generally have power to order costs against a non-party, including a third party funder. In *Knight v. FP Special Assets Ltd* the High Court held that the relevant provisions of the Supreme Court Act 1867 (Qld) empowered the Court to award costs against a non-party where the party to the litigation is an insolvent person or ‘man of straw’ and the non-party has played an active part in the conduct of the litigation and has (or some person on whose behalf that non-party has been appointed has) an interest in the subject of the litigation.⁶⁹

Examples exist where a litigation funder did not provide any contractual indemnity against adverse costs and where the court subsequently refused to order that third party funder to pay adverse costs. In *Jeffery & Katauskas Pty Ltd v. SST Consulting Pty Ltd (SST)* the High Court held that it was not an abuse of process where a plaintiff was unable to meet an adverse costs order simply because the funder had not assumed any liability for adverse costs.⁷⁰ In that case the defendant had not sought adequate security for costs during the proceeding. The High Court clarified that a litigation funder does not always have to put the funded party in a position to meet any adverse costs order.⁷¹

At the time the High Court’s *SST* decision generated some apprehension from some quarters suggesting that funders might refuse to provide indemnities for adverse costs to the detriment of successful respondents. However, perhaps as a result of commercial realities and market competition, these fears have not materialised.⁷² In practice, litigation funders now routinely agree to indemnify funded clients against adverse costs exposure and provide security for costs that may be ordered. Representative applicants in funded class action claims will often not be prepared to assume personal liability for the costs of the class without such costs indemnities.⁷³

67 *Hastie Group Ltd (in liq) v. Moore* [2016] NSWCA 305.

68 *ibid.* at [59] – [60].

69 *Knight v. FP Special Assets Ltd* (1992) 174 CLR 178, [192]–[193]; see also *Gore v. Justice Corporation* (2002) 119 FCR 428.

70 *Jeffery & Katauskas Pty Ltd v. SST Consulting Pty Ltd* (2009) 239 CLR 75.

71 See also Grave, Adams and Betts, *Class Actions in Australia*, para. 17.1000.

72 *ibid.*

73 *ibid.*

In *Domino's Pizza Enterprises Limited v. Precision Tracking Pty Ltd (No. 2)* the funded party opposed a security for costs order being made on the grounds that there was no risk that a costs order would not be satisfied due to the combined effect of the litigation funding indemnity, an adverse costs insurance policy and proposed undertakings by Precision Tracking Pty Ltd to notify the parties of any relevant change of funding circumstances.⁷⁴ However, the court ordered security for costs be lodged, concluding that (1) Precision Tracking did not have the capacity to meet an adverse costs order, (2) the funding agreement restricted the indemnity to a counterclaim in the proceeding and (3) the adverse costs insurance was taken out for the primary claim. Additionally, the funder had an absolute discretion to terminate its funding arrangements with Precision Tracking at any time, including the adverse costs indemnity and the adverse costs insurance.

The adequacy of adverse costs insurance, as a form of security, was again tested in *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Ltd (Petersen)*.⁷⁵ In that case Justice Yates accepted that, depending on the circumstances, 'an appropriately worded ATE policy might be capable of providing sufficient security for an opponent's costs'; but on the facts of *Petersen* concluded that the specific policy offered was not sufficient, noting the beneficiary of the policy was the applicant, not the respondents.⁷⁶ His Honour also found that there was no mechanism by which the respondents could compel the applicant to sue on the policy if it were breached. Although this could potentially be overcome by direct proceedings against the insurer under the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW), there were other potential difficulties including numerous policy exclusions that might be relied on, and a lack of evidence in relation to procurement of the policy that might have an impact on non-disclosure and avoidance rights.

VI THE YEAR IN REVIEW

i Competing funded class actions

Evidence suggests that competing funded class actions against the same respondent arising out of substantially the same subject matter are becoming more prevalent. Professor Vince Morabito's empirical report 'Competing class actions and comparative perspectives on the volume of class action litigation in Australia' concludes that as at 30 June 2018 there had been 28 instances or sets of competing class actions in Australia.⁷⁷

The Federal Court of Australia is adopting a 'hands on' approach to case management and demonstrating a willingness to exercise its case management powers to prevent duplicative funded class actions. In *McKay Super Solutions Pty Ltd (Trustee) v. Bellamy's Australia Ltd (Bellamy's)* the Court scrutinised the funding packages offered by competing litigation funders in detail at the commencement of the case.⁷⁸ Two securities class actions

⁷⁴ *Domino's Pizza Enterprises Limited v. Precision Tracking Pty Ltd (No. 2)* [2017] FCA 211.

⁷⁵ [2017] FCA 699.

⁷⁶ *ibid.* at [92].

⁷⁷ See Vince Morabito, 'Competing class actions and comparative perspectives on the volume of class actions litigation in Australia', *An Evidence-Based Approach to Class Actions Reform in Australia* (Monash Business School, 6th ed, 11 July 2018), p. 13 – of the 28 competing class action identified, 16 related to shareholder claims, five concerned product liability, four were investor, two were mass tort and one related to consumer protection.

⁷⁸ *McKay Super Solutions Pty Ltd (Trustee) v. Bellamy's Australia Ltd* [2017] FCA 947.

commenced on an open basis had been filed against Bellamy's Australia Ltd, in *McKay Super Solutions Pty Ltd (Trustee) v. Bellamy's Australia Ltd* (the *McKay* class action) and *Basil v. Bellamy's Australia Limited* (the *Basil* class action).⁷⁹ The respondent applied to the court to stay one of the class actions on the grounds that it would be oppressive and an abuse of process to defend two similar funded class actions. The pleadings and claim period in each class action were similar, each class action was of a similar size and claim value, and each had experienced class action solicitors on the record. The major point of difference was the litigation funding. The *McKay* class action was funded by IMF Bentham. The *Basil* class action was funded by ICP Capital. Beach J held that neither class action should be stayed and that the IMF Bentham-funded class action should remain as an 'open class' and the ICP Capital-funded class action should remain on foot but become a closed class.⁸⁰ Ultimately, the comparative financial position of IMF Bentham, the form of security provided and the standard terms of its funding agreement were key determinants in the court resolving which funded class action should proceed as an open class in Bellamy's.

In *Perera v GetSwift Ltd*⁸¹ (*GetSwift* class action) there were three competing class actions resulting in a carriage motion to determine which class action would proceed and which (if any) would be stayed. The court adopted a multi-factorial analysis to compare the competing class proceedings.⁸² Justice Lee considered that the court had the power to stay two of the proceedings and permit one to proceed on the basis that to allow two duplicative open class proceedings to proceed would perpetuate unnecessary multiplicity, would bring the administration of justice into disrepute and would amount to an abuse of the court's process. Broadly, the main area of difference between the various *GetSwift* class actions identified by the court was in the approach to funding and costs. The class action selected to proceed (the *Webb* class action)⁸³ was said to have an innovative, highly competitive funding model and novel proposed methods to reduce costs by involvement of court-appointed costs referees and joint experts.⁸⁴ The funding model was calculated as the lesser of 20 per cent of the net settlement sum and a multiple of legal costs, increasing at various stages of the proceedings.⁸⁵ Lee J considered the alignment of the reward of the funder with a multiple of legal costs was a significant attraction of the funding model because it recognises the reality that the risk of a funder (including for adverse costs) increases incrementally as legal costs increase and has the advantage of avoiding 'windfalls' which might be disproportionate to the risk and costs incurred.

Perhaps the most prominent recent example of competing funded class actions in Australia involves one of Australia's oldest funds managers, AMP Ltd. In 2018, the market value of AMP Ltd plummeted by about 11 per cent as a result of previously undisclosed revelations that emerged during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Five separately funded shareholder class

79 *McKay Super Solutions Pty Ltd v. Bellamy's Australia Limited* (VID 163/2017); *Basil v. Bellamy's Australia Limited* (VID 213/2017).

80 A closed class action is restricted to identified group members who have entered into a funding agreement with the funder. An open class action is a class action on behalf of both the funded group members and unfunded group members who fall within the group member definition.

81 [2018] FCA 732.

82 *ibid.* [169].

83 *ibid.* [330].

84 *ibid.* [328].

85 *ibid.* [73].

actions have been brought against AMP Ltd offering various types of funding packages. Four of these class actions were commenced in the Federal Court and one in the NSW Supreme Court. A final determination as to claim or claims that will be permitted to proceed is yet to be made.

ii Common fund orders

A recent significant development has been the judicial approval of ‘common fund’ orders sought in funded class actions. Common fund orders can provide for the legal cost of the proceeding and the commission charge of a litigation funder to be met by all members of a class who succeed in, or achieve a settlement in, a class action, irrespective of whether they have signed any legal retainer or funding agreement. Common fund orders have been made in a growing number of class actions, including: *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Ltd* (the QBE class action),⁸⁶ *Blairgowrie Trading Ltd v. Alloco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No. 3)* (the Alloco class action),⁸⁷ and *Camping Warehouse v. Downer EDI (Approval of Settlement)* (21 December 2016) (the Downer EDI class action);⁸⁸ *Lenthall v. Westpac Life Insurance Services Limited*⁸⁹ (the Lenthall class action); and *Catherine Duck v. Airservices Australia*⁹⁰ (the Airservices class action).

A common fund order was first made in the QBE class action at an early stage of the proceeding to assist group members in making an informed decision as to their participation in the class action prior to ‘opt-out’. In making the order the court did not set the funding commission rate, preferring to determine that issue at a later stage once the amount of any settlement was known (the applicant had sought a rate of 30 per cent, being less than the 32.5–35 per cent provided for in the pre-existing funding agreements).⁹¹

Justice Beach subsequently made a common fund order at the time of settlement approval of the Alloco class action, allowing the funder 30 per cent of the net settlement amount (i.e., after deduction of legal costs), which equated to about 22 per cent of the gross settlement amount of A\$40 million. His Honour emphasised that the 30 per cent rate was reasonable and proportionate to the investment and risk undertaken by the funder in the context of the settlement and should not be seen as a precedent and that he would have set a lower rate had the settlement amount been substantially higher. He also stated that ‘a 30% rate would be difficult to justify on a net settlement sum above A\$50 million’; albeit with the caveat that ‘valuable services such as that which a funder provides have a commercial cost and if it can be justified, so be it’.⁹²

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

86 (2016) 245 FCR 191.

87 [2017] FCA 330; (2017) 118 ACSR 614.

88 [2016] VSC 784.

89 [2018] FCA 1422 at [25].

90 [2018] FCA 1541.

91 *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Ltd* (2016) 245 FCR 191 at [183].

92 *Blairgowrie Trading Ltd v. Alloco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No. 3)* [2017] FCA 330 at [160].

Justice Lee made common fund orders for the payment of funding commission of the lesser of 20 per cent of the net settlement sum and a multiple of legal costs at the commencement of the proceedings in the *GetSwift* class action. Lee J considered it to be preferable to make the order at an early point, and noted that the order could be varied by the Court at a later time if necessary.⁹³ This decision was subsequently cited in *Impiombato v. BHP Billiton Ltd*⁹⁴ in support of the making of an early common fund order, while retaining scope to vary or vacate the order. In the *Lenthall* class action, Justice Lee made similar orders to the *GetSwift* class action. The funding rate to be paid by the class in the *Lenthall* class action is the lesser of 25 per cent of the gross recovery and three times the total spend on legal costs and disbursements and adverse costs.⁹⁵

Whether it is appropriate to provide for common fund orders with funding commission rates early in the proceedings will depend on the circumstances of the case. In the *Airservices* class action, Justice Bromwich held that it might distort decision-making and was not appropriate to make common fund orders early in that proceeding that fixed any commission rates because there was a reasonable possibility that a separate question might end the proceeding or provide a platform for early settlement.⁹⁶

The judicial power for common fund orders has been challenged in the *Lenthall* class action in which an application for leave to appeal has been filed.⁹⁷ If leave is granted the appeal will determine whether the Federal Court has the power to make common fund orders pursuant to Section 33ZF of the Federal Court of Australia Act 1976, which is the general power of the court to make orders appropriate or necessary to ensure that justice is done in the proceeding. The Australian judicial trend towards making common fund orders to ensure fairness and equality between group members might suggest the prospects of this appeal are not strong.

VII CONCLUSIONS AND OUTLOOK

Litigation funding in Australia is well established and now progressing into a mature and sophisticated market. Common law and regulatory requirements have steadily developed and clarified the regime's requirements since the High Court's foundational decision in *Fostif*. Market competition spurred by new local and international funding entrants is driving innovation and placing downward pressure on commission rates and competitive terms.

The general acceptance of the common fund doctrine in class actions has improved fairness and equity between class members and enabled funders to more efficiently consider the commercial viability of multiparty claims, without completing costly book-building. Looking ahead we can expect to see further judicial guidance on funding arrangements and the extent of the court's powers of intervention. We also expect that increased regulatory requirements will be imposed on funders as a result of the VLRC and ALRC reviews and recommendations to parliament.

93 *Perena v. GetSwift Ltd* [2018] FCA 732, [244]–[248].

94 [2018] FCA 1272 at [25].

95 *Lenthall v. Westpac Life Insurance Services* [2018] FCA 1422 at [13], [58] – [62].

96 *Catherine Duck v. Airservices Australia* [2018] FCA1541 at [16].

97 See *Westpac Life Insurance Services Limited ABN 31 003 149 157 & Anor v. Gregory John Lenthall & Ors*, NSD1880/2018, filed 2 October 2018.

Clearly, an important next step facing state and federal regulators will be the introduction of damages-based contingency fees for lawyers, as has been recommended by the Productivity Commission and the VLRC. It seems inevitable that Australian lawyers will shortly be competing with litigation funders in the funded class action segment of the market, which should further enhance consumer outcomes and provide greater access to justice in Australia.

AUSTRIA

Marcel Wegmüller and Mirdin Gnägi¹

I MARKET OVERVIEW

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

The aspect that has gotten the most exposure and that has substantially influenced the public opinion of third party funding in Austria is its contribution to the Austrian-style class action. While there is no specific collective redress provided for in Austrian law apart from the joinder of parties, there has been a class action mechanism existing in Austria's civil procedural law practice for over 10 years. This mechanism is based on a combination of several elements of the Austrian Code of Civil Procedure (ZPO) and is commonly referred to as 'Austrian-style class action'.² It entails the possibility not only for the original owner of a claim to assert it against the debtor but also for a third party to whom the claim has been assigned to do so. In addition, the Austrian-style class action allows a plaintiff who wants to assert several claims against the same defendant to bundle all these claims into a single litigation. In addition, claim-size restrictions do not apply in case of the assignee and class action claimant being a specific association (e.g., a consumer organisation). This allows for all bundled claims to be brought before the Supreme Court regardless of the individual claim size.³ In a landmark decision in 2013, the Supreme Court explicitly confirmed the legality of third party funding of such Austrian-style class actions.⁴

Third party funding in Austria has grown in recent years and now covers single case funding both in litigation and arbitration for a broad variety of civil claims, and for corporations as well as for private individuals.

Alternative funding options entailing the same advantages as third party funding are scarce in the Austrian market: while legal cost insurance is widely available in Austria, the coverage it provides is quite limited regarding the maximum amount of legal costs insured as well as the type of disputes insured, depending on the specific policy. Another disadvantage of legal cost insurance consists in the need to arrange it before the event giving rise to a claim even happened, that is before a possible claimant even becomes aware of the need to litigate.

1 Marcel Wegmüller is a managing partner and Mirdin Gnägi is an associate at Nivalion AG.

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

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

4 OGH, 27 February 2013, 6 Ob 224/12b.

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

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

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

II LEGAL AND REGULATORY FRAMEWORK

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

While the question of third party funding has been taken up by the courts, lawmakers have not yet seen the necessity to deal with it. Austrian legislation contains no specific

5 Sections 63–73, ZPO. Legal aid in Austria is called *Verfahrenshilfe*.

6 E.g., regarding lacking financial resources: VfGH 25 August 2016, E 1891/2016; 22 March 2002, B 254/02; 2 April 2004, B 397/04. E.g., regarding reasonable chances of success: VfGH 17 August 2017, E 1096/2017.

7 Section 63(2), ZPO; VfGH 5 October 2011, G 26/10.

8 <http://www.advofin.at/>; <http://nivalion.ch/>; <http://www.jura-plus.ch/>; <https://www.foris.com/>; <https://www.roland-prozessfinanz.de/>; last visited on 18 September 2018.

9 See footnote 4 above. The first decision stating the admissibility of someone lending financing support in litigation against a share of the proceeds in Austria dates back to the 1980s and remained very isolated until the 2013 landmark decision: OGH 11 December 1984, 4 Ob358-365/83, Öbl 1985,71.

10 <https://www.foris.com/fuer-aktionaeere/investor-relations/news/detail/handelsgericht-wien-bestaetigterneut-zulaessigkeit-von-prozessfinanzierung.html>; HG Wien 7 December 2011, 47 Cg 77/10s, available at: https://verbraucherrecht.at/cms/index.php?id=49&tx_ttnews%5Btt_news%5D=2709&cHash=22ed0518d1c211afc704b438764b8078; OLG Wien 23.8.2012, 3 R 41/12i, available at: https://verbraucherrecht.at/cms/index.php?id=49&tx_ttnews%5Btt_news%5D=2849&cHash=6725fce59f65f57bb77c4063ac4594c3, last visited on 18 September 2018.

provisions regarding third party funding. What is more, neither the Austrian financial regulator nor any other governmental body has so far taken any steps to install any oversight of reported litigation funding.

Therefore, a specific legal or regulatory framework concerning third party funding is absent in Austria. However, third party funders and their clients have to take into consideration the rules and regulations regarding the professional conduct of lawyers in Austria, since the client's mandated lawyers do play a role in any client's relationship with his or her litigation funder. In Austria, lawyers are prohibited from working on a contingency fee basis only.¹¹ The reasoning behind this relates to the lawyer's independence: if a lawyer has a financial stake in a case that exceeds the basic compensation for his or her services (i.e., if he or she works on a contingency fee basis), the assumption is that he or she would no longer have only the client's interests on his or her mind but might start to look out for his or her own (financial) interests. This, in turn, might conflict with the client's interest as a lawyer may excessively insist on taking a case to court when the best advice for the client would be to settle the case.

The prohibition of a pure contingency fee remuneration for the client's lawyer has to be taken into account when drafting the litigation funding agreement. Any stipulation therein that would – directly or indirectly – result in a pure contingency fee model regarding the remuneration of the client's lawyers, would be in violation of the above-mentioned legislative provisions in the Lawyer's Ordinance (RAO) and the Austrian Civil Code (ABGB). However, if the lawyers charge a basic fee (flat or on an hourly basis) for their services that covers the actual costs of the lawyers' practice, the fee arrangement could entail an additional remuneration in addition to the basic fee, such as a premium in the event of a successful outcome.¹² Within those limits, the litigation funding agreement can stipulate a remuneration model for the client's lawyers that is partially responsive to the outcome of the case. What must be strictly avoided is a pure contingency-fee-based model – or any model that would allow for it to be interpreted as such.

Furthermore, since the lawyers' independence is a crucial principle of the RAO,¹³ it is not sufficient to factor it in only regarding the financial aspects of the funder-lawyer relationship. It is equally important that the funder and the lawyers assume distinct roles, meaning that the funder provides a financial service while the lawyers advise their clients on all legal aspects – including the client's relationship to the funder. Thus, any conflict of interest on the lawyers' part can be prevented.

An additional point to consider is the prohibition of profiteering under Austrian law (i.e., exploitation of a person in need).¹⁴ In principle, there is no explicit limit on a funder's share of proceeds and no definition of what constitutes an acceptable compensation for the funder's services, but any agreement under Austrian law, including a litigation funding agreement, must not constitute profiteering.

11 Prohibition of the *pactum de quota litis*: Section 16(1), RAO and Section 879(2), ABGB.

12 In contrast to the *pactum de quota litis*, the *pactum de palmario* is allowed in Austria, the difference being that the latter – while being dependent on a successful outcome – is not dependent on the extent of the success. See Marcel Pilshofer, 'Grundlagen und Grenzen freier Honorarvereinbarungen im Anwaltsberuf', doctor's thesis Vienna 2010, p. 161 et seq., 292 et seq.; as well as Michael Kutis, 'Das «pactum de quota litis» in Österreich', in: *Anwaltsrevue* 2008/10, p. 457 et seq.

13 Cf. Section 9(1), RAO.

14 Section 1 of the Act against Profiteering.

III STRUCTURING THE AGREEMENT

Normally, litigation funding agreements in Austria contain a standard clause regarding confidentiality and non-disclosure, basically prolonging the reciprocal obligation that the parties might have entered into under a non-disclosure agreement at the very start of their relationship. This standard clause usually concerns itself with protecting the litigant's interest, but, since in Austria there is no duty to reveal a third party funder's involvement,¹⁵ the confidentiality clause in the litigation funding agreement could also contain some obligation for the litigant such as not to disclose the funder's involvement without the funder's express written consent.

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

The principle of the lawyer's independence in acting on behalf of the litigant, as described above, has to be taken into account when structuring the litigation funding agreement, in order to adhere to the regulations on the lawyer's professional conduct. 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 his or her client. Nevertheless, a litigation funding agreement in Austria may very well stipulate a funder's right to grant funding only for a specific lawyer accepted by the funder. These situations are part of the usual contractual negotiations between parties to a litigation funding agreement. In addition, a litigation funding agreement may provide that if the litigant intends to replace his or her lawyer, further funding will only be granted if the new lawyer is accepted by the funder, considering that the funder's belief in the lawyer's skills is an essential element when the former is assessing a case and concluding a litigation funding agreement. But these two special stipulations do not really concern the fundamental element of any client-lawyer relationship – namely, the client's right to instruct his or her lawyer. In this respect, the claimant's lawyer has to stay independent from the third party funder. Thus, the funder must not instruct the lawyer during the proceedings.

Of course, in a normal working relationship the funder will express his or her opinion on the progress of the case and will mention any steps he or she thinks should be taken in the best interest of the case, but only the client has the right to instruct his or her lawyer, and the lawyer has the obligation to take instructions only from his or her client. If, instead, the lawyer acts upon instructions by the funder, he or she would violate the professional conduct as provided in the RAO. Any rights and actions that the funder might intend to exercise during the course of the litigation process must therefore have been agreed upon in the litigation funding agreement, to which the funder and the claimant, not the claimant's lawyer, are parties. In this context, the parties need to consider any information rights, access to documents produced during the ongoing litigation and any rights for the funder to veto

15 See Section IV.

actions that a litigant is usually free to take – respectively the offsetting mechanisms triggered if a litigant takes such actions against the funder’s preference. Often, these considerations lead to contract clauses stipulating the litigant’s obligation not to: conclude or revoke any settlements; waive any claims; initiate any additional proceedings in connection with the funded claim; adopt any legal remedies; expand the claim; or otherwise dispose of the funded claim without the written permission of the funder. By negotiating these terms beforehand and including them in the litigation funding agreement, the claimant’s rights to his or her claim are respected.

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

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

- a* court or authority decisions that result in a full or partial dismissal of the claim;
- b* the disclosure of previously unknown facts that have a negative effect on the current litigation process;
- c* a change in case law that has a negative effect on the current litigation process;
- d* a loss of evidence or harmful evidence adduced by the respondent; and
- e* a major change in the creditworthiness of the respondent.

When a funder exercises his or her right to terminate under such circumstances, in practice he or she would terminate the agreement and bear any costs incurred up until this moment as well as costs that are incurred as a consequence of the termination.

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

IV DISCLOSURE

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

¹⁶ Section 90 of the Austrian Constitution (B-VG), Sections 171 et seq., ZPO.

¹⁷ Section 175, ZPO.

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

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

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

V COSTS

In Austria, court fees and all other expenses arising from the litigation, including the opposing lawyer's fees, are borne by the losing party, commonly referred to as the 'Loser Pays Principle', with a proportional split between the two parties if one party only partially prevails.²⁰ If the parties agree to settle the case, the costs are divided between the parties as provided by the terms and conditions of the settlement agreement.²¹

The Rules of Arbitration of the Vienna International Arbitral Centre (the Vienna Rules 2018) provide that the arbitral tribunal shall decide on the allocation of costs according to its own discretion, unless the parties have agreed otherwise. The conduct of any or all parties as well as their representatives, and in particular their contribution to the conduct of efficient and cost-effective proceedings, may be taken into consideration by the tribunal.²²

To determine and allocate court costs and party costs, the Austrian courts refer to the applicable tariff schedules. These tariff schedules often differ from the legal fees actually incurred (i.e., the actually incurred costs are higher than what the courts allocate). The same holds true with regard to appellate proceedings before the state courts and the Supreme Court.²³

The issue of a funder's liability for adverse costs in Austria is quite straightforward, but there are a few nuances. In third party litigation funding, as practised and understood in Austria, a funder's contractual obligation towards the claimant to cover the costs of the

18 Third-party Funding in International Arbitration, ICC Dossier, Vol. 10, Paris 2013; pp. 95 et seq.

19 Section 9, RAO, Section 321, ZPO.

20 Sections 41 and 43, ZPO.

21 Section 47, ZPO.

22 Rules of Arbitration by VIAC (www.viac.eu), Article 38(2).

23 Section 50, ZPO; Federal Law on Court Fees (GGG).

litigation has no reflex effect. Furthermore, the ZPO does not stipulate that a court could order a third party funder to pay adverse costs. Therefore, in principle, a third party funder cannot be held liable for adverse costs unless he or she contractually obliged himself or herself to do so (towards the claimant). If this contractual obligation exists, it can naturally be enforced by the funder's contractual partner (the claimant). It is also possible to detect two ways in which the prevailing respondent or the bankruptcy estate consisting of the claimant's assets could hold a third party funder liable for his or her costs (i.e., the adverse costs), though both require that in the litigation funding agreement there is a contractual obligation on behalf of the funder to pay adverse costs to the claimant. First, if the claimant succumbs, he or she could assign his or her claim against the funder to cover the adverse costs to the respondent – provided that the litigation funding agreement allows for such an assignment. The respondent can then take the assigned claim against the funder to court and force the funder to fulfil the obligation. Second, if the claimant does not assign the above-mentioned claim to the respondent (maybe because the funding agreement does not allow for an assignment) and at the same time refuses to pay the adverse costs, a funder could be forced to fulfil his or her obligation to cover adverse costs at the end of a long process of enforcement, namely if the respondent takes legal action against the claimant, the claimant is declared insolvent and the claim against the funder is realised as part of the bankruptcy assets. In practice, the prevailing respondent is granted recourse against the claimant to recover such costs in the courts' judgments. The enforcement of a judgment is governed by the Austrian Enforcement Regulation,²⁴ which provides that the successful respondent can request the competent debt collection office to issue a payment order against the claimant on the basis of the existing judgment,²⁵ which, as described, grants the prevailing respondent recourse against the claimant. Once the payment order is handed to the claimant, if he or she fails to pay the amount due the competent court will eventually declare him or her insolvent.²⁶ The claim against the funder to cover adverse costs will consequently become part of the bankruptcy assets. This constitutes the basis for the bankruptcy estate or, if specific circumstances apply, the respective creditors to subsequently bring this claim against the funder before the competent court.

Regarding security for adverse costs,²⁷ generally a claimant may be ordered to provide two distinct types of security for costs by Austrian courts. First, the courts can order the claimant to provide security for the expected court costs, which the court calculates by using tariff schedules and that depend mainly on the claim size.²⁸ Second, the claimant can be ordered to advance the costs for taking the evidence he or she requested in his or her submissions.²⁹

The claimant must only provide security for the potential compensation of the opposing party's costs if the respondent requests it and if the claimant has no residence or registered office in Austria.³⁰ If the claimant is domiciled in a country that has entered into a treaty excluding respective security bonds with Austria, then the claimant cannot be ordered to post security for adverse costs even if the respondent requests it.³¹

24 Law on Enforcement and Execution (EO).

25 Sections 1(1), 3(2) and 54, EO.

26 Sections 1, 66, 67, and 70 of the Federal Law on Insolvency.

27 Security for adverse costs is called *aktorische Kaution* in Austria.

28 Sections 6, 7(1), and 14, GGG, Sections 54–60 of the Law on Jurisdiction and Competence.

29 Section 365, ZPO.

30 Section 57, ZPO.

31 Section 57(1), ZPO. Thus, claimants domiciled in the European Union (cf. Article 6(1) of the EC Treaty; case C-323/95 Hayes European Court Reports 1997 I-01711; and Article 51 of the Council

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

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

A final issue regarding costs is the potential recovery of the costs of securing third party funding through a court order. To date, no Austrian court has ordered an unsuccessful party to pay the litigation funding costs of the successful party. But, theoretically, Section 41 of the ZPO provides a sound basis for a wide range of cost compensation in favour of the successful party, potentially including recovery of litigation funding costs.³²

VI THE YEAR IN REVIEW

Two interesting developments have occurred in the past year or so regarding third party funding in Austria. First, the share of third party funding in arbitration as opposed to civil litigation has increased. Given Austria's importance as an arbitration forum this development was long overdue, but it remains noteworthy nonetheless, as it only occurred recently. Second, some third party funders have begun to offer a wider array of funding solutions, including offering sophisticated forms of funding in litigation finance. The most noteworthy of these novel forms of third party funding is the monetisation of claims for corporate litigants, which means that a third party funder would not only fund the costs of a litigation or arbitration, as has traditionally been the case, but would also provide funds to be used by the litigant for general corporate purposes against the company's litigation or arbitration case as collateral.

Regulation (EC) No. 44/2001 (Brussels I) or in a country that is a party to the Lugano Convention of 30 October 2007 (Article 51 Lugano Convention) cannot be ordered by Austrian courts to provide security for adverse costs.

32 Section 41(1), ZPO provides for the compensation of 'necessary costs for the expedient and adequate enforcement of one's rights' (authors' translation). What is decisive are considerations regarding usefulness and prospects of success (Martin Mahrer, Zulässigkeit von "leeren" Klagebeantwortungen?, in: *AnwBl* 2004/6, pp. 336-341, p. 339), which always have to be evaluated *ex ante* (Michael Bydlinski, *Kostenersatz im Zivilprozess*, Vienna 1992, p. 15). Further reflection on this matter could be informed by the following aspects: regarding certain pre-proceedings costs, such as expert opinions and detective costs, some opinions in Austria have held that, depending on the exact circumstances, such costs could be claimed either as costs under Section 41, ZPO or as separate damages (Alfred Tanczos, Konstantin Pochmarski and Nicole Konrad, Kosten und Nutzen des Privatgutachtens im Bauprozess, in: *bauaktuell* 2014/1, pp. 9-12, p.11 et seq.; Clemens Thiele, Der Ersatz von Detektivkosten in Österreich, in: *RdW* 1999/12, pp. 796 et seq.).

VII CONCLUSIONS AND OUTLOOK

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

In addition, the Austrian market for third party litigation funding is slowly opening up to a broader array of approaches regarding litigation in need of funding, thus connecting the claimants' needs with the funders' resources.

BRAZIL

*Luiz Olavo Baptista and Adriane Nakagawa Baptista*¹

I MARKET OVERVIEW

In 2016, the Brazilian chapter of *Getting the Deal Through: Litigation Funding*² registered the status of third party funding (TPF) in Brazil as being nearly non-existent. In 2017, this situation changed as arbitration institutions reported TPF cases for the first time. In 2018 though, the number of cases being subject to funding substantially decreased, perhaps reflecting the hardships of the Brazilian economy and the fact that companies are avoiding litigation.

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

Atelier Jurídico conducted a survey of 13 arbitration institutions from six different states.³ The research provided mixed results. Some of the largest institutions reported not only the existence of funded cases, but also provided information regarding actual queries from the parties or procedural incidents relating to the participation of the funder. Most of the other institutions chose not to make any comment on how they would deal with issues of disclosure and confidentiality. Although there were only four reported cases in 2017, this seems to be a breakthrough for the Brazilian market.

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- 1 Luiz Olavo Baptista is the founding partner and Adriane Nakagawa Baptista is a lawyer at Atelier Jurídico. The authors would like to thank Lucas de Medeiros Diniz for his help in drafting the questions and organising the results of our survey, and Caique Bernardes Magalhães Queiroz for reviewing and offering valuable input.
 - 2 Baptista, Luiz Olavo and Nakagawa, Adriane, Brazil – Litigation Funding 2017. Available at: <https://gettingthedealthrough.com/area/94/jurisdiction/6/litigation-funding-2017-brazil/>.
 - 3 The authors chose to focus on arbitration institutions as the issue of TPF did not appear in the case law research conducted through the website of the main Brazilian state courts. The following institutions were surveyed: Arbitration and Mediation Center of the Brazil – Canada Chamber of Commerce (CAM-CCBC); Arbitration and Mediation Center CIESP-FIESP (CMA CIESP-FIESP); AMCHAM Arbitration and Mediation Center; Chamber of Mediation and Arbitration of Eurochambers; Market Arbitration Chamber (CAM); Arbitration Council of the State of São Paulo (CAESP); Chamber of Arbitration Business (CAMARB); FGV Chamber of Mediation and Arbitration; Brazilian Chamber of Mediation and Corporate Arbitration (CBMAE); Brazilian Centre of Mediation and Arbitration (CBMA); Arbitration and Mediation Chamber of the Federation of Industries of the State of Paraná (CAMFIEP); Arbitration and Mediation Center of the Commercial Association of Paraná (ARBITAC); Chamber of Conciliation, Mediation and Arbitration of the Bahia Commercial Association (ACB).

The above-mentioned four cases were reported by only two of the 13 institutions surveyed, namely CAM-CCBC and CMA CIESP-FIESP (three cases and one case respectively, with total amounts in dispute of around 1.080 million reais and 12 million reais respectively). CAM-CCBC reported instances of both claimant and respondent receiving funding, while, in the case reported by CMA CIESP-FIESP, only the respondent received funding.

At CAM-CCBC, the queries reported in the survey covered a broad range of subjects and touched upon issues whose details are not yet clear, such as the extent of the funder’s participation in a given case, or the ethical boundaries underlying the funder’s right to oversee the proceedings.

The funder’s (or the party’s) liability for adverse costs awards was also mentioned in the query, but to date there is no standard practice on adverse costs funding.

CMA CIESP-FIESP pointed out that the instance of funding it dealt with was discovered ‘accidentally’. Following this occurrence, a thorough review was set in motion to identify any possible risk of conflicts of interest. AMCHAM and CAMARB also stressed their concern with potential conflicts of interest. None of them reported having dealt with any TPF cases.

Arbitration institution	Objections or queries regarding funder participation
CAM-CCBC	The opposing party in one of the cases requested further information on (1) report the complete qualification of the third party funder; (2) the confidentiality and confidentiality agreement signed by the funder; (3) submitting the financing contract concluded so as to allow verification of the degree of influence of the funder in the procedure as well as of the consideration given to it and the extent of the financing granted.
CMA CIESP-FIESP	The TPF was not voluntarily reported by the party. A payment receipt indicated the participation of a funder and CMA CIESP-FIESP requested further clarification.

While only one of the institutions reported having any regulatory measures in place regarding TPF (CAM-CCBC, the institution that reported having dealt with three cases, has enacted Resolution 18/2016 in this regard), the survey produced, among other things, the following responses regarding the institutions’ policies on disclosure of funding.

Arbitration institution	Funding disclosure policy
Arbitration and Mediation Center of Brazil-Canada Chamber of Commerce (CAM-CCBC)	Recommends parties disclose TPF as soon as possible. Full information on the identity of the funder is required.
Mediation and Arbitration Chamber CIESP-FIESP (CMA CIESP-FIESP)	Recommends parties disclose TPF as soon as possible and submit to the institution any information regarding potential conflicts of interest (independence and impartiality).
Market Arbitration Chamber (CAM)	Recommends disclosure of the existence of the funding and any and all relevant information to allow checks for conflicts of interest.
Business Arbitration Chamber (CAMARB)	CAMARB is constantly evaluating standards on TPF; to date, the arbitration institution has not issued an official recommendation.
Brazilian Chamber of Mediation and Corporate Arbitration (CBMAE)	The existence of funding should be disclosed, along with the identity of the funder and its representatives.

On a separate but relevant note, there are – apparently – a number of funded cases that have not been reported to arbitration institutions. The lack of regulation and the inherent difficulty in monitoring the participation of funders contribute to this situation.

Overall, Brazil has a huge potential for TPF, as there is a combined total of over 99.7 million lawsuits pending in all courts and instances,⁴ and more than 200 new arbitration proceedings were initiated last year.⁵ It is a multibillion-dollar market that is now starting to become acquainted with external funding methods and players.

II LEGAL AND REGULATORY FRAMEWORK

There is no specific legislation on third party funding. Although the Brazilian Arbitration Act (BAA) has incorporated new procedural tools with the aim of promoting efficiency in commercial arbitration, this subject remains unregulated. As mentioned above, only CAM-CCBC has drafted guidelines for parties assisted by a funder through its Resolution No. 18/2016. These guidelines outline a definition of third party funding and provide recommendations on matters such as disclosure and submission of all relevant information on the funder's identity.

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

Types of legal fees and related fee arrangements

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

Peculiar to Brazilian law is the existence of a rule concerning *honorários de sucumbência* (BCCP Section 85, Paragraph 11), whereby lawyers receive a separate credit arising from their work on the case, determined by the tribunal. It is incumbent upon the losing party to pay these fees.

If requested in court proceedings, the judge may order at every stage, cumulatively (BCCP Section 85, Paragraph 1), the payment of the counterparty's attorneys' fees. The same applies to arbitration. Pursuant to this provision, the successful party's attorneys must receive a percentage of the amount in dispute. In ordinary cases between private parties, the percentage ranges from 10 per cent to 20 per cent on average (the BCCP does not establish a reasonable range), whereas in cases involving public entities, the percentages decrease as the amount in dispute rises (BCCP Section 85, Paragraph 3, I, II and III). In both cases, fees increase with subsequent appeals.

To avoid disputes, especially if funders pay all costs – including legal fees – it is worth stating in the agreement whether the portion to be awarded under the heading of *sucumbências* is also within the limits of what the funder can collect, or whether reimbursed legal fees should be included (the latter is a highly questionable approach, as *sucumbências* are owed to the attorneys, not the parties).

4 2016 National Council of Justice report, available at www.cnj.jus.br/programas-e-acoas/politica-nacional-de-priorizacao-do-1-grau-de-jurisdicao/dados-estatisticos-priorizacao.

5 Luiz Olavo Baptista and Mariana Cattel Alves, *The International Arbitration Review* (8th ed.), available at <http://thelawreviews.co.uk/edition/the-international-arbitration-review-edition-8/1145653/brazil>.

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

As for contingency fees, the Brazilian Bar Association is not particularly supportive of conditional fee agreements or contingency arrangements, despite there being no prohibitions against this practice. This is also the position of the Federal Council of the Brazilian Bar Association.⁶ The Council declared that conditional fees – as is the case with *quota litis*, where attorneys receive a percentage of proceeds in exchange for service that is unpaid until the final decision is rendered – represent a potentially harmful practice, leading to the depreciation of the work of attorneys. To that effect, the Brazilian Bar Association stated that hourly fees – duly supported by the client throughout the litigation – are the rule, to which *quota litis* is the exception.

Since then, the Superior Court of Justice (STJ) has revised this position.⁷ According to the STJ's recent interpretation, lawyers may receive a fixed percentage of the final amount collected by their clients, but this decision has not yet been confirmed in other Supreme Court cases.

In light of the foregoing, should limits on *quota litis* apply, chances are that the court or arbitral tribunal would at least consider an upper limit of 30 per cent, given the existence of a relevant precedent.⁸ In the case in question, an *ad exitum* of 50 per cent of the amount in dispute was deemed excessive by the Supreme Court on the grounds that this rate was not a reasonably proportionate amount between that of the *quota litis* agreement and the amount in dispute. Furthermore, the Court declared that the lawyer had taken advantage of the party's desire to end the dispute, which also led to the conclusion that the percentage was unacceptable. This case is a good starting point for any funder looking into possible limitations in connection with recoverable percentages of proceeds.

III STRUCTURING THE AGREEMENT

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

As for litigation, BCCP Section 109 allows the purchase of claims, with the third party's participation conditional upon the counterparty's consent (BCCP Section 109, Paragraph 1). The BCCP legislator attempted to prevent fraud and undue monetisation of adjudicated claims and rights, assuming that any change in the ownership of the claim must be notified to and accepted by all parties. Needless to say, this adds to the list of disadvantages of claim transfers in Brazil.

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

6 Consultation 2010.29.03728-01 of 2010: 'However, it is important to note that the *quota litis* clause is exceptional, to be resorted to only when effectively verified, with ballast documentation, that the party is in a situation of irremediable financial impossibility to support procedural fees'.

7 STJ, REsp No. 805919 of October 2015.

8 STJ, REsp No. 1155200 of March 2011.

Parties

Both claimants and respondents may be eligible for funding.

Coverage

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

Non-achievement of contractual goal

In the event of failure, parties are not liable for any costs or payments. Funding agreements are aleatory contracts and funders are normally aware of the risks.

Confidentiality

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

Dispute resolution

According to our research and practice, funders prefer arbitration as the dispute resolution mechanism.

Funder liability for adverse costs and other indemnities

It is not standard practice to insert any provisions on this issue.

Termination

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

Payment event

The trigger for payment is usually the issuance of the arbitral award or final decision.

IV DISCLOSURE

Based on the above-mentioned research, the two institutions with actual reported cases requested information on the funder, with the purpose of conducting a conflict check. BAA Section 14 gives good reason for a thorough vetting of circumstances that may lead to conflicts of interest, as the BAA incorporates, by reference, BCCP Sections 144 and 145, which comprise standards of independence and impartiality applicable to judges.

BCCP Section 144 relates to the basic requirements of economic and professional independence, some of which are also found in the International Bar Association (IBA)

Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines), in particular in the Non-Waivable Red List and the Orange List. BCCP Section 145 holds both impartiality and independence to a higher standard than the IBA Guidelines.

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

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

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

In the course of our survey, even those institutions with no reported TPF cases were asked to indicate which type of information parties should disclose and why.

The arbitral institutions with reported cases, CMA CIESP-FIESP and CAM-CCBC, asserted that it is paramount that the parties provide full qualification of and all information on the funder. This information may be disclosed to all parties and arbitrators pursuant to the above-mentioned standards. The other participating chambers also ranked information on funders as a top priority while emphasising that the independence and impartiality of the arbitrators is the main issue at stake.

As for confidentiality standards, the BAA does not expressly impose confidentiality on all arbitration proceedings. BAA Section 13, Paragraph 6, mentions the duty of the arbitrators to remain independent and impartial, and to act diligently and in a discreet manner. By extending and analysing the meaning of the word ‘discreet’, one could possibly infer that confidentiality is an obligation of arbitral tribunals. Some of the most relevant arbitral institutions in Brazil have already incorporated confidentiality provisions in their arbitration rules. Among these, CAM-CCBC (Section 14); CMA FIESP-CIESP (Section 10.6); CAMARB (Section 13.1); CAM – BM&FBOVESPA (Section 9.1); AMCHAM (Sections 18.1 and 18.2); FGV (Sections 61 and 62); and CBMA (Sections 11.2 and 17.1) have express provisions regarding the confidentiality of proceedings, documents presented therein, and awards issued. Even *ad hoc* procedures are bound by confidentiality and it would not be too far-fetched to say this is a customary rule. The STJ, ruling on a competence issue at the enforcement stage, decided to remove an arbitral award from the dockets⁹ upon request from one of the parties.

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

9 STJ, Conflito de Competência No. 122439 – RJ (2012/0091919-8).

As regards the client–attorney relationship, the Brazilian Bar Association’s Code of Ethics (EOAB) Section 7, II expressly establishes that communications between parties and their attorneys are privileged. Thus, information exchanged in the context of this professional relationship is confidential. This does not mean that the very existence of funding should be kept secret. According to one of the funding companies interviewed, their clients are encouraged to disclose the funding at the beginning of the performance of the funding agreement.

V COSTS

In relation to costs, the BCCP, even after the amendments implemented by Law No. 13.105 of 16 March 2015, focuses on the role of parties and attorneys. Although the BAA does not refer to the BCCP (as it does with regard to the independence and impartiality of arbitrators), it cannot be denied that some elements of the BCCP with respect to costs and legal fees may be embedded in the legal culture of some arbitrators. The BAA refers very succinctly to costs in Section 27 and this provision has been reproduced in the vast majority of the Brazilian arbitral institutions’ rules, including those of CMA CIESP-FIESP (Article 10.5); CAM-CCBC (Article 10.4.1); CAMARB (Article 10.6); AMCHAM (Article 17.5); and FGV (Article 39, Paragraph 2).

As the BCCP is a subsidiary source of law in arbitration, its rules are also referenced. There are many intricacies practitioners must keep in mind (BCCP Sections 81 to 96), and only the most relevant will be mentioned here.

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

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

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

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

In the event of withdrawal – waiver of a right by one of the parties – the party responsible for the withdrawal will be liable for all costs incurred. This stems from the provisions of the BCCP whereby the lawmakers attempted to establish a sense of proportionality in defining costs. In contrast, when parties reach a settlement in litigation, in the absence of rules governing the division of costs, there should be an equal distribution of all costs (BCCP Section 90, Paragraph 2).

As for arbitration, the tribunal enjoys some leeway in choosing the most appropriate balance and distribution of reimbursed costs among the parties. The circumstances of the case (i.e., specific claims on costs, complexity of the dispute and analysis of the conduct

of the parties throughout the proceedings) may play a role in this equation. Parties, and especially funders, are advised to take into consideration the above-mentioned provisions, as most arbitrators come from a litigation background.

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

In addition, attorneys' fees are tackled under a different heading (Section 85) in the BCCP. The arbitration rules of the main institutions place attorneys' fees under the broad heading of costs, therefore arbitral tribunals could take different approaches to dealing with them. To be on the safe side, it is recommended that parties specifically request the reimbursement of legal fees – not to the party itself, but to the attorneys and, if applicable, to the funders themselves.

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

Another relevant aspect of the BCCP is the participation of public entities¹⁰ – now fully acknowledged by the BAA (Section 1, Paragraph 1). The BAA lacks details on how to rule on costs in this regard. While theoretically costs would be left to the arbitral tribunal's discretion, there is a thin line between the private nature of arbitration and public order and other legal standards applicable to public entities. The BCCP and other *lex specialis* in this context may offer some guidance.

Security for costs

Security for costs may be ordered by a state court or arbitral tribunal in cases where there is a significant reason for the case to be heard (*fumus boni iuris*) and a risk (*periculum in mora*) that, if the case proceeds, one of the parties may not have enough resources to meet its procedural financial commitments. Before the state courts, the BCCP (Section 83) regulates the situation where one of the litigating parties is foreign and does not have any assets in Brazil, in which case a court may order the collection of the funds corresponding approximately to the costs and attorneys' fees. The STJ has revised this position¹¹ by virtue of the principle of *pas de nullité sans grief*, which means that unless there is actual damage for the opposing party, it is not mandatory to strictly observe Section 83 of the BCCP. There is another situation regarding security, but it is only applicable to the enforcement of the court decision. Before the changes implemented in 2015 (Section 525), a party seeking to challenge any of the findings of the decision at the enforcement stage had to provide security. However, this is no longer the case.

In arbitration, BAA Sections 22-A and 22-B refer to interim measures to be issued both by state courts (if arbitration proceedings have not already been initiated) and arbitral tribunals. In the first case, the arbitral tribunal can, after a duly informed review, change,

10 Given the dispute has connection with *acta jure gestionis*.

11 STJ, AgInt no REsp 1664304/SP Agravo Interno No Recurso Especial 20170070698-7.

modify or extinguish the interim measure. There is no official database on how arbitral tribunals have decided, but our experience shows tribunals seldom grant this type of security, as the arbitrators tend to advance the proceedings before issuing orders on costs.

Finally, the BCCP (Sections 79 to 81) deals with a type of damages that can be awarded if a party litigates without legal grounds (Section 80, I) or factual grounds (Section 80, II) – in other words, when the party is not acting in good faith, which is also a breach of Article 34 of the EOAB. Although there are statutory provisions, courts or arbitral tribunals rarely grant damages stemming from bad-faith conduct.¹²

VI THE YEAR IN REVIEW

A major breakthrough in Brazilian legislation occurred with the approval on 13 July 2017 of changes to the labour law in Law No. 13.467, which introduced arbitration in labour law cases. According to Article 507-A, employees receiving more than twice the limit of benefit payments available under the Brazilian social security system (approximately 11,070 reais or approximately US\$5,000) may resort to arbitration. This is a remarkable achievement in a country with 3,600 judges specialised in labour law and over 5 million¹³ cases. The STJ has highlighted on many occasions the relevance of arbitration as a means of easing the congested judicial system in Brazil. This is definitely the case with the labour courts and, as a result, possibilities for the funding market seem promising.

VII CONCLUSIONS AND OUTLOOK

Statistically, TPF has enjoyed a major breakthrough since 2016. There have been seven officially reported cases and the funders in operation seem to have grasped the potential of the Brazilian market. In regulatory terms, the BCCP and the EOAB still remain the main source of legal guidance regarding costs, conflicts of interest and cession of claims. At present, there is no code of ethics nor the prospect of further rules on TPF on the horizon.

12 See STJ, Resp No. 947.927-AgRg, Rel. Nancy Andrighi, j. 15 April 2008, CJU de 29 April 2008.

13 Report 'Justiça em Números' from the National Council of Justice, available at www.cnj.jus.br/files/conteudo/arquivo/2016/10/b8f46be3dbbf344931a933579915488.pdf.

CANADA

*Hugh A Meighen*¹

I MARKET OVERVIEW

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

International funders have taken note. The recent case law refers to a number of international litigation funders, including Ireland-based funder, Claims Funding International, and a British funder, Redress. More recently, Australia-based international third party funder, Bentham IMF, entered the Canadian market in January 2016. From opening to October 2017, Bentham IMF received over 300 applications for funding.

The development of Canadian law and the Canadian legal market for TPF has been self-reinforcing. Increased funding opportunities have resulted in greater scrutiny of funding agreements by the Canadian courts and more sophisticated rules governing them. This exposure has brought the opportunity of funding to the fore. As one class actions lawyer recently noted, contingency fees are becoming increasingly insufficient to meet the demand for funding, and law firms are increasingly concerned with the risk involved in contingency fees: 'it is now beyond the capacity of most firms to self fund [. . .] they have to get funding'.² Moreover, in one judgment involving a TPF agreement (TPFA),³ the court noted that 'anecdotal evidence suggests that indemnity agreements became more popular than resorting to the Class Proceedings Fund'.⁴

The jurisprudence regarding TPF has been typically considered in the context of class proceedings, as courts in Canadian common law jurisdictions (all those aside from Quebec) must approve a funding agreement at the outset of the case for it to be binding on the class. At

1 Hugh A Meighen is a senior associate at Borden Ladner Gervais LLP. The author wishes to thank Tania Sulan and Naomi Loewith of Bentham IMF Canada for their assistance in preparing this chapter.

2 'Third-Party Litigation Funding', *Canadian Lawyer Magazine*, 3 January 2017.

3 *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974 (*Bayens*).

4 *ibid.* at para. 31. The Class Proceedings Fund, which has been established by the Law Foundation of Ontario, '[p]rovides financial support to approved class action plaintiffs for legal disbursements' and '[i]ndemnifies plaintiffs for costs that may be awarded against them in funded proceedings'. Class Proceedings Fund, 2017 Law Foundation of Ontario, online source: www.lawfoundation.on.ca/class-proceedings-fund.

the same time, however, litigation funding for single-party commercial litigation is becoming more commonplace in Canada, as evidenced by cases such as *Schenk v. Valeant Pharmaceuticals International Inc*⁵ and *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc*.⁶

II LEGAL AND REGULATORY FRAMEWORK

i Maintenance and champerty

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

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

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

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

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

Notwithstanding the prohibitions against maintenance and champerty, the concept left open the possibility of ‘proper’ forms of litigation support. More specifically, the court’s early analysis of the issue in *Newswander v. Giegerich* emphasised the concern over a maintainer (i.e., the third party that maintains the party with a direct interest in the claim) who is ‘stirring up strife’.¹⁰ In other words, the motive of an alleged maintainer was particularly important to determine if the act was, in fact, maintenance.

5 2015 ONSC 3215.

6 2017 FC 826.

7 It is worth noting that ‘champerty’ as a common law concept and, as confirmed by the Quebec Court of Appeal in *Montgrain v. Banque Nationale du Canada*, 2006 QCCA 557, ‘the concept of champerty is inapplicable in Quebec civil law’ (para. 63).

8 (2002), 61 O.R. (3d) 257 at para. 26.

9 *Fischer v. Kamala Naicher*, 8 Moo Ind. App. 170 at p. 187, cited in *Newswander v. Giegerich* [1907] 39 SCR 354 at p. 361.

10 *Newswander v. Giegerich* [1907] 39 SCR 354 (*Newswander*).

Champerty in Canada is a ‘subspecies’ of maintenance, as there cannot be champerty without maintenance.¹¹ Accordingly, the concept of champerty in Canadian law similarly invokes the concept of proper and improper motives underpinning litigation funding. In *Goodman v. R.*,¹² Goodman was charged with champerty after agreeing to assist an improvident claimant injured by a streetcar in exchange for a share of any proceeds. Among the key facts in that case were that (1) Goodman’s assistance consisted of locating witnesses to the event and (2) the plaintiff had consulted a lawyer before Goodman became involved. In this regard, the facts of the case reflected those of *Newswander*: the plaintiff had already considered litigation and the contribution by Goodman was required to enable the litigation to proceed given the plaintiff’s financial circumstances. The Supreme Court of Canada quashed Goodman’s conviction and held that his conduct did not amount to ‘officious intermeddling’ as he had not ‘stirred up strife’.¹³ The relevance of motive in an assessment of maintenance and champerty was reaffirmed in the 1993 decision of *Buday v. Locator of Missing Heirs Inc* (1993).¹⁴

Following *Newswander* and *Goodman*, maintenance and champerty were removed from the Criminal Code in 1953.¹⁵ However, under the Champerty Act, champerty remained a tort in common law jurisdictions and has typically had the effect of acting as a shield against the enforcement of champertous agreements (rather than serving as the basis of an action for damages, as in *Newswander*).

The prospect of TPF in Canada was significantly enhanced in the early 2000s when helpful jurisprudence developed in the context of contingency fee arrangements and class proceedings. Most notably, in 2002, the Ontario Court of Appeal found that the interests of justice can, in fact, be served by allowing third parties to fund litigation. In *McIntyre Estate v. Ontario (Attorney General)*,¹⁶ a plaintiff who intended to commence an action against Imperial Tobacco and Venturi Inc for wrongful death of her husband first sought a declaration from the court that the contingency fee arrangement with her lawyers was not prohibited by the Champerty Act.

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

- a a person’s motive is a proper consideration, and indeed, determinative of the question of whether conduct or an arrangement constitutes maintenance or champerty;¹⁷
- b the courts have shaped the rules relating to champerty and maintenance to accommodate changing circumstances and the current requirements for the proper administration of justice;¹⁸

11 *McIntyre Estate v. Ontario (Attorney General)*, 61 OR (3d) 257; 218 DLR (4th) 193; [2002] OJ No. 3417 (QL); 116 ACWS (3d) 527; 164 OAC 37; 23 CPC (5th) 59, at para. 34.

12 [1939] SCR 446 (*Goodman*).

13 ‘Maintenance and Champerty’ Bentham IMF (12 September 2017), online source: www.benthamimf.ca/legal-landscape/maintenance-and-champerty.

14 *Buday v. Locator of Missing Heirs Inc* (1993), 16 O.R. (3d) 257 at p. 268.

15 The Criminal Code was consolidated in 1953, at which time all common law offences were abolished.

16 61 OR (3d) 257; 218 DLR (4th) 193; [2002] OJ No. 3417 (QL); 116 ACWS (3d) 527; 164 OAC 37; 23 CPC (5th) 59 (Ont CA) (*McIntyre Estate*).

17 *McIntyre Estate*, at para. 27.

18 *McIntyre Estate*, at para. 32.

- c whether a particular agreement is champertous is a fact-dependent determination, requiring the court to inquire into the circumstances and the terms of the agreement;¹⁹ and
- d this fact-based inquiring depends in part on the ‘reasonableness and fairness’ of the agreement.²⁰

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

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

ii Class action funding

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

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

- a the involvement must be spurred by some improper motive; and
- b the result of that involvement must enable the third party to possibly acquire some gain following the disposition of the litigation.

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

20 *McIntyre Estate*, at paras. 79–80.

21 Contingency Fee Agreements, O Reg 195/04, <http://canlii.ca/t/1llx>, retrieved on 19 September 2017.

22 In addition to private funders, Ontario has a Class Proceedings Fund, a statutory body that will provide a costs indemnity and disbursement to cases selected by its Committee. See, www.lawfoundation.on.ca/class-proceedings-fund/, last visited 19 September 2017. A similar fund, *Fonds d’aide aux actions collectives*, exists in Quebec. See, www.faac.justice.gouv.qc.ca/, last visited 19 September 2017.

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

24 *Metzler Investment GMBH v. Gildan Activewear Inc*, 2009 CanLII 41540 (ON SC) (*Meltzer*).

25 *ibid*, at paras. 44–45.

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

A further class proceeding provided the first instance of court approval of a TPFA. In *Dugal v. Manulife Financial Corp.*,²⁶ Strathy J approved a funding agreement, under which a third party agreed, *inter alia*, to indemnify the plaintiffs against their exposure to the defendants' costs, in return for a 7 per cent share of the proceeds of any recovery in the litigation.²⁷ The court built upon the principles articulated in *McIntyre Estate* and *Metzler*,²⁸ and recognised that funding agreements had been approved in other provinces of Canada, albeit without reasons,²⁹ as well as in other common law jurisdictions around the world.³⁰ In accepting the role that TPFAs can play in promoting access to justice, the court approved the funding agreement in *Dugal*.³¹

From 2009 to 2015, the judicial review of funding agreements between funders and representative plaintiffs in class proceedings has provided useful guidance on the law applicable to TPF. For example, the court has provided useful commentary in the following cases:

- a In *Fehr v. Sun Life Assurance Company of Canada*,³² the court discussed the law on litigation funding and reviewed the key judgments (identified as *McIntyre Estate* in 2002, *Metzler* in 2009 and *Dugal* in 2011).³³ It concluded that TPFAs are not categorically illegal on the grounds of champerty or maintenance, but a particular TPFA might be illegal as champertous or on some other basis, and that a plaintiff must obtain court approval in order to enter into a TPFA.
- b In *Labourers' Pension Fund v. Sino-Forest*,³⁴ the representative plaintiffs moved for approval of a funding agreement that was described by the court as being nearly identical to the one approved by Justice Strathy in *Dugal*.³⁵ The court nevertheless identified individual key terms of the funding agreement, including the grounds of the

26 *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785 (Ont SCJ), at paras. 16 and 37 (*Dugal*); see also, *Dugal v. Manulife Financial Corp.*, 2011 ONSC 3147 (Ont SCJ), at para. 5.

27 *ibid.*, at para. 1.

28 *ibid.*, at paras. 19–20.

29 For example, *MacQueen v. Sydney Steel Corp.* (19 October 2010), Action 218010 (NSSC), cited at *ibid.*, at para. 22.

30 *Dugal* at para. 24.

31 As part of its approval, the court imposed the following requirements: (1) adequate security provided by the plaintiff; and (2) that there be some reasonable controls on the provision of information to the funder. It ultimately approved the funding agreement in *Dugal v. Manulife Financial Corp.*, 2011 ONSC 3147 (Ont SCJ), at para. 5.

32 2012 ONSC 2715 (*Fehr*).

33 See, *Labourers' Pension Fund v. Sino-Forest*, 2012 ONSC 2937, para. 11.

34 2012 ONSC 2937 (*Labourer's Pension Fund*).

35 *ibid.* at para. 9. In fact, the funder in *Labourer's Pension* was the same entity as had appeared in *Meltzer* and *Dugal*.

funder's agreement to pay the plaintiffs' adverse costs orders and the terms of recovery on a settlement or judgment in favour of the plaintiffs. Upon doing so, the court approved the funding agreement.

c In *Bayens v. Kinross Gold Corporation*, the court noted that the 'concept of third party funding is a work in progress' and that 'courts have been left to develop the approval criteria for third party funding largely on their own initiative, relying on common sense, knowledge of the problems of access to justice and of the administration of justice, and academic commentary.'³⁶ While the court did not go into the same detail regarding the terms of the funding agreement, it nevertheless approved the agreement based on principles derived from the above-mentioned cases (and particularly, *Febr, Metzler and Dugal*).³⁷

d In *Stanway v. Wyeth Canada Inc.*,³⁸ the court found that litigation funding agreements may be approved in British Columbia and the lack of any reference thereto in the Class Proceedings Act did not make them unavailable in that province. It also determined that, in that case, the TPFA was subject to legal privilege on matters relating to litigation strategy, litigation budget and other 'highly sensitive' aspects.

e More recently, in August 2017,³⁹ the court provided a thorough analysis of the law regarding approval of TPFA's and specific terms contained therein.

f The court once again confirmed that 'deciding whether to approve a [TPFA] will depend upon the particular circumstances of each case';⁴⁰ however, it also opined that, based on the foregoing case law, the court must be satisfied of at least four criteria to approve a TPFA:⁴¹ (1) the agreement must be necessary in order to provide access to justice; (2) the access to justice facilitated by the TPF agreement must be substantively meaningful; (3) the agreement must be fair and reasonable agreement and facilitate access to justice while protecting the interests of the defendants; and (4) the third party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching and champertous. In this case, the court considered fees funding and noted that 'the novelty of the hybrid retainer that combines a partial contingency fee with a fee-for-services retainer strikes me as a positive factor [...] This approach which partially protects the financial and human capital of class counsel may expand the roster of firms prepared to assume the risks of class action litigation'.

The Court then set out a six-part test for assessing an LFA: (1) can a court scrutinise the LFA (para. 73); (2) is third-party funding necessary in the case (para. 75); (3) will the funder make a meaningful contribution to access to justice or behaviour modification (para. 78); (4) will the funder be overcompensated for its risks in the case (para. 80); (5) is the lawyer-client relationship protected from interference (para. 88); and (6) is the LFA not illegal under some other grounds, independent of champerty and maintenance (para. 100).

36 *Bayens*, at para. 37.

37 *Bayens*, at para. 41.

38 *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585.

39 *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129. This decision is under appeal.

40 *ibid.* at para. 72.

41 *ibid.*, at paras. 63-64.

g The law on TPF developed significantly in Quebec, Canada's only civil law jurisdiction, in 2014. In *Marcotte v. Bank of Montreal*, a class action against chartered banks was funded by two third parties. Like the analysis of funding arrangements in common law provinces, the Superior Court of Quebec determined that, without funding from third parties, the plaintiffs could not have pursued the case and been reimbursed fees that had been illegally collected by the financial institutions and that funding provided a 'path to justice'.⁴²

For further examples of court consideration of TPFAs, see *Schneider v. Royal Crown Gold Reserve Inc*⁴³ and *Berg v. Canadian Hockey League*.⁴⁴

iii Single-party commercial litigation

Despite the above jurisprudence in the class proceedings context, as of 2015, the law on TPF in Canada remained relatively underdeveloped in the context of single-party commercial litigation. However, that year, the court took a step forward in *Schenk v. Valeant*.⁴⁵ In that case, the court case drew upon the jurisprudence in the class proceedings context and extended similar principles to the commercial litigation setting. Justice McEwen commented that '[t]ypically, such agreements have arisen in class proceedings. Counsel could not locate any cases in which third party funding has been extended to the context of commercial litigation. This being said, I see no reason why such funding would be inappropriate in the field of commercial litigation.'⁴⁶ However, as with jurisprudence arising in the class proceedings context, McEwen J also commented that 'the statutory and common law prohibition on champerty and maintenance in the Province of Ontario must be considered'.⁴⁷

In applying this law to the facts of the particular TPFA in *Schenk*, the court declined to approve this particular agreement as it constituted maintenance and champerty. This conclusion was based on the fact that, in the absence of a cap, the agreement could result in the funder recovering over 50 per cent of the proceeds and could be construed to allow 'open-ended exposure to Schenk that could result in Redress retaining the lion's share of any proceeds'.⁴⁸ The court further opined that 'such an agreement [. . .] does not provide access to justice to Schenk in a true sense, but rather provides an attractive business opportunity to Redress who suffered no alleged wrong'.⁴⁹

As with prior jurisprudence arising in the class proceedings context, and particularly *McIntyre Estate*, the court in *Schenk* was concerned with the overarching principle of access to justice. However, the ruling does not include an express discussion of the proper or improper motive behind the funding, which has previously appeared in Canadian jurisprudence regarding champerty and maintenance. Other issues that have typically been considered in the process of judicial approval of a funding agreement, such as the termination provisions, were found to be reasonable and fair.

42 *Marcotte v. Banque de Montréal*, 2015 QCCS 1915.

43 2016 SKQB 278

44 2016 ONSC 4466.

45 *Schenk v. Valeant*, 2015 ONSC 3215 (*Schenk*).

46 *ibid.*, at para. 8.

47 *ibid.*, at para. 8.

48 *ibid.*, at para. 17.

49 *ibid.*, at para. 17.

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

There have been further decisions in the single party commercial context. For example, in *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc.*⁵⁰ This case involves the enforcement of the plaintiff's patent against an international pharmaceutical company. Seedlings needed financial help moving its litigation forward and Bentham IMF agreed to pay a portion of its legal fees and disbursements on a non-recourse basis. Seedlings sought approval of the agreement, but, as explained in Section IV.ii, the court ultimately concluded that it did not need to approve the funding agreement. This case demonstrates the growth of funding beyond the class action context, which as discussed below, has contributed to an increasing acknowledgement of the differences in considerations that affect TFPA in the class action context and the single-party litigation context.

The crossover of jurisprudence has also been reflected in Quebec civil law. In a March 2018 decision, *Re 9354 9186 (formerly Bluberi Gaming Technologies Inc) and 9354 9178 (formerly Bluberi Group Inc)*,⁵¹ the Quebec Superior Court relied upon Bayens (cited above under class actions) and *Hayes v. City of Saint John*,⁵² to find that TFPAs 'should be approved, subject to [certain] principles', which reflect the considerations addressed in common law jurisprudence. This development speaks to a consolidated national approach to TPF in Canada, notwithstanding the different legal traditions reflected in the common law provinces of Canada and civil law province of Quebec. This decision has been appealed by the defendant and will be considered by the Quebec Court of Appeal in December 2018.

III STRUCTURING THE AGREEMENT

i Class actions

Canadian case law demonstrates that it is vital that, if relying on TPF, parties conclude an agreement that the court will approve as being reasonable and non-champertous. In this regard, the court has focused on the following provisions in recent judgments, which are typical clauses in TPFAs in the Canadian market:

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

50 2017 FC 826.

51 2018 QCCS 1040, 16 March 2018.

52 2016 NBBR 125.

f the termination provisions, both in terms of the right to terminate the TPFA and the consequences thereof.

In construing the above terms and determining whether they are unfair or champertous (or both), the court will rely upon judgments regarding similar terms captured in other TPFA's. For example, as set out in Section II.ii, the court recognised that the TPFA at issue in *Labourers' Pension Fund* was materially the same agreement as had been approved in *Dugal*.⁵³ The court approved the TPFA in both cases. However, as funding arrangements expand beyond the costs-indemnity-plus-minimal-disbursements model seen in the early class action jurisprudence, comparisons to prior agreements may be more difficult to make. For example, in *Schenk*, the funder agreed to pay all the legal fees and disbursements, in addition to covering any costs awards, so it was difficult to draw analogies to earlier cases.

As an example of the court's analysis of these provisions, in *Stanway v. Wyeth Canada Inc.*,⁵⁴ the British Columbia Supreme Court relied upon the Ontario jurisprudence to find that a funding agreement 'must be fair and reasonable and provide the representative plaintiffs with access to judgment, without compromising the principles of independence of counsel, confidentiality agreements between the parties be observed and, not to the disadvantage of the representative plaintiffs'.⁵⁵ The court analysed the fees and lack of a commission cap in the agreement and favourably compared it to other caps that had been previously approved; it analysed the terms of the termination clause and the right to terminate the agreement following a decision to change counsel. The court also addressed the concerns of the defendant over privacy and confidentiality arising under an access order applicable to documents originating from other jurisdictions.⁵⁶ In doing so, it approved the funding agreement.

ii Single-party commercial litigation

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

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

IV DISCLOSURE

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

53 *Labourer's Pension*, at para. 9.

54 *Stanway v. Wyeth Canada Inc.*, 2014 BCSC 931.

55 *ibid.*, at para. 17.

56 *ibid.*, at para. 18–21.

i Class actions

The disclosure obligations vary by province. For example, in Alberta and Nova Scotia, the court will approve an agreement on an *ex parte* basis.⁵⁷ However, in New Brunswick, the defendants must be given notice, but are not provided with a copy of the TPFA and can therefore only address overall principles without application to the specific agreement.⁵⁸

Ontario and British Columbia require notice to the defendants, who must receive a copy of the agreement. As set out in *Bayens*, in the class proceedings context, ‘a TPFA must be promptly disclosed to the court, and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent, and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice. The TPFA is not itself a privileged document.’⁵⁹

The issue of privilege in a class proceeding context also arose in *Fehr*. In this case, the court reaffirmed that TPFAs are not privileged and even if they were, that privilege has either been rebutted or waived.⁶⁰ Consequently, the court cautioned that ‘as a matter of best practices, an applicant for third party funding should not include extraneous and otherwise privileged information in a third party funding agreement.’⁶¹

ii Single-party commercial litigation

In the commercial litigation setting, the Federal Court has found that ‘there are no procedural requirements for the approval of a party’s funding agreement outside of class proceedings’⁶² and that the question is strictly a matter of contract between the funder and the plaintiff. In *Seedlings Life Sciences Ventures LLC*, the court declined to approve the TPFA, ruling that ‘where the Plaintiff is asserting its own rights against the Defendant, th[e] Court has no jurisdiction to make any determination in respect of any funding agreement to which the Plaintiff is a party.’⁶³ To the apparent benefit of funded litigants in the commercial litigation setting, the court questioned why its approval would be necessary and confirmed that a ‘[d]efendant has no legitimate interest in enquiring into the reasonability, legality or validity of [the plaintiff’s] financial arrangements, its counsel’s fee structure or the manner in which [the plaintiff] chooses to allocate the risks and potential returns of the litigation’.⁶⁴

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

57 See, e.g., *Hobshawn v. Atco Gas and Pipelines Ltd* (14 May 2009), case No. 0101-0499 (ABQB), cited in *Dugal* at para. 21.

58 *Hayes v. The City of Saint John et al*, 2016 NBQB 125.

59 *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, at para. 41; see also, *Fehr*, at paras. 89–90.

60 *Fehr* at para. 141.

61 *Fehr* at para. 142.

62 *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc*, 2017 FC 826 (*Seedlings*), at para. 28.

63 *Seedlings*, at para. 25.

64 2017 FC 826, at para. 23.

On the issue of privilege in the commercial litigation setting, the court has found that litigation privilege attaches to certain aspects of the TPFA at issue, particularly in respect of the details regarding the funding commitment and the temporal variables of the indemnity provisions, which, if disclosed, would provide a tactical advantage to the opposing party.⁶⁵

V COSTS

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

In the context of TPFAs in class proceedings, the court has required a funder to provide security for costs as a precondition for approving a TPFA.⁶⁶ The issue of whether a defendant would be given a direct right against the security has also been raised, but not resolved.⁶⁷

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

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

VI THE YEAR IN REVIEW

In 2018, the law regarding TPFAs in the class action context consolidated around existing precedent in both civil law and common law provinces.

- a* In Quebec, the Superior Court approved a settlement agreement in a class action against a number of school boards, which included terms for the reimbursement of litigation funding costs. In citing *Marcotte*, the Court found that the funding had been necessary to pursue the action⁶⁸ and ordered that litigation financing costs should be reimbursed from the collective recovery sums.⁶⁹
- b* In Ontario, the Superior Court noted the similarities in terms between the TPFA arising in *Kinross* and *Sino Forest* (cited above), and in applying ‘the *Kinross* factors’⁷⁰ the Court granted the motion for approval of the funding agreement.

65 *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc*, 2017, T-608-17 Order, at pp. 3–4.

66 *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785 (Ont. S.C.J.), at para. 35.

67 *ibid.*

68 *Marcil c. Commission scolaire de la Jonquière et al.*, QSSC, 30 July 2018, at para. 84 and 86.

69 *ibid.*, at para. 85.

70 *Marriott v. General Motors of Canada Company*, 2018 ONSC 2535, at para. 9.

The divergence in the law applicable to TPFAs in class actions, on the one hand, and other commercial settings, on the other, also arose in 2018. Specifically, the distinction arose in the reasoning set out in Re 9354 9186 (formerly Bluberi Gaming Technologies Inc) and 9354 9178 (formerly Bluberi Group Inc).⁷¹ This matter dealt with a bankruptcy proceeding in which the only remaining asset of the debtors was a claim against its secured lender. The debtors had applied for litigation funding in order to file a \$200 million lawsuit against the lender. As part of the judgment, the court considered the terms of the TPFA, and distinguished the reasoning of *Houle v. St. Jude Medical Inc.*,⁷² which it determined ‘was rendered in the context of a class action where the motivation and ability of the plaintiff to pursue the litigation are important’. Rather, it preferred the analysis in *Schenk*, noting that ‘in the context of CCAA proceedings, [...] the objectives are different’.⁷³ At the time of writing, the case had proceeded to appeal.

VII CONCLUSIONS AND OUTLOOK

Overall, the law in Canada regarding TPFAs has consolidated into a clear set of principles in the class proceedings context, where the funder is providing an adverse costs indemnity. Highlighting this consolidation of case law, in April 2018, the Ontario Superior Court in *Marriott* referred to these principles as the ‘*Kinross* factors’. The position is less clear where the funder is also funding legal fees and disbursements. Appellate level guidance in the *Houle v. St. Jude* case may serve to clarify the position.

These principles have begun to shift into the single-party commercial litigation setting, although the process has raised some procedural questions regarding the requirements and jurisdiction of court approval of TPFAs. At the time of writing, it is not entirely clear, but there is support from the *Seedlings* case to suggest that TPFAs do not require court approval at the outset of litigation, as they do in the class proceedings context. We anticipate further divergence of the jurisprudence arising in the class proceedings context, as opposed to other commercial contexts, as highlighted by comments in the reasons provided by the court in *Bluberi*. It is also possible that different commercial settings will provide still more nuanced rules, given the increased interest in TPF in specialised settings, such as bankruptcy proceedings (again, as highlighted by *Bluberi*). For instance, whereas the need for pre-approval of a TPFA appears necessary in the class actions and bankruptcy context, it may not be required for general commercial claims.

Certain commentators have highlighted the lack of legislation or code of conduct to guide parties on the issue of TPF.⁷⁴ There is no regulation akin to Regulation 195/04 governing contingency fee agreements to govern TPFAs that transfer the litigation risk to third parties rather than to solicitors. The first indication of codified treatment of TPFAs is found in Bill C-30, which enacts the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union. As part of the dispute resolution provisions, CETA provides in Article 8.26 that, where TPF exists:

71 2018 QCCS 1040, 16 March 2018.

72 2017 ONSC 5129, para. 81.

73 *ibid.*, at para. 82.

74 ‘Third-party funding in arbitrations lack guidelines, legislation’, *Advocate Daily*, 2014, online source: www.advocatedaily.com/third-party-funding-in-arbitrations-lack-guidelines-legislation.html.

- a* the disputing party benefiting from it must disclose to the other disputing party and the tribunal the third party funder's name and address; and
- b* the disclosure must be made at the time of the submission of a claim, or if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

Compared to the analysis undertaken by the court in the class proceedings context, these obligations are relatively straightforward. It remains to be seen how these provisions will be treated in the international context. However, a recently amended law in at least one Canadian jurisdiction also provides additional clarity as to the current disposition towards third party funding in international disputes. In the recently amended British Columbia International Commercial Arbitration Act RSBC 1996, c 233, which incorporates the UNCITRAL Model Law, the recognition and enforcement provisions of the Model Law have been modified to expressly confirm that '[f]or the purposes of subsection (1)(b)(ii), third party funding for an arbitration is not contrary to the public policy in British Columbia.'⁷⁵

As set out above, Canadian law in respect of court approval of TPFAs in the domestic setting is also undergoing maturation. While the law has departed significantly from the criminalisation of champerty in the early twentieth century, there is still an opportunity for the court or legislators to provide further guidance on the balance between funders and plaintiffs, and the role of the court in overseeing this relationship in the commercial setting.

In recent years, a broader range of Canadian clients and lawyers have expressed interest in using funding as a means of controlling cost and mitigating the risk of litigation. Looking forward, we expect there will be increased interest in TPF from well capitalised claimants who are interested in managing the cost and risk of their legal disputes. Law firms have also become increasingly interested in specialised arrangements with funders, including through 'portfolio funding'.⁷⁶ There is similarly no clear legislative direction regarding portfolio funding, although given the recent interest in this issue in other jurisdictions,⁷⁷ we may expect some direction from authorities in the future, if portfolio funding takes root among funders and firms in Canada.

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

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

77 See, for example, the NYC Bar Association Formal Opinion 2018 5: Litigation Funders' Contingent Interest in Legal Fees.

ENGLAND AND WALES

*Leslie Perrin*¹

I MARKET OVERVIEW

During the past 12 months in England and Wales there has been no decided case to rival the influence on third party funding (TPF) of the November 2016 Court of Appeal decision in the costs appeal in *Excalibur Ventures LLC v. Texas Keystone Inc* [2017] 1 WLR 2221 (CA), in which Lord Justice Tomlinson said: ‘Litigation Funding is an accepted and judicially sanctioned activity perceived to be in the public interest.’

However, the significance of TPF on legal markets has continued to grow. The 2018 Litigation Funding Research by Burford Capital² states that three-quarters of UK lawyers said litigation finance was now a ‘key marketing tool’. Furthermore, the UK Snapshot taken from the Burford Report states that:

- *More than six in ten (63%) UK respondents say their organization’s use of legal finance has increased in the past two years;*
- *Four in ten (40%) UK in-house respondents say their companies are very likely to use litigation finance in the next two years;*
- *Compared to other geographies, UK respondents are most likely to agree that litigation finance can help turn in-house legal departments into profit centres (79%); and*
- *Two thirds (65%) of UK lawyers say they are very familiar with litigation finance.*

This is, of course, against the background that England and Wales, which is effectively London for these purposes, is the most expensive and the riskiest litigation market in the world. The sheer expense of London High Court proceedings is driven for the largest cases by the combined effect of exhaustive pre-action procedures, exacting requirements for written pleadings, the ever-increasing demands of disclosure during discovery, the fervent belief of the judiciary in lengthy oral evidence and cross-examination, and in the excellent value for money represented by the £1,000 per hour QC. All this complexity drives eye-watering expense, and is made worse the absence of a functioning contingent fee regime and by the absence of court-driven budgeting from the largest cases, which could be said to need it most.

Then there are the risks contained within the adverse costs implications of losing a case, which can more than double the cost for claimants and funders of a case that is unsuccessful.

1 Leslie Perrin is chairman of Calunius Capital LLP.

2 www.burfordcapital.com/wp-content/uploads/2018/10/Burford-Capital-2018-Litigation-Finance-Survey.pdf.

This was graphically illustrated by the *Excalibur* case, where Excalibur's various inexperienced funders were found to be jointly and severally liable for adverse costs of nearly £32 million, quite apart from the money they lost in funding the defeated claimant.

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

No wonder then that, in Burford's 2018 research, the need to manage the sheer financial risk of litigation was a such a significant factor behind in-house interest in litigation finance, with 81 per cent of UK in-house lawyers identifying costs management as an urgent issue for them, while 72 per cent were willing to admit that their company had chosen to forgo claims due to the impact of the associated legal costs on the bottom line.

What Burford's absorbing research does not say, is that litigation funders are increasingly looking askance at the inherent and sometimes disproportionate financial risk involved in funding the very same London litigation that in-house lawyers are so keen to hedge. Hence the growing appeal to London-based funders of international arbitration, both commercial and treaty based, plus the growing interest in litigation and arbitration opportunities in other jurisdictions, which have seen many UK-based litigation funders forsake UK investments in favour of opportunities that, while unfolding in jurisdictions that are perhaps less well known, are more predictable and manageable on the downside.

On the subject of research, it is impossible to ignore the publication in April 2018 of the monumental Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration.³

II LEGAL AND REGULATORY FRAMEWORK

i The London TPF market

The market for the funding of litigation in England and Wales is still dominated by the nine funder members of the Association of Litigation Funders of England and Wales (ALF). At the time of writing, the identities of those funder members have remained unchanged over the course of the past 12 months. They are Augusta Ventures, Balance Legal Capital, Burford Capital, Calunius Capital, Harbour Litigation Funding, Redress Solutions, Therium Capital, Vannin Capital and Woodsford Litigation Funding.

Several other funders are active in England and Wales, including global hedge funds and family offices, mostly on an opportunistic basis.

In any review of the TPF market in England and Wales, it is worth pointing out at the outset that the overwhelming majority of investments by funders in England and Wales are still in the context of commercial litigation and arbitration, and that the overwhelming majority of funded litigants are either commercial entities or experienced professionals or business people. By way of example of this proposition, no funder member of the ALF transacts with personal injury claimants.

³ To which reference will be made throughout this chapter, where it will be referred to as the ICCA-Queen Mary Report – https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf.

ii A historical perspective

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

Until the Criminal Law Act 1967, the funding of litigation, as we now know it, would have been a crime. Even now, litigation funding agreements (LFAs) are at risk of being found to be unenforceable for illegality if their terms are found to be in breach of the rules against maintenance and champerty, especially if funders exert any material amount of control over the case.

Maintenance and champerty were originally rules of the common law that were aimed at preventing the rich and powerful from interfering in court proceedings, to the detriment of the administration of justice. However, by the nineteenth century, it had become apparent that, far from protecting justice, the inability of the claimant to fund his or her claim other than with his own money, was a bar to access to justice and exceptions to maintenance and champerty were then created in insolvency cases.

There is an authoritative and comprehensive account of the history of maintenance and champerty and the gradual escape of TPF from its prohibitions in the 2013 Harbour Litigation Funding Annual Keynote Address⁴ by Lord Neuberger of Abbotsbury, the then president of the UK Supreme Court.

In brief, the modern history of this process lies in various Court of Appeal decisions from around 2002 until 2005,⁵ which made it clear that, within certain boundaries, the provision of funding by third parties for litigation in England and Wales would not necessarily offend against maintenance and champerty and could be permissible. However, following these decisions, but prior to publication in January 2010 of Lord Justice Jackson's immensely influential Review of Civil Litigation Costs⁶ and the formation of the ALF that followed, it was still necessary for a funder of litigation in England and Wales to look to the common law to determine what was permissible. This landscape of cases, especially *Arkin*, still delineates the business model for litigation funders in England and Wales as it is operated now.

iii Regulation in England and Wales

Today, in England and Wales, the ALF is the instrument by which the funding of litigation through TPF is subject to voluntary regulation. Voluntary regulation is a mechanism that is widely recognised by government and others as providing a viable regulatory framework as an alternative to statutory regulation, especially when, as in the case of TPF, no statutory body has ever put itself forward or been nominated for the purpose by government. The classical model for voluntary regulation is that industry professionals, with sponsorship from government entities, develop voluntary standards and codes of conduct to regulate standards,

4 'From Barretery, Maintenance & Champerty to Litigation Funding' <https://www.supremecourt.uk/docs/speech-130508.pdf>.

5 Including *R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions (No. 2)* [2002] EWCA Civ 932 and *Arkin v. Borchard Lines Ltd & Others* [2005] EWCA Civ 655 (*Arkin*).

6 <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> (the Jackson Report).

subjecting themselves to a complaints procedure of demonstrable independence. Voluntary regulation provides a strong alternative to statutory regulation, being flexible to introduce and update, but requiring a high degree of commitment from those involved.

An account of the history and constitution of the ALF can be found on its website.⁷ In brief, in November 2011, the creation of the ALF and the Code of Conduct were welcomed by the Civil Justice Council of England and Wales (the CJC), the Master of the Rolls, Lord Neuberger of Abbotsbury, and by Lord Justice Jackson. The CJC is an advisory public body that has a statutory role in advising government and the judiciary on civil justice in England & Wales. It was established by the Lord Chancellor under the Civil Procedure Act 1997 (CPA) with responsibility, *inter alia*, for keeping the civil justice system under review, for considering how to make the civil justice system more accessible, fair and efficient, and for advising the Lord Chancellor and the judiciary on the development of the civil justice system. The CJC summarises these duties on its website as, ‘responsibility for overseeing and coordinating the modernisation of the civil justice system’.⁸ The CJC’s members must include UK judges, civil servants, senior practitioners and academics, representatives of various interest groups, representatives of the UK government and others specified in the CPA. For the first six years of the life of the ALF, the CJC played an invaluable role as a ‘critical friend’ of the ALF.

The subject of TPF had taken up just eight pages of the Jackson Report in January 2010. However, that was plenty of time for Sir Rupert to bestow a generous blessing on litigation funding, which he saw as ‘beneficial’, because, to summarise what he said, it promoted access to justice without imposing financial burdens on defendants, and filtered out unmeritorious cases.

The ALF was then charged with delivery of voluntary regulation of the TPF industry in England and Wales. Voluntary regulation by the ALF was to be achieved by means of the ALF Code of Conduct (the Code)⁹ with an independent complaints procedure that is available to any person or entity who has entered into an LFA with a funder member of the ALF.

The Code, which sets out standards of best practice and behaviour for litigation funders in England and Wales, was essentially the product of a working party established under the auspices of the CJC, which produced a draft code of conduct in the form which was adopted by the board of the CJC in November 2011. This version of the Code was then revised in 2014 to introduce strengthened capital adequacy requirements for ALF members as well as a fresh, detailed complaints procedure.

It should be noted that funder members have their standard draft LFAs confidentially examined by an independent barrister to confirm compliance with the fairness provisions of the ALF’s Code of Conduct. Each funder member of the ALF agrees to adhere to the terms of the Code and submits to the ALF Complaints Procedure thereby assuring and promoting best practice in TPF.

7 <http://associationoflitigationfunders.com>.

8 <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/>.

9 A copy of the Code in its current form at the time of writing can be found at <http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>.

iv The Code

The Code provides various protections to litigants who contract with the ALF's funder members and develops and codifies the model that had developed within the parameters of the common law. The Jackson Report spoke of the desirability of 'a fair balance between the interests of funder and client' and the Code delivers on this by requiring funders to behave reasonably. It does so by providing that funders must:

- a* take reasonable steps to ensure that the funded party shall have received independent advice on the terms of the LFA (para 9.1);
- b* not take any steps that cause or are likely to cause the funded party's lawyers to act in breach of their professional duties (para 9.2);
- c* not seek to influence the funded party's lawyers to cede control or conduct of the dispute to the funder (para 9.3);
- d* maintain adequate financial resources to meet their funding obligations (para 9.4);
- e* not include in any LFAs a right to terminate the LFA at the pure discretion of the funder (para 12). The right for a funder to terminate an LFA as and when it pleases is seen as a potential short cut to control of the claim, control by the funder being the principal of the vestigial elements of maintenance and champerty that can still void an LFA;
- f* behave reasonably in exercising rights to terminate for material breach of the LFA by the funded party or because the claim is no longer viable, if such rights are included in the LFA. This is achieved by requiring funders to give litigants the contractual option of going to an independent QC for a binding opinion if the reasonableness of the funder's behaviour comes into question in the context of such terminations (paragraphs 11–13); and
- g* in relation to approval of settlements, the LFA must state whether (and if so how) the funder may provide input to the funded party's decisions in relation to settlements. In practice, all funders will insert into their LFAs a right to be consulted about any settlement opportunities that may arise during a funded case. This is part of the funder's need to ensure that funded claims are always conducted in an economically rational manner. In the event that there is a dispute about a settlement, either party may take the dispute to an independent QC for an opinion that would bind both funder and funded party.

III STRUCTURING THE AGREEMENT

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

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

LFAs should provide a fair, transparent and independent dispute resolution process.

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

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

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

IV DISCLOSURE

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

There are a number of generally accepted principles at work in this difficult area that apply equally to litigation and arbitration. In the context of arbitration Chapter 5 of the ICCA-Queen Mary Report on Privilege and Professional Secrecy is very useful.

First, it is absolutely essential for the funder and claimant to enter into a comprehensive non-disclosure agreement (NDA) at the outset of their discussions.

Second, the fact of the existence of an LFA and the identity of the funder will never in themselves be privileged information, although the detailed terms of the LFA will almost certainly include much content that is privileged.

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

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

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

The principal (perhaps, only) reason for the vigour of the debate in the arbitration community about disclosure of the existence of funding is the potential in arbitration for

conflicts of interest between third party funders and arbitrators, particularly if an arbitrator has sat in a number of cases where the claimant has been funded by the same funder or if the funder is funding another case in which the funded claimant is represented by that arbitrator's law firm. Funders are very much alive to the destructive potential of these conflicts and will normally do their utmost to avoid taking on cases where such conflicts might exist. Chapter 4 of the ICCA-Queen Mary Report is of great interest here.

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

V COSTS

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

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

i The funder's liability for adverse costs

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

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

When considering whether there were any limits or caps on the extent of a funder's adverse costs liability, funders have hitherto relied on *Arkin* (as cited above) in which the claimant was only able to pursue his claim to judgment because a litigation funder supported the case, albeit solely for the disbursements in respect of expert evidence, to the tune of £1.3 million. The defendants, having successfully defended the claim, sought an order that the funder should pay the entirety of their costs (which amounted in total to nearly £6 million).

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

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

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

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

- a* that a commercial funder will ordinarily be required to contribute to the defendants’ costs on the same basis as the funded claimant. Therefore, if a claimant has been ordered to pay costs on the indemnity rather than standard basis, the funder will be liable to indemnity costs irrespective of its own conduct, but, possibly, subject to the *Arkin* cap; and
- b* that an order for adverse costs may be made not only against the funder named in the LFA but also against a third party that provided those funds and stood to benefit in the event of success, in that case the funder’s parent company, thus comprehensively piercing any funder’s corporate veil.

In arbitration, on the other hand, it is generally taken that an arbitral tribunal lacks jurisdiction to issue a costs order against a funder of the arbitration.¹⁰ This is because only the parties to the dispute being arbitrated are within the jurisdiction of the tribunal, normally by virtue of their being parties to a contract or through the terms of a treaty. This leads many respondents to arbitration to make applications for security for costs, as to which see below.

ii The question of security for costs

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

In funded cases where the claimant is insolvent, an adverse costs insurance policy with a sufficient level of indemnity is often advanced by claimants and their funders, whereupon defendants will often challenge the insurance policy as inadequate. The governing principle taken from *Premier Motorauctions v. PwC and another* [2017] EWCA Civ 1872 is that resolution of these issues is fact sensitive. Currently, however, a pattern is emerging from the decisions subsequent to *Premier Motorauctions* as to two particular categories of objection to such insurance policies. First, there is the question of the extent of the rights of the insurer to avoid or otherwise to terminate the policy as a consequence of misrepresentation or

10 See Chapter 6, Principle C.4 of the ICCA-Queen Mary Report.

non-disclosure, which has led to a general requirement for the insurance to contain suitable anti-avoidance provisions. Secondly the defendant may wish the court to assess the risk to the defendant of not actually receiving the money, due, for example, to insolvency or exclusion of the Contracts (Rights of Third Parties) Act 1999, considerations that may require assignments to be undertaken between the claimant, the funder, the insurer and the defendant.

An application may also be made for security for costs directly against a professional TPF provider as it was recently in the *RBS Right Issue Litigation* [2017] EWHC 1217 (Ch).

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

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

In arbitration, applications for security for costs are generally decided on the basis of the party’s impecuniosity or its inability to pay if costs were to be awarded against it at the conclusion of the proceedings.¹¹

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

If an arbitral tribunal decides that a security for costs order is warranted, it can order security for costs in various ways; by production of a funder indemnity or ATE insurance, or, in exceptional circumstances by way of a bank guarantee. The tribunal will normally order a defendant for whose benefit the security for costs is granted, to pay the costs reasonably incurred by the funded claimant in complying with the order for security in the event that the claimant eventually prevails.

VI THE YEAR IN REVIEW – RECENT CASES

i *Excalibur* on TPF and due diligence

Quite apart from its clarification of the position relating to adverse costs, security for costs and the *Arkin* cap, the *Excalibur* judgment Tomlinson recognised the ALF’s role as the voluntary regulator of ‘professional funders’, and also the important distinction drawn by the Court between professional funders and ‘the funders [in the *Excalibur* 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.’

Perhaps the most interesting remaining aspect of this remarkable judgment for the TPF market is the clarification of funders’ ongoing role in relation to review of the cases in which they have invested. Tomlinson LJ said:

11 See the ICCA-Queen Mary Report, Chapter 6, Principles D.1 to D.3.

By funding, the funder takes a risk, a risk as to the nature of which he has the opportunity to inform himself both before offering funding and during the course of the litigation which he funds.'

Also:

'when conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous.'

Tomlinson LJ had earlier defined champerty to mean 'behaviour likely to interfere with the due administration of justice'.

Funder members of the ALF have always known that claims evolve over time and have recognised the legal and commercial importance of maintaining an active oversight of cases throughout. Their aim is to ensure, to the extent possible, that they are only ever funding meritorious claims being conducted properly by all concerned. No sensible, experienced funder has any interest in funding speculative claims that do not have good chances of success.

ii Collective proceedings under the Consumer Rights Act 2015 and the Rules of the Competition Appeal Tribunal

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

Since 2015, only two applications have been made for certification of claims by virtue of collective proceeding orders (CPOs) in the CAT under the new procedures. Both applications were for opt-out CPOs in follow-on damages claims – the first in relation to mobility scooters, and the second in relation to interchange fees on Mastercard credit cards. Each application was (in May and July 2017 respectively) refused, in each case on the basis that the CAT was not persuaded that the claims were suitable to be brought in collective proceedings. Although the specific reasons were different in each case, the CAT's essential objection on both occasions was that the methodology suggested by the applicants' economic experts for calculating the losses incurred by members of the group was not appropriate. In other words, the applicant was unable to satisfy the CAT that it had a robust method for estimating (even broadly) the aggregate amount of damages owed by the defendants to the members of the class.

In the *Mastercard* case, there was some debate as to whether there was a direct right of appeal to the Court of Appeal from the decision of the CAT, or whether an application was needed to the Administrative Court for a judicial review. In any event, the Court of Appeal is, at the time of writing, preparing to hear the claimant's legal team's appeal.

Furthermore, in the context of the Truck cartel, two applications to the CAT for CPOs have been made; one each on an opt-out and an opt-in basis. The case management conference for both applications will be heard before Christmas 2018.

The role of TPF in these collective proceedings has been expressly recognised and the results of the appeals and fresh applications on both bases are eagerly awaited by all litigation funders active in England and Wales.

VII CONCLUSIONS AND OUTLOOK

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

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

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

GERMANY

*Daniel Sharma*¹

I MARKET OVERVIEW

In Germany, the market for third party funding of litigation and arbitration cases is relatively mature and well developed, even compared to that of other major economies. The first professional third party funding services were introduced around 1998.² The German legal framework for funding agreements is relatively non-restrictive, which makes it easier for smaller funders to enter the market.

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

The German third party funder in a traditional sense is a company that specialises in funding large cases; these companies mostly stipulate a minimum claim value of between €25,000 and €100,000 as a requirement to even review a case for potential funding. These traditional funders typically fund a large variety of cases and do not restrict their offer to specific areas of law. One reason for this may be that there is only a limited number of cases on the German market that have a sufficiently high claim value to be of economic interest to funders³ and for which funding is sought. That being said, it is often stated that such third party funders reject about 90 per cent of the cases presented to them for review, usually (but not always) based on their assessment that the prospects of success are insufficient for the purposes of the funder.

One of the major funders is Foris AG, which originally pioneered the introduction of professional third party funding services on the German market in 1998. Moreover, several German insurance companies that initially only offered legal costs insurance⁴ as a product have in recent years extended their product portfolio to also cover the funding of cases in which a dispute has already arisen. These include Legial AG and Roland Prozessfinanz AG (which was acquired by the Dutch founder Omni Bridgeway in 2017).

Last but not least, several Anglo-American and Australian companies have recently become increasingly present on the German market, including Burford Capital and the European branch of the Australian IMF Bentham Limited.

1 Daniel Sharma is partner at DLA Piper UK LLP.

2 Frische/Schmidt, 'Eine neue Form der Versicherung?' in: *Neue Juristische Wochenschrift (NJW)* 1999, page 2,998 et seq.

3 It has often been stated that cases have a high claim value in this sense if the claim value exceeds €1 million.

4 A typical (before the event) legal costs insurance is characterised by the fact that at the time the contract is concluded, a dispute has not yet arisen.

Apart from the aforementioned traditional third party funders, Germany has seen an increase of players that could be described as atypical funders. Many of these companies operate with a business model vastly different from that of the traditional funders described above. They do not specialise in funding complicated, high-risk cases involving a high claim value where the law firm involved is truly selected by the party that receives funding. Instead, these companies specialise in funding proceedings⁵ in relation to specific claims that have a relatively low claim value but where the handling of the case can be streamlined by highly specialised partner law firms that contractually still act as legal counsel to the party receiving the funding (and not the funder), but that, in practice, are selected by the funder, and in some cases have little actual contact with the party that, formally, is their client. A relatively prominent example is Flightright, which enables travellers to pursue claims against an airline based on a flight delay without an associated cost risk.⁶

It may also be relevant for the purpose of an assessment of the German market for litigation funding that German law, in Section 114 et seq. of the German Code of Civil Procedure, provides for a request for legal aid in cases where a party lacks the funds required to participate in a court proceeding (regardless of whether it is as claimant or respondent). This request can sometimes be a viable alternative to third party funding, and it is not restricted to natural persons; a legal entity can also file a request for legal aid. An important difference to real third party funding, however, is that the party receiving legal aid may, under specific circumstances, have to pay back the amounts received by the state. In contrast, in the vast majority of German third party funding agreements, the funder also assumes the duty to reimburse the opposing party for its legal costs in the proceeding in the case that the funded party is ultimately unsuccessful with its claim. Normally, amounts paid by the funder during the proceeding will not have to be reimbursed in the case that the claim is ultimately unsuccessful. In other words, most German third party funding agreements, in principle, provide for a 'no risk' scenario for the funded party.⁷

II LEGAL AND REGULATORY FRAMEWORK

When discussing the legal and regulatory framework for agreements in the area of third party funding, in German law it is particularly important to keep in mind that the funding

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

6 For purposes of illustration, Flightright currently charges a fee of between 20 per cent and 30 per cent of the claim value (excluding VAT), which also covers the fee of the legal counsel involved, and the maximum value of the claim under the applicable EU regulation providing for the compensation claim is €600; it is therefore clear that such a business model is only viable if the internal costs of the funder and the costs of the legal counsel combined will on average be far below €150 per case. Such a business model thus requires a highly automated handling of cases at both the funder and the legal counsel involved. As of September 2018, Flightright claims on its website that its service has been used 5.2 million times so far, with Flightright having successfully pursued claims exceeding €150 million.

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

agreement (the contract between the funded party and the funder) on the one hand, and the contract between the funded party and its legal counsel (engagement letter or fee agreement) on the other hand, are contracts of a different nature. Thus, they are subject to different regulatory frameworks.

i The funding agreement

Today, the majority of German legal literature takes the view that funding agreements are to be classified as German partnerships under civil law. This qualification of the funding agreement has a number of practical consequences for the content of the funding agreements.

However, it is important to note that so far, the highest German courts have not clearly confirmed this qualification.⁸ On the contrary, in 2006, at a time when the clear majority of German legal literature already favoured the qualification as a partnership under civil law, the District Court Bonn in one of its decisions⁹ addressed the question of the legal qualification of third party funding agreements in great detail and made explicit reference to the fact that the leading view in legal literature classified the funding agreement as a partnership under civil law, but then came to the conclusion that it did not share this view.¹⁰ In the decision in the appeal proceeding regarding the appeal filed against the cited decision of District Court Bonn, the court of next instance, the Higher Regional Court Cologne,¹¹ left the question unanswered, but stated in an *obiter dictum* that it was inclined to agree with the ‘convincingly argued view of the District Court Bonn’.

In contrast, the Higher Regional Court Munich, in a decision in 2015, stated that a third party funding agreement was to be classified as an agreement of its own kind, but further stated that it was, however, similar to the German partnership under civil law.¹²

In more recent decisions, some courts have addressed the question, but ultimately left it open for debate, including, for example, the Higher Regional Court Frankfurt in a decision of August 2017, in which it merely stated that the question was still unresolved and that it was debated whether a third party funding agreement could be classified as a loan agreement with the interest linked to the borrower’s profit, an insurance contract, a purchase of receivables or a partnership.¹³

Regarding a potential qualification as an insurance contract,¹⁴ the former German Federal Insurance Supervisory Office (BAV), which is now part of the German Federal

8 See District Court Bonn, Decision dated 28 August 2006, Case 15 O 198/06, paras. 73 et seq. Also see Higher Regional Court Frankfurt, Decision dated 22 August 2017, Case 16 U 253/16, para. 25.

9 District Court Bonn, Decision dated 28 August 2006, Case 15 O 198/06, paras. 73 et seq.

10 While the District Court Bonn made clear in its decision that it did not view the third party funding agreement as a partnership under civil law, it did not present a clear alternative qualification. The court merely stated that the third party funding agreement was to be classified as a contract for the exchange of performances in the form of a legal relationship where performance of one party is tied to the profit of the other. But this form of relationship does not in itself entail a clear qualification of the funding agreement as, e.g., a loan or an insurance contract.

11 Higher Regional Court Cologne, Decision dated 29 November 2007, Case 18 U 179/06.

12 Higher Regional Court Munich, Decision dated 31 March 2015, Case 15 U 2227/14, para. 46.

13 Higher Regional Court Frankfurt (*Oberlandesgericht Frankfurt*), Decision dated 22 August 2017, Case 16 U 253/16, para. 25.

14 Regarding potential arguments for such a qualification, see Frische and Schmidt, ‘Eine neue Form der Versicherung?’ in: *Neue Juristische Wochenschrift (NJW)* 1999, page 2998 et seq.

Financial Supervisory Authority, decided in 1999¹⁵ that the only third party funder existent in Germany at that time was not regulated by the BAV, since it was found not to operate a business that could be qualified as an insurance business.¹⁶

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

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

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

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

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

However, two potential restrictions in particular should be kept in mind.

First, in the case that the share of the proceeds that the funder receives in cases of success is particularly high, the funding agreement could be found to violate public policy because a court could assume that the party seeking funding had no other option than to agree to unfair terms because of undue duress exerted by the funder (Section 138 of the German Civil Code). Few court decisions exist that could help to clarify which success fees can, in practice, be agreed. However, the Higher Regional Court of Munich, in a case in 2015¹⁷ where the funder had started to fund the case only after the claimant had already lost in first instance, decided that a success fee of 50 per cent did not violate public policy. In its decision, the court, *inter alia*, pointed to the fact that the first instance proceeding that had already taken place might have led to lower projected costs to be borne by the funder, since the funder did not need to fund the case in first instance; but the court also pointed out that, on the other hand, the fact that the proceeding had already been lost in first instance meant that the projected overall chance of success might have been reduced. In another case, the Higher Regional Court of Munich in 2004 indicated that a share of the proceeds attributed to the funder of more than 66 per cent could possibly violate public policy.¹⁸

Secondly, it is still subject to debate whether standard contracts introduced by funders can be subject to judicial review regarding the provisions of German law applicable to

15 German Federal Insurance Supervisory Office, Decision dated 29 April 1999, in: *Veröffentlichungen des Bundesaufsichtsamtes für das Versicherungswesen* (VerBAV) 1999, page 167 et seq.

16 For arguments against a qualification as an insurance contract, see also an article published in answer to the aforementioned article of Frische and Schmidt, written by two members of the board of directors of the funder FORIS AG, Müller-Güldemeister and Rollmann, 'Die Prozessfinanzierung der FORIS AG ist keine Versicherung' in: *Neue Juristische Wochenschrift (NJW)* 1999, page 3,540.

17 Higher Regional Court Munich, Decision dated 31 March 2015, Case 15 U 2227/14.

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

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

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

As regards the agreement between the funded party and its legal counsel (engagement letter and fee agreement), the most important restriction imposed by the regulation applicable to German lawyers is that German lawyers are, in principle,¹⁹ not allowed to agree a success fee (Section 49b of the German Federal Lawyer’s Act). A success fee can only be agreed if, in the individual case, the client would otherwise not be able to enforce or defend his or her rights in a proper manner for personal financial reasons (Section 4a of the German Law on the Remuneration of Lawyers). As is often highlighted in German legal literature, this provision in essence means that a German lawyer, in principle, is not allowed to fund a client’s case,²⁰ no matter whether directly (through a payment) or indirectly (through waiving the legal counsel’s fees in the case of a loss in the proceeding).

As the services provided by the funder under the funding agreement are not classified as a contract for legal advice, there is no similar restriction for the funder. The fact that German lawyers are, in principle, not allowed to agree a success fee should be kept in mind when drafting or negotiating the funding agreement, as it means that the funding agreement should not stipulate that the funded party’s counsel will share a portion of the risk in relation to the outcome of the case through a reduced fee in the case of a loss in the proceeding, or an increased fee in the case of success in the proceeding, as this clause (barring cases

19 Until 30 June 2008, according to Section 49b, para. 2, sentence 1 of the German Federal Lawyer’s Act, German lawyers were generally not allowed to agree a success fee. However, on 12 December 2006, the German Supreme Court decided that such a general prohibition, not providing for exceptions in cases where the claimant has no access to financing for its case, was incompatible with and violated Article 12 of the German Constitution; see German Supreme Court, Decision dated 12 December 2006, Case 1 BvR 2576/04. To comply with this court decision, the provisions of the German Federal Lawyer’s Act and the Law on the Remuneration of Lawyers were amended; see in more detail Onderka and Schneider in *AnwaltKommentar Rechtsanwaltsvergütungsgesetz*, Section 4a Law on the Remuneration of Lawyers, para. 1 et seq.

20 E.g., cf. Von Seltmann, in: *Beck’scher Online-Kommentar zum Rechtsanwaltsvergütungsgesetz*, Section 4a Law on the Remuneration of Lawyers, Introduction; Rauscher, in: *Münchener Kommentar zur Zivilprozessordnung*, 5th Edition 2016, Introduction, para. 77.

where exceptional circumstances in the sense of Section 4a, Paragraph 1 of the Law on the Remuneration of Lawyers are given) could not be complied with when involving a German lawyer as counsel.

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

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

III STRUCTURING THE AGREEMENT

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

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

i Representations by the claim holder (claimant)

Full rights to claims, power to transfer

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

In the case of a claim subject to German law, it should be noted that German law, in principle, provides for the opportunity of a cession without the consent of the debtor (Section 398 of the German Civil Code), but that, as an exception, consent of the debtor is required if an agreement between the creditor and the debtor so stipulates (Section 399 of the German Civil Code). Such a restriction can also be agreed in German standard terms.

21 Scholl, in *Beck'sches Rechtsanwalts-Handbuch*, 11. Edition 2016, Section 54 para. 250.

22 Scholl, in *Beck'sches Rechtsanwalts-Handbuch*, 11. Edition 2016, Section 54 paras. 250, 252.

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

If consent is required because of such a contractual restriction, and the creditor still tries to assign the claim to a third party without consent of the debtor, the assignment is void and has no effect.

No undisclosed facts

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

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

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

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

- The funded party releases its legal counsel from its duties of confidentiality regarding all facts relating to the pursued claims, and undertakes to inform the funder (via the funded party's legal counsel) of any new development, providing full copies of all relevant documents.
- The funded party has to obtain the consent of the funder before incurring any costs.
- The funded party may not conclude a final and binding settlement agreement with the debtor without the funder's consent, and may not discontinue the proceeding without consent of the funder. Most funding agreements, however, provide for a possibility of the funded party to conclude a revocable settlement without prior consent of the funder; in the case that such a revocable settlement is concluded, it is the duty of the funded party to inform the funder of the settlement in time before the revocation period expires.
- If the claims are pursued in an arbitration proceeding, the funded party will use all tools available to (if possible) ensure that representatives of the funder can attend the oral hearing.²⁴

24 This provision typically refers only to arbitration proceedings because German state court proceedings are public proceedings; therefore, representatives of the funder can attend proceedings before a state court without the need for related requests to the court.

iii Costs to be initially borne by the funder

Most importantly, it will be clarified whether the funder only bears the fees of the funded party's legal counsel to the extent stipulated in the Law on the Remuneration of Lawyers.

However, even if the funder, in principle, only bears the fees of the funded party's legal counsel to the extent stipulated in the Law on the Remuneration of Lawyers, the funding agreement will typically stipulate²⁵ that the funded party's legal counsel will receive an additional remuneration (included as compensation for the time-consuming and complicated task of communicating with the funder), in the form of an additional 1.0-fee in the sense of provision VV 2,300 of the Law on the Remuneration of Lawyers.²⁶ In this regard, this section of the funding agreement does not in itself lead to a direct claim of the funded party's legal counsel with regard to the funder, as the funded party's legal counsel is not a party to the funding agreement. Therefore, the fee agreement between the funded party and its legal counsel needs to reflect this provision in stipulating such an additional fee. Secondly, an interesting aspect of this provision is the question of who will ultimately bear the costs of this additional fee in the case that the proceeding against the (alleged) debtor is won; in this regard, see Section V.

If the funder is to bear fees of the funded party's legal counsel that exceed the fees stipulated in the Law on the Remuneration of Lawyers (e.g., fees calculated on the basis of hourly rates), or if the claims are to be pursued in a proceeding abroad, the fees to be borne by the funder are often specified in detail, sometimes in an annex to the funding agreement.

This section will typically also clarify that costs in relation to any counterclaim or set-off declared by the debtor and the travel costs of the funded party will not be borne by the funder. It will also typically clarify that all payments by the funder will be made to the legal counsel of the funded party and not to the funded party itself, except in cases where the funder reimburses the funded party for payments that have already been made by the funded party itself.

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

The agreements typically stipulate that value added tax shall only be paid by the funder insofar as the funded party cannot offset payments against its own tax liability.

iv Review of the claim by the funder

If the funder has not yet reviewed and accepted the claim for funding prior to the conclusion of the agreement, this section will set out the related duties of the funder. Typically, it will be stated that the funder will review the claims without any initial costs for the party that seeks

25 Scholl, in: *Beck'sches Rechtsanwalts-Handbuch*, 11. Edition 2016, Section 54 para. 249.

26 The fees stipulated in the Law on the Remuneration of Lawyers are calculated based on claim value. E.g., in case of a claim value of €200,000, a 1.0-fee in the sense of No. VV 2,300 of the Law on the Remuneration of Lawyers amounts to €2,013 (excluding VAT). In case of a claim value of €500,000, a 1.0-fee in the sense of No. VV 2,300 of the Law on the Remuneration of Lawyers amounts to €3,213 (excluding VAT).

27 Some uncertainties, however, exist; for example, in relation to potential reimbursement claims covering costs relating to expert opinions or witnesses.

to receive funding. It will be clarified that the review of claims is only conducted to enable the funder to assess whether or not it wants to fund the case, and in particular that the review of claims is not to be understood in any way as the funder acting as legal counsel with regard to the party that seeks funding. Finally, it will be stated that the funder has no duty to accept the case for funding, has no duty to provide any reasons for a rejection of funding and will not be liable towards the party that seeks funding based on such a rejection.

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

The funding agreement will typically stipulate that first, both parties will be reimbursed for their recoverable costs²⁸ from the proceeds. Regarding the question of who will ultimately bear the costs of legal fees to the extent to which they exceed the statutory fees following the Law on the Remuneration of Lawyers in the case that the proceeding is won, see Section V.

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

vi Assignment of all claims to the funder as security

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

vii Termination rights of the funder

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

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

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

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

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

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

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

viii Termination rights of the funded party

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

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

ix Settlement proposal

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

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

x Confidentiality

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

xi Applicable law and jurisdiction clause

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

IV DISCLOSURE

Currently, there is neither a general obligation to disclose the existence of a third party funding agreement in German state court litigation cases, nor is there such a general obligation in arbitration cases derived from German procedural law or practice. However, in principle, it is conceivable that the existence of a third party funding agreement might in certain cases be relevant to the assessment of request for security for costs, or that it might give rise to a conflict of interests,²⁹ in which case, a party could be at least indirectly forced to disclose the funding, if only to contest a statement of the other side.

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

V COSTS

i Recovery of costs for securing third party funding

With respect to German state court proceedings, in line with the majority view in legal literature, recent court decisions have held that costs for securing third party funding cannot be recovered through the system of recovery of costs in relation to the cost award (Section 91 et seq. of the German Code of Civil Procedure).³⁰ The reason for this is that the German state court in its initial award only decides the ratio of each party's obligation as to costs, while the specific amounts are only determined in a subsequent, separate procedure for the setting of cost reimbursement claims, in which, however, no substantial new taking of evidence takes place.³¹ If, however, the winning party could successfully claim in this subsequent procedure to have incurred costs in relation to the financing of its claim, this would in practice lead to the requirement that new evidence is assessed, which is not compatible with the nature of the procedure for the setting of cost reimbursement claims.³² Therefore, costs for securing third party funding will in any case not be recoverable as costs in the procedural sense (referring to provisions Section 91 et seq. of the German Code of Civil Procedure).

However, a different question is whether the funded party can demand reimbursement for such costs through a request as part of the substantive claim itself, based on a material law claim for reimbursement following Section 280 et seq. or Section 823 et seq. of the German Civil Code.³³ In principle, costs for financing of a case, in particular, regarding interest paid by the claimant regarding a credit facility, can be claimed as part of the material law claim.³⁴ However, in order for expenses to be classified as, or as similar to, a damage in the sense of Section 280 et seq. or Section 823 et seq. of the German Civil Code, the expenses must have been necessary to pursue the claim. In that sense, regarding specifically a success fee agreed in the course of third party funding, it has to be noted that as long as the claimant does not have his or her own funds available at all to finance the claim, he or she can file a request for legal aid as stipulated in Section 114 et seq. of the German Code of Civil Procedure, as described in Section I above. If, however, such a request would not be successful because

30 Higher Regional Court Koblenz (*Oberlandesgericht Koblenz*), Decision dated 4 January 2006, Case 14 W 810/05, in: *Neue Juristische Wochenschrift (NJW)* 2006, page 2,196; Higher Regional Court Koblenz (*Oberlandesgericht Koblenz*), Decision dated 25 August 1987, Case 14 W 604/87, in: *Zeitschrift für das Versicherungsrecht (VersR)* 1988, page 972; Higher Regional Court Munich (*Oberlandesgericht München*), Decision dated 14 September 1999, Case 11 W 2389/99, in: *Monatsschrift für Deutsches Recht (MDR)* 1999, 1466; Higher Regional Court Düsseldorf (*Oberlandesgericht Düsseldorf*), Decision dated 13 August 1980, Case 10 W 34/80, in: *Zeitschrift für das Versicherungsrecht (VersR)* 1981, page 437. With the same result and in more detail Jerger/Zehentbauer, 'Grundlage und Geltendmachung von Schäden im Zusammenhang mit der Finanzierung des Zivilprozesses' in: *Neue Juristische Wochenschrift (NJW)* 2016, page 1,353 et seq.

31 *Schneider/Thiel, Das ABC der Kostenerstattung*, 3. Edition 2016, Section 'Prozessfinanzierungskosten'.

32 *Schneider/Thiel, Das ABC der Kostenerstattung*, 3. Edition 2016, Section 'Prozessfinanzierungskosten'.

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

34 Jerger/Zehentbauer, 'Grundlage und Geltendmachung von Schäden im Zusammenhang mit der Finanzierung des Zivilprozesses' in: *Neue Juristische Wochenschrift (NJW)* 2016, page 1,353 et seq., in particular, page 1,357.

the claimant still has funds at his or her disposal, it may be argued that the funds obtained through the funding agreement are then not required to pursue the claim. With a similar line of argument, the District Court Aachen held in 2009, specifically in a case where the claimant had claimed costs in relation to third party funding of its case as part of the claim (based on a material law claim relating to Sections 280 et seq. and 249 et seq. of the German Civil Code), that such costs could not be recovered from the other side.³⁵

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

ii Liability of a funder for adverse costs

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

iii Security for adverse costs

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

In arbitration proceedings where German law is the law of the seat of the arbitration, Section 110 of the German Code of Civil Procedure will already not be applicable as long as the seat of the claimant is a country that is a Member State of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as a cost award rendered by the arbitral tribunal could in any case be enforced against the claimant on the basis of a treaty in the sense of Section 110 Paragraph 2 No. 2 German Code of Civil Procedure.³⁶ A request based on the rules of the arbitral institution, for example, in the case of the German Institution

35 *District Court Aachen (Landgericht Aachen)*, Decision dated 22 December 2009, Case 10 O 277/09.

36 *Voit*, in: *Musielak/Voit, Zivilprozessordnung*, Section 1042 ZPO para. 12; Pörnbacher/Thiel, 'Kostensicherheit im Schiedsverfahren' in: *Zeitschrift für Schiedsverfahren* (SchiedsVZ) 2010, page 17.

of Arbitration (DIS) on the basis of a request for interim relief following Section 20.1 of the DIS Rules is, in principle, conceivable in exceptional cases where a substantial risk exists that the adverse party will not be able to reimburse the other party for its costs following a respective cost award and if this risk has only arisen after the arbitration agreement was signed;³⁷ however, in practice, such a request will only rarely be successful.

iv Other issues regarding costs

In German state court proceedings, the successful party, in principle, will be able to recover its costs from the adverse party.³⁸ However, specifically regarding legal fees paid by the successful party to its legal counsel, the unsuccessful party only has to reimburse the successful party to the extent of the statutory fees stipulated in the Law on the Remuneration of Lawyers.³⁹ As a consequence, in practice, in complex proceedings, the winning party will usually only be able to recover a part of the legal fees that it paid to its counsel.

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

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

In arbitration proceedings where German procedural law is the law of the seat of the arbitration, in practice, the cost award will usually allow the succeeding party to recover the full legal fees paid to its counsel, even if calculated on an hourly basis; but only to the extent that such fees were reasonable, which will be reviewed on a case-by-case basis by the tribunal rendering the cost award. While it is also conceivable that an arbitral tribunal might decide that the legal fees to be reimbursed are capped according to the statutory fees stipulated in the Law on the Remuneration of Lawyers (considering German law is the law of the seat of the arbitration), in practice, this will only very rarely happen.

37 Pörnbacher/Thiel, 'Kostensicherheit im Schiedsverfahren' in: *Zeitschrift für Schiedsverfahren* (SchiedsVZ) 2010, page 17.

38 Section 91 para. 1 of the German Code of Civil Procedure (*Zivilprozessordnung*).

39 Section 91 para. 2 sentence 1 of the German Code of Civil Procedure (*Zivilprozessordnung*); Schulz, in: *Münchener Kommentar zur Zivilprozessordnung*, 5. Edition 2016, Section 91 ZPO para. 61. The mechanism just described also means that the legal fees for which the other side will potentially have to be reimbursed can be calculated up front in German statutory proceedings (based on claim value).

VI THE YEAR IN REVIEW

Since the beginning of 2017 there have been some changes in the German market for third party funding.

The Dutch litigation funder Omni Bridgeway in 2017 acquired one of the leading German litigation funders, Roland Prozessfinanz AG.⁴⁰ Subsidiaries of foreign funders (e.g., Burford Capital and IMF Bentham) have again increased their presence on the German market.⁴¹

While as of 2016, with FORIS AG only one of the largest German funders had offered not only traditional funding of cases,⁴² but also an immediate monetisation of claims above €1 million,⁴³ some competitors now also offer such a monetisation of claims.⁴⁴

Funders are increasingly becoming active on the German market in relation to specific cases where a high number of claimants raise claims that are in essence based on the same or very similar facts, often, but not exclusively, in the area of antitrust follow-on claims. Funders have to fund such cases on a case-by-case basis as German law does not provide for the general possibility of class actions yet. Several attempts have been made to circumvent this in the way of a transfer of claims to a special-purpose vehicle (bundling of claims), with varying degrees of success.⁴⁵

In 2018, however, in the wake of the automakers' diesel scandals and following extensive discussions among both legal scholars and the general public about the need for legal reform, the German Code of Civil Procedure was amended (with effect from 1 November 2018)⁴⁶ and now offers the possibility of a model declaratory action that can take effect for a large number of claimants. Still, this new instrument is severely restricted in that only certain consumer and similar organisations can file such a claim, and only declaratory relief can be sought. It thus remains to be seen what role such model declaratory actions will play in practice on the German market for third party funding. As of September 2018, one notable development is that the Federation of German Consumer Organizations has announced it plans to file

40 Cf. the press statement of Roland Prozessfinanz AG dated 7 July 2017.

41 Cf. the annual report of the funder FORIS AG for the year 2017 (*Geschäftsbericht* zum 31. Dezember 2017) in German language, page 13.

42 Referring to the financing of a case that is already, or will be, led by and in the name of the funded party, while the funding agreement stipulates that the funder will receive a success fee in the case that the funded party is successful and that the funder indemnifies the funded party against certain costs connected to the proceeding, should it be unsuccessful with its claim, while a mere (silent) security cession of the claim is typically (but not necessarily) also agreed.

43 Cf. the annual report of the funder FORIS AG for the year 2016 (*Geschäftsbericht* zum 31. Dezember 2016) in German language, page 14.

44 Cf. the annual report of the funder FORIS AG for the year 2017 (*Geschäftsbericht* zum 31. Dezember 2017) in German language, page 13.

45 For example, in a decision in 2015 that drew considerable public attention, the Higher Regional Court Düsseldorf decided that the assignment of claims to a special purpose vehicle violated public policy (Section 138) because it was to be expected that the special purpose vehicle would not be able to reimburse the adverse party for its costs in the proceeding in case of a loss; cf. Higher Regional Court Düsseldorf (Oberlandesgericht Düsseldorf), Decision dated 18 February 2015, Case VI-U (Kart) 3/14. The Belgium-based company CDC, specialising in antitrust follow-on claims, pursued claims related to a cartel in the cement industry. For the decision in first instance see District Court Düsseldorf (Landgericht Düsseldorf), Decision dated 17 December 2013, Case 37 O 200/09 (Kart).

46 Cf. the German Federal Law Gazette (Bundesgesetzblatt) 2018, Volume 1 (No. 25), page 1,151 et seq.

such a model declaratory claim in cooperation with the General German Automobile Club (ADAC) in connection with the automakers' diesel scandal against Volkswagen AG on 1 November 2018.⁴⁷

VII CONCLUSIONS AND OUTLOOK

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

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

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

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

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

Typically, German funding agreements will provide for a cession of the claim (assignment of the claim to the funder), but only in the form of a (silent) cession for purposes

⁴⁷ Cf. the joint press statement of the Federation of German Consumer Organizations (Bundesverband der Verbraucherzentralen) and the General German Automobile Club (ADAC) dated 12 September 2018, as of September 2018 downloadable via the link: https://www.vzbv.de/sites/default/files/2018-09-12_pm_vzbv_adac_mfk_final_en_1.pdf.

of security and not in the sense of a full monetisation and full and final purchase of the claim. The latter, an immediate monetisation of a claim, is a relatively new phenomenon on the German market.

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

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

HONG KONG

*Melody Chan*¹

I MARKET OVERVIEW

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

In 2013, the Law Reform Commission of Hong Kong (the Commission)² commenced its consultation with the industry's professionals on third party funding for arbitrations and mediations. A report was released by the Commission in October 2016 recommending that maintenance and champerty should not apply to arbitration and mediation and that the Arbitration Ordinance (Cap. 609) and the Mediation Ordinance (Cap. 620) should be amended accordingly.³

The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017 (the Amendment Ordinance) was passed by the Legislative Council on 14 June 2017. The legislation came into force, save for some specific sections as discussed below, on 23 June 2017, legalising third party funding in arbitrations and mediations in Hong Kong.

II LEGAL AND REGULATORY FRAMEWORK

Under Hong Kong's own mini constitution, the Basic Law, all the laws previously in force in Hong Kong before the handover would be maintained unless they contravene the Basic Law

1 Melody Chan is a partner at White & Case. She was assisted in writing this chapter by Stephanie Ma and Aurora Leung, trainees at White & Case.

2 The Commission's role is to reform aspects of Hong Kong law through referral from the Secretary for Justice or the Chief Justice and normally will do this in consultation with members of the relevant industry groups.

3 Law Reform Commission of Hong Kong, Report: Third Party Funding for Arbitration (October 2016) www.hkreform.gov.hk/en/docs/rtpf_e.pdf (Law Reform Commission Report).

or have subsequently been amended by the legislature. Accordingly, Hong Kong inherited the common law principles that existed before the handover, including the maintenance and champerty doctrines.

Maintenance is ‘directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse’.⁴ Champerty has been described as ‘a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute’.⁵

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

i Third party funding in court litigation

Third party funding in the court litigation context, save for the three express exceptions mentioned below, will still attract potential tortious or criminal liability. The Amendment Ordinance,⁶ discussed further below, only allows for third party funding in arbitrations and mediations to be exempted from criminal and tortious liability.

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

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

4 *Unruh v. Seeway* [2007] 2 HKC 609.

5 *Neville v. London ‘Express’ Newspaper Ltd* [1919] A C 368 at para. 382.

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

7 See *Unruh* (n.4); and Law Reform Commission Report para. 1.5.

8 [2009] HKCU 172.

9 [2010] 2 HKLRD 1137.

law suggesting that the Hong Kong courts will allow for litigation funding in the insolvency context where there is a 'legitimate commercial purpose' (*Re Po Yuen (To's) Machine Factory Ltd*).¹⁰

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

ii Third party funding in arbitration

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

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

However, not all of the amendments contained in the Amendment Ordinance have been incorporated into the Arbitration Ordinance when the Amendment Ordinance came into effect in 2017. At the time of writing in September 2018, Division 3 and Division 5 have yet to come into force. Division 3 seeks to, among other matters, ensure that third party funding of arbitration is not prohibited by the civil and criminal common law doctrines of maintenance and champerty. Division 5 predominantly relates to disclosure in third party funding in arbitration. According to the Legislative Council Brief (Legco Brief)¹⁶ prepared by the Department of Justice for the first reading of the Amendment Ordinance in the

10 [2012] 2 HKLRD 752.

11 [2018] HKCFI 1852.

12 *ibid* [98].

13 [1995] 2 HKLR 475.

14 *Unruh* (n.4) [123].

15 *Unruh* (n.4) [119].

16 Department of Justice, Legislative Council Brief: Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (File Ref.: LP 19/00/16C) www.legco.gov.hk/yr16-17/english/bills/brief/b201612301_brf.pdf (Legco Brief).

Legislative Council, the Amendment Ordinance would be rolled out in two phases in order to 'facilitate the preparatory work for the relevant regulatory framework to be done before the provisions clarifying the legal position come into operation'.¹⁷

The main change ushered in by the Amendment Ordinance now is a declaration that third party funding is allowed in arbitration, including proceedings before emergency arbitrators and ancillary court proceedings.¹⁸ The Amendment Ordinance defines third party funding of arbitration to mean a 'provision of arbitration funding for an arbitration (1) under a funding agreement; (2) to a funded party; (3) by a third party funder; and (4) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement'.¹⁹ A third party funder is someone '(a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b) who does not have an interest recognized by law in the arbitration other than under the funding agreement'.²⁰

In the meantime, the Hong Kong International Arbitration Centre has introduced changes to accommodate the legalisation of third party funding for arbitrations in its proposed amended Administered Arbitration Rules (the Proposed HKIAC Rules) published on 11 July 2018 for public consultation. The revised rules expressly recognise third party funders and funding agreement such funder may enter into with an arbitration party.²¹

iii Third party funding in mediation

The Commission also recommended that third party funding be allowed in mediation²² and the Amendment Ordinance amends the Mediation Ordinance to allow for third party funding in mediation.

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

However, in the same way as certain provisions in the Amendment Ordinance are not yet in force, certain sections amending the Mediation Ordinance are also not yet in force at the time of writing. They have been postponed and will be brought into force on a date to be appointed by the Secretary of Justice.²³

iv Self-regulation of third party funding

The Law Reform Commission envisioned that a Code of Practice (the Code) would be issued by a body under the Arbitration Ordinance to promote best practices in the initial three-year period.²⁴ This is a common approach in Hong Kong to ensure accountability among the

17 Legco Brief at para. 23.

18 Amendment Ordinance, Sections 98K and 98 L.

19 Arbitration Ordinance Cap 609, Sections 98F and 98G (Arbitration Ordinance).

20 Arbitration Ordinance Sections 98F and 98J(1)(a) and (b).

21 Hong Kong International Arbitration Centre, Proposed Amended HKIAC Administered Arbitration Rules (12 July 2018) www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/HKIAC%20AAR%20%28for%20public%20consultation%29%2012.7.2018.pdf (Proposed HKIAC Rules).

22 Law Reform Commission of Hong Kong Report, *ibid.* at para. 3.48.

23 Amendment Ordinance, Section 1(3)(a).

24 Arbitration Ordinance Section 98P.

relevant industries. This also reflects the trend in other common law jurisdictions that a ‘light touch’²⁵ or self-regulating approach towards third party funding in arbitration is often preferred.

On 30 August 2018, the Department of Justice launched a two-month public consultation²⁶ to seek views on a draft of the Code of Practice (the draft Code).²⁷ The draft Code is said to apply to some pre-contractual negotiations and the making and performing of any funding agreement between a third party funder and a funded party. According to the draft Code, the third party is subject to duties to maintain capital adequacy requirements to (1) pay all debts when they become due and payable; and (2) cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months.²⁸ They also must maintain access to a minimum of HK\$20 million of capital.²⁹

The draft Code also states that the third party funder must undertake that ‘(1) the third party funder will not seek to influence the funded party or the funded party’s legal representative to give control or conduct of the arbitration or mediation to the third party funder except to the extent permitted by law; and (2) the third party funder will not take any steps that cause or are likely to cause the funded party’s legal representative to act in breach of professional duties’,³⁰ addressing the issue mentioned by Stone J in *Akai Holdings Ltd v. Ho Wing On Christopher*.³¹

The draft Code also includes provisions attributing to funders the responsibility for compliance by its subsidiary, associated entities and any investment advisors acting as its agent,³² a dispute resolution mechanism for disputes on the funding agreement, a complaints procedure, and a requirement for an annual return.³³

The draft Code, when implemented, will not be a part of the legislation, and so failure to comply with the Code will not attract any legal consequences.³⁴ However, the Amendment Ordinance does give the Code some teeth: while failure to comply does not make a person liable to civil or criminal liabilities, it can be used as evidence in court and may be taken into account in court proceedings if it is relevant to the matter at hand.³⁵

25 Law Reform Commission of Hong Kong Report, *ibid.* at para. 4.14.

26 Department of Justice, Public consultation on proposed code of practice on third party funding of arbitration and mediation starts today (30 August 2018) www.info.gov.hk/gia/general/201808/30/P2018083000396p.htm.

27 Department of Justice, Draft Code of Practice for Third Party Funding of Arbitration and Mediation https://www.doj.gov.hk/eng/public/pdf/2018/tpfcode_e.pdf (Draft Code).

28 Draft Code, clause 2.5(1).

29 Draft Code, clause 2.5(2).

30 Draft Code, clause 2.9.

31 [2009] HKCU 172. Stone J criticised that funders often appear in practice to exercise more control over proceedings than proper.

32 Draft Code, clause 2.1.

33 Draft Code, clauses 2.17–2.19.

34 Amendment Ordinance, Section 98S(1).

35 Amendment Ordinance, Section 98S(2).

v Contingency fees rules

Unlike other jurisdictions, Hong Kong law does not permit Hong Kong solicitors or barristers to charge conditional or contingency fees.³⁶ While the Commission conducted a consultation on conditional fees in 2005, it concluded that such reform was unnecessary, as the Commission was of the view that it would be against the public interest to allow Hong Kong lawyers to charge conditional fees and contingency fees.

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

The Amendment Ordinance does make clear that third party funding is not available to lawyers acting for parties in the arbitration but it does not prohibit providers of legal services or persons practising law from being third party funders.³⁷ It is worth noting, however, that this section has not yet come into force, as it falls under Division 3 in the Amendment Ordinance.³⁸

III STRUCTURING THE AGREEMENT

The Amendment Ordinance does not specify any particular requirements as to the funding agreement, but defines a funding agreement to mean ‘an agreement for third party funding of arbitration that is (a) in writing; (b) made between a funded party and a third party funder; and (c) made on or after the commencement date of Division 3’.³⁹ The draft Code requires that a third party funder must set out and explain clearly in the funding agreement all the key features, risks and terms of the proposed funding, provide a Hong Kong address for service, and set out the name and contact details of the advisory body responsible for monitoring and reviewing the operation of third party funding.⁴⁰ While the inclusion of such terms is not compulsory, it is seen as best practice to include those terms as they are incorporated in the draft Code.

The draft Code also requires the funding agreement to state whether a third party funder can terminate the funding agreement when it ‘(1) reasonably ceases to be satisfied about the merits of the arbitration; (2) reasonably believes that there has been a material adverse change of prospects to the funded party’s success in the arbitration; (3) reasonably believes that there has been a material adverse change of prospects to the funded party’s being able to reach any agreement with the other party(ies) to the mediation to resolve in whole or in part the dispute in question; or (4) reasonably believes that the funded party has committed a material breach of the funding agreement’.⁴¹ The funding agreement must provide that if

36 Law Reform Commission Report, para 3.36; Legal Practitioners Ordinance Cap 159 Section 64(1); Law Society of Hong Kong, *Guide to Professional Conduct* Vol. 1, Rule 4.17; Bar Association, Code of Conduct, para. 124.

37 Amendment Ordinance, Section 98F and Section 98O.

38 Amendment Ordinance, Section 1(3)(a).

39 Amendment Ordinance, Section 98H.

40 Draft Code, clause 2.3.

41 Draft Code, clause 2.13.

the third party funder terminates the funding agreement, the third party funder is to remain liable for all funding obligations accrued to the date of termination, unless the termination is due to a material breach.⁴²

IV DISCLOSURE

i Disclosure to third party funders

Arbitrations in Hong Kong generally abide by strict confidentiality rules. Section 18 of the Arbitration Ordinance prohibits any disclosure of information relating to the existence of any arbitration proceedings and any subsequent awards made pursuant to the arbitration proceedings. However, with the development of a third party funding regime for arbitration, there is a need to balance the right to confidentiality of the party not seeking third party funding and the need of information for the third party funder. Section 98T of the Amendment Ordinance carves out an exception to the confidentiality obligation and allows disclosure by a party to another person for the purpose of having or seeking third party funding from the person.⁴³

Section 98T provides that despite the restriction under Section 18, a funded party can communicate information relating to the arbitral proceedings to a third party funder and the subsequent awards made for the purpose of having or seeking funding. However, no information may be further communicated unless the information is made 'to protect a legal right or interest and enforce or challenge an arbitration award',⁴⁴ 'to any government body, regulatory body, court or tribunal and the person is obliged by law to make the communication'⁴⁵ or 'to a professional adviser of the person for the purpose of obtaining advice in connection with the third party funding or arbitration'.⁴⁶ However, it should be noted that these sections have not yet come into force as they are contained in Division 5 of the Amendment Ordinance.⁴⁷ There is a section in the Draft Code on confidentiality and privilege that reaffirms the duty for the third party funders to observe confidentiality of the arbitration.⁴⁸ Similarly, the Proposed HKIAC Rules also allow parties to make necessary publication and disclosure to a person for the purposes of having or seeking third party funding for arbitration.⁴⁹

ii Disclosure to the other party

To protect the party not seeking funding, the funded party must give written notice of the fact that a funding agreement has been made and the identity of the third party funder.⁵⁰ The notice must be given on or before the commencement of the arbitration, or, for a funding agreement made after the commencement of the arbitration, within 15 days after the funding

42 Draft Code, clause 2.15.

43 Amendment Ordinance, Section 98U.

44 Amendment Ordinance, Section 98T(2)(a).

45 Amendment Ordinance, Section 98T(2)(b).

46 Amendment Ordinance, Section 98T(2)(c).

47 Amendment Ordinance, Section 1(3)(a).

48 Draft Code, clause 2.8.

49 Proposed HKIAC Rules, Article 45.4(e).

50 Amendment Ordinance, Section 98U(1).

agreement is made.⁵¹ Notice must be given to all parties to the arbitration and the arbitral tribunal (or an emergency arbitrator if there is one).⁵² Where there is no arbitral tribunal set up at the time the notice is served, the notice must instead be given to the arbitration tribunal immediately after one is set up for the arbitration.⁵³ There should also be disclosure about the end of third party funding.⁵⁴ The draft Code reaffirms the funded party's duty to disclose information about the third party funding arrangement.⁵⁵

The Proposed HKIAC Rules also require parties to disclose the (1) existence of any funding agreement; and (2) identity of the third party, as soon as practicable after the funding agreement is made, or in the Notice of Arbitration or the Answer to the Notice of Arbitration, whichever event is earlier.⁵⁶

V COSTS

i Adverse costs against third party funders

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

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

51 Amendment Ordinance, Section 98U(2).

52 Amendment Ordinance, Section 98U(3).

53 Amendment Ordinance, Section 98U(4).

54 Amendment Ordinance, Section 98V.

55 Draft Code, Clauses 2.10 – 2.11.

56 Proposed HKIAC Rules, Article 44.

57 Law Reform Commission Report 1.

58 Rules of the High Court Cap 4A, Ord 62, r 6A; High Court Ordinance Cap 4, Sections 52A and 52B.

59 Law Reform Commission Report, paras. 2.11(1) & 7.31(1).

60 Law Reform Commission Report, paras. 2.11(2) & 7.31(2).

61 Legco Brief, Annex B, Recommendation 4.

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

In contrast to the Amendment Ordinance, the Proposed HKIAC Rules move further and give the arbitral tribunal power to take into account any third party funding arrangement in apportioning all or part of the costs of the arbitration.⁶³

ii Security for adverse costs against third party funders

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

VI THE YEAR IN REVIEW

There have been a number of new developments in third party funding in Hong Kong in 2017–2018. On one hand, the court has refused to expand the existing exceptions to allow third party funding in other areas of court litigation. On the other hand, the regulation regime on third party funding in arbitration and mediation is gradually developing. First, the publication of the draft Code is a further step in opening up the availability of third party funding in arbitrations and mediations. Secondly, Hong Kong International Arbitration Centre has proposed changes to its Administered Arbitration Rules to accommodate the legalisation of third party funding arrangements. The Proposed HKIAC Rules recognise third party funders and third party funding agreements. They set out disclosure standards for parties seeking third party funding and also give arbitral tribunals the power to order costs against third party funders.

The industry is expecting the draft Code to be finalised in the near future to provide a clearer set of standards and practices that third party funders are expected to comply with. The final rollout by the Secretary of Justice of Division 3 and Division 5 of the Amendment Ordinance will see all of the Commission’s recommendations and Legislative Council’s adoptions fully coming into force.

VII CONCLUSION AND OUTLOOK

Third party funding in Hong Kong has seen new developments this year. At present, there is limited guidance on how third party funding will affect arbitrations in Hong Kong. Guidance

62 Draft Code, clause 2.12.

63 Proposed HKIAC Rules, Article 34.4.

64 Law Reform Commission Report, paras. 2.11(3) and 8.15.

from the Commission, the Amendment Ordinance and the draft Code indicates that Hong Kong envisions its third party funding regime to be similar to that of other arbitration-friendly jurisdictions. Third party funding is self-regulated, with disclosure requirements imposed on the third party funder and the funded party. There are carve-outs made against normal confidentiality requirements in arbitration. Some things, however, will not change, such as the general ban on solicitors and barristers to charge contingency or conditional fees. The future of the powers to award adverse costs and security for adverse costs remains to be seen. At present, the Commission does not see the need to empower any arbitrator or tribunal to have the power to award security for adverse costs, but may, after the initial trial period, empower any arbitrator or tribunal to do so.

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

ITALY

*Federico Banti and Eva de Götzen*¹

I MARKET OVERVIEW

The Italian legal system is still rather unfamiliar with litigation funding.

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

The absence of prior experience concerning litigation funding on the Italian market is mainly attributable to the origin of the third party funding practice, which lies in the common law system. Moreover, Italian court proceedings have traditionally been considered time-consuming, and therefore inconsistent with the evident goals sought by investors. Furthermore, contingency fee arrangements between client and lawyer have traditionally been forbidden under the Italian legal system.² As the recently passed review of the Italian Code of Professional Conduct for Lawyers currently stands, Italian lawyers cannot accept a share of the asset that is challenged in the case (see Article 13, Italian Law No. 247/2012, *pactum de quota litis* or contingency fee). Finally, there is a general lack of awareness on the part of potential users (i.e., prospective claimants) of litigation funding and of the opportunities connected to it.

It flows from the above that over the past few years Italy has not provided the perfect environment to nurture litigation funding.

Against this background, the Italian legal system has, however, recently undergone a radical change.

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

1 Federico Banti is a partner and Eva de Götzen is a senior lawyer at Osborne Clarke.

2 They were at first allowed pursuant to Law Decree No. 223/2006. See below.

Other initiatives have enhanced access to justice in multiparty actions (see new Article 140 *bis*, Consumer Code, which contemplates an opting-in collective action for damages arising out of liability in connection with mass contracts, torts, unlawful commercial practice or non-competitive behaviour or antitrust infringements).

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

- a* the Italian Legislative Decree No. 3/2017, which implements EU Directive 2014/104/EU and introduces a series of new procedural rules that considerably simplify the possibility of obtaining compensation for damages caused by infringements of EU or national competition laws, by addressing both private claims and class actions;
- b* the increasing number of Italian insolvency proceedings relating to high-value claims that do not have sufficient resources to start proceedings and to pursue such claims to an economically efficient conclusion;
- c* the fact that any judgment delivered by the lower courts is immediately enforceable in Italy, regardless of the fact that it has been appealed; and
- d* only a very small percentage of possible claims are eligible for financial assistance funded by the government (i.e., legal aid) under the Italian legal system. Currently, a legal aid applicant must have an annual gross taxable income, together with that of cohabiting dependant family members, lower than €11,528.41.³

All the above-mentioned circumstances are playing a role in making Italy more attractive and suitable for litigation funding, by *de facto* increasing the number of parties entitled to bring a high-value claim. It is therefore reasonable to conclude that third party funding may well find its market in Italy and several professional litigation funders have been reported to have shown interest in financing claims in Italy.

II LEGAL AND REGULATORY FRAMEWORK

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

Generally speaking, the Italian legal system expressly governs a number of contracts, and party autonomy is the cornerstone of this system. More precisely, under the first paragraph of Article 1322 of the Italian Civil Code, parties are allowed to create their own contractual framework, always within the limits imposed by the law. In other words, the Italian legal system entitles parties to create a bespoke contractual relationship for their commercial transaction, by adapting the 'typical' contracts ruled by Italian law to the interests at stake and the relevant circumstances.

According to the second paragraph of Article 1322, parties are free to enter into other kinds of agreement that differ from those provided by the Italian law, provided that such non-traditional relationships seek interests worthy of protection under Italian law ('atypical

³ See Article 74 of Presidential Decree No. 115 dated 30 May 2002.

contract'). In other words, the parties are free to deviate from typical forms of contract specifically ruled by law and to validly enter into atypical contracts provided that the aims pursued by the parties deserve protection (see Articles 1322 and 1325 et seq., Italian Civil Code).

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

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

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

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

A relationship that is extremely close to the litigation funding is the 'association in participation' contract – which is similar to a joint venture – which is a contract whereby the associate attributes to the associating party the share of the proceeds of its business or the proceeds from the conduct of one of more deals in consideration for a specific contribution from the other associating party.⁴ Third parties acquire rights and obligations only towards the associating party.⁵ The management of the business is only carried out by the associating party and the contract must provide what type of rights of control are granted to the associate. Unless otherwise agreed, the associate shares in the losses to the same extent as its shares in the profits, but the losses that affect the associate cannot exceed the value of its initial contribution.⁶ By way of analogy, the funder could be considered as an associate and the claimant as the associating party.

A litigation funding agreement cannot be characterised as a loan agreement under the Italian legal system. According to Article 1813 of the Italian Civil Code, a loan agreement is the contract through which the lender delivers to the borrower a specific amount of money

4 Article 2549, Italian Civil Code.

5 Article 2552, Italian Civil Code.

6 Article 2553, Italian Civil Code.

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

- a* the claimant is not obliged to pay anything if the case fails; and
- b* in case of success, the return will be a multiple or a percentage of the award or settlement (the return is never equal to the investment made by the fund).

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

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

A litigation funding agreement should be acceptable under the Italian legal system also from the contingency fee's standpoint. Paragraph 2(a) of Article 2 of Law Decree No. 233/2006 – according to which, only if the lawsuit is successful or is favourably settled out of court, the successful lawyer is paid a percentage of the damages recovered by its client instead of or as a discount on a traditional fee – overcame the former prohibition on contingency fee agreements set forth by the Italian law so as to safeguard the independence and the impartiality of the role of the lawyer. Therefore, from 2006 onwards, such agreements were allowed in Italy. As proof of this, in the context of bankruptcy proceedings, Italian lawyer were expressly allowed to be paid with a percentage of the recovery as an alternative to the application of the tariff system provided for by the law, provided that the claim aims at collecting sums or other assets.⁷ However, as mentioned above, Law No. 247/2012 changed the situation and forbade contingency fee arrangements while allowing success fees. Consequently, since 2012 counsel cannot accept for services a return share of the recovery or out-of-court settlement instead of fees should the action succeed, since such agreement could amount to a breach of professional duty or ethical rules of professional conduct. As a result, Italian counsel is expected to request fees to be calculated in relation to both the amount in dispute and the tariff system provided for by the law, though room is left in relation to success fees. However, third party funding is different from contingency fee arrangement, as the funder is not a lawyer. Moreover, the relevant contract is entered into directly by the funder with the disputant and not with the lawyers. This leads us to conclude that a funder is not affected by any limit set forth by Italian law in relation to contingency fees.

Finally, it is worth adding that, notwithstanding the above-mentioned Law No. 247/2012, the Italian practice allows contingency fees to be limited to bankruptcy proceedings,⁸ provided that the contingency fee agreement is entered into by and between the lawyer and the bankrupt entity that does not have sufficient resources to start proceedings.

7 See the consolidated version of Milan Court Circular No. 2/2010, bankruptcy section, dated 23 March 2010 and integrated pursuant to Circular No. 4/2010 dated 29 September 2010, point H.15.o).

8 See the Milan Court Circular No. 3/2012, bankruptcy section, dated 4 December 2012 (available at https://www.tribunale.milano.giustizia.it/files/fallimenti/Circolari/circolare3_2012.pdf).

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

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

However, according to recent Italian case law concerning the exercise of an organised business of purchasing credits for damages correlated with the advancing of the costs of repair of vehicles damaged in road accidents, the professional collecting of claims must be regarded as 'a financial business', thus falling within the meaning of Article 106 of the single text of banking laws (Italian Legislative Decree No. 385 dated 1 September 1993). As a consequence, such an assignee – which is, on closer inspection, a profit-seeking financial entity that addresses legal claims – must be expressly authorised by the Bank of Italy. Otherwise, if the assignee is not registered in the relevant roll held by the Bank of Italy and does not hold the relevant authorisations, the assignment of the credit is null and void as it is contrary to Italian mandatory rules (under Article 1418 of the Italian Civil Code and Articles 106 and 132 of Italian Legislative Decree No. 385/1993). This leads us to conclude that the Italian legal system leaves room for a funder to be assigned a legal claim by the claimant, provided that it meets certain conditions.

For the sake of completeness, it is worth adding that the Italian legal system allows the parties to choose the law applicable to a cross-border contract. Both the 1980 Rome Convention and Regulation (EC) No. 593/2008 (Article 3) allow the freedom of choice of the law governing a contract, provided that certain safeguards concerning weak parties (consumers, assured, employees) are guaranteed and relevant overriding mandatory provisions (Article 9) are given effect. According to scholars, rules concerning financial activities can be regarded as overriding mandatory provisions. As a result, the principle of party autonomy is expected to foster access to the Italian market by foreign funders, by allowing them to choose a law applicable to the third party agreement that is most familiar to the funder, provided that certain conditions are met.

III STRUCTURING THE AGREEMENT

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

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

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

- a* legal merits of the claim;
- b* likelihood of success;
- c* quantum of damages likely to be awarded (higher than a certain threshold amount);

- d* accuracy of costs estimate;
- e* claimant's solvency; and
- f* defendant's solvency and prospects of recovering the damages awarded.

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

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

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

IV DISCLOSURE

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

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

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

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

- a* its production will not cause serious harm for the party or for the third party, without requiring them to violate any of the secrecy obligations provided in Articles 200 and 201 of the Italian Code of Civil Procedure (professional secrecy or official secrecy);
- b* the proof of the relevant fact cannot be obtained from any other source; and
- c* the order to produce relates to documents that are necessary or at least very important for the judge's ability to decide the case.

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

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

However, in light of the arbitrators' obligations of impartiality and independence (both in national arbitration proceedings⁹ and international proceedings),¹⁰ the existence of a third party funding agreement might be relevant for the purpose of evaluating any possible conflicts of interest on the part of the arbitrators. Therefore, a duty to disclose may be raised in such a context.

V COST

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

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

To calculate lawyers' fees, Ministerial Decree No. 55/2014 (the Ministerial Decree)¹¹ applies. The Ministerial Decree sets out parameters and criteria for the calculation of fees based on, *inter alia*, the value of the proceedings, their complexity and the number of parties

9 See, for instance, Article 18 of the Regulations of the Milan Chamber of Arbitration.

10 Namely, the IBA Guidelines on Conflicts of Interest in International Arbitration.

11 As referred to by Article 13 of Law 247 dated 31 December 2012.

involved. For instance, by applying the scale contained in the Ministerial Decree, if the value of the case is €10 billion, the lawyers' fees are capped at €150,303. If the value of the case is €20 billion, the lawyers' fees are capped at €195,397.

This amount should be added to the court administrative costs and legal charges (VAT, which is currently 22 per cent), and a mandatory contribution to the lawyers' pension fund (CPA – currently 4 per cent).

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

VI CONCLUSION AND OUTLOOK

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

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

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

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

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

NETHERLANDS

*Rein Philips*¹

I MARKET OVERVIEW

The Dutch market for third party litigation funding is developing rapidly.² Still a relatively unknown phenomenon a few years ago, today many Dutch lawyers will tell you it is the flavour of the day. That being said, litigation finance in the Netherlands is not nearly as common as it is in Australia or the UK. It is hard to determine potential market size for litigation funding based on publicly available figures but it seems safe to assume that litigation funding in the Netherlands is not yet half way to reaching its full potential.

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

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

Dutch insolvency administrators and supervisory judges in insolvencies are only just starting to discover the benefits of litigation finance. Based on the widespread use of litigation

1 Rein Philips is managing director and co-founder of Redbreast Associates NV.

2 There is no public data available on the actual use of litigation funding in the Netherlands, hence this overview is to a large extent on the subjective experience and analysis of relevant published events of the author.

finance in insolvency in countries such as Australia, Germany and the UK, and the obvious benefits that litigation finance offers to insolvent estates lacking the funds to prosecute valid claims, there is potential for further development in this area.

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

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

Notable players

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

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

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

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

II LEGAL AND REGULATORY FRAMEWORK

i Funding of individual claims

Dutch law does not put particular restrictions on litigation funding or the degree of control that a third party litigation funder can assume in the funded lawsuit. Common-law doctrines of maintenance and champerty did not find their way into the Dutch Civil Code (DCC).

As such, a funding agreement will be governed by the general rules of contract, meaning that parties are generally free to shape their funding agreement as they like as long as their agreement does not result in a violation of public policy (including due process).

ii Funding of class actions

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

- a class actions in which a Dutch special purpose foundation or association represents all claimants of a certain class, whether or not the claimants have signed up or are actively involved in any other way; and
- b class actions in which the claim entity only represents claimants with which it has entered into an agreement to that effect.

305a class actions

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

A bill has been passed by the House of Representative and is now awaiting approval by the Senate that will enable 305a-Organisations to also sue for compensation of damages after liability has been determined (the Bill). Together with this new feature, the Bill will to a large extent enact existing non-binding guidelines for 305a-Organisations that were drafted by a commission of experts and representatives of claimants' organisations.

Relevantly, the Bill stipulates that to qualify as a 305a-Organisation the entity must have sufficient financial means to bring the claim and must have a professional board whose members do not have a direct or indirect financial interest in the outcome of the lawsuit. This means that the board members must be compensated independently from the outcome of the lawsuit and, presumably, cannot be representatives of a third party litigation funder financing the suit. This cuts off the possibility for the litigation funder to exercise direct control over its investment when funding claims of a 305a-Organisation (de Claimcode).

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

The *Fortis/Ageas* settlement showed that the court, when asked to confirm a settlement by a 305a-Organisation, may critically review the compensation received under the settlement by the claimants' organisations and this may even be cause to deny the confirmation. Although, after some amendments, the settlement was eventually confirmed, this affair, together with impracticalities and uncertainties associated with the Claimcode and the Bill (only partially discussed above), have caused some practitioners and funders to question the viability of the use of 305a-Organisations. As always, the proof of the pudding will be in the eating and it will be interesting to see how the market will respond when the Bill is implemented, possibly in the course of 2019.

Regular class actions

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

Contingency fees

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

III STRUCTURING THE AGREEMENT

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

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

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

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

- a* The amount of funding to be provided and conditions for payment – the litigation funder will usually provide the funding through the direct payment of invoices for attorneys' fees and other costs incurred in the litigation.
- b* Compensation or return to the funder – the compensation of the funder usually amounts to 20 per cent to 40 per cent of the actually realised proceeds after subtraction of costs. Alternative compensation schemes may include a preferred return out of the proceeds of two or three times the investment or a preferred cumulative interest on the committed capital.
- c* Information sharing – in the Netherlands information exchanged between claimant and funder is not discoverable in the proceedings. In general, the litigation funding agreement will therefore stipulate that the funder is provided with all information regarding the dispute without limitation and is kept fully up to date by litigation counsel on all material progress of the case and any settlement discussions.
- d* Governance and control – the litigation funder will demand some kind of control over important decisions such as the acceptance of a settlement offer, the filing of an appeal or the replacement of litigation counsel. Usually the claimant will not be allowed to take such decisions without the consent of the litigation funder and vice versa. The agreement may provide for the appointment of an independent third party adviser or exit, or both, in the event of deadlock.
- e* Representations – the most important representations of the claimant regard the accuracy and completeness of the information provided in the due diligence process preceding the agreement. Important representations of the funder include the absence of conflicts of interest and the availability of the committed capital.
- f* Exit or termination – the agreement will usually allow the funder to terminate the agreement in the event of breach by the claimant or a material adverse change, such as surfacing of new facts that materially impact the chances of success.
- g* Counterclaims and cost orders – the costs of defence against possible counterclaims and liability for cost orders may or may not be covered by the funding agreement. The Netherlands has a loser-pays rule. However, outside litigation regarding the infringement of intellectual property right where the cost order is based on actual litigation expenses, cost orders are based on fixed tariffs that are usually less than 10 per cent of the actual costs of litigation.

IV DISCLOSURE

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

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

V COSTS

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

VI CONCLUSIONS AND OUTLOOK

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

The providers of third party funding in the Netherlands are generally professional parties with a solid background in law practice and so far have caused little legal or public

turmoil. The exception to this general rule is class action brought by 305a-Organisations. These organisations have the power to represent all claimants in a certain class independent from their active participation and have been at the centre of some of the more publicised class actions that were brought mainly against financial institutions in the wake of the financial crisis. A new law is expected to be enacted in 2019 that will extend the scope of action of 305a-Organisations to claims for actual damage compensation but simultaneously raise the thresholds for being recognised as a 305a-Organisation. This law and the increase in claims brought by 305a-Organisations have triggered a debate that includes the way that these organisations are funded. Although it is generally recognised that third party litigation funding can play a positive role in bringing just class actions to fruition, restrictions are imposed on the degree of control a third party funder can exercise in these types of cases and the fee it charges for its services can be subject to scrutiny of the courts. In the coming years it will become apparent whether these developments will affect the viability of the use 305a-Organisations as some fear.

NEW ZEALAND

*Adina Thorn and Rohan Havelock*¹

I MARKET OVERVIEW

Funded litigation in New Zealand is not as common as in comparable common law jurisdictions such as the United Kingdom and Australia, but is undoubtedly on the rise.² There are several local and overseas litigation funders operating. The local funders include LPF Group Ltd, Litigation Funding Ltd, Tempest Litigation Funders, and Earthquake Services Ltd. The overseas funders include Harbour Litigation Funding (United Kingdom) and Litigation Lending (Australia).

In recent years, a variety of proceedings funded by third parties have been brought involving allegations in relation to losses on share investments caused by misleading statements in a share prospectus,³ building products,⁴ losses resulting from kiwi fruit being affected by the entry of disease into the country,⁵ illegitimate fees charged to consumers by banks,⁶ insurance claims arising out of earthquakes⁷ and breaches of directors' duties owed to companies.⁸

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

1 Adina Thorn is a principal and Rohan Havelock a consultant at Adina Thorn Lawyers.

2 Statistics on the number of funded civil proceedings are not available. In 2016, 2,602 new civil proceedings were filed and 2,352 proceedings disposed. In 2017, 2,653 civil proceedings were filed and 2,360 proceedings disposed. This data was taken from Report from the High Court 2017: the Year in Review. See <https://www.courtsofnz.govt.nz/the-courts/high-court/30-december-2017/annual-statistics-for-the-high-court-31-december-2017>.

3 *Saunders v. Houghton* [2014] NZHC 2229.

4 *White v. James Hardie New Zealand* [2017] NZHC 2112.

5 *Strathboss Kiwifruit Ltd v. Attorney-General* [2018] NZHC 1559.

6 *Cooper v. ANZ* [2013] NZHC 2827.

7 *Southern Response Earthquake Services Ltd v. Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312.

8 *Walker v. Forbes* [2017] NZHC 1212.

II LEGAL AND REGULATORY FRAMEWORK

There is no specific legislation in New Zealand governing litigation funding,⁹ or even class actions. Instead, the applicable principles have been developed by the courts in the context of the existing rules of civil procedure that do not specifically govern litigation funding or class actions.¹⁰ These existing rules have necessarily been applied in a flexible and liberal way to cater for the modern style of group litigation.

i Attitude and role of the courts

The recent attitude of the New Zealand courts to litigation funding can be described as ‘cautiously permissive’. Although the common law torts of ‘maintenance’ (support of litigation by a stranger without just cause) and ‘champerty’ (an aggravated form of maintenance involving such support in return for a share of proceeds) have not been abolished in New Zealand and their role is not necessarily abrogated,¹¹ the general approach taken to these torts is a relaxed one. This minimises their potential application to funding arrangements.

The Supreme Court of New Zealand has made it clear that it is not the role of the courts to act as general regulators of litigation funding arrangements or to give prior approval to such arrangements, outside their supervisory role in ‘representative’ proceedings under Rule 4.24 of the High Court Rules.¹² 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.¹³

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.¹⁴ There are two basic grounds for intervention:

- a Where there is a manifestation of an abuse of process on traditional grounds, such as where proceedings deceive the court, are fictitious, or a mere sham, use the process of the court in an unfair or dishonest way or for some ulterior or improper purpose or in an improper way, are manifestly groundless, without foundation or serve no useful purpose, and are vexatious or oppressive.¹⁵
- b Where a funding arrangement amounts to an assignment of a bare cause of action to a third party funder in circumstances where this is not permissible (i.e., the exceptions to maintenance and champerty do not apply). In assessing whether litigation funding

9 Similarly, there are also no industry associations or codes of conduct.

10 High Court Rules 2016 (part of the Senior Courts Act 2016).

11 See *PriceWaterhouseCoopers v. Walker* [2017] NZSC 151 at [121] per Elias CJ.

12 This procedure, inherited from England as developed in the 17th and 18th centuries, allows one or more persons to sue on behalf of or for the benefit of all persons with the same interest in the subject matter. This requires either (1) consent of the other persons who have the ‘same interest’ (meaning a common issue of fact or law of significance for each member of the class represented) or (2) a court direction on an application made by a party or intending party to the proceeding.

13 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [28]-[29].

14 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [46].

15 *PriceWaterhouseCoopers v. Walker* [2016] NZCA 338 at [14(e)].

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.¹⁶

Even where such concerns arise, the provision of appropriate undertakings by a funder may be effective to allay them. In one notable case,¹⁷ 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 that the belated provision of undertakings given by the funder to the Court (1) not to rely on clauses in the security agreement giving it greater control than it had under the funding agreement and (2) to pay a proportion of proceeds of a successful claim for the benefit of unsecured creditors (where the funder was otherwise entitled to all of these under the security agreement) satisfied concerns as to the permissibility of the assignment.

ii Regulation of litigation funders

As providers of financial services and products in trade, litigation funders are subject to the provisions of the Fair Trading Act 1986.¹⁸ This contains consumer protections against misleading and deceptive conduct, unsubstantiated representations, and false or misleading representations. The legislation provides redress against such conduct by funders in, for example, marketing funding, negotiating with prospective plaintiffs, or in relation to acts or omissions while a funding arrangement is in place.

Funders with a place of business in New Zealand, and who provide a 'financial service' (typically, this is because they act as a creditor under a credit contract),¹⁹ must register as a financial service provider (FSP). Those providing services to 'retail clients'²⁰ must also belong to a dispute resolution scheme. All FSPs are subject to the 'fair dealing' provisions in the Financial Markets Conduct Act 2013, which prohibit misleading conduct, false or misleading representations and unsubstantiated representations in relation to financial products and services. The regulatory authority, the Financial Markets Authority, can take civil action against FSPs whose conduct breaches these provisions. Possible civil orders include declarations of contravention, pecuniary penalties²¹ and compensatory orders.

16 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91; *PricewaterhouseCoopers v. Walker* [2016] NZCA 338.

17 *PricewaterhouseCoopers v. Walker* [2017] NZSC 151 at [77] to [91].

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

19 As defined in Section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act.

20 As defined in Section 49 of the Financial Service Providers (Registration and Dispute Resolution) Act.

21 In the case of a specified civil liability provision, the maximum penalty is the greatest of the consideration for the relevant transaction, or three times the amount of the gain made or loss avoided, or NZ\$1 million (in the case of an individual) or (NZ\$600,000) in any other case: Section 490(1), Financial Markets Conduct Act 2013.

III STRUCTURING THE AGREEMENT

Funded litigation typically involves a relationship between three parties: the litigation funder, the lawyers, and the funded plaintiff or plaintiffs. There will be at least two contracts involving these parties. First, there will be a retainer agreement between the lawyer and the funded plaintiff or plaintiffs defining the scope and terms of the legal services. Second, there will be a funding agreement between the litigation funder and the funded plaintiff or plaintiffs defining the terms on which funding is to be provided. In addition to incorporating terms standard in commercial agreements (such as confidentiality), these terms will comprehensively regulate matters such as the level of recoveries to be enjoyed by the funder, the extent to which the funder has control over the litigation (including veto rights over settlements), the application of recoveries and termination.

In addition to these agreements, there may be a separate agreement entered into between the lawyers and the litigation funder, governing matters such as the level of legal fees and expenses, the process for invoicing and payment of these, and reporting obligations. Quite separately, the litigation funder may also appoint a project manager to monitor the progress of the funded litigation against the applicable budget.

i No requirement for court approval

In a significant decision at the end of last year, the Court of Appeal confirmed that the representative action procedure does not require the Court to give prior approval of a funding arrangement.²² Instead, the Court will be concerned to ensure that in granting leave it is not facilitating an abuse of process. If a representative action 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 actions (i.e., the funding arrangements and communications with prospective class members) than where a party brings an ordinary non-representative proceeding that is funded.

Subject to this and to the law relating to illegality, parties are free to include whatever terms they wish in funding agreements, and the courts are reluctant to interfere with this freedom.

ii Level of funder recovery

There are no limits prescribed by either legislation or the common law. In the context of a non-representative funded action, the Supreme Court has said that it is not the role of the courts to assess the 'fairness' of any bargain between a funder and a plaintiff, presumably including the matter of funder remuneration.²³ 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.²⁴

22 *Southern Response Earthquake Services Ltd v. Southern Response Unresolved Claims Group* [2017] NZCA 489 at [79]. Funding arrangements have been approved in earlier cases: *Re Nautilus Developments Ltd* [2000] 2 NZLR 505 (HC) and *Re Gellert Developments Ltd (in liq)* (2001) 9 NZCLC 262,714.

23 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [48].

24 *Strathboss Kiwifruit Ltd v. Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [70].

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

While there is no regulation of the nature and extent of recovery by litigation funders, lawyers in New Zealand may utilise only a certain type of contingency fee. The fee must:²⁵

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

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

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

iii Validity of settlement ‘veto’ rights

The courts take a generally liberal and non-interventionist approach to the inclusion of veto rights in a funding agreement. In the leading case considering this issue,²⁶ 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:

- a* in most scenarios, the claimants and the funder should continue to have aligned interests in relation to what would constitute an acceptable settlement;
- b* 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
- c* where the funding agreement contemplates the involvement of independent third parties with appropriate expertise to resolve disputes, this will provide a fetter on the funder’s ability to act unreasonably.

iv Validity of termination rights (with or without cause)

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

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

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

25 Sections 333–335 of the Lawyers and Conveyancers Act 2006.

26 *Strathboss Kiwifruit Ltd v. Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [70]–[73].

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

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

IV DISCLOSURE

On the issue of any funded proceedings, a litigant must disclose the following matters to the other party or parties:²⁷

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

The litigation funding agreement itself must be disclosed 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.²⁸ 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.²⁹

Disclosure is subject to appropriate redactions being made to preserve confidentiality or legal privilege, or both.

In this regard, confidentiality is protected by a combination of the common law and the Evidence Act 2006.³⁰ Legal privilege in proceedings is protected by the Evidence Act 2006.³¹ This extends to communications, information and any opinions formed based on the communication or information. There is privilege for communications with legal advisers,³² privilege for preparatory materials for proceedings³³ and privilege for settlement negotiations or mediations.³⁴ The legislation does not specifically address communications exchanged between legal advisers and litigation funders, or materials prepared for or by litigation funders for prospective legal proceedings. Such communications or materials would ordinarily be encompassed within the privilege over preparatory materials for proceedings.³⁵

27 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [67]-[69] and [72].

28 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [73]-[74].

29 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [63].

30 Sections 68-70.

31 Sections 53-67.

32 Section 54.

33 Section 56.

34 Section 57.

35 Section 56. In particular, section 56(2)(b) [a communication between the party's legal adviser and any other person] and (d) [information compiled or prepared at the request of the party, or the party's legal

In domestic arbitrations, an arbitral tribunal may order the discovery and production of documents or materials within the possession or power of a party.³⁶ This is broad enough to extend to a litigation funding agreement, although an arbitral tribunal would be cognisant of the need to protect confidentiality and privilege.

V COSTS

In any civil proceeding, a court may order the unsuccessful party to pay the costs (and certain disbursements) of the successful party in the litigation. All matters of costs are at the discretion of the High Court,³⁷ 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.³⁸

i Level of costs

Generally, costs are assessed by applying a notional daily recovery rate (normally, two-thirds of the daily rate considered reasonable for each step of the proceeding) to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application.³⁹ A court may award increased costs,⁴⁰ or even indemnity costs,⁴¹ in specified circumstances (generally involving fault by one party).

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

ii Liability of funders for adverse costs

In exceptional circumstances, funders may be liable for adverse costs as non-parties, even in the absence of any abuse of process⁴² or impropriety.⁴³ Further, the level of such costs is not limited to the amount of funding provided.⁴⁴

adviser, by any other person].

36 Arbitration Act 1996, Schedule 2 Rule 3(1)(f).

37 Rule 14.1.

38 Rule 14.2(a).

39 Rule 14.2(c) and (d).

40 Rule 14.6(3).

41 Rule 14.6(4).

42 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52]. See generally *Erwood v. Maxted* [2010] NZCA 93, (2010) 20 PRNZ 466 at [18].

43 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [33].

44 *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [53].

According to the leading case on costs against non-parties:⁴⁵

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

In this case, a non-party had funded unsuccessful litigation by an insolvent company. The Privy Council did not have litigation funding specifically in contemplation. Given that a litigation funder always stands to benefit financially from the proceedings and will ordinarily exercise at least some control over the proceedings, the above proposition must be read down. It seems likely, therefore, that for a funder to be liable for adverse costs, something more is required. One situation might be where the funder exercises control over the proceedings to the effective exclusion of the plaintiffs. Another might be where the funder withdraws funding part way through the litigation, leaving the defendants to face a plaintiff who is impecunious or insolvent. A third might be where it was clear at the time of filing that the funded claim is simply not tenable and litigation should have been avoided.⁴⁶

Indemnity or increased costs will not be awarded merely because a litigation funder with a profit motive stands behind the losing party.⁴⁷

iii Security for adverse costs

On application by a defendant, a court may order the giving of security for costs if:⁴⁸

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

Funders may be ordered to provide security, and have been so ordered. The evolving practice is for funders of funded representative actions to provide security for costs that tend to be quantified on a relatively generous basis in favour of defendants.⁴⁹ Calculation of the sum is a matter for the court to assess in all the circumstances. Those include the:

- a amount or nature of the relief claimed;

⁴⁵ *Dymocks Franchise Systems (NSW) Pty Ltd v. Todd (No. 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [25] (approved in *Mana Property Trustee Ltd v. James Developments Ltd* [2010] NZSC 124, [2011] 2 NZLR 25). Conversely, this discretion would not be exercised against a 'pure funder' (meaning a party without any personal interest in the litigation, who does not stand to benefit from it, was not funding it as a matter of business, and who did not seek to control its course: *Hamilton v. Al-Fayed* [2002] EWCA Civ 665, [2003] QB 1174 at [40]).

⁴⁶ See *Poh v Cousins & Associates (HC Christchurch, CIV 2010-409-2654, 4 February 2011)* at [61]; compare *Capital + Merchant Finance Ltd (in rec and in liq) v. Vision Securities Ltd (in rec)* [2011] NZCA 657 at [17]–[18]. This will be very rare in the context of funded litigation, since the funder will ordinarily have conducted thorough due diligence on the merits of the claim and its prospects of success.

⁴⁷ *Prattley Enterprises Ltd v. Vero Insurance New Zealand Ltd* [2016] NZCA 67 at [135].

⁴⁸ Rule 5.45.

⁴⁹ *Saunders v Houghton* (No 1) [2009] NZCA 610, [2010] 3 NZLR 331 at [36] and *Walker v. Forbes* [2017] NZHC 1212 at [92]–[94].

- b* nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of interlocutory procedures;
- c* estimated duration of trial; and
- d* the probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant's estimated actual (i.e., solicitor and client) costs.

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

The sum ordered must either be paid into court, or security for that sum must be given to the satisfaction of the judge or registrar. Where the litigation funder is overseas, an appropriate form of security will be a bank bond or guarantee unconditionally enforceable by the defendant on demand, or additional commitments made by the funder and an after-the-event insurer.⁵⁰

The involvement of a funder does influence the court's decision to award security, and may justify increased security for costs. In the leading case,⁵¹ the Court of Appeal stated:

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

In that case, the Court of Appeal ordered security (for the appeal) in the sum of NZ\$100,000 (increased from NZD\$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.

VI THE YEAR IN REVIEW

In light of the recent increase in funded litigation, a number of practitioners, judges and commentators have expressed concern that the absence of a regulatory regime for litigation funding (and class actions) is creating inefficiencies in the court system and uncertainty for litigants. On 10 May 2018, the Law Commission (an independent law reform agency established by statute⁵²) 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.⁵³

50 *Houghton v. Saunders* [2013] NZHC 1824 at [121]-[123].

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

52 Law Commission Act 1985 Sections 4 and 5(3). Two principal functions of the Law Commission are to (1) take and keep under review in a systematic way the law of New Zealand and (2) to make recommendations for the reform and development of the law in New Zealand.

53 www.lawcom.govt.nz/sites/default/files/The%20Future%20of%20Class%20Actions%20Symposium%20Paper.pdf.

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'.⁵⁴

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:⁵⁵

- a* the extent to which the courts should have a role in supervising, managing or approving class actions and third party funding arrangements;
- b* whether any regulatory requirements should be imposed on third party funders;
- c* issues relating to costs and settlement in class actions and other third party funded proceedings; and
- d* 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 writing, no final completion date for the review has been set.

This report is tabled in Parliament and the government responds by deciding whether to accept or reject some or all 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.

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

A final draft was sent to the Secretary for Justice in 2009. In October 2011, following an inquiry into major finance company failures in New Zealand, the Commerce Committee recommended⁵⁶ 'that priority be given to progressing legislation on class actions during the term of the 50th Parliament' and 'that such legislation include guidelines for the operation of commercial third-party funders of litigation'. In March 2012, the government issued a response to the report.⁵⁷ In relation to the recommendations quoted, this stated that further policy work was required before the Bill could be introduced to the House, and that this was expected to occur in 2012. The Bill subsequently received no further political consideration, and has now almost certainly been overtaken by the pending Law Commission review.

54 *ibid* at [52].

55 *ibid* at page 14.

56 Inquiry into Finance Company Failures, Report of the Commerce Committee, Forty-Ninth Parliament (Lianne Dalziel, Chairperson) page 33 available at: https://www.parliament.nz/resource/en-nz/49DBSCH_SCR5335_1/0d9cfef1280ab5ba97f9569c8f965bfd7374305f.

57 Government Response to Report of the Commerce Committee on its Inquiry into Finance Company Failures [2011–2014] 15 Appendix to the Journals of the House of Representatives 1 at 11.

VII CONCLUSIONS AND OUTLOOK

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

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

On the issue of any funded proceedings, a litigant must disclose certain 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). The litigation funding agreement itself must be disclosed where an application is made to which the terms of the agreement could be relevant.

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

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

NIGERIA

*Justina Ibejunjo, Iheanyichukwu Dick and Pascal Ememonu*¹

I MARKET OVERVIEW

Nigeria has a population of over 180 million people. The country is organised under a federal Constitution² that creates court systems at the federal and state level and recognises arbitration and other dispute resolution processes such as expert determination, mediation and negotiation.

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

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

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

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

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

1 Justina Ibejunjo, Iheanyichukwu Dick and Pascal Ememonu are senior counsel at Uche Nwokedi & Co.

2 The 1999 Constitution of the Federal Republic of Nigeria (as amended).

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

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

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

It is important to note that, under Nigerian law, third party funding of litigation is generally regarded as champertous if it involves a third party's election to maintain and bear the costs of an action for another in order to share the proceeds of the action or suit.

In Nigeria, parties to civil actions are usually responsible for their litigation costs. There are instances, however, where the claims may be sponsored by third parties with no prior connection to the suit either for pecuniary, financial or proprietary interests. For instance, in most class actions that are often used to pursue claims for oil spillages, pollution and communal land matters, there is the likelihood that some of the claims are funded by independent third parties in view of the pecuniosity of the litigants. Also, in some election petition cases or pre-election matters, the suits are usually funded by the political parties even though they may not be direct parties to the suit. This is because the practice of independent candidacy is not allowed in Nigeria, as a candidate for an election must contest on the platform of a political party and such a party will either fail or lose if the candidate fails or loses the suit. In some maritime cases too, particularly matters involving ships and vessels, certain litigations are insured or funded by insurance companies or finance houses.

Parties to potential or ongoing litigation or arbitration in the commercial sectors such as oil and gas, construction, concession, debt portfolio management and international trade require huge financial assistance from third parties to prosecute the motley of litigations that arise from transactions. They resort to informal sources such as family, friends and loan sharks (who are not ordinarily or directly affected by the subject matter or outcome of the lawsuits or arbitral proceedings) for financial assistance in prosecuting their suits in courts or before arbitral tribunals.

II LEGAL AND REGULATORY FRAMEWORK

Litigation funding is not currently prevalent in Nigeria; as a result, there is no clearly defined legal framework for third party funding to operate within the country.

One of the main sources of law recognised in the Nigerian legal system is 'common law and equity'. The principles of common law and equity are applied in every aspect of the

law except where a statute has been enacted by the Nigerian legislature to cover the same subject matter or cause of action. However, in areas where there are no local enactments, the principles of common law and equity still hold sway. A practice that is closely related to third party funding is the common law principle of champerty and maintenance. At common law, champerty is a form of maintenance and occurs when the party maintaining another person demands a share of the proceeds of the action or suit or other contentious proceeding where property is in dispute.³

‘Champerty’ is defined by *Black’s Law Dictionary* as:

*[A] bargain between a stranger and a party to a lawsuit by which the stranger pursues the party’s claim in consideration of receiving part of any judgment proceeds. It is one type of maintenance.*⁴

‘Maintenance’ on the other hand, is defined as:

*[A]n officious intermeddling in a lawsuit by a non party by maintaining, supporting or assisting either party with money or otherwise to prosecute or defend the litigation.*⁵

In *Oyo v. Mercantile Bank (Nig) Ltd*,⁶ the Court of Appeal defined ‘maintenance’ as:

Improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.

There is no legislative provision or rule that expressly prohibits third party funding in Nigeria. While there may be some cases where champerty and contingency fee arrangement have been considered by the Nigerian courts, it appears, however, that there have equally not been any express judicial pronouncements as to third party funding of litigations.

The Nigerian legal system adopted the common law stance on champerty and maintenance to the effect that lawyers were prohibited from funding their clients’ cases. Thus, in *Oloko v. Ube*, the Court of Appeal held that:

[A]n agreement by a solicitor to provide funds for litigation or without charge to conduct litigation in consideration of a share of the proceeds is champertous. The solicitor cannot recover from his client his own costs or even his out of pocket expenses.

In the case of *Oyo v. Mercantile Bank (Nig) Ltd*, the Court of Appeal tried to distinguish between contingency fee arrangements and champerty and maintenance. The Court defined contingency fee arrangement as fees to be earned by a solicitor only if he or she wins the litigation, while champerty was described as the bedrock of maintenance and is usually regarded as having a reprehensible basis. Both contingency fee arrangements and champerty and maintenance were prohibited in Nigeria under common law. In the above case, the Court explained the rationale behind the prohibition of such an arrangement to the effect that it fires the solicitor’s interest beyond his or her mere professional commitment and

3 See *Oloko v. Ube* (2001) 13 NWLR (Pt 729) 161 at 181.

4 *Black’s Law Dictionary*, 6th Edition p. 231.

5 *Black’s Law Dictionary*, 6th Edition p. 954.

6 See *Oyo v. Mercantile Bank (Nig) Ltd* (1989) 3 NWLR (Pt 108) 213.

may render the whole transaction unethical. In that case, the appellant, a legal practitioner, entered into a contingency agreement with the respondent to recover debts from his debtors and to be remunerated with a certain percentage of the total debts recovered. The appellant took necessary steps to recover the debts – he wrote several letters to the debtor, instituted court actions and filed several motions in court. However, while the matter was still pending and before a judgment could be delivered, the respondent negotiated with the debtors and had the money paid. It then asked the appellant to withdraw the matter from court. The appellant, having withdrawn the case, submitted a bill of charges to the respondent that covered the agreed percentage of the total amount of debts involved or, in the alternative, reasonable or substantial *quantum meruit*. The bill was not honoured by the respondent. The appellant sued the respondent for failure to honour the bill of charges. One of the issues raised by the respondent in court was whether the appellant was guilty of champerty when he agreed with the respondent to receive a certain percentage of the amount recovered in consequence of litigation. The Court held that merely agreeing to receive a percentage of the proceeds of litigation to be conducted by a solicitor does not amount to champerty. It is a contingency fee agreement that could be regarded as contrary to public policy. The Court described such agreement as an unprofessional agreement that is unenforceable in law.⁷ Adopting the decision of Lord Denning MR in *Re Trepca Mines Ltd*,⁸ the Court, gave the rationale for prohibiting champerty as follows:

[T]he reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated, but, be that so or not, the law for centuries has declared champerty to be unlawful and we cannot do otherwise than to enforce it.

However, it appears that with the enactment of the Rules of Professional Conduct for Legal Practitioners 2007, made pursuant to the Legal Practitioners Act, this position of the law has been amended somewhat. To a large extent, the Rules relaxed the practice or norm prohibiting a legal practitioner to fund litigation. The relevant provisions are Rules 50 and 51, which provide as follows:

50(1) A lawyer may enter into a contract with his client for a contingent fee in respect of a civil matter undertaken for a client whether contentious or non-contentious: provided that -

- (a) the contract is reasonable in all the circumstances of the case including the risk and uncertainty of the compensation;*
- (b) the contract is not –*
 - (i) vitiated by fraud, mistake or undue influence; or*
 - (ii) contrary to public policy.*

(5) In this rule, 'contingent fee' means fee paid or agreed to be paid for the lawyer's legal services under an arrangement whereby compensation, contingent in whole or in part upon the successful accomplishment or deposition of the subject matter of the agreement, is to be of an amount which is either fixed or is to be determined under a formula.

⁷ See pages 228–230 of the report.

⁸ *Re Trepca Mines Ltd* (No.2) (1963)1 Chapter 199 at 219.

51. *A lawyer shall not enter into an agreement to pay for, or bear the expenses of his client's litigation, but the lawyer may, in good faith, advance expenses-*
- (a) *as a matter of convenience, and*
 - (b) *subject to reimbursement.*

From the above provisions, while a lawyer is allowed to enter into a contingency fee agreement, he or she is not allowed to bear the expenses or costs of litigation. There are, however, exceptions to the general rule – a lawyer may be allowed to advance the cost of litigation as a matter of convenience and subject to reimbursement.

In the more recent case of *Kessington Egbor*, the Court of Appeal was confronted with the issue of whether agreement for a contingency fee arrangement or commission payable upon recovery of indebtedness is champertous. A summary of the facts of the case is that Kessington Egbor and a company he had an interest in (Eskol Paint Nigeria Ltd) (the appellants) engaged the services of Peter O Ogbebor (the respondent), a chartered accountant, to give an expert opinion on their behalf in an action for the recovery of a debt owed to them by Union Bank of Nigeria Plc (UBN). The appellants alleged that they had agreed to pay the respondent the sum of 100,000 naira for his services. While agreeing that his services were secured for a fee, the respondent contended that the agreement was that he would be entitled to 15 per cent of the amount to be recovered in the event it was recovered. According to the respondent, it was on these terms that he agreed to assist the appellants in the said recovery by giving evidence in court as an expert witness.

At the conclusion of the debt recovery proceedings, UBN eventually paid the appellants the sum of 65 million naira, for which the respondent demanded that he be paid the sum of 9.7 million naira, being 15 per cent of the amount. The appellants contested the respondent's demand on the ground that the money paid by UBN was by virtue of the judgment of the court. To recover his entitlements, the respondent instituted an action at the High Court of Edo State, Benin, wherein he sought among other reliefs his 15 per cent entitlement and other ancillary reliefs. At the end of trial, the court found in favour of the respondent and ordered the appellants to pay the respondent his 15 per cent entitlements. The court further awarded the sum of 30,000 naira to the respondent as cost and 5 per cent interest on his entitlement calculated over a period of time. Aggrieved by this decision, the appellants appealed to the Court of Appeal, Benin Judicial Division.

Among the issues determined by the Court of Appeal was whether the respondent's action was competent and maintainable at law – in other words, whether the agreement the appellants had with the respondent was champertous.

The appellants argued that the respondent was not entitled to the sum claimed by him under the agreement he had with the appellants because the said agreement was champertous. As such, it was against public policy for the respondent to seek to recover a percentage of proceeds of litigation in which he testified as a witness. In response, the respondent argued that the facts and circumstances of the case did not constitute or fall within the purview of a champertous agreement, as he (the respondent) acted within the scope of operation of his profession (as a chartered accountant) to recover debt for the appellants. He further argued that champerty applies to a situation where a lawyer maintains an action for account without fees, hoping to recover his fees from the proceeds of the trial, if successful, but that the respondent, not being a legal practitioner, acted as a chartered accountant and within the purview of the ethics of his own profession. In sum, the respondent maintained that what he did was consultancy and not champerty.

The Court of Appeal resolved the issue in favour of the respondent. In arriving at its decision, the Court noted that the appellants' assertion that they merely wanted the respondent as an expert witness does not change the character of the case presented by the respondent, who had proved that he was engaged to recover the debt and not only to testify as a witness.

In considering whether the agreement between the parties amounted to champerty, the Court of Appeal held that it is settled law that a situation where a person elects to maintain and bear the costs of an action for another in order to share the proceeds of the action or suit is champertous. However, it expressed the view that the determination of whether a relationship is champertous or contrary to public policy is to be ascertained not on the basis of averments in the statement of defence, but on the basis of the assertions in the statement of claim, being the facts upon which the plaintiff founded his action. The Court further held that:

[I]n order for the action of the respondent to be champertous, the facts have to show that the respondent offered to maintain the action by bearing the costs of the litigation in order to be given a share of the proceeds.

According to the Court, the facts of this matter did not disclose that the respondent was maintaining the action with a view to getting proceeds of the action in payment.

From the statements above, it is apparent that for a contingency fee arrangement to be champertous there has to be some element of maintenance. This implies that a third party funding of litigation may not be champertous if the third party merely 'bears the cost of an action for another' without any intention of benefiting from the suit by way of sharing the proceeds of the action.

It is presumable that third party litigation funding is not limited to funding of claims or defences, but may include financing a counterclaim in an already instituted action. This implies that the services of a third party litigation funder are not limited to financing a claimant alone, but may also benefit a defender in deserving circumstances.

From the above, it is apparent that the practice and law of third party funding of litigation and arbitration has yet to develop in Nigeria. Unlike in other jurisdictions where there are recognised funding institutions or associations of litigation funders, there is neither a formal judicial pronouncement in favour of third party funding of litigation nor any organisation of third party litigation funders recognised by Nigerian law. Rather, what exists in Nigeria is an *ad hoc*, underground industry of third party litigation financiers that is neither recognised nor regulated by Nigerian law.

III STRUCTURING THE AGREEMENT

There is no special statutory or case law requirement for structuring a third party litigation funding agreement in Nigeria. Thus, it depends on the circumstances of each case. As with all other commercial contracts under Nigerian law, parties to the third party litigation funding agreement would set the terms that govern their commercial relationship. It is unlikely that the Nigerian courts will intervene when a party complains of a bad bargain, as long as the parties' relationship or transaction is legal and all ingredients for the formation of a contract are present. In such matters, Nigerian courts adopt the 'freedom of contract' approach, to

match the mercantilist nature of Nigerian society. It follows that Nigerian courts will enforce a third party litigation funding agreement if it clearly expresses the parties' voluntary terms of agreement and is not champertous or otherwise offensive to public policy.⁹

A typical funding agreement will include methods for calculating the maximum amount of money the funder will contribute to the legal representation, the percentage of the proceeds of the case that the funder will expect to receive upon success, and the maximum adverse costs award that the funder would pay, if any, in the event that the client loses the case. The agreement between the funder and the funded party may also include the funder paying the legal fees of another party or parties to the suit in the event that the funded party loses the suit, or where the judge or arbitrator orders the funded party to pay the attorney fees of another party. Clauses imposing duty of non-disclosure of confidential information released in the process of negotiation may also be inserted in the agreement, to avoid either party disclosing privileged or confidential information.

In arbitration, the party seeking third party funding may be asked by the funders to provide detailed information about the transaction. Such information may be confidential or privileged under applicable law. The funder will evaluate the information to determine the strengths and weaknesses, the likelihood of success and the ability to recover from the losing party. If acceptable, the parties would negotiate a funding agreement that may cover the costs of the funded party's arbitration and the other party's attorney.¹⁰

IV DISCLOSURE

The liability of a third party funder with respect to the award of costs depends largely on the circumstances of the case and the provisions of the third party funding agreement between the parties. Where it is found that the identity of the funder is necessary for the purposes of the payment, the funded party may be asked to disclose the identity of the funder. However, with respect to an order of court in an application for security for costs, it is doubtful that the issue of the identity of any litigation funder may be considered by the court. This is because security as to costs is usually either a form of bond or order to be paid into the account of the registry of the court. With that being done, the identity of the funder may not be necessary. With respect to arbitration, however, whether the identity of the funder will be disclosed will depend on the circumstance of the case.

V COSTS

Under Nigerian law, the issue of award of costs is discretionary. Costs are awarded at the discretion of the court but the discretion has to be exercised judicially and judiciously. Issues relating to costs are usually regulated by the rules of the court. In accordance with these rules, in fixing the amount of costs, the court or tribunal takes into account all the surrounding circumstances of the case. Thus, it is usually said that costs follow the event. The principle to

9 The attitude of Nigerian courts in relation to contractual relationships mimics the attitude of courts in the United Kingdom, to the effect that provided that there is voluntary consent, the fairness of the parties' contract terms is a matter for the parties themselves.

10 Professor Paul Obo Idornigie. *Third Party Funding of International Arbitration*. A presentation at the Professorial Symposium Marking the 35th Year Anniversary: 14 March 2014.

be observed is that the party that is in the right is to be indemnified for the expenses borne by him or her in the proceedings, as well as compensation for his or her time and effort in coming to court.¹¹

With respect to arbitration, the Arbitration and Conciliation Act¹² provides that the arbitral tribunal shall fix costs of arbitration in its award. The cost of the arbitration usually includes:

- a the fees of the arbitral tribunal;
- b travel and other expenses incurred by the arbitrators;
- c costs of experts' advice;
- d administrative costs of the tribunal; and
- e costs of legal representation of the successful party if such costs were claimed during the arbitral process, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

The fees of the arbitral tribunal should be reasonable, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case. In *ad hoc* arbitration, the arbitral tribunal determines the fees, and in institutional arbitration the arbitral institution determines the administrative charges and the arbitrators' fees while the arbitral tribunal fixes the costs of arbitration. Fees can be based on the amount in dispute or on a daily or hourly rate.¹³

VI YEAR IN REVIEW

As indicated above, litigation involving institutions, companies and qualified legal persons does not often require funding from specialised third parties. Individuals usually bear the costs of prosecuting their claims themselves. The implication of this is that a person who cannot afford the cost of litigation or arbitration, even though he or she has a valid claim, may be denied access to court because of lack of funds. However, there are some established institutions by government that have the duty to prosecute the legal rights of indigent persons. Such institutions include the Legal Aid Council set up by the federal government of Nigeria and the Office of the Public Defender set up by the Lagos state government. Also, lawyers are permitted to prosecute matters *pro bono* when a person is indigent and cannot afford legal fees. It appears, however, that these established institutions and the *pro bono* lawyers often operate in cases of abuse of human rights and not in commercial disputes. Moreover, these institutions are not third party funding institutions and do not benefit from the proceeds of the cases they prosecute or defend.

Nigeria is gradually moving towards recognising third party funding of litigations, though there are no recognised government or public third party funding institutions in Nigeria as this activity is not currently commercialised. Some private legal entities are springing up as third party funding institutions. One such entity is aetasLF, a private legal funding initiative focused on Nigeria.

11 See the case of *Nigerian Society of Engineers v. Ozah* (2015) 6 NWLR (Pt,1454) 76.

12 Cap A18, Laws of the Federation of Nigeria 2004, Section 49.

13 Professor Paul Obo Idornigie (see footnote 9).

VII CONCLUSION

With the enactment of the Rules of Professional Conduct for Legal Practitioners 2007, and the more flexible interpretation of champerty by the Court of Appeal in the Kessington Egbor's case above, it appears that Nigerian law is slowly moving away from the rigid application of the common law doctrine of champerty and maintenance which has over the years made the recognition of the third party funding of litigation overly impossible. It is believed that, to grant more people access to justice, there is need for more flexibility with respect to third party funding. The existence of third party funding will create a form of equality among the parties in dispute and better access to justice for all parties. However, it has to be properly regulated to avoid abuse.

NORWAY

Eivind Tandrevold and Jan Olav Aabø¹

I MARKET OVERVIEW

Although third party litigation funding² is still an uncommon concept in Norway, 2017 and 2018 have seen an increased momentum in the market. Several pending claims are publicly known to be backed by third parties, and in June 2018, a Norwegian court of first instance handed down Norway's first-ever court judgment in a funded matter.

As of September 2018, there is only one professional provider of third party funding services based in Norway: Therium Nordic. The company, which is partly owned and funded by UK-based Therium Capital Management, was established in 2016. Since the Norwegian third party funding market is largely unregulated, Therium Nordic instead proclaims its commitment to the Code of Conduct developed by the Association of Litigation Funders of England and Wales. In addition to Therium Nordic, a number of foreign-based funders are said to be assessing Norwegian cases.

While an increasing number of Norwegian legal practitioners are advertising the benefits of third party funding to their clients, many still appear sceptical to the concept. Moreover, a recent study reported that Norwegian buyers of legal services are less likely to resort to third party litigation funding in the near future than their Danish, Finnish and Swedish colleagues.³ These perceptions may change as third party funding arrangements become more common in Norway and elsewhere in the Nordic countries.

Claims purchase arrangements are less rare than third party financing arrangements, and are widely accepted throughout the Norwegian legal industry.

II LEGAL AND REGULATORY FRAMEWORK

There is no legislation or other mandatory rules in Norway explicitly regulating third party funding. The issue of third party funding is neither addressed in the procedural law governing civil litigation, nor in the most common procedural rules of arbitration. In addition, there is no case law discussing regulatory issues or the legality of third party funding arrangements.

Due to the lack of regulation, claim owners and funders are generally free to negotiate the particulars of their contractual relationship. The same applies for transfer agreements between claim owners and claims purchasers. Parties need to be mindful, however, of general

1 Eivind Tandrevold and Jan Olav Aabø are senior lawyers at Arntzen de Besche Advokatfirma AS.

2 'Third party funding' will be used as an umbrella term for any arrangements where a party to a dispute seeks financing by non-parties to the dispute.

3 Roschier Disputes Index 2018, available at www.roschier.com. The survey was based on feedback from 143 of the largest companies operating in Sweden, Finland, Norway and Denmark.

principles set out in statutory law and case law that would apply to all types of commercial agreements governed by Norwegian law. For instance, as further explained in Section III, courts and tribunals may revise or even set aside unreasonable terms of an agreement.

Regulators have not yet subjected professional third party funders to licensing or other types of scrutiny, but that may change as the market for third party funding increases in size.

Lawyers acting in funded matters, however, need to take extra care to comply with the Norwegian Bar Association's Code of Conduct for Lawyers (the Code of Conduct). In the following – as all the legal and ethical dilemmas that may arise in relation to third party funding cannot be addressed within the scope of this chapter – we will discuss the most practical issues.

First, one of the main principles of the Code of Conduct is that a lawyer cannot undertake assignments in which he or she would risk breaching the duties of loyalty, confidentiality, and independence towards his or her client.⁴ Consequently, a lawyer cannot act on behalf of both the funded party and the funder as there is a clear risk of these clients having conflicting interests in certain aspects of the case. Similarly, a lawyer representing a funded party must never allow the interests and influence of the third party funder to affect his or her advice to the client. As explained in Section III, the litigation funding agreement should be drafted with these principles in mind.

Second, the Code of Conduct prohibits lawyers from entering into contingency fee arrangements and, to a certain extent, conditional fee arrangements.⁵ Agreements where lawyers receive a percentage of the recovered amount are prohibited, as are any agreements where the lawyer's personal economic interest in the outcome might conflict with his or her independence or the client's best interests, or both. 'No cure no pay', 'good cure good pay' and similar arrangements are permitted as long as the fee structure is reasonable and does not render the lawyer conflicted or financially dependent on the outcome.

In summary, third party funding is a largely unregulated practice but requires extra prudence on the part of the lawyers involved. We believe that if the third party funding market sees increased activity, the likelihood of regulatory developments is high.

III STRUCTURING THE AGREEMENT

There is currently no standard market practice for how to structure a litigation funding agreement. As a starting point, claimants and funders are free to tailor the structure and the terms of their litigation funding agreement as they prefer. Still, parties need to observe several principles of Norwegian contract law when drafting their funding or transfer agreement. For instance, Section 36 of the Norwegian Contracts Act grants courts and tribunals the power to set aside or revise unreasonable contractual terms upon the motion of a party. The threshold for revising or setting aside an agreement is high, in particular between professional parties, and courts and tribunals require evidence of considerable contractual imbalance before doing so.

Moreover, there exist no standard fee or uplift ranges in third party financing agreements governed by Norwegian law. We have seen fee structures ranging from multiples of three times the funder's commitment, to percentages at around one-third of the recovered amount.

4 Sections 2.1, 2.2, 2.3 and 3.2.1 of the Code of Conduct.

5 Sections 2.1.2, 3.3.2, 3.3.2 of the Code of Conduct.

Owing to the legal ethics challenges outlined in Section II, parties involved in third party funding arrangements should be mindful of how the counsels' role is set out in the agreement between the funded party and the funder. Drafters should place great emphasis on explaining and defining the lawyers' involvement and obligations so that they do not interfere with the lawyers' duties as set out in the Code of Conduct. To mitigate the risk of facing ethical dilemmas, lawyers should not be party to a litigation funding agreement and parties should place contractual responsibilities such as reporting on the funded party rather than on the funded party's counsel.

IV DISCLOSURE

Norwegian law imposes no explicit obligation on a funded party to disclose the involvement or identity of a third party funder in a dispute – neither in arbitration proceedings nor in civil litigation proceedings.

Although there are no such explicit obligations, failing to disclose the existence and identify of a third party funder could pose serious legal and ethical challenges for the parties and lawyers involved. Failing to disclose can, among other things, lead to delays or to the judgment or award becoming void or unenforceable. Parties should therefore consider carefully whether choosing not to disclose the existence of a third party funder is worth the risk. The main argument in favour of disclosure is that it ensures that the identity of the funder poses no challenge to the independence and impartiality of the arbitral tribunal or ordinary court.

When acting in arbitration and litigation proceedings, judges and arbitrators have a duty to inform the parties or to recuse themselves when there are circumstances that might raise doubts as to their impartiality or independence.

In most arbitration proceedings, issues concerning impartiality and independence are governed by the Norwegian Arbitration Act.⁶ This is because the bulk of arbitration proceedings seated in Norway are *ad hoc* proceedings, meaning that they are not administered by an arbitral institution. Parties rarely adopt procedural rules that derogate from the Arbitration Act's rules on impartiality and independence. Section 14 of the Arbitration Act⁷ provides that arbitrators have a duty to disclose 'any circumstances likely to give rise to justifiable doubts about his [or her] impartiality or independence.' Thus, arbitrators should not assess whether they are in fact conflicted, but whether it might appear as if they are.

When assessing their impartiality and independence, Norwegian arbitrators frequently refer to the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines).⁸ Since 2014, the IBA Guidelines has contained the following provision:

6 The Norwegian Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration.

7 Section 14 of the Norwegian Arbitration Act is based on Article 12 of the UNCITRAL Model Law.

8 As supported by leading authorities, see for instance G Woxholth, *Voldgift* ['Arbitration'] (1st edn Gyldendal Norsk Forlag, Oslo 2013), p. 407.

If one of the parties is a legal entity, any legal or physical person having [...] a direct economic interest in, or a duty to indemnify the party for, the award to be rendered in arbitration, may be considered to bear the identity of such a party.⁹

Therefore, when assessing their impartiality, arbitrators can deem third party funders to be comparable to the funded party to the arbitration proceedings. Arbitrators could very well consider themselves conflicted and thus incapable of acting if they have a relationship with the third party funder that could undermine the parties' and others' confidence in their impartiality.

The same general rule applies in civil litigation. Pursuant to Section 108 of the Courts of Justice Act, a person may not serve as a judge when circumstances exist that 'are capable of undermining confidence' in the judge's impartiality. This assessment should not only take into account the judges' relationships with the parties, but their relationships with anyone who would have an economic interest in the outcome of the particular dispute. While we have not seen Norwegian courts referencing the IBA Guidelines, the same general principles are relevant in the assessment of a judge's impartiality under the Courts of Justice Act. On this background, if a judge has a relationship with the third party funder that could undermine one's confidence in his or her impartiality, the judge should be disqualified.

Given the above-mentioned principles, judges and arbitrators would expect parties and counsels to let them know if any 'unknown' third parties have a direct economic interest in the outcome of the dispute that they preside over.¹⁰ If, for instance, an arbitrator is a partner at the law firm that advises the third party funder, or the presiding judge is a close relative of one of the funder's key employees, they would likely recuse themselves.

Failing to disclose the existence and identity of a third party funder does not just entail the risk of delays owing to untimely recusals and reputational damage. In arbitration, if an award has been handed down and it is later discovered that an arbitrator was conflicted owing to the third party funder's involvement, the award may be nullified by the ordinary courts¹¹ or enforcement of the award may be refused.¹² Similar rules apply in civil litigation proceedings, where decisions may be appealed or reopened on the basis that they were rendered by a legally incompetent judge. When a judgment rendered by a judge that should have been disqualified is appealed in good time, the appeals court shall annul the judgment and the case must be retried.¹³ If the deadline for appeal has passed, the judgment may still be re-opened and subsequently retried.¹⁴

In summary, parties are under no explicit obligation to disclose the existence of funding and the identity of the funder, but parties that do not disclose risk being faced with several types of delays and objections, such as the removal of arbitrators or judges, the challenge or annulment of the judgment or award, and the impossibility of enforcement.

9 General Standard 6(b) of the IBA Guidelines.

10 Pursuant to General Standard 7 of the IBA Guidelines, parties have a duty to inform the arbitrators of such circumstances.

11 Section 43 of the Arbitration Act.

12 Section 46 of the Arbitration Act, which corresponds with Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention).

13 Sections 29-21 and 29-12 of the Dispute Act.

14 Section 31-3 of the Dispute Act. A judgment shall not be reopened, however, if it there is a reasonable probability that a new hearing of the case would not lead to an amendment of significance to the party, cf. Section 31-5 of the Dispute Act.

On this basis, we believe that funded parties are best off disclosing the existence of their funding arrangement and the identity of the funder. In addition to mitigating the risk of facing obstacles during and after the proceedings, disclosing the fact of funding might also benefit the funded party's claim directly, as it would demonstrate for the opposite party that an independent third party has faith in the merits of the claim. Furthermore, we believe that if even more funded parties disclosed the existence of their financial backing, it would serve the integrity of the market for third party funding.

Parties to Norwegian litigation and arbitration proceedings are obliged to share relevant documents, including those unhelpful to their case. The ordinary courts can compel anyone to make available evidence containing information that may be relevant to the factual basis for the ruling. An arbitral tribunal can only recommend parties or third parties to disclose such evidence, but does not have the power to enforce disclosure. However, if a party or third party fails to comply with a recommendation made by an arbitral tribunal, the requesting party might instead petition the ordinary courts to order disclosure.

Therefore, anyone – including funded parties and third party funders – can be compelled to disclose a litigation funding agreement provided that it contains information that may shed light on disputed matters.

However, the general duty to disclose evidence only comprises the parts of the evidence (such as sections of an agreement) that are relevant for the dispute in question.¹⁵ If, for instance, a funded party claims compensation for its funding costs, the fee provisions of the funding agreement would be relevant while other provisions might not be. Similarly, if a claim purchaser needs to prove ownership of the claim that it pursues, the requested party would only need to disclose the parts of the requested documents that are sufficient to prove that the claims transfer was valid and binding. In other situations, where the funding agreement has no relevance for the disputed matters, requested parties may refuse to disclose it. It is important to note, however, that relevance assessments shall be based on the parties' assertions without regard to their merits – meaning that a requesting party may 'tailor' its assertions in a manner that would be more likely to result in a duty to disclose.

There are several exemptions to the duty to disclose evidence. For instance, parties cannot be compelled to submit evidence protected by legal privilege, that is, confidential communications between lawyers and their clients made for the purpose of seeking or giving legal advice. Courts and tribunals may also exempt a party from its duty to disclose if the evidence cannot be made available without revealing trade or business secrets.

V COSTS

In civil litigation, a party that is successful in an action is entitled to full compensation for its 'legal costs' from the opposing party.¹⁶ Full compensation for such costs shall cover 'all necessary costs incurred by the party in relation to the action'.¹⁷ Arbitrators generally apply

15 T Schei et al., *Tvisteloven*, Kommentarutgave ['The Dispute Act – Commentary'] (2nd edn, Oslo 2013), p. 961.

16 Section 20-2 subsection 1 of the Dispute Act.

17 Section 20-5 subsection 2 of the Dispute Act.

the same principles in arbitration proceedings, although the Arbitration Act merely provides the arbitrators' with the power to order the losing party to pay all or part of the legal costs of the prevailing party 'as it sees fit'.¹⁸

Under the main rules outlined above, courts and tribunals classify lawyers' fees, arbitrators' and experts' fees, and administrative fees and costs, as recoverable legal costs. In addition, a prevailing party can claim compensation for 'its own work on the case if the work has been particularly extensive or would otherwise have had to be undertaken by counsel or other qualified assistant'.¹⁹ Any other type of losses and expenses, such as loss of revenue, lost goodwill, or increased interest expenses are, as a main rule, not recoverable.²⁰

As of September 2018, the only Norwegian case law discussing whether funding costs qualify as recoverable legal costs is a first-instance court judgment, *Atlant v. Oslo municipality*.²¹ The claimant, Atlant, that had its case funded by Therium Nordic, claimed compensation for its funding costs. Atlant's funding costs constituted approximately 50 per cent of the damages that it was awarded in the main claim. The district court concluded, summarily, that funding costs did not constitute 'legal costs' pursuant to the Dispute Act, and rejected Atlant's claim for compensation.

To our knowledge, no cost items similar to third party funding (for instance, claims for compensation of the added costs of borrowing money to cover legal fees) have been successfully recovered as legal costs under the Dispute Act or the Arbitration Act. This serves to support the district court's conclusion in *Atlant v. Oslo municipality*.

In addition, classifying funding costs as recoverable legal costs might conflict with the universal right of access to justice, as set out the Norwegian Constitution and the European Human Rights Convention. This is especially the case since holding a party responsible for the other party's funding costs could multiply its costs exposure manifold.

Therefore, as things stand, we believe that Norwegian courts and tribunals are highly unlikely to award a funded party compensation for its funding costs under the main rules that we have described above.

In certain exceptional circumstances, however, arbitrators and courts could award compensation for funding costs as damages. Pursuant to case law from the Norwegian Supreme Court, a party can be held liable for other costs than legal costs in 'abuse situations'.²² A typical 'abuse situation' would exist if a party sets forth or rejects claims despite knowing that its position has no merits. As an example, if a party is found to have rejected a claim that it knew was merited, and that the rejection left the claimant with few other options but to seek funding to enforce its claim legally, a Norwegian court or tribunal court could award the funded party compensation for its funding costs. The threshold for proving the grounds for such a claim would be high, however, and there are few examples of claims that have prevailed on these bases.

In summary, applying existing statutory and case law, claimants seeking to recover their funding costs from the other party would face an uphill battle. To be awarded such

18 Section 40 subsection 2 of the Arbitration Act.

19 Section 20-2 subsection 1 of the Dispute Act.

20 JE Skoghøy, *Tvisteløsning* ['Dispute resolution'] (3rd edn, Oslo 2018), p. 1327.

21 *Atlant Entreprenør Svs v Oslo kommune* (Oslo District Court, 5 June 2018, case No. 16-094601TVI-OTIR/08).

22 Judgement reported in Supreme Court Reports (Rt.) 2015 on p. 385.

compensation, a funded party would likely need to prove that its counterparty has abused the legal system by knowingly maintaining an untenable position, and that the added costs were incurred as a consequence of the 'abusive' party's behaviour.

The loser pays principle applies in most Norwegian litigation and arbitration proceedings.

As a main rule, only direct parties to litigation or arbitration proceedings may be held liable for adverse costs. In most third party funding arrangements, the funder will not be a party to the arbitration or litigation proceedings. Hence, as a starting point, there are no legal grounds to hold a third party funder liable for adverse costs. When it comes to claims purchase arrangements, the company that owns the claim will be party to the proceedings. Thus, the claim purchaser would risk becoming liable for costs.

In terms of security for adverse costs, the rules differ between arbitration and litigation proceedings. In arbitration proceedings governed by the Arbitration Act, parties can only be requested to put up security for the arbitrators' fees and not for adverse costs. In litigation proceedings, however, courts may order claimants to put up security for adverse costs if the claimant is registered in a country outside the European Economic Area.²³

None of the above-mentioned main rules apply to third parties, even in cases where the claimant is in such a poor financial condition that it will be unable to pay the respondent's legal fees and costs. As explained below, however, certain narrow exceptions exist, and there are circumstances in which third parties risk becoming liable for adverse costs.

First, under non-statutory law, company representatives (such as board members) can be held personally liable for adverse costs provided that they instituted or continued the legal proceedings on behalf of an insolvent entity, while at the same time knowing that the chances for the claim to be successful were low.²⁴ In civil litigation proceedings, parties may request the court to include the representatives to the proceedings by way of joinder.²⁵

Second, while there is no statutory or case law on the issue, it is possible that courts and tribunals could award compensation for adverse costs from third parties in 'abuse situations' similar to the one exemplified in Section 5.i. The same applies for claims against shareholders or effective beneficiaries of 'claims vehicles' that are unable to settle an award for adverse costs. Here, non-statutory rules could evolve with inspiration from recent case law from Sweden²⁶ and Denmark.²⁷

VI THE YEAR IN REVIEW

The past 18 months saw some interesting developments in the Norwegian market for third party funding.

²³ Section 20-11 subsection 1 of the Dispute Act.

²⁴ JE Skoghøy, *Twisteløsning* ['Dispute resolution'] (3rd edn Universitetsforlaget, Oslo 2018), p. 1318, referencing i.a. judgments reported in Supreme Court Reports (Rt.) 2014 on p. 706 and p. 817.

²⁵ Section 20-7 of the Dispute Act.

²⁶ *Deloitte AB v MH and JL* (Supreme Court of Sweden, 11 December 2014, reported in NJA 2014 p. 877).

²⁷ *Van der Boom Holding B.V. v Danish Business Authority et al.* (Supreme Court of Denmark, 19 January 2018, reported in UfR 2018 p. 1487).

In June 2018, in its first-ever case known to be funded by a third-party, Oslo City Court found for a claimant backed by Therium Nordic.²⁸ The claimant, the construction company Atlant, was awarded damages from a Norwegian municipality after being thrown out of a major construction project.

Atlant was always open about the fact that it had received funding to pursue its damages claim, and it even tried to recover its funding costs from the respondent.²⁹ Although the claim for compensation for funding costs was unsuccessful, the court did not appear to have any other issues with the concept of third party funding.

Several other Norwegian companies are also using third party funding to finance their claims. By way of example, Norwegian Energy Company ASA (Noreco), an oil and gas company listed on the Oslo Stock Exchange, received funding to pursue major claims against a group of insurers in Denmark. The Danish first-instance court awarded Noreco compensation of US\$470 million including interest (of which, reportedly, US\$200 million was payable to the funders).³⁰ However, in May 2018, an appeals court overturned the decision and only awarded Noreco US\$21 million in damages.³¹ Noreco has appealed the appeals court's decision to the Supreme Court of Denmark. Furthermore, in June 2017, EAM Solar ASA, a solar energy company listed on the Oslo Stock Exchange, reported that it had secured funding from Therium Capital Management to pursue a €200 million damages claim against Swiss and Luxembourgian counterparties.

These matters may prove to be stepping stones towards demystifying the concept of litigation funding in Norway.

VII CONCLUSIONS AND OUTLOOK

The Norwegian market for third party funding is still in its infancy. In recent years, however, the concept of litigation funding has slowly started moving towards becoming an established dispute resolution tool. Although the Norwegian market for third party funding is largely unregulated, parties involved in funded matters need to carefully observe applicable laws and be mindful of the risks they face.

In the coming years, as the global litigation funding industry is predicted to expand, it is likely that the Norwegian market for third party funding will grow too. The Norwegian litigation and arbitration climate appears ripe for more funders to enter. Further to the high-value oil and energy-related disputes that continue to dominate the market, 'funding-friendly' claims such as cartel damages claims, patent infringement claims, and class action lawsuits are becoming increasingly common. On this basis, there is definitely a potential for the continued development of third party funding in Norway.

28 See footnote 20.

29 As explained in Section V(i).

30 *Noreco Oil Denmark A/S et al. v Zurich Insurance Public Limited Company et al.* (Maritime and Commercial High Court, 15 December 2016, case No. S-2-14). See also Noreco's Annual Report for 2017 on p. 5, available at www.noreco.com.

31 *Noreco Oil Denmark A/S et al. v Zurich Insurance Public Limited Company et al.* (Eastern High Court, 4 May 2018, reported in FED2018.04). See also Noreco's Annual Report for 2017 on p. 5, available at www.noreco.com.

POLAND

Zbigniew Kruczkowski¹

I MARKET OVERVIEW

Defining ‘third party litigation’ is crucial in light of the fact that the term is not defined under Polish law and is rarely seen as an economic activity category in the country.

For the purpose of this chapter we use a broader definition of the phenomenon that includes claim financing *sensu stricto*, claim purchasing, as well as class action funding and insurance contracts. All these features must be addressed distinctly, since market recognition and assessment vary.

The market for third party litigation funding in Poland (when understood as the financing of a litigation (arbitration) in exchange for a contingency fee) does not seem particularly well developed. While there are certain (mostly foreign) companies addressing their offers of litigation financing to legal and natural persons in Poland, there are no public records or statistics available showing the scale of their operations and results. Typically, it is not the sole activity of a company; rather, litigation financing is part of their broader offer. Not many examples of litigation financing are thus in the public domain, although randomly surfacing records reach as far back as 1995. Accordingly, it is difficult to assess the strength of this market segment or assess its development. It is fair to say, however, that it is not flourishing, and it is given literally no media coverage, marketing or any separate identification in official statistics. There are several reasons for this. In simple terms, the economic reasons for the existence and development of the industry are the high value and complexity of claims, which require extensive funding. Most frequently, they are affiliated with healthy, strong legal entities with large operations that can produce such funding without a struggle, whereas in respect of individuals, state legal aid seems to be the remedy for limited resources of funding. It is also worth mentioning that there are *pro rata* limits on the entry fee in relation to the value of the claims: for instance, in common courts 100,000 zlotys is the limit of the court entry fee.

The element of third party litigation is more common on the insurance market. However, at the end of the first quarter of 2017, legal expense insurance policies numbered 1,096,695 out of a total of 47,631,586 policies.² More importantly, only 1,530 claims

1 Zbigniew Kruczkowski is counsel at Linklaters C Wiśniewski i Wspólnicy Spółka Komandytowa.

2 The number of legal expense policies in the first quarter of 2017 grew insignificantly as compared to 2016 (1,050,392 at the end of 2016), after a decrease by almost half in comparison to the 1,906,642 at the end of 2015 – statistics of KNF – the Polish Financial Supervision Authority (https://www.knf.gov.pl/publikacje_i_opracowania).

were settled between January and March 2017 (at the end of 2016, the number of claims settled reached 5,324).³ The data suggest society's low legal awareness or a lack of interesting insurance products, which leaves a broad field for development of this branch of insurance.

The most popular and the fastest growing 'branch' of the third party litigation funding industry seems to be claims purchasing. This kind of investment takes different forms on the Polish market, ranging from securitisation funds, through debt recovery entities, to claims purchasing replacing class actions. Currently, claims alienation seems to be of utmost importance for business entities facing a growing number of overdue receivables. According to a survey of the Conference of Financial Companies in Poland,⁴ Polish businesses deal with 21.8 per cent of overdue receivables on average,⁵ whereas 14.6 per cent of companies deal with at least 50 per cent of overdue receivables in their portfolio. The above conditions make Polish companies more and more likely to use the services of professional debt recovery entities of any kind.

As regards prospects for potential growth, there are different solutions for different market segments. The segment involving claims purchases, insurance and (considering its specifics) class action funding is developing and seems fairly mature. The segment that is lagging behind is claim financing, which is less popular and difficult to identify. When discussing the potential of the latter, we feel its use largely depends on a properly identified target. In general, it should not target individuals or corporates. However, small and medium-sized business entities may find the industry's offer attractive, since they are often intimidated by the prospect of complex, challenging disputes with high-value claims and strong counterparties. They also tend to back off when facing disputes with foreign entities in another jurisdiction.

The attitude to carrying out disputes in Poland seems to be another inducement for the development of the market; court disputes and litigation in particular are frequent, and with the growth of the economy, higher value claims are more and more common. In 2016, 9,042,666 cases were brought before Polish civil courts and 1,737,323 were brought before Polish commercial courts.⁶

II LEGAL AND REGULATORY FRAMEWORK

Neither Polish statutory law nor the rules of two leading Polish arbitration courts (the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Court of Arbitration at the Confederation of Lewiatan) provide specific rules on third party litigation funding. Since the phenomenon of third party litigation funding in its core feature (i.e., claim financing) is not yet popular in Poland as a commercial activity, there is also no court precedent regarding the field. The industry thus operates under general frames of freedom of economic activity, currently regulated (in addition to Poland's Constitution) by the Act of 2 July 2004 on freedom of economic activity. Agreements for claims financing are subject to the rules and principles

3 Statistics of KNF – Polish Financial Supervision Authority (https://www.knf.gov.pl/publikacje_i_opracowania).

4 <https://kpf.pl/badania-i-publikacje/raporty-cykliczne>.

5 The Conference of Financial Companies in Poland, 'Portfolio of receivables of Polish enterprises', July 2017.

6 Statistical Guidebook of Justice, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne/rok-2017>.

of Polish private law (i.e., the Act of 23 April 1964 (Civil Code)), which offers far-reaching flexibility for parties. In principle, no licences are required (see, however, the comments on securitisation funds below). According to the Act's regulations on contractual obligations, any agreement of this kind should therefore be considered on the basis of the general rule of freedom of contract, which means that its content or purpose shall not prejudice the nature of the relation, a statute or the 'principles of community coexistence'. The aforementioned rule means that every litigation funding contract should be analysed within the scope of, at least, its possible non-compliance with the rules of community coexistence. As such, and as an example, grossly excessive remuneration may constitute an infringement of these rules.

Apart from the minor limitations of a general nature mentioned above, there are certain restrictions on the conduct of such activities by bar-admitted lawyers (i.e., legal counsellors and attorneys at law). This affects the opportunities of Polish law firms in relation to offering such services.

First, it is forbidden for professional lawyers to agree on remuneration consisting solely of a contingency fee. At least part of the lawyer's remuneration should be fixed (however, it is not defined or specified how big such fixed part should be). Whereas litigation funding is frequently based entirely on the success fee, this rule hinders litigation funding being provided by law firms. It should, however, be emphasised that, in general terms, the concept of a success fee is widely applied by Polish lawyers, and is now becoming more common following clients' growing demands.

Secondly, it is questionable whether litigation financing (or financial intermediation) is permissible in light of the codes of conduct of professional lawyers. According to the rules applicable to professional lawyers, it is forbidden to carry on any activity that can potentially give rise to doubts as to the impartiality of the lawyer. Financial services or financial intermediation as well as intermediation in commercial transactions are examples of activities that are considered likely to influence the impartiality of a lawyer; therefore, it is questionable whether professional lawyers are allowed to engage in cases of litigation funding. Furthermore, this may also raise doubts because a professional lawyer's core duty is to act in the best interests of the client, which may raise controversies if funding is the key driver for a client's involvement in a dispute.

Contrary to third party litigation funding, strictly speaking, claim purchasing is widely used and based on statutory regulations of a supplementary character. A claim purchase agreement itself may be concluded by anyone, and no specific licence or permission is required to purchase a claim. More complex rules apply to securitisation funds, which are funds that issue investment certificates for the purpose of raising funds to acquire receivables. The fund is obliged to apply for a permit from the Polish Financial Supervisory Commission. The operation of the fund is also subject to the supervision of the Financial Supervisory Commission as well as the National Bank of Poland, the Inspector General for the Protection of Personal Data, the Inspector General of Financial Information or the Office for Competition and Consumer Protection.

Apart from the above, specific rules on insurance contracts are also worth mentioning.

Polish regulation of legal expense insurance policies is coherent with Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance, also known as Solvency II. The act implementing the Solvency II Directive provides general rules on legal expense insurance, such as the obligation of an insurance company to bear the costs of court proceedings and services directly related to the pursuit of the claim before a court

or by extra-judicial settlements, or the right of a policy holder to freely choose a lawyer. Limitations on insurance contracts derive from the Civil Code. Although the market offers a wide range of legal expense insurance, in Poland, contrary to many other jurisdictions, only before-the-event insurance is available. It is highly questionable whether after-the-event (ATE) insurance is permitted by Polish law since, according to the Polish Civil Code, an insurance agreement concluded after the event being subject to the agreement occurred shall be ineffective. Therefore, concluding an ATE insurance agreement would involve a high risk of nullity of the contract.

In conclusion, taking into account the low level of market interest in third party litigation funding and the marginal number of cases of such financing, it is quite unlikely that the market for litigation funding will be regulated in the near future. The foregoing should be considered – from the legal and regulatory framework perspective – as an inducement to potential investors.

III STRUCTURING THE AGREEMENT

Since cases of third party funding – when talking about claim funding only – are rarely accessible in the public domain on the Polish market, it is difficult to outline the typical structure and provisions of such agreements. Nevertheless, there are certain guidelines on critical stipulations.

First and most importantly, the parties generally indicate that the funding is to be reimbursed, and to what extent, only if the case is won. This may be a fairly straightforward agreement, or fairly sophisticated, for instance, by making it conditional on whether the case is won in full or in part. Accordingly, specific rules on the distribution of the award should be provided for. The parties can specify whether the funder gets a percentage of the award, costs incurred increased by a percentage of the award or a multiple of costs incurred. It seems indispensable to provide for the rules of settlement if the costs incurred exceed the award.

Since court proceedings, especially in complex cases involving significant capital, can take many years (sometimes more than 10), the parties should set forth the maximum level of funding provided throughout the litigation. The parties to a contract should also bear in mind that Polish civil procedure consists of two instances and extraordinary review procedures. During the main proceedings some additional, interlocutory proceedings may also arise, along with proceedings resulting from the counterclaim of the other party to a process. All the aforementioned proceedings can considerably extend the duration of the main court proceedings, increase the costs incurred by the funder and therefore decrease the profitability of the funding; thus, these should be settled in the contract. The remuneration may also be structured as a lump sum without making the fee contingent upon the percentage of the value of the claim.

Secondly, the contract should stipulate the rules on exchanging information between the parties to a contract as well as the rules on disclosing information to third parties. The arrangements of the parties should cover the admissibility of disclosure of funding by any of the parties, specifying the information that shall remain confidential. Furthermore, the parties should be aware that the funder may come to possess information classified as a company secret, and thus it is highly recommended to provide for rules of confidentiality.

Thirdly, it is recommended that the funder protect against any fraudulent misrepresentation or non-disclosure of any information or document important from the point of view of a risk assessment or a profit–loss analysis. In such a case, the funder should be allowed to withdraw from the contract and claim damages or contractual penalties, or both.

Finally, the parties should consider other minor issues such as who chooses the lawyer or whether (and, if so, under what conditions) the claimant is allowed to settle the dispute. In general, defining the scope of the funder's interference in the proceedings needs to be determined, otherwise it opens the way to a potential dispute between the party and the funder over the trial's handling and pursuing liability in the case of an unfavourable verdict.

In the case of claims purchasing, the agreement concluded by the parties usually constitutes a purchase agreement and an assignment. Hence, it should include elements typical for a purchase agreement, such as price and the timing of the passing of the claim as well as related profits and burdens to the buyer, and provisions on the assignment.

In structuring the provisions on the assignment, the parties (particularly the purchaser) should focus on the responsibility of the seller for his or her entitlement to the claim and the possible insolvency of the debtor. Even though the responsibility of the seller for the entitlement to the claim is based on statutory provisions, it is in the purchaser's best interest to verify whether the disposability of the claim was limited by the parties; hence, an agreement concluded contrary to such a provision shall be ineffective. Contrary to the seller's responsibility for his or her entitlement, the responsibility for the insolvency of the debtor does not arise from statutory provisions, and it should therefore be subject to the parties' arrangements.

In addition, in respect of claims purchases, the parties to a claim purchase agreement should be aware that according to the statutory provisions, the performance of an obligation to the former creditor shall be effective towards the acquiring party until the alienating party notifies the debtor of the assignment. Therefore, the parties should consider whether to notify the debtor of the assignment, which party is responsible for notification and how to settle any payments made by the debtor between the conclusion of the contract and the notification of the debtor (if applicable).

It is important to note that as a result of a claim purchase agreement, the seller disposes of all of his or her rights towards the claim; thus, the seller will usually not have any interest in providing for rules on the choice of lawyer or the costs of proceedings arising in relation to the claim. Nevertheless, in every case the parties should consider concluding a non-disclosure agreement.

IV DISCLOSURE

In general terms, the obligation to pay the costs of litigation (arbitration) is imposed on the party to the process. There are, however, no regulations preventing a third party from paying the costs on behalf of the party, as long as it is clear that the court cost was paid in the case in question. It is allowed under the Civil Code to pay someone's else dues. There are also no regulations imposing on the party the obligation to disclose the source of financing, any agreement in this regard or, for example, a contract with a lawyer (apart from in class action claims). The party to a process is free to organise its relationship with the funder in the most convenient way. It is also important to note that even if disclosed, the third party litigation funder is not a party to a process and cannot be held liable for adverse costs.

Furthermore, bar-admitted lawyers are not only allowed, but are also under a duty, to keep confidential all information obtained in connection with their professional activities. A confidentiality obligation applies to all the information concerning his or her client disclosed to the lawyer by the client or obtained in any other way, regardless of the source or the form of the information. Legal privilege also applies to the documents created by the lawyer and any correspondence between the lawyer and the client. Legal privilege or a confidentiality obligation has no time limits. It is even disputable whether the client can release a lawyer from the obligation of preserving secrecy. On the basis of the confidentiality obligation, the lawyer is allowed to refuse to answer any questions concerning the information covered by the obligation.

The party to the process and the third party litigation funder are, therefore, quiteable to keep the financing, and any circumstances related to the financing, secret.

The situation is entirely different when the funding consists of claim purchasing. In such a case, the rules on legal privilege and confidentiality remain unaltered, whereas the seller and the purchaser of the claim, as well as the claim purchase agreement itself, shall be disclosed (at least before the court). The disclosure of the legal relationship between the purchaser and the seller is necessary to prove that the transaction took place and was valid. It is important to note that hearings are public in most cases. The court can order the hearing to be held *in camera* upon the request of a party being a business entity if facts constituting a company secret may be revealed; however, there is no actual possibility to limit the access of another party to such information revealed during the hearing or included in the case file. Nevertheless, company secrets shall be protected on the basis of the Act on Fair Trading providing that the disclosure or the making use of someone else's company secret constitutes an unfair trading practice and shall be subject to punitive measures.

V COSTS

The main rule of cost distribution in Polish domestic litigation is 'loser pays'. The losing party shall, upon the request of the winner, reimburse reasonable costs of the legal proceedings, which include court costs, the attorney's or legal counsellor's fee, and the cost of the appearance of the party before the court.

As to court costs, in most disputes involving property rights the court fee amounts to 5 per cent of the value of the object in dispute: not less than 30 zlotys and not more than 100,000 zlotys. The court costs are entirely reimbursed to the winning party. However, where only a part of the claims is awarded, costs shall be reciprocally exclusive or proportionally shared. The court may also require that one of the parties reimburse all costs if the other party lost only a minor part of his or her claims.

The rules of reimbursement of the fee of a professional lawyer constitute a more complex issue. According to general rules, a party may request reimbursement of the fee of a lawyer within the limits set forth in the regulation on the fees for legal counsel's activities, which amount to, for example, 10,800 zlotys for cases where the value of the object in dispute is between 200,000 zlotys and 2 million zlotys, or 25,000 zlotys where the value of the object in dispute is above 5 million zlotys. A party may request multiples of the fee provided for in the regulation when it is justifiable in light of the required workload of the lawyer, the value in dispute or the complexity of the case. Nevertheless, the fee reimbursed by the losing party cannot exceed six times the fee provided for in the regulation. The costs reimbursed

are therefore detached from the costs actually incurred by the party, especially given the fact that the courts rarely order the losing party to pay more than the minimal fee provided for in the regulation.

When it comes to the reimbursement of the cost of a party's appearance before the court, it should be noted that in general terms, a party represented by a professional lawyer is not obliged to be present throughout the hearings, unless the court orders the party to appear in person. Therefore, a party represented by a professional lawyer is entitled to reimbursement of the costs of personal appearance only if such appearance is summoned by the court. A party not represented by a lawyer can request a reimbursement of the costs of the personal appearance irrespective of a court summons, within the limits of the fee of the lawyer performing his or her professional activities in the court.

VI CONCLUSIONS AND OUTLOOK

Third party litigation funding (considering the financing of a claim of a party to a court or tribunal dispute) has no strong presence in Poland, and data regarding this practice are difficult to access. The segment of the claim funding industry that is recognised is claims purchasing, performed under various schemes. Most frequently it involves entities dealing with difficult-to-collect or non-collectible receivables that wish to use debt recovery services or that will sell their claims to securitisation funds in order to recover at least a part of their funds, making the claims purchasing market buoyant. Some entities would rather insure against legal expenses to mitigate any future risk of their inability to bear the costs of litigation; however, legal expense insurance constitutes only a marginal share of the insurance market.

Part of the growing industry segment is class action claims (however, with the rather unusual 'funder' being the state).

The absence of third party litigation funding (in its core feature) is reflected by the lack of specific regulations in this regard. It can be expected that as soon as this branch of business starts to grow, relevant regulations shall be introduced. For now, litigation funding is considered a commercial activity allowed under the general rules of freedom of economic activity, whereas the specific legal framework is driven by the regulations of the Civil Code. Since third party litigation funding is not a regulated activity, investors can take up and pursue this kind of economic activity without any limitations. Obviously, certain specific regulations apply to some segments of the industry related to the claim purchase scheme, such as securitisation funds or insurance; third party litigation funding is not subject to any of these.

PORTUGAL

*Duarte G Henriques and Joana Albuquerque*¹

I MARKET OVERVIEW

The market for third-party funding in Portugal is still small compared with more evolved markets such as the United States, United Kingdom, Australia and Germany, and still unknown to some Portuguese companies and law firms. However, the high costs of pursuing complex arbitration or litigation are paving the way for small and medium-sized Portuguese companies to seek litigation financing. This makes Portugal a country to keep on the radar as a growing market.

On the other hand, academic discussion surrounding third party funding is also on the rise, with three academic papers on the subject published by Portuguese jurists, including one of the authors of this chapter.² The 2017 postgraduate course on arbitration at the University of Lisbon School of Law also specifically included a lecture on third party funding.

On 9 October 2017, a special event took place in Lisbon to present and discuss, among prominent international and Portuguese academics, practitioners and arbitrators, the ‘Draft Report for Public Comment’ of the ICCA-Queen Mary Task Force on Third-Party Funding.³ It should come as no surprise, therefore, that this practice looks set only to increase in the context of Portuguese arbitration and litigation.

Portugal has a long-standing practice of insurance for judicial protection; this kind of insurance is widespread in Portugal and, in most cases, is included in the civil liability insurance for motor vehicles. Although less common, there is also insurance coverage for other kinds of claims, including family, commercial, real estate and other areas of the law.⁴

The model adopted in such insurance policies is the typical ‘before-the-event’ insurance for legal and judicial risks. The insurance companies, in these cases, have virtually no control over the case, with their involvement limited to the payment of judicial costs and attorneys’

1 Duarte G Henriques is a partner and Joana Albuquerque is of counsel at BCH Lawyers.

2 António Pinto Leite, ‘Third-Party Funding as a joint venture and not as a mere finance agreement: the independence and impartiality of the arbitrators’, *VII Congresso do Centro de Arbitragem Comercial: Intervenções* (Almedina, July 2014), 105–113; Duarte Gorjão Henriques, ‘Third-Party Funding ou o Financiamento de Litígios por Terceiros em Portugal’, *Revista da Ordem dos Advogados*, Ano 75 – Vol. III/IV Jul/Dec – 2015, 573–624; Ricardo Silva Pereira, ‘Third-Party Funding e implicações éticas na relação com os árbitros’, *Revista Internacional de Arbitragem e Conciliação, da Associação Portuguesa de Arbitragem*, Year No. 9 – 2016 (Almedina), 87–122.

3 See www.arbitration-icca.org/projects/Third_Party_Funding.html, last accessed 1 September 2017.

4 See, for example, <https://www.arag.pt/>.

fees up to the limit covered by the policy. In some cases, they appoint the counsel who will have direct and exclusive contact with the insured party. However, no generic coverage is accorded to cases involving arbitration.

This insurance practice has different characteristics and is subject to regulation that is quite distinct from that applicable to third party funding, therefore it is not feasible to transpose directly any of the concepts from this insurance practice to third party funding. Also, as yet, the funding of arbitration cases using the modern business model of third party funding is uncommon in Portugal. Nonetheless, it is undeniable that, in practical terms at least, the notion of a litigation case being financed by an insurance company is not wholly alien to the Portuguese market. However, the same conflicts-of-interest issues that arise in the context of arbitration (the subject of the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines) – see Section IV) should also arise in relation to disclosures of interests for both before-the-event insurance and (albeit less common in Portugal) after-the-event insurance. For although they are different models, the same principles of disclosure apply to funders and insurers, both of whom have a direct or indirect economic interest in the arbitration.

In any event, given the size and characteristics of the Portuguese legal market, we see potential for the growth of third party funding, which will primarily involve (1) small and medium-sized Portuguese companies pursuing complex claims that need sophisticated counsel and experts; (2) Portuguese companies in financial distress that need to secure rights through litigation or arbitration claims; (3) foreign investors seeking redress through investment arbitration against the Portuguese state, or Portuguese companies against a foreign state; and (4) international commercial arbitration in Portugal, where companies willing to pursue their claims often do not have the initial capital to pay the advance on costs, including those of some international arbitration institutions.⁵

II LEGAL AND REGULATORY FRAMEWORK

There is no specific regulation of third party funding in the Portuguese legal system, or the European Union for that matter.

There are also no judicial precedents in Portuguese courts relating to third party funding and no association for self-regulation of funders, such as the Association of Litigation Funders of England and Wales.

However, the common law rules prohibiting champerty (supporting litigation in exchange for a share of the proceeds of that litigation) and maintenance (supporting litigation, regardless of the reason) do not exist in the Portuguese legal system. Although

5 A simple exercise to estimate the advance on costs for an ICC arbitration (see <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/>) will show that an amount in dispute of US\$20 million, with one arbitrator, will require advance on costs of approximately US\$200,000, with this amount increasing to approximately US\$450,000 for three arbitrators. These are only the costs to start the arbitration, and do not include the arbitrator's expenses and counsel's fees. These amounts may prove prohibitive for some small and medium-sized companies.

even in common law jurisdictions these rules have lost some of their importance or have been eliminated altogether,⁶ the lack of prohibition in Portugal fosters more flexibility for the participants in this industry and poses fewer challenges in its application.

Notwithstanding the scenario above, it is worth investigating the possible challenges litigation funding by third parties may face in relation to the Portuguese legal system.

The following are the fundamental challenges: (1) verifying whether the activity of litigation funding may be subject to prior authorisation or licensing by Portuguese financial authorities; (2) assessing whether the third party funding business model may fall into a *quota litis* or sharing-of-attorneys'-fees model; (3) analysing the issues pertaining to attorney–client privilege; (4) verifying the extent to which third party funding may be characterised as usury; (5) analysing whether third party funding can be considered a 'monetisation' of justice and, if so, what consequences derive from that assertion; and finally (6) assessing whether it violates principles of public policy and good morals.

i Licensing of the activity

Banking and financial activities in Portugal are regulated by Decree-Law No. 298/92 of 31 December, as modified and adjusted.⁷

We find it challenging to place third party funding within any of the activities of credit or financial institutions allowed under this Act (as described in Articles 3, 4-A and 6 of Decree-Law 298/92). We also question whether third party funding can be characterised as any of those activities that are exclusive to institutions of credit, as provided for in Article 6 of Decree-Law 298/92.

By the same token, we cannot conclude that the modern type of litigation funding agreements fulfil the definitional requirements of the financial agreements listed in Article 2-A of Decree-Law 298/92.

Equally, it does not seem correct to affirm that third party funding could be classified as an insurance activity (for the purposes of the legal regime governing access to and exercise of insurance and reinsurance activity provided by Law No. 147/2015 of 9 September), because even though the funding agreement contains the element of risk, in the very same fashion as an insurance policy, it lacks a fundamental requirement of the insurance policy: the premium, which is the typical 'price' for the insurance policy. Indeed, because third party funding in its common model is a 'non-recourse' finance model, it typically does not have a price attached.

In summary, we understand that there is no legal provision under Portuguese law requiring the licensing of the activity of third party funding.

It may be the case that funders may be subject to licensing and regulation to the extent that they become listed companies or need to raise capital in the financial market. However, these cases do not pertain to, and cannot be confused with, the activity of financing litigation, which remains unregulated in Portugal.

6 This was the case in Australia. Hong Kong and Singapore also passed legislation in 2017 permitting third party funding in arbitration. The Irish Supreme Court, however, ruled on 23 May 2017 that such a funding arrangement is unlawful because it violates the country's law barring champertous agreements.

7 The 46th version being the most recent modification, from Law No. 30/2017, of 30 May.

ii Issues related to the legal profession in Portugal

The new Rules of the Portuguese Bar Association, approved in Law No. 145/2015 of 9 September, maintain the traditional rule in Portugal that prohibits the *pactum de quota litis*.⁸ This provision has the purpose of protecting the dignity of the legal profession by declaring it unlawful to waive the fees that compensate a lawyer for his or her professional performance.

It does not seem to us, however, that the funding of litigation by a third party violates this rule. Even if the attorneys' fees are paid directly by the third party funder, which is a common scenario in many jurisdictions where such payment is not forbidden,⁹ it is only doing so on behalf of the client, and it does not call into question counsel's right to the fee.

It also cannot be claimed that a third party funder is practising any form of *quota litis* agreement. The funder does, in fact, have a share in the proceeds of the case under the agreement with the assisted party, but such an agreement is not prohibited by Article 106 of Law No. 145/2015, because neither the funder nor the assisted party is a lawyer, nor are they acting in the capacity of a lawyer.

The Rules of the Portuguese Bar Association also ban the practice of sharing attorneys' fees.¹⁰ However, in a litigation finance agreement, there is no sharing of attorneys' fees.

In any event, the question that follows is whether the counsel who accepts to work under a contingency fee agreement or for a success fee (to the extent permitted by Article 106 of Law No. 145/2015) is performing the activity of a third party funder. Is the party's counsel financing the case and, as such, subject to the same consequences and treatment as a third party funder? The answer can only be a negative one. The salient issue here is not so much whether a contingency fee agreement constitutes some form of litigation finance but rather ascertaining whether counsel can be considered a 'third party'. Given the legal representation phenomenon, in Portugal, the identity of counsel and client may be considered the same and, therefore, there is no involvement of a third party in the dispute.

At the same time, a party's counsel could not be held liable for adverse costs or security for costs. Aside from the issue of liability for acts in the exercise of the legal profession or vexatious litigation,¹¹ the responsibility for paying the costs of a claim cannot be transferred to a party's counsel.

Finally, it is also important to mention the confidentiality obligation of the party's counsel and the relationship between the party's counsel and the third party funder.

8 Article 106(2) of the Rules of the Portuguese Bar Association: 'By "*quota litis* agreement" is understood the agreement between the attorney and his or her client, before the definitive conclusion of the matter in which the latter is a party, by which the right to attorney's fees is exclusively dependent on the result obtained in the matter, and by virtue of which the constituent is required to pay its counsel part of the result obtained, either in amounts in cash or in any other good or value,' (free translation).

9 For instance, under French and Belgian rules applicable to the legal profession, an attorney cannot be paid and cannot enter into any fees agreement with a party other than his or her client.

10 Article 107 of the Rules of the Portuguese Bar Association: 'It is forbidden for the counsel to share his or her fees, even as a commission or another form of compensation, except with other lawyers, trainees or paralegals with whom he or she is associated or who may have provided collaboration,' (free translation).

11 Article 545 of the Portuguese Civil Procedures Code: 'When it is recognised that the party's attorney in fact had personal and direct responsibility in the acts revealed as vexatious litigation, this fact will be notified to the relevant professional public association, so that the association may apply the sanctions and charge the attorney in fact with the portion of the costs, penalties and indemnification it deems fair,' (free translation).

The Portuguese legal system provides for attorney–client privilege in Article 92 of the Rules of the Portuguese Bar Association, under which the counsel has a duty of confidentiality in relation to all information provided to him or her and about the case.

Disclosure of information by the assisted party’s counsel to a third party funder can only be made upon the waiving of privilege by the client (i.e., with prior authorisation from the latter). Without this authorisation, the lawyers could only disclose information protected by attorney–client privilege if the disclosure were absolutely necessary for the defence of their own dignity, rights and legitimate interests or those of their clients or representatives, and with prior authorisation from the chairman of the Bar Association’s regional council (Article 92(4) of the Rules of the Portuguese Bar Association).

The same obligation or right does not extend to the third party funder. Except for the confidentiality obligation provided in the funding agreement, the third party funder cannot benefit from a privilege that is conveyed exclusively to the legal profession. The ‘common interest’ doctrine of some common law jurisdictions, extending to the funder the protection of privileged information, is not applicable under Portuguese law. Thus, a funder may be ordered by a court judge to disclose any information it has obtained during the financing of a claim.

iii Usury

The prohibition of usury is a general principle of Portuguese law.

The question of usury, however, has not been much debated in the international arbitration setting (particularly in matters involving the United States and the United Kingdom). The discussion is at best limited to whether a funding agreement can be characterised as a loan.

However, in Portuguese law, the debate proves to be more significant because the prohibition of usury goes beyond the mere verification of the interest rates agreed in a contract.

According to Article 282 of the Portuguese Civil Code, a transaction is voidable when a party exploits another party’s state of necessity, inexperience, dependency, weak mental state or character to obtain excessive or unjustified benefits or the promise thereof, for itself or a third party.

Hence, the challenge may exist when litigation finance is used to fund a party in financial distress, which is the most typical case. In these cases, we may well encounter a party in a state that qualifies as one of necessity, dependency or mental weakness. Could such a party later invoke usury to have the contract declared void? Or would that claim challenge the limits of good faith?

The answers to these questions are not straightforward, but rather should be assessed on a case-by-case basis. In any event, given that the theoretical risk is significant, the funding agreement should be drafted with an eye to the limits of proportionality acceptable in Portuguese law.

iv Monetisation of awards and judgments

The Portuguese legal community may question whether third party financing could fall within the concept of transforming a lawsuit into a commodity or reducing justice to a commercial asset.

This, however, seems a far-fetched idea, and one that does not consider the actual benefits of third party funding, most notably the access to justice.

There may be cases where the rights of the funder in a funding agreement may be used as collateral for its operations, or those rights may even be recorded as financial assets in its balance sheets, but even these circumstances do not go so far as to characterise third party funding as a monetisation of awards and judgments.

In fact, experience shows that most funding agreements do not allow for the free assignment or pledge of the funder's rights, because of the specificity of those rights and the personal nature of the funder's obligations.

We have not found, in any case, any provision under Portuguese law or reference therein that may be interpreted as considering third party funding a monetisation of awards and judgments.

v Public policy and good morals

Articles 280 and 281 of the Portuguese Civil Code consider a transaction that violates public policy or good morals to be null and void.

However, we cannot find any principles of this nature in the Portuguese legal system (either of public policy or good morals) that would call into question the validity and effectiveness of a funding agreement. Neither have we found any judicial precedents that could be used to support such an argument.

Even if, theoretically, any such arguments could arise, they would need to be balanced against another fundamental right, which is the access to justice that third party funding provides – a consideration often forgotten.

III STRUCTURING THE AGREEMENT

As mentioned above, there are no laws in Portugal that regulate third party funding. For this reason, the funding agreement is not a typified (regulated) contract and it is far from harmonised. With a legal nature of uncertain status, the most cautious approach is to assess such agreements on a case-by-case basis.

The most common business model of third party funding is where the funder finances the litigation, with some level of monitoring or control, in exchange for a share of the proceeds if the claim is successful. This model would not seem to constitute a loan agreement, since the repayment of the funding is not obligatory but at the funder's risk. It is not a partnership, nor a commercial company, because the structure of the funding agreement does not create a separate legal entity. What then is the legal nature of the typical funding agreement?

There are those who consider the funding agreement to be a joint-venture agreement, more specifically an 'association in partnership' in Portuguese law (Decree-Law 231/81 of 28 July).¹² The similitude of relations that exist between third party funding and the association in partnership may indeed allow, by analogy, the application of Decree-Law 231/81 to regulate funding agreements.

In this case, Decree-Law 231/81 should be analysed to determine which contractual provisions should be expressly included, to avoid results that may not have been intended by the parties.

The following are the most relevant provisions that, pursuant to Decree-Law 231/81, require express and written agreement by the parties in the contract for litigation finance:

¹² See António Pinto Leite, 'Third-Party Funding' (2014), at 109–111.

- a* Where there is more than one funder in a funding agreement, the contract should provide for the exercise of the right of access to information, as well as the rights of audit and monitoring of the case by the various funders.¹³ The joint and several liabilities of the funders in the losses and gains of the claim also require an express provision in this sense.¹⁴
- b* If the parties agree that the funder will not bear the ‘losses’ arising from the claim, that is, that the funder will not be liable for paying adverse costs or security for costs, the contract needs to expressly provide for this exclusion.¹⁵ The lack of such an express provision may be construed as the funder’s obligation to participate in the losses.
- c* Conversely, the funder’s unlimited responsibility to bear adverse costs or security for costs must also be expressly written in the contract,¹⁶ as otherwise it will be limited to the amount of the funder’s contribution.¹⁷
- d* The assignment of the funder’s contractual standing must be expressly permitted in the contract.
- e* The contract must specifically provide for the participation and the manner in which the funder will participate in the proceeds of the claim.¹⁸ By the same token, the contract must provide for the financial contributions of the funder in the claim.¹⁹
- f* The requirement that the assisted party not perform certain acts, nor take certain steps, without the funder’s previous consent must be expressly included in the contract. The assisted party shall be liable for any damage caused to the funder for acts performed in non-compliance with these contractual obligations.²⁰
- g* The survival of the funding arrangement in the event of death or extinction of the assisted party or the funder must be expressly included in the contract.²¹
- h* The termination of the funding agreement for reasons other than ‘just cause’ (for instance, if the funder believes that the dispute is no longer commercially viable) must be expressly included in the contract.²²
- i* Article 31 of Decree-Law 231/81 provides for the assisted party’s annual obligation to report to the investor. The reporting should be precise and clear on all operations the investor may have an interest in, justifying the amount of its participation in eventual losses or gains, if any. Therefore, any reporting obligations by the assisted party to the funder that are different from the provisions of Article 31 of Decree-Law 231/81, or in a more detailed manner, must be expressly included in the contract.

Besides the above, the agreement should stipulate confidentiality obligations between the funder and the assisted party, including any information received from the financed party’s counsel. If the funder wishes to receive information directly from the party’s counsel, the waiver of attorney–client privilege must be express and in writing.

13 Article 22(2) of Decree-Law 231/81.

14 Article 22(1) of Decree-Law 231/81.

15 Article 21(2) of Decree-Law 231/81.

16 Article 23(2) of Decree-Law 231/81.

17 Article 25(4) of Decree-Law 231/81.

18 Article 25(1) of Decree-Law 231/81.

19 Article 24(1) and (4) of Decree-Law 231/81.

20 Article 26(2) and (3) of Decree-Law 231/81.

21 Articles 28 and 29 of Decree-Law 231/81.

22 Article 30 of Decree-Law 231/81 does not specifically provide for such events of termination.

Finally, as stated previously, the principle of proportionality is a fundamental principle of law, as is the prohibition of excess under Portuguese law. This principle is encapsulated in Article 18, among others, of the Portuguese Constitution and may be considered a principle of Portuguese international public policy.²³

Ultimately, this means that the parties' free will is limited by these principles. Provisions that are excessively advantageous to one of the parties and a detriment to the other may be subject to scrutiny, review and, eventually, annulment by the Portuguese courts.²⁴

IV DISCLOSURE

The duty of disclosure of the existence of third party funding is a matter of much discussion and it relates not only to the parties' duty of disclosure but also to the arbitrator's duty of disclosure.

This discussion has revolved around the following main concerns in the context of arbitration: the possible conflicts of interest of arbitrators; and the arbitral tribunal's assessment of whether a party may be considered impecunious and thus unable to pay the adverse costs of a claim, and consequently being ordered to pay security for costs.

The discussion on conflicts of interest of arbitrators arises for a diversity of reasons in relation to third party funding, not the least of which is that ultimately arbitrators, unlike judges, receive their fees from the parties to perform their roles. In this context, the analysis of potential conflicts should focus on the extent to which an arbitrator, in the eyes of the parties, may be questioned as to his or her independence and impartiality in an arbitration in which one of the parties is being financed by a third party.

On the grounds of the principles of law, the duties of independence and impartiality of the arbitrators require that they be free of any prejudice, predisposition or affinities that may affect their fair and impartial decision in a claim, and that they be free of any personal, contractual or other relationship that may call into question the independence of the arbitrator.²⁵

Consistently, Article 9(3) of the Voluntary Arbitration Act (Law No. 63/2011 of 14 December) expressly requires that the arbitrators be independent and impartial in the exercise of their duties. This is a duty that cannot be waived by the parties, and violation of this duty will result in annulment of the final award. Furthermore, Article 11(1) of the Rules of Arbitration of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (also known as the Commercial Arbitration Centre) provides that arbitrators shall be, and shall remain, independent and impartial (and available); and Article 11(2) sets out that 'any person who agrees to sit on an arbitral tribunal shall sign the statement provided for in the previous article, in which he or she will disclose any circumstances which may, from the parties' viewpoint, give rise to reasonable doubts as to his or her independence, impartiality (or availability)'.

23 See Duarte Gorjão Henriques, 'The International Public Policy of the Portuguese State: A Matter of Value?', *Kluwer Arbitration Blog* (4 July 2017) (at <http://kluwerarbitrationblog.com/2017/07/04/international-public-policy-portuguese-state-matter-value/>, last accessed on 1 September 2017).

24 See decision of the Portuguese Supreme Court of Justice of 14 March 2017, Ref. 103/13.1YRLSB.S1 (<http://www.stj.pt/index.php/jurisprudencia-42213/basedados>).

25 Ricardo Pereira Silva, 'Third-Party Funding' (2016), at 98.

The rules of arbitration of other Portuguese arbitration institutions require similar standards from the arbitrators. These institutions include the Centre for Commercial Arbitration of the Oporto Institute of Commercial Arbitration,²⁶ the Concórdia Centre for Conciliation, Mediation of Conflicts and Arbitration,²⁷ and the Arbitrare Centre for Arbitration for Intellectual Property, Domain Names, Corporate Names and Designations.²⁸

In addition, General Standard 3(a) of the IBA Guidelines provides for the arbitrators' duty to disclose any facts or circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. On the other hand, General Standard 7(a) provides that the parties have a duty to inform an arbitrator or the arbitral tribunal of any relationship between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The official explanation to General Standard 7(a) sets out that 'Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment', and gives the example of an entity providing funding for the arbitration as a person having direct economic interest in the award. It should be noted that insurers are also included in the duty to disclose, as they too may have a direct or indirect economic interest in the arbitration.

The question that follows from this is whether and how the Portuguese jurisdiction is giving weight to the IBA Guidelines. In this respect, albeit considered in a specific setting (arbitrations involving public entities), in four recent cases brought before the Supreme Court of Justice, and the Lisbon and Oporto Courts of Appeal, the courts considered that 'particular weight should be given to the IBA Guidelines'. In these cases, the courts relied on the IBA Guidelines as a particularly useful instrument in deciding conflicts of interest.²⁹ Portuguese commentators have also attributed substantial relevance to the IBA Guidelines.³⁰ As a consequence, we may conclude that General Standard 3(a) and General Standard 7(a) of the IBA Guidelines will most likely apply in Portugal.

Therefore, since the issue of disclosure has a legal basis in Portuguese law and is also provided for in certain rules of international arbitration institutions,³¹ it follows that in arbitrations in Portugal the parties must disclose whether they have resorted to third party funding, and arbitrators must disclose whether they have any relationship with the funders.

26 Article 16 of the Rules of Arbitration of the Commercial Arbitration Centre (<http://www.institutodearbitragemcomercial.pt/wp-content/uploads/2014/08/Regulamento-de-Arbitragem-do-Instituto-de-Arbitragem-Comercial-versão-18-de-Março-de-2016.pdf>, last accessed on 4 September 2017).

27 Article 11 of the Rules of Arbitration of the Concórdia Centre for Conciliation, Mediation of Conflicts and Arbitration (<http://www.concordia.pt/#>, last accessed on 4 September 2017).

28 Article 13(2) of the Rules of Arbitration of the Arbitrare Centre for Arbitration for Intellectual Property, Domain Names, Corporate Names and Designations (https://www.arbitrare.pt/sub_regulamentos.php?id=47, last accessed on 4 September 2017).

29 See the decision of the Portuguese Supreme Court of Justice of 12 July 2017, decisions of the Lisbon Court of Appeal of 24 March 2015 and 29 September of 2015, and the decision of the Oporto Court of Appeal of 3 June 2014, all accessible at <http://www.dgsi.pt/>.

30 See Dário Moura Vicente (Coordinator), *Lei da Arbitragem Voluntária Anotada* (3rd Edition, Almedina, 2017), at 44; and Mário Esteves de Oliveira (Coordinator), *Lei da Arbitragem Voluntária Comentada* (Almedina, March 2014), at 129-130.

31 See Article 24, 1, of the Investment Arbitration Rules of the Singapore Investment Arbitration Centre (at <http://siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf>, last accessed on 4 September 2017); Article 4 of Administrative Resolution 18/2016,

Finally, the question also remains as to the content of the disclosure by the parties regarding third party funding. The international setting shows us that there is no uniform understanding of this issue. Although initially the duty to disclose was limited to the existence of third party funding and the identity of the funder, it seems that information of a broader scope has been demanded more recently.³²

Therefore, in Portugal we may expect parties to be required to disclose the existence and details of any funders, as well as further information of relevance to the dispute, as was the case in the decision of Professor Julian Lew.³³

V THE FUNDER'S UPLIFT, COSTS AND SECURITY FOR COSTS

The decision of the High Court of Justice in the United Kingdom in the *Essar v. Norscot* case,³⁴ in 2016, merits discussion in relation to Portuguese arbitration, because a similar decision could potentially be reached in Portuguese courts.³⁵

In his decision, J Waksman QC confirmed the award made by Sir Philip Otto in an ICC arbitration seated in London. The arbitrator considered the financing arrangement the claimant had made with a third party funder to be 'costs' incurred by the claimant in pursuing its claim, which should therefore be reimbursed by the defendant in the recovery of expenses.

Under Portuguese law, arbitral tribunals have the authority to allocate costs under the principle of 'costs follow event', that is, the prevailing party has the right to recover the costs of the claim from the other party.³⁶ There is no limit to this allocation other than what the tribunal deems to be 'reasonable'. Therefore, given the arbitral tribunal's discretion to allocate adverse costs as it sees fit, it is possible that a similar decision could be rendered by an arbitral

of 20 July 2016, of the Centre for Arbitration and Mediation of the Brazil–Canada Chamber of Commerce (at <http://www.ccb.org.br/Materia/2890/resolucao-administrativa-182016>, last accessed on 1 September 2017); and the ICC Guidance Note for the disclosure of conflicts by arbitrators (at <https://iccwbo.org/>).

32 See Order No. 3 of Prof. Julian Lew of 12 June 2015, in *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), where the arbitral tribunal ordered the claimant to 'confirm to respondent whether its claims in this arbitration are being funded by a third party funder, and, if so, shall advise respondent and the Tribunal of the name or names and details of the third party funders, and the nature of the arrangements concluded with the third party funders, including whether and to what extent it/they will share in any successes that claimants may achieve in this arbitration'. See also, Article 24, I, of the Investment Arbitration Rules of the Singapore Investment Arbitration Centre.

33 See footnote 29.

34 *Essar v. Norscot* [2016] EWHC 2361 (Comm) ([http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2016/2361.html&query=\(2016\)+AND+\(ewhc\)+AND+\(2361\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2016/2361.html&query=(2016)+AND+(ewhc)+AND+(2361))).

35 See Duarte Gorjão Henriques, 'The *Essar v. Norscot* Case: A Final Argument for the "Full-Disclosure-Wingers" of TPF in International Arbitration', Kluwer Arbitration Blog (15 October 2016) (at <http://kluwerarbitrationblog.com/2016/10/15/the-essar-v-norscot-case-a-final-argument-for-the-full-disclosure-wingers-of-tpf-in-international-arbitration/#comments>, last accessed on 25 August 2017).

36 Article 42(5) of the Voluntary Arbitration Act (Law No. 63/2011, 14 December 2011) sets out that: 'Unless the parties agree otherwise, the award must contain the division by the parties of the costs directly resulting from the arbitral proceeding. The arbitrators may decide in the award if they deem it fair and adequate that one or some of the parties compensate the other or others for the totality or part of the reasonable and evidenced costs and expenses resulting from the involvement in the arbitration.' Similarly, Article 48(3) of the Rules of Arbitration of the Commercial Arbitration Centre allows the tribunal to 'decide on the manner of division of arbitration costs, attending to all circumstances of the case, including the adverse result and procedural behaviour of the parties'.

tribunal applying Portuguese law. However, it is appropriate to question not whether the arbitral tribunal has this authority, as it clearly does, but rather the real or effective extent of the reach of this authority.

We understand that the decision in the *Essar v. Norston* case should be met with criticism because it produces an unjust outcome, it is a strong deterrent to arbitration and is potentially damaging to the third party funding industry, and to arbitration in general as a consequence.

The uplift payable to the funder is neither a party's cost, nor is the assisted party liable for the uplift in the form of damages. Such an understanding could lead to a double (or triple or multiple) recovery or could be characterised as unjust enrichment attributable to the prevailing party.

Finally, such an understanding could have two adverse consequences for the funders: a strong argument for disclosure of the financing agreement and its conditions; and the resulting liability of the funders for the adverse costs, under the principle of *ubi commoda, ibi incommoda* (one who benefits from a legal regime must also assume the corresponding risks).

Thus, we must watch carefully, and eventually condemn this outcome, in case a decision such as that in the *Essar* case is repeated in Portugal, which may well happen.

On a different note, if we analyse the possibility of a court or arbitral tribunal in Portugal ordering the payment of adverse costs by the funder, as happened in the UK Court of Appeal *Excalibur* case,³⁷ we may conclude that the same result would be unlikely in a Portuguese court or in a tribunal seated in Portugal.

In the *Excalibur* decision, the Court held that the funders were required to pay the defendants' costs on an indemnity basis, even though the funders were not a party to the actions that led to the award of indemnity costs against *Excalibur*.

The authority of common law judges seems to have a greater reach than that of civil law judges. To a limited extent, Portuguese judges have authority over third parties (e.g., to order the submission of evidence), but not to the extent shown in the *Excalibur* decision.

However, depending on the development of third party funding in Portugal and, in particular, the level of control a funder may have in a claim, the principle of *ubi commoda, ibi incommoda* may eventually be taken into consideration in Portuguese courts to allocate adverse costs to a funder. A similar outcome is potentially feasible in arbitration, although the jurisdiction of the arbitral tribunal should be dealt with in a separate case under a doctrine allowing the extension of the arbitration agreement.³⁸ Certainly, any such development should be followed carefully in the near future.

As to the matter of security for costs, in theory it may be ordered by arbitral tribunals to be paid by the claimant or the defendant when the arbitral tribunal considers there to be a real and verified the risk that a party may not be able to bear the other party's costs in an adverse scenario.

In arbitration as well as in court proceedings, security for costs will be raised on the grounds of being a necessary interim measure, requiring, implicitly, the fulfilment of many prerequisites, such as the *periculum in mora* (the urgent need for the order and the 'danger in its delay') and the *fumus boni iuris* (a *prima facie* case).

37 *Excalibur Ventures LLC v. Texas Keystone Inc. and others* [2016] EWCA Civ 1144 (<http://www.bailii.org/ew/cases/EWCA/Civ/2016/1144.html>).

38 See Duarte G Henriques, 'The Extension of Arbitration Agreements: A "Glimpse" of Connectivity', *ASA Bulletin*, Volume 32, No. 1 (2014), p. 18.

However, the requirement for a party to pay the costs of the claim is a matter that the Portuguese courts and arbitral tribunals will not decide in advance so readily. For this reason, we anticipate that we may only see the imposition of this measure in extraordinary cases, and in exceptional circumstances.

In any case, and in line with what has been defended in international disputes (aside from the conspicuous case of *RSM v. Santa Lucia*),³⁹ we anticipate that tribunals will not assume a party's impecuniosity nor the impossibility of a party meeting its costs solely because it resorted to third party funding.

VI THE YEAR IN REVIEW

It is fair to say that much of what has been discussed so far in this chapter in respect of third party funding has also been debated among the Portuguese legal community in the course of the past year.

We have not seen any court or legislative developments for, as already mentioned, third party funding has not yet reached the stage of regulation or court precedents in Portugal.

However, academic discussions and relevant events for practitioners, such as the inclusion of a third party funding lecture in the postgraduate course on arbitration at the University of Lisbon School of Law, the ICCA-Queen Mary Task Force on Third-Party Funding event held in Lisbon in October 2017, and the Congress of Commercial Law, also held in Lisbon, in November 2017, with a presentation on third party funding, show the signs of the development of this industry in the country. We will presently see much more progress in this direction in Portugal.

VII CONCLUSIONS AND OUTLOOK

Even though the third party industry is not yet fully developed in Portugal, it continues to take strides in that direction.

Given the high costs of some commercial claims and the need for small and medium-sized Portuguese companies to finance the pursuit of their claims, coupled with the increase in international arbitration and the steady economic growth in size and complexity of commercial transactions in Portugal, we expect third party funding to feature increasingly in commercial and international disputes in Portugal.

As the discussions on the need for regulation of third party funding grow at international level, we anticipate that it will also be regulated at some stage in Portugal.

Regulation of third party funding could deal with issues such as costs related to arbitration and the responsibility of the funder for such costs; the definition of third party funding; the relationship between the funders, the assisted parties and the parties' counsel as regards attorney–client privilege, as well as the question of disclosure of the existence of a funding agreement and conflicts of interest.

In conclusion, given these challenges, it would seem prudent for arbitration agreements to include certain provisions to ensure less uncertainty in potential claims, and in particular: (1) the obligation to disclose the existence of funding agreements in the event of disputes, and the content to be disclosed; and (2) acknowledgement by the parties that, as a security

39 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014).

measure to avoid a potential annulment of the award or refusal of its recognition and enforcement under the 1958 New York Convention, the funder's eventual uplift should not comprise any recovery of costs or indemnity due to the prevailing party in the arbitration or litigation.

Last, but not least, if the practice of third party funding is to grow in Portugal, it is the duty of policymakers, judges, arbitrators and practitioners to ensure that its use and practice are tailored to the particularities of Portugal's legal system, otherwise there is a risk of driving participants away instead of encouraging them to develop this industry. Framing a safe and steady practice that embraces the needs of the Portuguese business community is key to the success of third party funding in Portugal.

SINGAPORE

*Matthew Secomb and Adam Wallin*¹

I MARKET OVERVIEW

Singapore opened its doors to third party funding in early 2017, but only for international arbitration and related proceedings. Since then, funding has become a growing feature of Singapore's international arbitration landscape. Funders are quickly establishing a presence in the city state.

Singapore is one of the world's leading international arbitration jurisdictions.² The caseload of the Singapore International Arbitration Centre (SIAC) has increased considerably over the past decade. In 2017, SIAC received over 450 new cases involving parties from 58 jurisdictions – a 32 per cent rise in caseload compared with the year before. The total aggregate sum in dispute for new cases filed in 2017 was S\$5.44 billion.³

These trends look set to continue. SIAC's caseload has grown more than fivefold in the past decade, and, in the past year, both the ICC International Court of Arbitration and the Permanent Court of Arbitration established offices in Singapore to meet the growing demand for commercial and investor–state arbitrations.⁴

A market for third party funding is also emerging. The first third party funding agreement under the new statutory framework was reported in July 2017, and international funders have a regular – and growing – presence in Singapore.⁵ Several funders have already opened permanent offices.

Further changes may also be on the horizon. In May 2018, Singapore's Ministry of Law concluded a public consultation seeking feedback on the third party funding framework.⁶

While it is still early days, funding in Singapore benefits from a combination of light statutory regulation, a rich pool of disputes, and serious interest from international funders. All of this means that the future looks bright for third party funding in Singapore.

1 Matthew Secomb is a partner and Adam Wallin is an associate at White & Case.

2 Queen Mary University of London and White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration', 9-10, <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf>. All websites referenced in this chapter were last accessed on 11 September 2018.

3 *ibid.*

4 ICC press release, 'ICC Court case management team begins operations in Singapore' (23 April 2017), <https://iccwbo.org/media-wall/news-speeches/icc-court-case-management-team-begins-operations-singapore/>; PCA website, 'Singapore Office', <https://pca-cpa.org/en/about/structure/singapore-office/>.

5 KC.Vijayan, 'First third-party funding for S'pore arbitration case', *The Straits Times* (1 July 2017).

6 Ministry of Law, 'Public Consultation to Seek Feedback on the Third-Party Funding Framework', <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-third-party-funding.html>.

II LEGAL AND REGULATORY FRAMEWORK

The legal and regulatory framework for third party funding in Singapore changed significantly on 1 March 2017. Singapore law now permits third party funding in international arbitration (and related proceedings) if the funder meets certain qualifying criteria. Outside the international arbitration context, however, funding is generally prohibited on public policy grounds.⁷

The regulatory regime for funding in international arbitration has been designed with flexibility and party autonomy in mind.⁸ Statutory regulation is relatively light, and focuses on lawyers and law firms practising in Singapore. Softer regulation from relevant institutions is emerging, but it remains to be seen how this will be used in practice.

The framework allowing third party funding is made up of various instruments.

i The Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017

Before the recent reforms, almost all funding arrangements in Singapore were unenforceable on public policy grounds. The amended Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017 provide a new framework to allow funding in certain cases.

The Civil Law Act abolishes civil liability for the tort of maintenance and champerty.⁹ However, funding agreements will still be unenforceable if they are contrary to public policy or are otherwise illegal.¹⁰

The Civil Law Act also creates a category of permitted funding agreements. These are contracts ‘under which a qualifying third-party funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings’.¹¹

Under the new framework:

- a ‘Prescribed dispute resolution proceedings’ means:¹²
- international arbitration proceedings;¹³

7 Recent (pre-reform) case law suggested limited exceptions to this general prohibition, including the sale of a cause of action in the context of insolvency, or where the funding party has a legitimate interest in the claim (*Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597). These exceptions would still appear to be available under the new framework, at least for funding agreements outside Section 5B of the Civil Law Act (see below).

8 Indraneel Rajah SC (Senior Minister of State for Law), Second Reading of the Civil Law (Amendment) Bill (10 January 2017) https://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00010624-WA¤tPubID=00010625-WA&topicKey=00010625-WA.00010624-WA_4%2Bid-83aee76-742e-45d8-bc2c-9996aa8b95b3%2B.

9 Civil Law Act Section 5A(1). This abolition of civil liability reflects earlier statements of the Singapore High Court that neither champerty nor maintenance is a tort or crime in Singapore: see *Jane Rebecca Ong v. Lim Lie Hoa* [1996] SGHC 140.

10 Civil Law Act, Section 5A(2).

11 Civil Law Act, Section 5B(2). Curiously, the remainder of the Civil Law Act provisions do not refer to this formulation. Rather, they refer to ‘third-party funding contracts’. To fall under that definition, the funding must be given ‘in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled’ (Civil Law Act, Section 5B(10)). This implies that permitted funding agreements must also meet this requirement.

12 Regulations, Regulation 3. This chapter focuses on funding in international arbitration, rather than related court proceedings.

13 See Section 5 of the International Arbitration Act (to which Regulation 2 of the Civil Law (Third Party Funding) 2017 Regulations refers) for a full definition of ‘international arbitration proceedings’. In summary, an arbitration is international if: at least one of the parties has its place of business outside

- court proceedings arising from or out of or in any way connected with international arbitration proceedings;
 - mediation proceedings arising out of or in any way connected with international arbitration proceedings;
 - an application for a stay of an international arbitration agreement and any other application for the enforcement of an arbitration agreement; and
 - proceedings for or in connection with the enforcement of a foreign award under the International Arbitration Act.
- b A ‘third-party funder’ is ‘a person who carries on the business of funding all or part of the costs of dispute resolution proceedings to which the person is not a party’.¹⁴ Dispute resolution proceedings are defined broadly to include the ‘entire process of resolving or attempting to resolve a dispute’, including through ‘any civil, mediation, conciliation, arbitration or insolvency proceedings’.¹⁵
- c To ‘qualify’ under the Civil Law Act, the third party funder must carry on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the third party funder is not a party;¹⁶ and have a paid-up share capital of not less than S\$5 million or not less than S\$5 million in managed assets.¹⁷

The effect of these provisions is that most commercial third party funders will now be able to fund international arbitration and related proceedings under Singapore law. However, the requirement to ‘carry on the principal business’ of funding, and the apparent need to fund ‘in return for a share or other interest in the proceeds or potential proceeds of the proceedings’, seem to exclude respondent-side funding¹⁸ and non-commercial funders (such as *pro bono* funders, most individual persons, and businesses not principally engaged in funding).

Where a third party funder does not comply with the qualification requirements identified above, its rights under a funding agreement will not be enforceable.¹⁹ The funder can, however, apply to the court or arbitration tribunal for relief. It may be granted relief if the disqualification or non-compliance was accidental, inadvertent or for other sufficient cause, or where it is otherwise just and equitable to grant the relief.²⁰ If the funder’s rights

Singapore when the contract containing the arbitration agreement is signed; the place of the arbitration under the arbitration agreement, the place most closely connected with the dispute or the place where a substantial part of the parties’ obligations are to be performed is outside the state where the parties have their place of business; or the parties otherwise agree the arbitration agreement is international.

14 Civil Law Act, Section 5B(10).

15 Civil Law Act, Section 5B(10).

16 Regulations, Regulation 4(1)(a).

17 Regulations, Regulation 4(1)(b). ‘Managed assets’ are defined in Regulation 4(2). In each case, this can be satisfied by an equivalent foreign currency amount.

18 See also the Law Society Guidance Note (discussed below), which states that ‘Third-party funding involves a commercial funder agreeing to pay some or all of the claimant’s legal fees and expenses’. The definition of a ‘third-party funding contract’ would, however, appear to permit the funding of a counterclaiming respondent (Civil Law Act, Section 5B(10)).

19 Civil Law Act, Section 5B(4).

20 Civil Law Act, Section 5B(6).

become unenforceable, the rights of any other party under the funding agreement will not be affected.²¹ In practice, however, funders will likely seek to neutralise this provision by including this situation as a termination event in the funding agreement.

ii Legal Profession Act and Legal Profession (Professional Conduct) Rules 2015

The new framework also makes amendments to the Legal Profession Act and the Professional Conduct Rules applicable to legal practitioners and law firms in Singapore.²² The amendments impose requirements to disclose the existence of third party funding (these are addressed further in Section IV). They also prohibit lawyers and law firms from holding financial interests in funders, or from receiving commissions, fees or shares of proceeds from funders.²³

These amendments are supplemented by a Guidance Note from the Law Society of Singapore.²⁴ Aspects of the Law Society Note are addressed in further detail below.

iii Other guidelines and practice notes

As anticipated when the Civil Law Act was passed,²⁵ various practitioner and institutional commentaries, guidelines and rules have emerged. The most significant to date are those produced by the Singapore Institute of Arbitrators (SI Arb) and SIAC.

SI Arb has produced Guidelines for Third Party Funders that aim to promote best practices for funders in Singapore-seated arbitrations.²⁶ Although not mandatory, the SI Arb Guidelines are the result of significant input from the Singapore arbitration community and carry considerable weight. The SI Arb Guidelines identify matters to be addressed in funding agreements, and suggest approaches to issues of confidentiality and privilege, conflicts of interest and control of proceedings, withdrawal of funding and disclosure.

SIAC has produced a Practice Note on Arbitrator Conduct in Cases Involving External Funding.²⁷ The Practice Note applies in SIAC arbitrations involving a permitted 'external funder'.²⁸ It includes provisions on disclosure (including the disclosure of potential arbitrator conflicts) and costs.

21 Civil Law Act, Section 5B(7).

22 This includes Singapore solicitors, certain registered foreign lawyers in Singapore, every Singapore law practice and law practices licensed under the Legal Profession Act: see Legal Profession (Professional Conduct) Rules 2015, Rule 3(8) and Legal Profession Act, Section 106A.

23 Legal Profession (Professional Conduct) Rules 2015, Rule 49B.

24 The Law Society of Singapore, Guidance Note 10.1.1 on Third-Party Funding (25 April 2017).

25 Indranee Rajah SC (Senior Minister of State for Law), footnote 9.

26 SI Arb Guidelines for Third Party Funders (18 May 2017) https://siarb.org.sg/images/SIARB-TPF-Guidelines-2017_final18-May-2017.pdf. Under the SI Arb Guidelines, a 'funder' is a 'third party [. . .] [that] provides financial support to enable a party (the Funded Party) to pursue or defend an arbitration or related court or mediation proceedings. Such financial support is provided in exchange for an economic interest in any favourable award or outcome that may ensue' (Paragraph 1.1). This scope of funding to which the SI Arb Guidelines potentially apply is therefore broader than that possible under the definition of 'qualifying third-party funder' in the new statutory framework.

27 SIAC Practice Note PN – 01/17 on Arbitrator Conduct in Cases Involving External Funding (31 March 2017), <http://www.siac.org.sg/images/stories/articles/Rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf>.

28 An external funder is 'any person, either legal or natural, who has a Direct Economic Interest in the outcome of the arbitration proceedings' (SIAC Practice Note, Paragraph 3(c)). This definition is broader than the definition of a 'qualifying third-party funder' under the Civil Law Act. Further, the SIAC Practice Note is not limited to funding arrangements governed by the new statutory framework.

SIAC also recently published the SIAC Investment Arbitration Rules 2017, which include provisions on third party funding.²⁹

Specific aspects of these materials are addressed further below.

III STRUCTURING THE AGREEMENT

The new statutory framework is silent as to the structure and terms of the funding agreement. The SIArb Guidelines, however, provide extensive guidance, and have gained traction in the market. At the time of writing, nine funds have publicly endorsed the Guidelines.³⁰ The Law Society Note also makes recommendations to legal practitioners when advising on funding negotiations.

The Law Society Note identifies five key themes outlined below, which overlap with the SIArb Guidelines.

i Confidentiality and privilege

The Law Society Note recommends that certain terms be included in an initial confidentiality or non-disclosure agreement. The terms are designed to protect confidentiality and privilege in documents disclosed to a funder before it decides to fund a claim.³¹ The SIArb Guidelines echo the need for this protection.³²

The Note also recommends that similar provisions be included in the funding agreement itself.³³ In addition, the SIArb Guidelines prohibit a funder from seeking disclosure of information from a funded party's legal practitioner that might amount to a breach of privilege or the practitioner's confidentiality obligations.³⁴

ii Scope of funding

The funding agreement should specify the amount of funding (and how this may be varied) and the agreed investment return.³⁵ It should also state the type of costs that will be funded, and in particular whether a funder is liable for adverse costs, insurance premiums, amounts ordered as security for costs or any other financial liability.³⁶ The Law Society Note also recommends terms on the priority and timing of payments to the funder.³⁷

29 SIAC, *Investment Arbitration Rules* (1st Edition, 1 January 2017), <http://www.siac.org.sg/images/stories/articles/Rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf>, Articles 24(1), 33.1 and 35.

30 The prospects of this are good, at least for funding agreements negotiated by Singapore legal practitioners. The Law Society Note (Paragraph 22) recommends that guidelines published by SIArb and SIAC should either be incorporated into the funding agreement or the funder should agree to comply with them.

31 Law Society Note, Paragraphs 25–29.

32 SIArb Guidelines, Paragraph 2.2.

33 Law Society Note, Paragraph 29; SIArb Guidelines, Paragraph 5.

34 SIArb Guidelines, Paragraph 5.2. The provision excludes situations where the funded party consents or the disclosure is made under a pre-agreed arrangement approved by the funded party.

35 Law Society Note, Paragraph 30(a-b); SIArb Guidelines, Paragraphs 3.1.2-3.1.3.

36 Law Society Note, Paragraphs 30(c) and 31; SIArb Guidelines, Paragraph 3.2.

37 Law Society Note, Paragraphs 33–34.

iii Managing conflicts of interest

The Law Society Note recommends terms designed to reduce the risk of conflicts between a funder and the funded party. These include the funder acknowledging that the lawyer's duties are owed to the client, not the funder; the lawyer only sharing written opinions with the funder if the funded party consents; and the funder not inducing the lawyer to breach his or her duties or cede control of the dispute to the funder.³⁸

The SIArb Guidelines contain similar provisions, although they appear to allow slightly more leeway for funders to control a dispute if the funding agreement permits.³⁹ The SIArb Guidelines also require funders to be satisfied the funding will not give rise to conflicts of interest.⁴⁰ Where a funder funds more than one party in the same proceedings, it must notify the funded parties of any potential conflict that arises during the case.⁴¹

The related issue of disclosure between adverse parties and to the court or tribunal is addressed further in Section IV. The SIArb Guidelines envisage the funding agreement authorising the funded party to disclose the funder's identity and address, and the existence of the funding, to the other parties, legal practitioners and court or arbitral tribunal.⁴² The guidelines also require funders to cooperate with any further disclosure about the funding required by the court or tribunal or under any applicable rules.⁴³

iv Funder's level of involvement in decision-making and dispute resolution

The Law Society Note recommends that a funding agreement specify the nature and scope of the funder's role, and gives examples of what this might look like in practice.⁴⁴ Outside the context of settlement, the SIArb Guidelines do not specifically envisage a term outlining the funder's role, although the Guidelines favour clarity where possible.⁴⁵

Both the Law Society Note and the SIArb Guidelines advocate including a dispute resolution provision for managing conflicts between the funder and funded party.⁴⁶ The Law Society Note gives two examples of possible procedures: referral of disputes to an independent arbitrator for an expedited and binding decision; or giving the funded party the final say, but reserving the funder's right to claim against the funded party if it acts in bad faith.⁴⁷ By contrast, the SIArb Guidelines suggest a 'fair, transparent and independent dispute resolution mechanism'.⁴⁸

38 Law Society Note, Paragraph 37(a-e).

39 SIArb Guidelines, Paragraphs 6.1 and 6.2.

40 SIArb Guidelines, Paragraph 2.1.3.

41 SIArb Guidelines, Paragraph 6.1.5.

42 SIArb Guidelines, Paragraph 3.1.5.

43 SIArb Guidelines, Paragraphs 3.1.6 and 8.1.

44 Law Society Note, Paragraph 41. The examples include assisting with choice of solicitors, arbitrators and mediators; assisting with strategic or tactical decisions; considering advice and providing instructions; managing expenses; and providing input on settlement.

45 SIArb Guidelines, Paragraph 7.1.1 (funder's role in settlement).

46 Law Society Note, Paragraph 42; SIArb Guidelines, Paragraphs 3.1.7 and 6.2.3.

47 Law Society Note, Paragraphs 42(a-b).

48 SIArb Guidelines, Paragraph 3.1.7.

v Termination of the funding agreement

The funding agreement should identify the situations in which it may be terminated by the funder.⁴⁹ The Law Society Note recommends that funders should generally not have a discretionary right to terminate a funding agreement.⁵⁰ The funding agreement may also provide for termination by the funded party.⁵¹

Termination provisions should clarify the extent to which a funder remains liable for accrued obligations.⁵² The Law Society Note suggests the funding agreement should also require the funder to pay costs caused by the funder's termination.⁵³

IV DISCLOSURE

Disclosure of funding arrangements to adverse parties and the court or arbitral tribunal is a central tenet of Singapore's new funding framework.⁵⁴ The disclosure rules are designed to address issues that can arise from a lack of transparency and conflicts of interest in funded proceedings, while avoiding prescriptive regulation that limits party autonomy and flexibility.⁵⁵

i Disclosure of basic funding information

Amendments to the Legal Profession (Professional Conduct) Rules 2015 require legal practitioners in Singapore to disclose certain information to the court or tribunal and every other party to funded proceedings, namely the existence of the funding agreement, and the identity and address of the third party funder.⁵⁶

Disclosure must be made either on the date the proceedings are commenced or, if no funding is in place at that date, as soon as practicable after that.⁵⁷

The Law Society Note also recommends that any termination of a funding agreement or change of funder should also be disclosed.⁵⁸

The rationale for these obligations was to give the disclosure requirements 'practical and real effect', instead of attempting to regulate funders or funded parties, which are often located outside the jurisdiction.⁵⁹ Two important consequences flow from this.

First, although the disclosure requirement on legal professionals themselves are relatively limited, it is unclear whether legal practitioners subject to the Professional Conduct Rules

49 Law Society Note, Paragraph 43; SIArb Guidelines, Paragraph 7.1.2.

50 Law Society Note, Paragraph 43.

51 Law Society Note, Paragraph 45.

52 Law Society Note, Paragraph 44(a); SIArb Guidelines, Paragraph 7.1.3.

53 Law Society Note, Paragraph 44(b).

54 Indranee Rajah SC (Senior Minister of State for Law), footnote 9.

55 *ibid.*

56 Legal Profession (Professional Conduct) Rules 2015, Rule 49A(1).

57 Legal Profession (Professional Conduct) Rules 2015, Rule 49A(2).

58 Law Society Note, Paragraph 52.

59 Indranee Rajah SC (Senior Minister of State for Law), footnote 9.

must disclose funding arrangements in proceedings outside Singapore.⁶⁰ If they must disclose in those circumstances, this may create inequalities in the disclosure obligations applicable to the parties' respective legal teams in some situations.⁶¹

Second, as the Professional Conduct Rules only bind Singapore legal practitioners, legal teams outside Singapore will not need to comply. This may create inequalities in the ethical rules applicable to legal practitioners even in Singapore-seated arbitrations.

In practice, the risk of inconsistent or unequal treatment may be limited, because tribunals or courts may take an active role in requesting the disclosure of funding arrangements (as is now possible under the SIAC Rules and SIAC Investment Arbitration Rules).⁶² They may use this power to deal with inequality (e.g., where one party's lawyers are obliged to disclose, but the other side's lawyers are not).

ii Disclosure of more detailed funding information in SIAC arbitrations

Unless the parties have agreed otherwise, a tribunal in a SIAC arbitration may conduct 'such enquiries as may appear to the Tribunal to be necessary or expedient'.⁶³ This may include ordering the disclosure of the existence of funding, the funder's identity and, where appropriate, details of the external funder's interest in the proceedings and whether the funder has committed to undertake adverse costs liability.⁶⁴

iii Arbitrator disclosure under the SIAC Rules

The SIAC Practice Note requires arbitrator candidates to disclose to the SIAC Registrar and the parties any direct or indirect relationship with a funder involved in the arbitration.⁶⁵ The disclosure must be made as soon as reasonably practicable, and in any event before the candidate is appointed.⁶⁶ In addition, an arbitrator must disclose any such relationship that is discovered or arises during the arbitration proceedings.⁶⁷

60 The analysis turns on the definition of 'dispute resolution proceedings' and 'third-party funding contract' under the professional conduct rules and the Civil Law Act. Neither of these terms are expressly limited to Singapore proceedings. However, the Civil Law Act's definitions of those terms are limited to 'prescribed dispute resolution proceedings', which are in turn (indirectly) limited to proceedings in Singapore (see Regulations 2 and 3, the International Arbitration Act, Section 5 and the Model Law at Schedule 1 of the International Arbitration Act, Article 1(2)).

61 This issue is not unique to third party funding or the Singapore framework. Differences in ethical rules frequently arise in various contexts in international arbitration, and the issue is sometimes referred to as the 'inequality-of-arms problem' (see, e.g., the discussion in Catherine A Rogers, *Ethics in International Arbitration* (OUP 2014) at Paragraphs 3.21–3.22).

62 See SIAC Practice Note, Paragraphs 5, 7 and 8; SIAC Investment Arbitration Rules, Article 24(l).

63 SIAC Practice Note, Paragraph 5; SIAC Investment Arbitration Rules, Article 24(c).

64 SIAC Practice Note, Paragraph 5; SIAC Investment Arbitration Rules, Article 24(l).

65 The SIAC Practice Note uses the term 'external funder', which is defined as 'any person, either legal or natural, who has a Direct Economic Interest in the outcome of the arbitration proceedings' (SIAC Practice Note, Paragraph 3(c)).

66 SIAC Practice Note, Paragraph 4.

67 SIAC Practice Note, Paragraph 6.

V COSTS

Two broad categories of costs issues arise: costs recovery by the funded party and costs recovery by an adverse party. Although the new statutory framework is silent on these issues, SIAC has produced guidance that will inform party expectations, at least in SIAC arbitrations.

i Costs recovery by the funded party

The SIAC Practice Note provides that ‘The Tribunal may take into account the existence of any external funder in apportioning the costs of the arbitration’;⁶⁸ and ‘The Tribunal may take into account the involvement of an external funder in ordering [. . .] that all or a part of the legal or other costs of a Disputant Party be paid by another Disputant Party.’⁶⁹ These provisions confirm that the tribunal may take into account funding arrangements when apportioning costs of the arbitration and awarding costs to a funded party.

Different tribunals will approach the issue of costs in funded cases differently. For example, SIAC’s formulation above may be wide enough to permit the recovery of a party’s funding costs (i.e., in addition to the legal costs).⁷⁰ At the other end of the spectrum, in some situations tribunals may decide a funded party should not be awarded any of the legal costs paid by the funder at all.⁷¹ These examples represent the extremes, and most tribunals will reach a solution somewhere in between.

ii Costs recovery by the adverse party

A party adverse to a funded party will wish to ensure it can recover its costs if it is successful in the proceedings.

A party will often do this by seeking security for its costs. In the funding context, the question is whether the existence of a funding agreement amounts to evidence that the funded party would be unlikely or unable to pay costs if ordered to do so. The SIAC Practice Note addresses this as follows: ‘The involvement of an External Funder alone shall not be taken as an indication of the financial status of a Disputant Party. The Tribunal may take into account factors other than the involvement of an External Funder in an order for security for legal or other costs.’⁷²

Tribunals may also see an increase in applications for disclosure of the terms (if any) on which a funder has agreed to undertake adverse costs liability.⁷³ Such applications may be used to assess prospects of recovering costs from a funded party, or as a precursor to a security application.

68 SIAC Practice Note, Paragraph 10. See also the SIAC Investment Arbitration Rules, Paragraph 33.1.

69 SIAC Practice Note, Paragraph 11. See also the SIAC Investment Arbitration Rules, Paragraph 35.

70 The English High Court, in *Essar Oilfield Services Ltd v. Norscot Rig Management PVT Ltd* [2017] Bus LR 227, held that such costs would fall within the meaning of ‘other costs’ under the UK’s Arbitration Act 1996.

71 For example, where a funding agreement becomes unenforceable by the funder under the Civil Law Act, the funded party would have no liability to the funder (Civil Law Act, Sections 5B(4)-(7)). In that situation, a tribunal might consider that allowing the funded party to recover legal costs paid by the funder would amount to a windfall for the funded party.

72 SIAC Practice Note, Paragraph 9.

73 See the tribunal’s powers under SIAC Practice Note, Paragraph 5 and SIAC Investment Arbitration Rules, Rule 24(l).

VI THE YEAR IN REVIEW

Singapore's new funding framework reflects a trend towards third party funding in arbitration in other leading international arbitration jurisdictions.⁷⁴ The framework adopts a light-touch approach to regulation, and places disclosure at its heart to promote greater transparency and fewer conflicts of interest.⁷⁵

The framework also leaves space for industry norms to establish and grow. Some organisations, notably the Singapore Law Society, SIAC and SI Arb, have led the way by issuing guidance and new institutional rules. Nine funds have already signed up to the SI Arb Guidelines.⁷⁶

The Singapore government is also keen to ensure the framework is working well, and to identify areas for further improvement and innovation. Between April and May 2018, Singapore's Ministry of Law carried out a public consultation. The consultation sought feedback on the operation of the current third party funding framework, and suggestions for improvement and extension beyond international arbitration.⁷⁷ The results of the consultation are expected in due course.

VII CONCLUSIONS AND OUTLOOK

The third-party funding framework has been a welcome development for international arbitration in Singapore. It provides parties with greater risk management opportunities and access to justice, and funders with a new pool of potential investments. Since the framework was introduced in early 2017, Singapore has seen an influx of funders, and the market is growing. In keeping with other aspects of the dispute resolution environment in Singapore, the Ministry of Law has sought views from users to catalyse further innovation. The recent public consultation on third party funding may thus lead to further refinements and improvements to the framework over the next year.

Outside the international arbitration context, for now third party funding remains generally prohibited. Looking forward, however, there are already signs that third party funding may be extended to other categories of proceedings in the future (potentially including domestic arbitration and litigation).⁷⁸ Parties, funders and practitioners alike will be watching market developments with interest.

74 Indranee Rajah SC (Senior Minister of State for Law), footnote 9.

75 *ibid.*

76 SI Arb, 'Third Party Funding', <https://siarb.org.sg/index.php/resources/third-party-funding>.

77 Ministry of Law, footnote 6.

78 Indranee Rajah SC (Senior Minister of State for Law), footnote 6: '[. . .] we want to have the framework tested in a limited sphere, where those involved are typically well-advised, commercially sophisticated and better able to bear the reduction in damages. If the framework works well, as and when appropriate, the prescribed categories of proceedings may be expanded. The Ministry will consult closely with the profession and stakeholders on this, as we have been doing.' One of the questions in the 2018 public consultation mentioned above, footnote 6, asked: 'whether you are of the view that there is a need to expand the safe harbour for funding of international arbitration cases into new areas (if so, which areas and why).'

SPAIN

*Antonio Wesolowski*¹

I MARKET OVERVIEW

The legal services market in Spain is mature, highly competitive and well internationalised. Continental Europe's largest law firm is Spanish, with two additional Spanish firms within the top 10.² Four of the United Kingdom's magic circle firms have a local presence in Spain. As of January 2016, Spain's ratio of 328 lawyers per 100,000 people³ was more than double Europe's average (147 lawyers per 100,000 people).⁴ Cost for legal services in Spain may be generally described as lower than in other civil and common law jurisdictions.⁵

Despite the recent wave of massive consumer litigation, Spanish courts registered 2.3 civil or commercial claims per 100 people in 2016, fewer than Irish (3), French (2.6) or Italian courts (2.5) but more than German (1.7), Dutch (1) or Luxembourgish courts (0.8). The effectiveness of the courts is comparable to other states in the European Union. In 2015, first instance courts took, on average, 325 days to solve a litigious civil or commercial case. They were faster than French or Italian courts but slower than German courts (190 days), Dutch courts (115 days) or Luxembourgish courts (86 days).⁶

A rising demand for litigation risk management solutions exists among companies and individuals. For years it has been medium-sized and small law firms that have demonstrated a growing appetite for taking on these risks. Contingent fees arrangements and *quota litis* agreements are the general rule in virtually all consumers' or mis-selling claims. The level of awareness of third party funding solutions is growing rapidly, with major international funders involved in claims either litigated in Spain or with key Spanish components.

Most innovative ways of litigation funding, such as claims portfolio funding or law firm finance have a particularly important expansion potential. The growing predictability of Spanish court judgments (in 2016, only 13.3 per cent of first instance judgments were

1 Antonio Wesolowski is general counsel for Spain and Latin America at Calunius Capital LLP. He is also a partner and co-founder at Wesolowski Abogados SLP.

2 The Lawyer European 100 at www.thelawyer.com/top-100-european-law-firms/.

3 La Justicia Dato a Dato, © Consejo General del Poder Judicial, 2017.

4 European Commission for the Efficiency of Justice, Council of Europe, 'European judicial systems: Efficiency and quality of justice', CEPEJ Studies No. 23 (Edition 2016 (2014 data)).

5 See Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, implemented by Hoche (Demolin, Brulard, Bathelemy) for the European Commission – DG for Justice, Freedom and Security.

6 Study on the functioning of judicial systems in the EU Member States. Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014-2015. Working Group on the Evaluation of judicial systems (CEPEJ-GT-EVAL).

appealed and 67.5 per cent of appealed judgments were fully confirmed),⁷ the reasonably short resolution periods and the availability of highly qualified and sophisticated local practitioners secure a solid basis for the development and growth of the industry in Spain.

II LEGAL AND REGULATORY FRAMEWORK

Spanish law establishes no explicit legal prohibition on funding others' claims. There are some barratry-related rules affecting lawyers, but common law doctrines of champerty and maintenance are alien to the Spanish legal system. Further, certain forms of buying into someone else's claim for profit are explicitly permitted by the Civil Code.

Spanish judges have in the past deliberated on the legality of third party litigation funding (TPF). As liquidation of bankrupt companies in Spain requires a pre-established court-sanctioned liquidation plan, on 4 November 2014 Commercial Court No. 3 of Madrid approved the liquidation plan of the Spanish companies Petersen Energía Inversora, SAU and Petersen Energía, SAU. The liquidation plan, as approved by the Court, contemplated the Petersen companies entering into litigation funding arrangements to initiate proceedings against the Argentine Republic.⁸

Sharing litigation risks for profit is common for Spanish lawyers under damages-based agreements. This practice was expressly forbidden until 2008, when the Spanish Supreme Court ruled null and void Article 16 of the Spanish Bar Association Code of Conduct, lifting a centuries-old prohibition on the *pactum de quota litis*.⁹

Seeking profit on the buying and selling of claims is also in the background of Article 1534 of the Spanish Civil Code. Clearly inspired by the Roman Lex Anastasiana, it establishes that in the event of the transfer of a 'litigious' credit the debtor will be entitled to extinguish the same by reimbursing the assignee for the price paid to the assignor (plus interest and costs). Notably, a credit will be considered litigious only if a lawsuit demanding payment has already been answered by the debtor. In other words, Article 1534 applies only to claims transfers made after commencement of proceedings. And within those boundaries the restriction may sound reasonable to the extent that it encourages the parties to settle the claim and to put an end to the litigation rather than to let litigation continue by transferring the claim for an amount at which they might have been willing to settle.

For these and other reasons it seems clear that the Spanish legislator was never particularly concerned about claimants seeking the assistance of third parties in alleviating both the financial risk and the inefficient diversion of resources caused by the inevitable emergence of commercial disputes in the course of ordinary business. In a framework such as that of Spanish legislation, the validity of funding others' claims is hardly challengeable.

A meaningful, and certainly more interesting, debate may be held as to the legal nature of a TPF agreement.

Most discussions on this topic start by considering whether TPF may be nothing but a new form of credit or loan operation. Under Spanish law this is also a valid question, and its answer could be as crucial as it is in many other jurisdictions. To name just one practical

7 La Justicia Dato a Dato, © Consejo General del Poder Judicial, 2017.

8 Details of the *Petersen v. Argentina* case are publicly available at <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015cv02739/440752/63/> (Opinion and Order of Judge Loretta A Preska in the New York Southern District Court (9 September 2016), Court File No. 15-CV-2739 (LAP)).

9 Supreme Court Sentence dated 4 November 2008.

consequence, Spain has usury statutes protecting borrowers from abusive interest rates. Tax and statutory treatment of TPF in Spain also depend heavily on what the legal nature of TPF is in accordance with Spanish law.

Reasons why TPF should not be legally treated as loans were discussed by Professor Victoria A Shannon in 'Harmonizing Third-Party Litigation Funding Regulation' (36 *Cardozo Law Review* 861, 2015). Professor Shannon also noted the eventual restrictions that usury statutes could impose on TPF and identified substantial differences between loans and TPF on two levels. First, the non-recourse nature of litigation funding¹⁰ and the absence of an absolute obligation to reimburse the funds. Second, the asymmetric information and uncertainty regarding the funder's future returns. Some of these are not definitive arguments, at least not if considered individually. For instance, loan contracts with no absolute obligation for reimbursement (such as maritime risk loans) existed and were regulated in Spain until 2014, when Articles 719 to 736 of the Spanish Commercial Code were derogated.¹¹ Article 140 of the Spanish Law on Mortgages expressly authorises non-recourse mortgage loans, whereby the lender is not entitled to pursue any assets of the borrower other than the mortgaged property. The lender's return over monies lent under a participative loan (Article 20 of Spanish Royal Decree-Law 7/1996) is uncertain and calculated by reference to 'net profit, revenue, total wealth or any other [criteria] freely agreed by the parties'.

However, unlike any of the above-mentioned forms of loans similar to TPF (despite being loans), only in TPF are both repayment and the size of the returns uncertain and dependent on the outcome of a future event. Besides, it seems uncontroversial that, under Spanish law, one cannot categorise as a loan any business in which obligation for repayment is not absolute. That may be the reason why it is now generally accepted among Spanish scholars that maritime risk loans were not really loans but something else, closer in legal nature to a form of insurance contract.¹² The limited-recourse mortgage loan, however, may be regarded as an exception to this principle.

An additional difference is to be found in the role that time plays in loans, as opposed to the role it plays in TPF. Term and maturity are usually regarded as essential elements of Spanish loan and credit operations. Time defines repayment obligations, remuneration on the amount lent or both. Although the passage of time is not irrelevant in TPF transactions, it is far from being the essential parameter of the transaction's contractual configuration.

When TPF is considered in relation to legal categories other than loans, it becomes clearer that loans and TPF do not share the same substance. TPF finds a much better fit within the legal frameworks that underpin silent partnerships, particularly those regulated

10 At least under Spanish standards, TPF can hardly be regarded as non-recourse from a strictly technical perspective. The funder's right to receive its fee or return is certainly conditional upon payment of the litigation proceeds by the defendant, but once the right becomes effective the funder would be entitled to collect its fee from any of the claimant's assets. If, for instance, another creditor of the claimant successfully forecloses on the litigation proceeds before the funder collects its fee, the funder would probably still be entitled to collect from other assets of the funded party, unless agreed to the contrary.

11 These maritime risk loans were a form of bottomry whereby repayment was contingent on the ship successfully completing the voyage. They were common in ancient Greece and described by Plutarch in his *Life of Cato the Elder* as 'the most disreputable of all ways' of lending money (*The Parallel Lives* by Plutarch, p. 325, published in Vol. II of the Loeb Classical Library edition, 1914). In the thirteenth century, Pope Gregory IX criticised this practice for being usurious in his *Decretal Naviganti*.

12 *Formación del contrato de Seguro y cobertura del riesgo*, Miguel L Lacruz Mantecón, Editorial Reus, Madrid, 2013.

by Articles 239 to 243 of the Spanish Commercial Code. In fact, a similar approach to the nature of TPF is apparently taken in the German jurisdiction, whose legal system has traditionally been a benchmark for Spanish legislators.¹³

Spanish silent partnerships enjoy a simple, flexible and consolidated legal regime and have traditionally been used as a hybrid, allowing new forms of financial investments to be accommodated, particularly in the private equity sector. The essence of Spanish silent partnerships is set out in Article 239 of the Commercial Code:

Businesspersons may participate in operations by other businesspersons, contributing to them with a part of the capital they may agree, thus becoming partners in the profits or losses according to the proportion determined.

The party that contributes capital will remain a silent partner throughout the life of the funded operations. Relationships with third parties shall only be entered into by the non-silent partner, who in turn is the only one entitled to take action against those third parties ('unless he formally assigns his rights to' the silent partner, as established in Article 242 of the Commercial Code). In turn, third parties cannot take any action against the silent partner. This latter provision has an obvious impact regarding funders' potential liability for adverse costs.

Although the character of the silent partnership would appear to provide a fitting answer to the question as to the legal nature of TPF, and would also clarify any questions about the tax treatment of TPF, the only definitive solution will come with the industry's formal regulation. The currently limited public impact of TPF in Spain suggests that neither legislators nor the various agents involved in the administration of justice have detected a need for regulation, or at least do not see it as a priority.

However, Spanish legislators recently intervened to decide a debate linked to the management of litigation risks and profit-making by non-litigant parties. On the back of the recent wave of banking litigation, certain mid-sized firms were first created then, notoriously, expanded massively as a result of these lawsuits. Their business model was to de-risk claims by accepting to be paid when and only if adverse costs were imposed on the defendant (usually a bank). Thousands of claims were filed and millions were paid by the banks to these firms. Some commentators (financial entities mainly) pointed out that law firms too often favoured litigation, before even attempting serious settlement talks. In Spanish litigation, the regulation of adverse costs follows the loser-pays rule, including when no meaningful pre-action measures have been adopted, and even if the defendant does not contest the claim. The legislature heard the commentators and in January 2017 passed a tailor-made law (Royal Decree-Law 1/2017) restricting the application of the loser-pays rule in certain very specific types of banking litigation cases (interest floor clauses in mortgage loans). The suspicion is that legislators wanted to alleviate – at least partially – the discomfort of the banking sector, which was seeing others doing business while their accounts were suffering severely.

Reform of the Spanish loser-pays rule was needed, and not only for banking litigation purposes. However, the passing of Royal Decree-Law 1/2017 may be a hint of how keen

13 Chapter by Burkhard Schneider and Heiko Heppner in *International and Comparative Legal Guides. Class and Group Actions* 2017. 9th edition published by Global Legal Group, in association with CDR.

Spanish legislators are to regulate scenarios in which wealthy defendants face the use (and sometimes abuse) of more effective mechanisms for private enforcement of rights, provided by non-litigant parties who seek to obtain a reward in doing so.

III STRUCTURING THE AGREEMENT

Spanish law permits the buying and selling of claims, with the notable restriction of Article 1534 of the Civil Code, entitling the debtor to extinguish the transferred claim by reimbursing the assignee for the price paid (but only if the transfer was made after a lawsuit was answered by the defendant).

Monetisation of awards and judgments also fits well into the Spanish judicial enforcement procedures. Article 540 of the Law on Civil Procedures expressly regulates situations in which the award or judgment may have been transferred to a third party, who will be entitled to enforce it against the defendant. Enforcement procedures are summary, generally quick and effective, and allow very few defences.

Funding claims through their purchase simplifies the contractual structure of a TPF transaction, as the funder becomes the owner of the claim and most of the usual provisions on confidentiality, termination, settlement or liability for costs become rather irrelevant. Yet, for many reasons, a claims purchase agreement may not fit the interests of a funder or a claimant in a particular transaction.

If the transaction is not a plain claim purchase but a pure legal costs funding agreement, it will usually include all the contractual provisions that are common in international TPF practice. The essence of the agreement will be the undertaking by the funder to pay all costs arising from the pursuance of the claim, in exchange for a fee that is contingent on the claim being successful.

Beyond the essential elements of a TPF transaction (undertaking to pay legal costs in exchange for a future and contingent fee) the remaining contractual issues are those typically addressed by international standards. TPF agreements entered into with Spanish counterparties will typically include a due diligence and exclusivity period, unless the claimant is in formal liquidation or under receivership, where exclusivity is usually avoided to allow formal tender processes. Putting various funders in competition tends to maximise returns for the insolvent estate and increases transparency throughout the contracting process.

The issue of the funder's control over how the claim is conducted is one of the key contractual discussions. In England and Wales, the Code of Conduct of the Association of Litigation Funders (ALF) addresses this matter clearly and directly by prohibiting funders who have accepted the Code from taking material control of the dispute. This prohibition in the ALF Code of Conduct is probably designed to mark the dividing line between TPF and the practices of champerty and maintenance. However, the need to mark that line vanishes in a jurisdiction such as Spain, in which prohibitions on funding someone else's claims have never existed. Consequently, Spanish TPF agreements are certainly more flexible when it comes to distributing control rights between the claimant and the funder.

Linked to the question of control over the dispute is the termination of the agreement at the funder's request. Funders understandably seek to preserve an option to discontinue funding when success expectations are materially and adversely affected. The contractual construction of this right has to respect the prohibition on leaving the performance of the contract 'to the discretion of one of the contracting parties' (Article 1256 of the Civil Code). Hence, it is advisable to include contractual mechanisms to ensure that the funder

acts reasonably when it chooses to stop funding the claim. The most common of these mechanisms is the submission of the matter to an independent third party, who will evaluate the reasonableness of the funder's behaviour if the funded party so requests.

Recourse to an independent third party is also a valid solution to disagreements over settlement offers, which is another common issue dealt with by Spanish funding agreements.

Upon success of the claim, distribution of the proceeds will be made in accordance with a priorities agreement, which may be put in place as a separate document or embedded in the funding agreement. Lawyers and court agents may also become a party to this agreement, as litigation proceeds are usually paid by the losing party into the court bank account. The court will forward the funds to the successful party following the court agent's request and instructions. Although trust schemes are not common in Spain (and unlikely to be enforceable if governed by Spanish law), escrow accounts can also be put in place, either through domestic entities or abroad.

Lastly, security documents would also be executed by the parties, particularly when the funded party is under insolvency proceedings. In the insolvency context, courts and court-appointed insolvency practitioners will be able to provide the funder with much of the comfort it seeks, especially in ensuring that the litigation proceeds will be available for the funder to collect its fee. In the absence of any insolvency proceedings (or even within them), funders will tend to obtain security over the claim or over the proceeds arising therefrom. Taking security over any forms of credit rights is valid and relatively simple under Spanish law (notice to the debtor-defendant is not required for perfection). Funders, however, must act carefully when taking security over international claims or over proceeds to be paid by non-Spanish residents, as the question of the law applicable to this type of security remains unresolved.

IV DISCLOSURE

Preservation of confidentiality or privilege is rarely affected by the fact that a claim has been funded. Litigant parties in Spain have a general duty to disclose all documents requested by the other party, but only if the court recognises they are directly relevant and clarify the facts that gave rise to the dispute. Disclosure orders to third parties, such as a funder, will be made by a court following the petition of a litigant party, but only if the document is 'transcendent' for the outcome of the proceedings and, again, if it refers to the facts giving rise to the dispute.

In Spain, procedures for obtaining evidence from the opponent party are not comparable to the Anglo-Saxon standards of discovery or disclosure. Mechanisms for obtaining evidence prior to commencement of civil proceedings exist in Spain, but they are of limited efficacy and thus not very commonly used. Besides, the general rule is that documents or information requests shall refer only to facts that constitute the object of the proceedings but not to satellite circumstances, such as whether the claim is being funded. There are no public precedents regarding requests for disclosure relating to TPF transactions, but under the current civil procedural rules it seems unlikely that a defendant could successfully force disclosure of the fact that a claim is being funded.

According to the above, it seems that disclosure of the fact that a claim has been funded will rarely be the consequence of the defendant's or the court's actions. However, disclosure of this circumstance may be advisable when certain forms of security are taken. As noted previously, perfection of security over credit rights does not require the serving of notice to

the debtor-defendant. Yet, such notice may be of practical use, as it would eventually permit the funder to force the debtor-defendant to satisfy the credit by paying its amount not to the claimant but to the security's beneficiary (the funder).

Legal professional privilege in Spain is both an obligation and right of the lawyer (who cannot be forced to disclose any privileged information) established under the Spanish Constitution (in respect of criminal proceedings) and under Article 542 of the Law on the Judiciary (in respect of all kinds of proceedings). Privilege thus protects all communication from being disclosed. Although there is a general consensus regarding the client's right to waive privilege (general, but not unanimous), a valid discussion would be whether disclosing privileged documents to third parties (such as a funder) entails an implicit waiver of privilege also in relation to the opponent party. As stated, no relevant judicial precedents exist on the issue, but in light of the constitutional relevance of the right to privilege and the very limited scope of disclosure and discovery procedures, it appears very unlikely that a court could find there to be a waiver of privilege in the disclosure of information to a potential funder, especially if the disclosure is also made under a confidentiality agreement.

V COSTS

Awards for costs in Spain are driven by the loser-pays rule (Article 394 of the Law on Civil Procedure). Exceptions may apply if the court finds that the facts or the law applicable to the case were seriously doubtful.

The Spanish costs rule is not effectively based on an indemnity principle, so litigants are not truly entitled to recover costs they have incurred but to obtain a generic compensation fixed by the provincial bar associations. Most of the bar and professional associations have published guidelines for calculation of costs. In the absence of an agreement between the litigants as to the amount of costs, the court will order the corresponding bar or professional association to study the case and issue an opinion. The opinion, although not legally binding, tends to be followed by the court.

Recoverable costs are only those listed in Article 241 of the Law on Civil Procedure, including judicial taxes, lawyer's and expert's fees or court agent's fees. The current drafting of Article 241 of the Law on Civil Procedure, together with the lack of an effective ruling on the indemnity principle, leaves little or no room to request the reimbursement of the costs of securing funding for bringing a claim.

Security for costs is a virtually non-existent phenomenon in Spanish litigation. There is no procedure for requesting or ordering this specific type of security. Hence, it would be beyond the courts' authority to order the provision of security for costs and, furthermore, would impede access to justice if either party were to fail to provide security for costs.

In a typical funding transaction, correctly structured as a silent partnership, the funder would never be found liable for adverse costs. Article 242 of the Spanish Commercial Code expressly protects the silent partner from claims by third parties. Forms of partnership other than the silent partnership established under the Commercial Code may not offer the same degree of protection for the funder, as some of them do not limit the liability of the partners in relation to third parties. Be that as it may, the issue has never reached the courts and, even if it does, the rather inflexible current costs rule makes it very unlikely that a non-litigant party could ever be found liable for costs.

VI THE YEAR IN REVIEW

Awareness of TPF among scholars and practitioners is now the rule, while only a year ago they were very few the professionals who knew of the existence of a TPF industry. During 2018, the Spanish National Bar Association held a course on TPF, and several articles on the topic were published on its website, embracing the benefits and opportunities that TPF could bring to the access to justice. Conferences and events are now common and constantly announced, although some of them are still very basic in terms of its content and limited in quality. However, it is now clear that an incipient TPF fever is growing rapidly in Spain. In view of this, the first Spanish TPF brokers have emerged and most law firms are now capable of seeking TPF for clients who demand it.

As per developments in the litigation and arbitration markets, banking litigation is still in the eye of the hurricane. Aggressive marketing campaigns are run by specialised plaintiff firms, which offer their services on a full or nearly full success fee basis. Litigation is now moving from interest rate floor unfair terms to claims over other allegedly unfair mortgage loan terms, such as those imposing consumers to bear all costs of formalising mortgage loan. The aftermath of the Banco Popular collapse also gave raise to mass litigation, and the first judicial resolutions have been issued, although no clear line of jurisprudence has yet emerged.

The Trucks cartel litigation is also a hot topic in the Spanish disputes environment. Once again, several law firms are actively seeking to gather potential claimants, occasionally backed by litigation funders.¹⁴

Lastly, some notable developments took place regarding the arbitration claims under the Energy Charter Treaty against Spain for the dramatic cuts suffered in the public incentives schemes for the production of energy from renewable sources. While several investors have been successful in the arbitration proceedings, the enforceability of their awards is now far from being an easy task. The recent decision by the European Court of Justice in the *Achmea* case was a historic blow to the institution of investment arbitration in the European Union. Many believe this decision puts an end to intra-EU investment treaties, as the court found that the arbitration clause in one of these treaties was not compatible with European law. This doctrine could equally apply to disputes between an EU investor and an EU state under the Energy Charter Treaty. If this were to be the case, awards against Spain could become unenforceable within the European Union.

VII CONCLUSIONS AND OUTLOOK

Demand for legal costs management solutions is growing rapidly. So far, this demand has been satisfied by law firms that – out of choice or necessity – have learned to live with a market where the risk of winning or losing litigation directly affects not only their prestige, but also the price of their services and their income. Some of Spain's largest law firms were created only relatively recently by professionals coming from the world of corporate finance who detected the growing need for individuals and companies to improve efficiency and returns on disbursements for legal costs. These firms have experienced annual growth rates of two or three figures, based only on the professionalised exploitation of the no-win no-fee

¹⁴ https://www.elconfidencial.com/empresas/2017-12-26/andersen-fondo-ramco-cartel-camiones-europa_1497589/.

model. The greatest exponent of this phenomenon, the firm Arriaga Asociados, grew by 34.10 per cent in 2017 and is now the twelfth Spanish firm by revenue, ahead of local offices of some magic and silver circle firms.

Along with the obvious growing demand for TPF, the legal framework in a civil law jurisdiction such as Spain facilitates the development of the industry. Funders and claimants (or defendants) enjoy as much flexibility as they could wish for when structuring the funding agreement, either through the transfer of claims or by having the funder pay the legal costs. Rules on confidentiality and privilege, and funder's liability for costs or security for costs are clear enough to ensure that whatever the parties have agreed will most probably be respected.

SWEDEN

*Johan Sidklev and Carl Persson*¹

I MARKET OVERVIEW

Despite its breakthrough at the global level, third party funding is still a relatively new and unfamiliar phenomenon in Sweden. Third party funding has not been subject to any extensive discussions among legal commentators and has only been referred to on a few occasions in articles written by Swedish lawyers.² In part, this is due to the fact that there is currently no domestic market in Sweden for third party funding. The instances in which third party funding currently occurs in Sweden are predominantly concentrated to international arbitration proceedings seated in Sweden.³

Rather, the prevalent type of litigation investment⁴ that has been established in Sweden has mainly related to sales of claims for damages. We have seen many examples of companies established for the sole purpose of acquiring smaller claims, typically damages claims against company directors. Lately, this trend has also evolved into larger damages claims, including claims in cartel cases. Formerly, this was primarily a trend in other Nordic countries, such as Finland, but there is reason to believe that we will see more of this phenomenon on the Swedish market in the future.⁵

In our view, investors that acquire damages claims do not fall within the scope of the type of litigation investment that has come to be referred to as third party funding.⁶ However, the case law that has evolved in respect of acquisitions of damages claims is, nonetheless, of

1 Johan Sidklev is a partner and Carl Persson is a senior associate at Roschier Advokatbyrå AB. Bruno Gustafsson, associate at Roschier in Stockholm, has conducted research, revised and provided updates to the current version of this article.

2 See, for example, Peter Mühlenbock, *Tvistinvestering – särskilt om vissa kostnadsfrågor* (Litigation investment – especially regarding certain issues relating to costs), *Juridisk Publikation*, 1/2016 and Christer Söderlund (Third party funding in arbitration), *Juridisk Tidskrift* No. 4 2015/16.

3 For a brief overview of the prospective Swedish TPF market, see Johan Sidklev, Carl Persson, Bruno Gustafsson, *Third Party Funding in Sweden – Uncovering Uncharted Territory*, Kluwer Arbitration Blog (16 Sept 2018 <http://arbitrationblog.kluwerarbitration.com/2018/09/16/third-party-funding-in-sweden-uncovering-uncharted-territory/>).

4 This term also includes investments relating to claims pursued by arbitration.

5 Linn Sundqvist and Gabriel Löwander, 'Pursuing claims in undercapitalised claims vehicles', *Europarättslig Tidskrift*, No. 4 (2014).

6 In this chapter, third party funding refers to a situation where an investor, that is not party to the proceedings or otherwise connected to the dispute between the parties, is funding the claimant's claim with the sole interest of receiving compensation for its funding by a proportion of the funds that are expected to be received as a result of the legal action. A similar definition is used by Catherine Rogers in *Ethics in International Arbitration* (Oxford, 2014), p. 185.

interest when assessing issues commonly seen in connection with arbitrations involving third party funding, such as liability for legal fees and litigation costs. For this reason, in Section V, we will discuss the existing case law in relation to liability for legal fees and litigation costs in conjunction with acquisitions of damages claims.

As noted above, the instances in which third party funding is currently used in Sweden are probably limited to international arbitration proceedings in which the seat of arbitration is located in Sweden. There are currently no statistics available as regards the number of arbitration proceedings that have been financed via third party funding in Sweden. However, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) dealt with 200 arbitration proceedings in 2017.⁷ Since third party funding has grown on the international market, it is undoubtedly the case that at least some of these proceedings have been funded via third party funding. The authors of this chapter know for certain that three major arbitration proceedings held in Sweden under the SCC rules were initiated by way of funding from a third party funder between 2014 and 2017.⁸

II LEGAL AND REGULATORY FRAMEWORK

There is no legislation or other mandatory rules in Sweden barring the use of third party funding. Furthermore, given the absence of a domestic third party funding market, no regulatory need has occurred, either by way of legislation or self-regulation. Given the perceived absence of a domestic market, it is unlikely that either mandatory rules or self-regulation will be introduced in Sweden in the near future.

In terms of the approach taken by the Swedish courts to third party funding, there is currently no case law relating to third party funding from which we are able to deduce the views of the courts. However, case law does exist in relation to issues that often arise in connection with third party funding, such as conflicts of interest. In relation to these issues, Swedish courts have been inclined to draw inspiration from international guidelines, such as guidelines from the International Bar Association (IBA).⁹ Arguably, Swedish courts will take a similar approach with respect to third party funding as well (i.e., they will be guided by international guidelines in these areas). This issue is discussed in more detail in Section IV.

As noted above, another interesting development in Swedish law that could have repercussions for third party funding is that Swedish courts have shown a tendency to impose liability for legal costs in relation to the use of what are referred to as 'claims vehicles'. The courts have in several cases held shareholders personally liable for paying legal fees and litigation costs. The evolved body of case law entails that such liability may come in effect where the third party has acted as the effective beneficiary in the dispute, and the claim has been transferred to a company in a poor financial condition for the purpose of limiting the financial consequences of an adverse costs decision. In taking this approach, the Swedish courts seek to counteract arrangements whereby a creditor transfers a claim to a party that does not have the financial resources to discharge the liability for legal fees and litigation costs in the event the claim is unsuccessful, while the creditor retains a financial interest in the outcome of the dispute if the claim is successful. Although these cases relate to transfers

7 Statistics from the SCC; <http://sccinstitute.se/statistics/>.

8 The cases have been financed by third party funders from the United Kingdom.

9 Case reported on p. 841 in NJA 2007. Stefan Lindskog, *Skiljeförfarande: En kommentar [Arbitration: A commentary]* (2nd edn), p. 4.

of claims and thus do not apply directly to what is herein referred to as third party funding, the underlying problem is the same, or, in any event, related. Therefore, Section V explores liability for legal fees and litigation costs in relation to third party funding in more detail.

The rules currently in effect with the closest relation to the type of investment agreement entered into between a company and a third party funder are the Swedish Bar Association's rules concerning risk agreements. A risk agreement is an agreement under which the lawyer's fees are based fully or partially on the outcome of the dispute.¹⁰ Thus, similarly to third party funding, the lawyer has a direct financial interest in the outcome of the dispute. Of course, a notable difference between the arrangements is that a lawyer performs work on the client's behalf, while a third party funder finances the legal action in return for a proportion of the potential outcome. However, the principle behind both phenomena is the same: a person or entity independent of the client invests in the dispute to obtain a positive outcome. This merits a closer look at the rules and views on risk agreements under the Bar Association's rules.

In Sweden, financial interests of lawyers in the disputes in which they act are governed by the Bar Association's Code of Professional Conduct (CPC). An essential principle under the CPC is that fees charged by lawyers must be reasonable.¹¹ The following factors typically affect the assessment on what constitutes a reasonable fee:

- a* what has been agreed with the client;
- b* the scope and nature of the work performed;
- c* the complexity and importance of the assignment;
- d* the lawyer's expertise;
- e* the result of the work; and
- f* other factors of equivalent nature.¹²

With the exception of a few narrow grounds laid out in the CPC, lawyers are prohibited from entering into risk agreements.¹³ The existing exceptions apply primarily to situations where the client is financially unable to bring the legal action (access to justice) or where the arrangement constitutes part of a larger international dispute based on a contingency fee agreement. However, the Bar Association's Disciplinary Committee has applied these exemptions very restrictively. In one important case, the Disciplinary Committee reprimanded a lawyer for charging a risk-based fee.¹⁴ This was despite the fact that the client proposed the arrangement and the client explained that the action would not be financially viable to bring unless the lawyer accepted the risk agreement. The client had contacted the lawyer to investigate the prospects of recovering unpaid royalties. The parties agreed that the lawyer would receive 25 per cent of the royalties received in exchange for the lawyer bearing all of the costs incurred from pursuing the legal action. The majority of the Disciplinary Committee held that the arrangement was not permissible. As far as we are aware, as of the date of this article, the Disciplinary Committee has given no rulings permitting risk agreements. In light of that, the prevailing principle concerning risk agreements for lawyers can best be described as a general prohibition.

10 In Sweden, the unsuccessful party is liable in full for the opposing party's legal fees and litigation costs.

11 Section 4.1.1 of the CPC.

12 Section 4.1.2 of the CPC.

13 Section 4.2.1 of the CPC.

14 Disciplinary Committee's decision in D-2014/1967.

An alternative to risk agreements, however, are ‘conditional fee arrangements’. Arrangements of this kind allow for outcome-based increases or reductions of the lawyer’s fee that come into effect once the dispute is concluded. As regards conditional fees, the situation is not as clear-cut under the CPC. There is no case law from the Bar Association or indeed the courts to provide guidance on this type of arrangement. However, the CPC does state that an agreement under which the lawyer assumes a financial risk in relation to the outcome of the case does not necessarily mean that the lawyer’s financial self-interest will be disproportionate or could affect the way in which the lawyer performs his or her work on the case.¹⁵

Consequently, in our assessment, the CPC appears to permit conditional fee arrangements where the risk and the reward are reasonably balanced while restricting potential fee increases if the lawyer’s financial interest is disproportionate in relation to the agreed fee estimate or otherwise – based on an *ex aequo et bono* assessment – risks adversely affecting the lawyer’s performance.

In summary, third party funding remains an unregulated practice in Sweden. However, it is clear that a restrictive view applies in Sweden in relation to lawyers involving financial interests when exercising their professional role. Conversely, third party funders who engage Swedish legal counsel must come to terms with the fact that Swedish lawyers, as a rule, charge fees based on traditional fee models, possibly with the exception of conditional fees. This, in turn, may affect the construction of the funding arrangement, as some funders require the funded party’s legal counsel to impart risk through the use of outcome-based fee arrangements.¹⁶ Notwithstanding any general scepticism, however, it is, in our view, unlikely that the Bar Association’s stringent rules concerning lawyers taking financial risks reflects an impending approach seeking to impose similar restrictions in relation to third party funding agreements. As stated above, we believe that third party funding will continue to be permitted in Sweden and continue to be unregulated.

III STRUCTURING THE AGREEMENT

In light of the fact that there is no domestic third party funding market in Sweden, no common practice has developed in terms of the typical structure of an agreement between the claimant and the investor. As mentioned above, litigation investment on the Swedish market has generally related to transfers of damages claims. The transfer agreement is diametrically different from an investment agreement. This type of transfer is also covered by legal provisions setting out how the acquirer of the damages claim can take over the action.¹⁷ However, this type of issue does not arise in the case of third party funding, since third party funding does not generally involve any transfer of the damages claim.

However, a number of other interesting issues arise in the case of third party funding, such as in relation to exclusivity, settlements and confidentiality. All these issues cannot be

15 Section 4.2.2 of the CPC.

16 See Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, *International Arbitration Law Library*, Volume 35 (Kluwer Law International; 2016) pp. 33–34.

17 In the case of transfers of damages claims in litigation proceedings, the conditions that must be met for the third party acquirer to take over an ongoing action are set out in the Swedish Code of Judicial Procedure. If the claimant transfers the claim, the third party acquirer will be permitted to assume the claimant’s claim and take over the action.

addressed within the scope of this chapter. Instead, we will focus on problems that can arise from the fact that, in principle, a lawyer can represent two parties where third party funding is used (i.e., both the claimant and the investor), and how this situation should be dealt with.

As regards the relationship between the claimant and the investor, initially the lawyer should make it very clear that the claimant is the client, which should also be stated in the investment agreement between the claimant and the investor. Even though this relationship is evident, situations could arise that result in the lawyer facing serious ethical challenges. The following example illustrates this. Generally, investment agreements provide for a right for the investor to terminate the agreement if the prospects of success in the dispute diminish. If a lawyer perceives that because of some factor or other the legal action has changed to diminish the prospects of success, the lawyer undoubtedly has a duty under the CPC to inform the client (i.e., the claimant).¹⁸ A lawyer's primary duty is a fiduciary duty to his or her client.¹⁹ However, the question is whether the lawyer has an equivalent duty to the investor (i.e., whether the investor should also be informed of the poorer prospects of success). This question is further complicated by the fact that under the agreement the claimant is generally always under a contractual obligation to inform the investor of such circumstances. In all likelihood, the correct solution for the lawyer in this situation is to inform the claimant of the new circumstances and then remind the claimant of its contractual obligation to inform the investor.²⁰

The situation described above is rendered even more cumbersome if the investor pays the lawyer's fees (which is typically the case) and the lawyer has agreed to regularly update the investor on the dispute (which is also typically the case). In this situation, the lawyer could owe a fiduciary duty to the investor, meaning that both the claimant and the investor are the lawyer's clients. If a claimant in this situation tells the lawyer that under no circumstances should the investor be informed of the new circumstances that have diminished the prospects of a successful outcome in the dispute, the lawyer will probably be placed in an impossible situation. In such case, the lawyer will likely have no choice other than to decline acting for the client in the dispute. This means that, where possible, the lawyer should explain his or her role carefully to both the claimant and the investor at the outset of the engagement. If the lawyer assumes a role that could trigger a fiduciary duty to the investor, the lawyer should explain clearly to the claimant what effect this has on the lawyer's role. The claimant must also comply in full with the provisions of the investment agreement to avoid placing the lawyer in an impossible situation where he or she may ultimately be compelled to decline acting for the claimant in the dispute. The example given is only one of many examples of issues that need to be taken into account and considered in relation to third party funding. Accordingly, a great deal of importance should be placed on how the investment agreement is structured to ensure that the agreement also works for all of the parties involved.

IV DISCLOSURE

Another pressing issue relating to the procedural impact of third party funding is the extent to which a claimant that receives third party funding is under an obligation to disclose this

18 Section 2.3 of the CPC.

19 Section 1 of the CPC.

20 In this respect, it should be noted that a lawyer is not permitted to assist in the investor's deceptive conduct, according to the commentary on Section 1 of the CPC.

to the arbitral tribunal or the other party to the dispute. This question is strongly linked to the requirement for an impartial and independent arbitral tribunal, which constitutes a fundamental principle in both domestic and international arbitration proceedings. Neither Swedish legislation (i.e., the Swedish Arbitration Act (SAA)) nor the rules of any arbitration institution (i.e., the SCC's rules) impose any obligations to disclose the existence of funding *sua sponte*. Furthermore, there are no such rules relating to litigation proceedings. Thus, as the law now stands, the parties in arbitration proceedings are not under any obligation to inform the arbitral tribunal that they are being funded by an investor.

With respect to conflicts of interest, the general rule under Section 8 of the SAA is that an arbitrator must be impartial and that, upon application by a party, an arbitrator can be discharged if circumstances exist that could give reason to question the arbitrator's impartiality. The assessment whether an arbitrator is impartial must be objective.²¹

The third party funder's impact on the arbitrators' impartiality under Section 8 of the SAA has not been addressed by Swedish courts. However, internationally, these issues have been subject to extensive doctrinal developments as well as public discourse. The latter has given rise to a body of guiding principles that are seen, *inter alia*, in the provisions of the IBA Guidelines and also the general recommendations laid out in the recently published Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration. This raises the issue of the extent to which Swedish courts are inclined to resort to international guidelines and other sources of 'soft-law nature' for deciding on issues pertaining to international arbitration in general and third party funding in particular.

In this respect, the Supreme Court has stated that, based on the rule similarity and the international elements that are often present, when assessing impartiality, not only should the provisions of the SAA be observed, but also international rules and guidelines.²² In our experience, it is rarely the case that parties agree on a strict application of, for instance, the IBA's Guidelines on Conflict of Interest. This notwithstanding, in one Supreme Court case, the court based a disqualification of an arbitrator partially on provisions laid out therein.²³ A similar line of argument with reference to the IBA Guidelines on Conflict of Interest was also applied in a subsequent Supreme Court case.²⁴ Consequently, applicable case law supports the notion that Swedish courts generally have a positive attitude to deriving guidance from international rules when determining matters – both domestic and international – relating to, among other things, conflicts of interest. This has also been confirmed by leading authorities in the area, such as the former President of the Supreme Court, Stefan Lindskog.²⁵

In light of the above, it is noteworthy that the IBA Guidelines on Conflict of Interest include the following provision:

*If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.*²⁶

21 Stefan Lindskog, *Skiljeförfarande: En kommentar* [Arbitration: A Commentary] (2nd edn), p. 414.

22 Case reported on p. 841 in NJA 2007.

23 Case reported on p. 841 in NJA 2007.

24 Case reported on p. 317 in NJA 2010.

25 Stefan Lindskog, *Skiljeförfarande: En kommentar* [Arbitration: A Commentary] (2nd edn), p. 412.

26 IBA Guidelines on Conflict of Interest 2014, General Standard 6(b).

This means that, in certain situations, third party funders can be deemed to be comparable to a party to the proceedings whose claim the investor has funded. The explanatory section further states that a third party funder ‘may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party’.²⁷

Consequently, the IBA Guidelines advocate for a case-by-case assessment as to whether a third party funder ‘may be considered to bear the identity’ of the funded party. As far as the commentary is concerned, since a third party funder is generally likely to fall within the scope of the provision, it will ‘bear the identity’ of the claimant.

According to Article 7(a) of the IBA Guidelines of Conflict of Interest, the parties are required to disclose any relationship with the arbitrator that may trigger impartiality concerns. In accordance with what has been stated above, the parties’ duty to disclose ‘any’ relationship between the arbitrator and the party extends to relationships with persons or entities with a direct economic interest in the award, such as an external funder, or any individual or entity committed to indemnify a party for an adverse costs decision or award.²⁸ The fact that the rules of the IBA Guidelines are generally not binding upon the parties means that it is within their own discretion to decide whether or not to disclose the existence of funding. It has been argued in this respect that the arbitrators cannot be deemed conflicted if they are not aware of the circumstances triggering the conflict. However, under Swedish law, the presence of any conflict of interest is determined based on an objective assessment. Arguably, this means that a Swedish court will not take into consideration whether the arbitrator *de facto* has been influenced when deciding on the existence of conflicts with disqualifying potential.

Accordingly, in light of the above, should a claimant and a third party funder fail to disclose the existence of funding, they do so accepting the inherent risk that this will be discovered later on during the proceedings. This, in turn, could induce a conflict of interest under the SAA, which could lead to one or more arbitrators being discharged. Moreover, if the conflicting realities come to light after the conclusion of the arbitration proceedings, the conflict of interest could constitute grounds for setting aside the arbitral award. However, in this respect, it should be noted that challenges to arbitral awards are subject to a three-month limitation period under Swedish law. If a challenge is not brought within this period, the ground for challenge will be procedurally barred. This is the case even in situations where the moving party became aware of the ground for challenge after the expiry of the limitation period.²⁹

A typical case where it can be disclosed that a third party funder is funding a dispute is where the opposing party suspects that this is the case and requests that the arbitral tribunal order the opposing party to disclose whether it is being funded by a third party. If the arbitral tribunal grants this request, the opposing party will have no choice other than to disclose the funding. If it turns out that there is a conflict of interest, this could create problems for both the parties and the arbitral tribunal. As stated above, it could mean that an arbitrator is required to resign from his or her appointment at a late stage in the proceedings. It could also constitute grounds for a challenge action against the arbitral award pursuant to Section 33 of the SAA. Consequently, the issue of whether or not the third party funding should be disclosed should be carefully considered when using such funding.

27 IBA Guidelines on Conflict of Interest 2014, Explanation to General Standard 6(b).

28 IBA Guidelines on Conflict of Interest 2014, Explanation to General Standard 7.

29 Stefan Lindskog, *Skiljeförfarande: En kommentar [Arbitration: A Commentary]* (2nd edn), p. 917.

Regardless of the above, and specifically the fact that currently no *sua sponte* obligation to disclose third party funding seems to exist, neither for the funded party nor for the third party funder, we are yet to experience how courts and arbitral tribunals in practice will handle the correlation between disclosure and third party funding. In addition to the principles inherent in the IBA Guidelines on Conflicts of Interest, support for an open-ended view towards imposing disclosure obligations can be found in the ICCA–Queen Mary Task Force Report. For the purpose of mitigating the risk of conflicts of interest, the report suggests that parties ‘should, on their own initiative, disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrators’.³⁰ This should be done as soon as possible after the funding has taken place.³¹ The report further advocates for a fairly generous view with respect to the arbitral tribunal’s mandate to order disclosure of whether a party is funded, as well as the identity of the funder.³² As noted above, transnational soft law sources have influenced the Swedish Supreme Court’s interpretation of the provisions relating to conflicts of interest in the Swedish Arbitration Act on numerous occasions. If applied in a third party funding context, this tendency may predict a shift towards a stricter view on disclosure duties, at least with respect to the existence of funding and the identity of the funder.

V COSTS

As explained in Section II, a claimant that transfers a claim to a party that has no financial resources to pay the defendant’s legal fees and litigation costs in the event the claim is unsuccessful could later be ordered to pay the defendant’s legal fees and litigation costs. However, this requires that the claimant retains a financial interest in the outcome of the dispute insofar as the outcome is positive. The question is whether this can also be applied to third party funding and, if so, whether this means that a third party funder can later be ordered to pay the defendant’s legal fees and litigation costs if the claimant does not have the financial resources to do so.

Under Swedish law, the assumption is that the party that loses the case must compensate the opposing party for its legal fees and litigation costs.³³ The problem described above arises when the claimant is in such a poor financial condition that it is unable to pay the defendant’s legal fees and litigation costs and, furthermore, has not agreed that the third party funder will cover the opposing party’s legal fees and litigation costs.

In this respect, it should be noted at the outset that Swedish courts have held that a party in poor financial condition is entitled to bring a legal action.³⁴ However, the Supreme Court has held that, in a situation where the claimant is unable to pay the defendant’s legal fees and litigation costs, in exceptional cases there may be grounds for imposing liability for paying these costs on a third party with a financial interest in the outcome of the dispute.³⁵

30 See Report for public discussion of the ICCA–Queen Mary Task Force on Third-Party Funding in International Arbitration, Apr. 2018. The ICCA Reports No. 4. at 81.

31 *id.*

32 *id.*

33 Chapter, 18, Section 1 of the Swedish Code of Judicial Procedure. This also applies to arbitration proceedings (see Stefan Lindskog, *Skiljeförfarande: En kommentar [Arbitration: A Commentary]* (2nd edn), p. 1023).

34 P. 144 in NJA 2000.

35 The cases reported on p. 420 in NJA 2006 and p. 887 in NJA 2014.

According to case law, this probably requires the third party to be the effective beneficiary in the dispute and the claim to have been transferred to an individual or company in poor financial condition for the purpose of limiting the adverse financial consequences of a negative outcome in the dispute.

In light of the above and based on current case law, it is probably difficult to impose liability for legal fees and litigation costs on a third party funder, since third party funding does not generally involve the claim being transferred to an individual or company in poor financial condition. The situation is reminiscent of that where an individual creditor in bankruptcy invests in the bankruptcy estate's action against a debtor in respect of a claim in favour of the bankruptcy estate. In such a case, the creditor in bankruptcy is the effective beneficiary in terms of the financial outcome of the dispute and probably also exercises a certain amount of influence over the action. Under Swedish law, in this situation the creditor in bankruptcy is unlikely to be ordered to pay the opposing party's legal fees and litigation costs in the event the action is unsuccessful.³⁶

In light of this, it is unlikely that a third party funder will be held liable for paying legal fees and litigation costs based on current case law. However, this does not prevent the Supreme Court from altering this position when it has the opportunity to assess a situation relating to liability for legal fees and litigation costs where a third party funder has been involved.

VI THE YEAR IN REVIEW

In the past year, there have been no considerable changes in the Swedish market that bear relevance as to third party funding. However, we have seen an increase in awareness and interest among Swedish lawyers towards third party funding and its potential benefits. While third party funding was previously regarded fairly negatively, we have, during the course of the past few years, detected a more positive attitude towards third party funding.

VII CONCLUSIONS AND OUTLOOK

In summary, third party funding is a phenomenon that is relatively new and unfamiliar in Sweden. The situations in which third party funding is used in Sweden are probably limited to international arbitration proceedings in which the seat of arbitration is located in Sweden. Furthermore, since third party funding is relatively new in Sweden, there is no legislation governing or barring the use of third party funding. In our view, this will remain the case in the future. If third party funding issues arise in the Swedish courts, it is reasonable to assume that the courts will be guided primarily by international guidelines and other 'soft law' sources.

³⁶ The trustee in bankruptcy can ask the creditor in bankruptcy to provide security for any compensation payable for the defendant's legal fees and litigation costs. However, if the creditor in bankruptcy is unwilling or unable to provide the security, the trustee in bankruptcy can still bring an action. However, if there is a risk that the bankruptcy estate will not be able to pay the defendant's legal fees and litigation costs if the claim is unsuccessful, an action should not be brought against the creditor in bankruptcy (see Lars Heuman, *Specialprocess* [Special proceedings] (6th edn), p. 227, and the cases reported on p. 131 in NJA 1999 and p. 420 in NJA 2006).

As for the future, we predict great potential for the continued development of third party funding in Sweden. The SCC is one of the major arbitral institutions and will thus continue to attract many arbitration cases. Moreover, the SCC is noted as being one of the major institutions when it comes to larger disputes, which typically are of greatest interest for third party funders. Therefore, it is likely that the third party funding market will increase in Sweden in the coming years.

SWITZERLAND

*Martin Bernet and Urs Hoffmann-Nowotny*¹

I MARKET OVERVIEW

Third party litigation funding is still a relatively new phenomenon in Switzerland. Triggered by the commercial success of FORIS AG in Germany in the late 1990s, first reports about litigation funding emerged in Swiss legal writing around the turn of the century.² FORIS AG entered the Swiss market in 2000. At the time, the legality of litigation funding under Swiss law was still uncertain. In the wake of the leading case of the Swiss Federal Court, the country's highest court, which answered the question in the affirmative in 2004,³ Allianz ProzessFinanz GmbH (Allianz), a subsidiary of the German Allianz Insurance Group, also entered the Swiss market.⁴ In 2008, Allianz even opened a representative office in Zurich. However, in 2011, Allianz stopped writing new funding business worldwide (including in Switzerland).

Until recently, two funders were known to be actively operating out of Switzerland, (1) Profina Prozessfinanzierung GmbH in Zug, which was founded in 2006⁵ and (2) JuraPlus AG in Zurich, which was founded in 2008.⁶ In 2017, a new player, Nivalion AG in Zug, which was founded in late 2016, entered the market.⁷ Furthermore, in 2018, Vannin Capital announced the launch of an office in Germany with an aim to, *inter alia*, fund business in Switzerland.⁸ Several other non-Swiss (in particular German) funders are also said to be taking on Swiss cases.

Most Swiss-based players seem to focus primarily on state court litigation, notably civil liability cases as well as intellectual property and inheritance disputes. Other fields of

1 Martin Bernet practises out of his own independent firm, Bernet Arbitration/Dispute Management. Urs Hoffmann-Nowotny is a partner at Schellenberg Wittmer Ltd.

2 See Schumacher, *Prozessfinanzierung, Erfolgshonorierte Fremdfinanzierung von Zivilverfahren*, Thesis Zurich 2015, cited Schumacher, *Prozessfinanzierung*, pp. 22 et seq. with references.

3 For more detail on this case, see Section II.

4 Allianz was one of the complainants that obtained the Federal Court's leading case.

5 See www.profina.ch, last visited on 21 September 2018.

6 See www.jura-plus.ch, last visited on 21 September 2018.

7 See <http://nivalion.ch>, last visited on 21 September 2018. Nivalion focuses on large-scale cases (minimum amount in dispute exceeding 7.5 million Swiss francs) and is particularly active in arbitration.

8 See <https://vannin.com/news-expertise/news/article.php?id=280>, last visited on 21 September 2018.

law with funded cases are general contract and corporate law (including liability of directors and officers).⁹ Furthermore, there is anecdotal evidence for third party funding in arbitration and in claims dormant in foreign bankruptcies,¹⁰ until recently mostly by non-Swiss funders.

The Swiss market is still relatively small. Swiss funders ordinarily require a minimum amount in dispute of 250,000 Swiss francs.¹¹ Representatives of funders have stated at conferences that there are no more than around 50 funded cases in Switzerland per year. According to recent indications from representatives, Swiss funders receive around 50 to 100 enquiries per year each, which result in the conclusion of between five and 15 agreements per funder.¹² Also, there are no Swiss industry associations.¹³

II LEGAL AND REGULATORY FRAMEWORK

The legality of litigation funding is no longer an issue in Switzerland since the Swiss Federal Court rendered the already mentioned decision of 10 December 2004.¹⁴ In this case, the Court had to review the constitutionality of a provision of the 2003 Zurich Cantonal Act on the Legal Profession (the Zurich Lawyers Act)¹⁵ that made it illegal to fund a lawsuit on a commercial basis and against a participation in the success of the suit. The Court found that the provision violated freedom of commerce as guaranteed in the Swiss Federal Constitution.¹⁶ The Court therefore quashed the critical provision of the Zurich Lawyers Act.

The Federal Court issued a very detailed opinion that provides guidance on a number of critical aspects of litigation funding. The most important points addressed are the following:

a The Court addressed the question whether third party litigation funding might jeopardise the independence of the lawyer acting for the funded party. Under the Swiss Federal Act on the Freedom of Lawyers (the Federal Lawyers Act), lawyers in Switzerland must exercise their activity independently.¹⁷ The Court found that the

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- 9 See Wegmüller, *Prozessfinanzierung in der Schweiz: Bestandesaufnahme und Ausblick*, in: *HAVE* 2013 235 et seqq., p. 240 et seq.; Dähler, *Juristische, ökonomische und soziale Aspekte der Prozessfinanzierung*, Presentation at the Europa Institut Zürich on 27 January 2012, Section 8.
 - 10 See in this respect Hunkeler/Wohl, *Kommerzielle Prozessfinanzierung zu Gunsten von Insolvenzmassen?*, in: *BSchK* 2015, pp. 41 et seqq.
 - 11 As a rule, minimum requirements are 250,000 Swiss francs (Profina), 300,000 Swiss francs (JuraPlus) and 7.5 million Swiss francs (Nivalion) (see http://nivalion.ch/direct_funding/, last visited on 21 September 2018; Wegmüller, *op. cit.*, p. 241).
 - 12 See for a recent overview Schumacher, *Richterliche Pflicht zum Hinweis auf private Prozessfinanzierung?*, in: *AJP* 2018 458 et seqq. (cited Schumacher, *Pflicht zum Hinweis*), p. 460 et seq. Accordingly, there has been a slight market growth in recent years (see, for comparison, Schumacher, *Prozessfinanzierung*, p. 8 with figures from 2014).
 - 13 However, Nivalion is an overseas funder member of the Association of Litigation Funders of England and Wales (see <http://associationoflitigationfunders.com/membership/membership-directory/>, last visited on 21 September 2018).
 - 14 The decision is reported in the Official Case Reporter: BGE 131 (2004) I 223 et seqq. It was confirmed later by the decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.1 (not published in the Official Case Reporter).
 - 15 Anwaltsgesetz of 17 November 2003, LS (Systematic Collection of Zurich Cantonal Laws) 215.1.
 - 16 Article 27 of the Swiss Federal Constitution, SR (Systematic Collection of Swiss Federal Laws) 101.
 - 17 Article 8(1)(d) of the Federal Lawyers Act of 23 June 2000, SR 935.61. The statutory requirement that lawyers exercise their activity as independent professionals does not prohibit law firms from being organised

plaintiff's contractual obligations under the typical funding arrangements to promptly and fully inform the funder on all aspects of the case and not to settle the case without the funder's prior approval do not jeopardise the lawyer's independence.¹⁸

b The Federal Court then considered the concern that the lawyer's duty of confidentiality¹⁹ was at risk. In the Court's analysis, it is perfectly permissible for the client to allow his or her lawyer to disclose confidential information to the third party funder and this does not call into question the lawyer's confidentiality obligation.²⁰

c The Federal Court finally looked at the issue of conflicts of interest. Swiss lawyers have not only a contractual, but also a statutory duty to avoid conflicts.²¹ The Court found that the party's and the third party funder's interests were, as a rule, aligned since they are both interested in obtaining the best possible result in the proceedings. However, the Court accepted that conflicts of interest might arise in certain scenarios; for example, when it comes to accepting or rejecting a settlement proposal. However, in the Court's analysis, such potential conflicts can be managed by appropriate arrangements in the funding agreement. Therefore, the mere possibility of such conflicts does not suffice to preclude third party litigation funding.²²

d The Federal Court also looked at the commercial realities of third party litigation funding. The Court recognised that funders will focus their acquisition efforts on lawyers and that the lawyers thus have a commercial interest in entertaining good relationships with professional funders, thereby being at risk of putting the funders' interests before those of the client. However, the Court found that this was not the only area of potential conflicts of interest for lawyers; it pointed as an example to the situation where the lawyer is paid by the client's professional liability insurer. The Federal Court came to the conclusion that the existence of the lawyer's legal obligation always to put the client's interests first, coupled with the threat of severe sanctions in the event of a breach, adequately addresses this concern.²³

There are no specific statutory rules concerning third party litigation funding. Certain clauses in litigation funding agreements can be inadmissible; for example, if the funder was granted an excessive share of the proceeds of the litigation.²⁴ Furthermore, as discussed by

as corporations, as long as the corporation is controlled by independent lawyers. It also permitted for a lawyer to exercise his or her activity as an employee provided he or she is employed by an independent lawyer or law firm.

18 BGE 131 (2004) I 223 c. 4.5.

19 The duty of confidentiality is based on a number of legal sources: the contract between lawyer and client, Article 13 of the Federal Lawyer's Act and the rules issued by the cantonal bar organisations. Breach of the duty constitutes a severe criminal offence, pursuant to Article 321 of the Swiss Penal Code (PC; SR 311.0); it also entails disciplinary sanctions.

20 BGE 131 (2004) I 223 c. 4.5.6.

21 The duty to avoid conflicts of interest is again based on a number of legal sources, in particular, Article 398(2) of the Swiss Code of Obligations (CO; SR 220), which requires lawyers to diligently and faithfully perform the business entrusted to them, as well as Article 12(c) of the Federal Lawyers Act.

22 BGE 131 (2004) I 223 c. 4.6.

23 BGE 131 (2004) I 223 c. 4.6.3, 4.6.4 and 4.6.6.

24 Article 157 PC prohibits 'profiteering' (i.e., exploitation of a party in need). Under Swiss civil law, a party that is affected by an agreement that takes unfair advantage can declare its rescission within one year of the contract having been entered into (Article 21 CO); see also BGE 131 (2004) I 223 c. 4.6.6.

the Federal Court in its leading case, the most important legal limits and prohibitions arise from the lawyers' duties (1) to exercise their activity independently, (2) to keep client-related information confidential and (3) to avoid conflicts of interest.

In this context, the Administrative Court of the canton of Aargau dealt with a case in 2008 in which the lawyer who represented the plaintiff as counsel was at the same time the president of the board of the third party funder financing the litigation. Despite this double function, the court found that the lawyer's duty to act independently had not been breached as long as the litigation funding agreement provided for the priority of the lawyers' rules of professional conduct over the interests of the funder and did not grant the funder any right to interfere with the lawyers' handling of the litigation.²⁵

By contrast, in another decision, of 22 January 2015, the Swiss Federal Court found that a lawyer had breached the duty to avoid conflicts of interest in a situation where the lawyer had represented both his client and the litigation funder when they negotiated the funding agreement. The Court found that there was a conflict between the interests of these parties with respect to the share of the proceeds of the litigation that they would receive.²⁶ In addition, the Court criticised the fact that the agreement provided for a share of the proceeds to be used to repay private loans that the lawyer had granted his client earlier on. As a consequence, the Court found that the lawyer had breached his professional duties.²⁷

Furthermore, Swiss law narrowly restricts the options for lawyers to agree to success-related remuneration. The Federal Lawyers Act bans the possibility of agreeing on a full-success fee (i.e., arrangements under which remuneration is only owed in the event of success, or in which the sole remuneration consists in a share of the proceeds of the litigation (*pactum de quota litis*)).²⁸ By contrast, Swiss case law has confirmed the permissibility of a *pactum de palmario*, an arrangement pursuant to which the client pays a reduced fee and the lawyer is in turn entitled to a share of the proceeds of the litigation as an additional (contingent) fee component.²⁹ The courts have held that the fee component that is unrelated to the outcome of the litigation must at least cover the lawyers' costs and must allow for a reasonable profit.³⁰ In its most recent leading case, the Federal Court has furthermore specified that the success-related component must not exceed the amount of the unconditional fee component. Furthermore, the agreement of a *pactum de palmario* is only permissible at the outset of the mandate or after the dispute has ended, but not in between.³¹ Litigation

25 AGVE (Official Case Reporter of Court and Administrative Judgments of the Canton of Aargau) 2008 275 et seq., c. II.2.3.

26 Decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.2.

27 Decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.3.

28 Article 12(e) of the Federal Lawyer's Act; furthermore, BGE 143 (2017) III 600 c. 2.5 with further references.

29 BGE 143 (2017) III 600 c. 2.7.4 and 2.7.5; decision of the Federal Court 2A.98/2006 of 24 July 2006 c. 2.1 (not published in the Official Case Reporter); furthermore, the *obiter dictum* in BGE 135 (2009) III 259 c. 2.3. Article 19 of the Rules of Professional Conduct of the Swiss Bar Association also assumes the permissibility of a *pactum de palmario*.

30 BGE 143 (2017) III 600 c. 2.7.5; decision of the Lawyer's Supervisory Commission of the Canton of Zurich of 2 March 2006, in: ZR (Official Case Reporter of the Canton of Zurich) 105 (2006) No. 46; see also decision of the Federal Court 2A.98/2006 of 24 July 2006 c. 2.2 according to which this only leaves a relatively narrow scope for the agreement of success-related fee components.

31 BGE 143 (2017) III 600 c. 2.7.5.

funding arrangements that circumvent the general ban on success fees are also prohibited. This can be the case if counsel in the litigation is at the same time a shareholder of the funder, in which case the lawyer's duty to act independently would also be violated.³²

Currently, there is no specific regulation and supervision of third party litigation funding in Switzerland. In particular, the Swiss Federal Court clarified that third party litigation funding does not qualify as an insurance that would fall under the Insurance Supervision Act³³ because there is no payment of a premium in exchange for insurance against a future risk.³⁴ Furthermore, the core offering of litigation funders does not fall within the scope of other Swiss financial market laws.³⁵ The Federal Court does not seem to exclude a need for future regulation,³⁶ and representatives of litigation funders have considered whether regulation may actually be in the interest of providers to help and better establish the existing offer.³⁷ Nevertheless, there is currently no prospect of regulation (and no self-regulation either).³⁸

III STRUCTURING THE AGREEMENT

There is no specific model agreement in use by Swiss litigation funders and each funder uses its own template. However, most of the relevant agreements are structured very similarly.³⁹ Some funders provide a template for download from their website.⁴⁰

The process of entering into a funding agreement ordinarily consists of two phases: after a preliminary assessment of the prospects of the case, the funder will require the prospective plaintiff to enter into an exclusivity arrangement for a certain period (e.g., three weeks); during the exclusivity period, the funder will conduct a more thorough assessment allowing for an informed decision on whether to take on the case.⁴¹

Funding agreements in Switzerland are typically structured as a financing (not as a purchase) of the claim.⁴² The funder enters into an obligation to pay all costs that are reasonably required to pursue the claim. This relates to court costs (including advances that are payable by the plaintiff) and the plaintiff's own attorney's fees. Furthermore, the potential

32 See AGVE 2008 275 et seqq. c. II.4. As early as 2004, the Swiss Federal Court had in its leading case stated that a lawyer's independence could potentially be jeopardised if the counsel to a party held a stake in or acted as a board member of the litigation funder and would thus indirectly profit from the outcome of the litigation (BGE 131 [2004] II 223 c. 4.6.4; see also decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.1).

33 SR 961.01.

34 BGE 131 (2004) I 223 c. 4.7.

35 Wegmüller, op. cit., p. 238.

36 See BGE 131 (2004) I 223 c. 4.6.6 ("These concerns can be addressed by existing laws or, if need be, regulations that will still be introduced.") and 4.8; furthermore, Schumacher, *Prozessfinanzierung*, pp. 20 et seqq.

37 Wegmüller, op. cit., p. 245.

38 See, however, Schumacher, *Pflicht zum Hinweis*, pp. 464 et seq., who raises the question whether a duty for courts to inform plaintiffs about the possibility of litigation funding, as it is proposed in a recent draft law for a partial revision of the CPC (see Section VII), should go hand in hand with regulation.

39 Wey, *Kommerzielle Prozessfinanzierung – ein Überblick über Angebot und Rechtsfragen*, in: Fellmann/Weber (eds.), *Haftpflichtprozess 2008*, Zurich/Basel/Geneva 2008, pp. 43 et seqq., 52.

40 See template of Profina Finanzierungsvertrag, downloaded from www.profina.ch/ablauf/vertrag.html, last visited on 21 September 2018.

41 Wey, op. cit., pp. 47 et seqq.; Schumacher, *Prozessfinanzierung*, p. 101.

42 Schumacher, *Prozessfinanzierung* p. 104.

compensation of the defendant for its legal fees if the claim is unsuccessful is also covered, which is not the case for many non-continental European funders. Depending on the nature of the case, the plaintiff may furthermore require the funding of a party-appointed expert to pursue the claim.⁴³

In exchange for the financing, the funder receives a share of the proceeds of the litigation. Generally, Swiss funders can be expected to take a share in the region of 30 per cent of the net revenue.⁴⁴ The share may vary, however, depending on the absolute value recovered and the point in time at which the dispute comes to an end (i.e., the funder's share will be lower in the case of high amounts recovered and in the case of an early settlement).⁴⁵ In some cases, the funder's share is also calculated as, or limited to, a multiple of the amount invested by the funder.

Under Swiss law, the question arises as to how the funder's claim can be secured. In Swiss civil procedure, a party cannot be authorised by agreement to pursue a claim on behalf of another person.⁴⁶ As a consequence, the plaintiff would no longer have standing to sue if the claim was assigned to the funder. Therefore, some agreements merely provide for a duty to assign the agreed share to the funder upon first request.⁴⁷ However, a pledge of the claim as security for the funder's share seems to be the preferred option.⁴⁸

The agreements usually provide for the funder's right to withdraw from the contract if events materially affect the initial assessment of the case. Such events typically include (1) the surfacing of previously unknown, detrimental facts, (2) a change in case law that affects the case, (3) a loss of important evidence and (4) a deterioration of the defendant's financial position.⁴⁹ Some funders will only commit to funding the case before the courts of first instance.⁵⁰ In any event, however, the rendering of a judgment that results in a full or partial dismissal of the claim will usually also trigger a right of termination by the funder.⁵¹ In the event of withdrawal, the funder will be required to cover all costs that have been incurred so far (including costs resulting from a termination of the proceedings). However, the plaintiff will be entitled to continue the proceedings at its own cost and risk.⁵²

Similarly, funding agreements often provide for an exit mechanism if the parties (i.e., the funder and the plaintiff) fail to reach an agreement regarding a settlement offer. The party rejecting the settlement is usually entitled to continue the proceedings but will become liable to the other party for the proceeds that would have resulted from the settlement.⁵³

There are no known examples of disputes between funders and plaintiffs in Switzerland.

43 Wegmüller, op. cit., p. 241; Wey, op. cit., p. 52.

44 Schumacher, *Prozessfinanzierung*, p. 21. See, however, also Wey, op. cit., p. 53, who reports a range of 20 per cent to 50 per cent.

45 Wegmüller, op. cit., pp. 241 et seq.; Schumacher, *Prozessfinanzierung*, p. 21.

46 BGE 137 (2011) III 293, c. 3.2.

47 Profina Finanzierungsvertrag, § 3.

48 Schumacher, *Prozessfinanzierung*, p. 223.

49 Wey, op. cit., p. 56.

50 Profina Finanzierungsvertrag, § 1.

51 Schumacher, *Prozessfinanzierung*, p. 99.

52 Schumacher, *Prozessfinanzierung*, p. 99; Wey, op. cit., p. 56.

53 Schumacher, *Prozessfinanzierung*, p. 100; see also Wey, op. cit., p. 56.

IV DISCLOSURE

In Swiss civil procedure law, the parties can seek disclosure and the production of documents from the counterparty or third parties if the information is of relevance for the court's decision.⁵⁴ However, production requests must be precisely worded and relate to documents that are clearly specified since fishing expeditions are inadmissible.⁵⁵

Legal documents stemming from communications between a party or third party and counsel are exempt from disclosure obligations (attorney–client privilege).⁵⁶ The scope of this exception was significantly expanded in 2013⁵⁷ and is today predominantly deemed to apply to all types of legal documents (including notes to file, whether prepared by the lawyer or the client, legal assessments, draft contracts, etc.) and irrespective of whether they are in the possession of the lawyer, the client or even a third party.⁵⁸ As a consequence, assessments from counsel will be subject to privilege even if they are in the hands of the litigation funder.

Under Swiss civil procedure law, there is also no duty to disclose the existence of a litigation funding agreement.⁵⁹ In particular, production requests relating to the funding of a claim are not permissible because they are irrelevant for the court's decision.⁶⁰ As a consequence, more often than not in court litigation, the existence of a funding arrangement will not be disclosed.

By contrast, in international arbitration, some authors have argued that a claimant would be under a duty to disclose the fact that it is supported by a litigation funder, in particular to allow for the evaluation of a security-for-costs request.⁶¹ Furthermore, under the IBA Guidelines on Conflicts of Interest in International Arbitration, as revised in 2014, any legal or physical person having a direct economic interest in, or a duty to indemnify a party

54 Article 160(1)(b) of the Swiss Federal Code of Civil Procedure (CPC; SR 272). The taking of evidence is generally limited to disputed facts that are legally relevant (Article 150 CPC; see in this respect also decision of the Court of Cassation of the Canton of Zurich of 23 February 1981, in: ZR 80 [1981] No. 102 c. 7b).

55 Schmid, in: Spühler/Tenchio/Infanger (eds.), *Basler Kommentar Schweizerische Zivilprozessordnung*, 3rd ed., Basel 2017, para. 24 ad article 160 with further references.

56 Article 160(1)(b) CPC; see also Article 166(1)(b) CPC.

57 Formerly, the exception was limited to genuine criminal defence counsel-related correspondence and it was argued that only documents in the hands of external lawyers would be protected.

58 Schmid, in: Spühler/Tenchio/Infanger (eds.), *Basler Kommentar Schweizerische Zivilprozessordnung*, 3rd ed., Basel 2017, para. 24 ad article 160; Schmid, in: Oberhammer/Domej/Haas, *Kurzkommentar ZPO*, 2nd ed., Basel 2014, para. 6a ad article 160; Hasenböhler, in: Sutter-Somm/Hasenböhler/Leuenberger (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung*, 3rd ed., Zürich 2016, para. 18 ad article 160.

59 An exception applies where a party has previously obtained legal aid, in which case it is required to notify the court upon entering into a litigation funding agreement that it has made sufficient funds available and no longer depends on legal aid (see decision of the Superior Court of the Canton of Zurich of 8 April 2012, LA110040, c. 8.3; furthermore, also of the Federal Court 2C_814/2014 of 22 January 2015 c. 5.2).

60 See Section IV, first paragraph.

61 von Goeler, *Third-Party Funding and its Impact on International Arbitration Proceedings*, Alphen a.d.R. 2016, pp. 130 et seqq. (also with reference to further procedural issues that may require a party to disclose certain facts related to the funding) and pp. 338 et seq.; Scherer, *Third-Party Funding in International Arbitration: Towards Mandatory Disclosure of Funding Agreements*, in: Cremades/Dimolitsa (eds.), *Third-party Funding in International Arbitration*, ICC Dossier, Vol. 10, Paris 2013; pp. 95 et seqq.; see also ICC Commission Report, *Decisions on Costs in International Arbitration*, ICC Dispute Resolution Bulletin 2/2015, para. 89.

for, the award to be rendered in the arbitration, may be considered to bear the identity of that party.⁶² As a consequence, concerns regarding relationships between an arbitrator and one of the parties with respect to conflicts of interest extend to third party funders and may require the disclosure of the existence of a funding arrangement.⁶³

In Switzerland, litigation funding agreements are typically subject to confidentiality obligations. A disclosure requires the consent of the other party.⁶⁴ Nevertheless, consideration is given to whether the chances of settlement would increase if the case's own financial strength (because of the funder's support) and soundness (given that it has passed the funder's assessment) is demonstrated to the opposing party early on. As a consequence, a voluntary disclosure of the existence of a funding arrangement for tactical reasons is considered.⁶⁵

V COSTS

Swiss law of civil procedure generally follows the 'loser-pays' rule, according to which the losing party has to pay the court costs and also compensate the winning party for that party's attorney's fees.⁶⁶ However, party costs are awarded on the basis of tariffs that depend on the amount in dispute.⁶⁷ In most cases, the compensations awarded cover only part of the actual costs incurred.

Upon the filing of the statement of claim, the court will usually request an advance on costs from the plaintiff to cover the prospective court costs.⁶⁸ Furthermore, each party must advance the costs for the taking of evidence that it has requested.⁶⁹ In addition, at the defendant's request, the plaintiff must also provide security for the party costs if, *inter alia*, (1) the plaintiff is domiciled abroad and no treaty exemption applies, (2) the plaintiff appears to be bankrupt or (3) there are other grounds for assuming that a claim for party costs would be at risk.⁷⁰ The question of whether the funding of a plaintiff's claim (to the extent the defendant becomes aware of this fact) may give rise to a duty to secure the defendant's party costs is hardly discussed in legal writing in Switzerland. In one case, however, where the conditions for having to secure party costs were met on the part of the plaintiff (who was bankrupt), the question arose whether the plaintiff could avoid the duty to furnish security by reference to the fact that its funder would be liable under the funding agreement for potential party costs payable if the claim was unsuccessful.⁷¹ The Commercial Court of the Canton of Zurich held that only the actual party's ability to meet its financial obligations was relevant

62 General Standard 6(b) and 7(a) of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.

63 Voser/Petti, the revised IBA Guidelines on Conflicts of Interest in International Arbitration, in: ASA Bulletin 1/2015, pp. 6 et seqq., p. 19; Scherer, op. cit. p. 96 et seq.; see also Born, *International Commercial Arbitration*, 2nd ed., Alphen a.d.R. 2014, Vol. II, para. 2867. Voluntary disclosure is also recommended as best practice in the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration of April 2018, p. 188.

64 Schumacher, *Prozessfinanzierung*, p. 98.

65 Wey, op. cit., pp. 54 et seq.

66 Article 106(1) and (2) CPC.

67 See Article 96 CPC.

68 Article 98 CPC.

69 Article 102 CPC.

70 Article 99(1) CPC.

71 Decision of the Commercial Court of the Canton of Zurich of 12 February 2016, in: ZR 115 (2016) No. 17.

for assessing whether party costs had to be secured under the CPC.⁷² As a consequence, the Court concluded that the obligation of the funder, which only exists in relation to the plaintiff, to pay compensation for the defendant's party costs, did not release the plaintiff from its duty to furnish a security.⁷³

By contrast, in international arbitration, notable authors argue that a claimant appearing to lack assets to satisfy a final cost award but pursuing the claim with the funding of a third party makes a strong *prima facie* case for security for costs.⁷⁴ Therefore, just as in other jurisdictions, there is a risk in Swiss-seated arbitrations that a claimant will be ordered to pay a security for party costs once the existence of a funding arrangement has been disclosed.

VI THE YEAR IN REVIEW

The past years have seen some movement in the Swiss market for litigation funding, with Nivalion AG and Vannin Capital entering as new players.⁷⁵

There has also been a slight increase in reported court cases relating to issues of litigation funding.⁷⁶ It will be interesting to see whether this trend continues. Furthermore, scholarly writers have recently pointed to the fact that Swiss lawyers are under a duty to advise their clients regarding the availability of third party funding and to represent them when entering into a funding agreement.⁷⁷ All these factors indicate an increased awareness of third party litigation funding and the opportunities arising from it.

VII CONCLUSIONS AND OUTLOOK

In light of the limited number of funded cases in Switzerland so far,⁷⁸ litigation funding is not yet an important phenomenon. However, litigation funding is here to stay and will very likely gain further in importance in the future.

The fact that the importance of third party funding in Switzerland has remained rather modest until now may in part have to do with the fact that class actions or other mechanisms of collective redress do not exist in Switzerland at present. In 2013, the Swiss government, the Federal Council, had published a report on collective redress, which suggested a number

72 *ibid.*, c. 3.

73 *ibid.*, c. 4. The security can, however, be furnished in the form of a payment guarantee a Swiss bank or insurance company (Article 100[1] CPC).

74 Born, *op. cit.*, para. 2496; see also ICC Commission Report, Decisions on Costs in International Arbitration, *op. cit.*, para. 90. By contrast, Redfern/O'Leary, Why it is time for international arbitration to embrace security for costs, in: *Arbitration International* 2016 397 et seqq., pp. 407 et seq., suggest that 'the fact of third-party funding alone is not enough to justify an order for security of costs'; similarly also von Goeler, *op. cit.*, p. 341.

75 See Section I.

76 See, e.g., decision of the Commercial Court of the Canton of Zurich of 12 February 2016, in: ZR 115 (2016) No. 17; decision of the Federal Court 2C_814/2014 of 22 January 2015; decision of the Superior Court of the Canton of Zurich of 8 April 2012, LA110040.

77 Schumacher/Nater, Anwaltsrubrik: Prozessfinanzierung und anwaltliche Aufklärungspflichte, in: *SJZ* 2016 43 et seqq. with reference to a corresponding statement of the Federal Court in its decision 2C_814/2014 of 22 January 2015, c. 4.3.1.

78 See Section I.

of measures to improve an efficient handling of mass claims in Swiss civil procedure.⁷⁹ In this report, the government expressed support for the further development of the Swiss market for litigation funding and described it as an important factor to improve access to justice in mass tort and consumer cases.⁸⁰ In March 2018, the Federal Council proposed a partial revision of the CPC one of the key objectives of which is to strengthen mechanisms of collective redress. Furthermore, the preliminary draft law provides for a duty for courts to inform plaintiffs about the possibility of litigation funding.⁸¹ These legislative efforts to establish mechanisms of collective redress in Swiss law are ongoing and may, if made law in future, favour third party funding.

79 Report of the Swiss Federal Council on Collective Redress in Switzerland of 3 July 2013, available online at <https://www.bj.admin.ch/dam/data/bj/aktuell/news/2013/2013-07-03/ber-br-d.pdf>, last visited on 21 September 2018.

80 Report of the Swiss Federal Council on Collective Redress in Switzerland of 3 July 2013, p. 46.

81 Explanatory Report of the Swiss Federal Council on the Revision of the CPC (Improvement of the Application of the CPC and the Enforcement of Rights) of 3 March 2018, pp. 50 et seq.; see also Schumacher, *Pflicht zum Hinweis*, pp. 458 et seqq.

UKRAINE

*Olexander Droug*¹

I OVERVIEW

Third party funding is not regulated in Ukraine. Accordingly, there are no limitations or prohibitions on funding the claims in the civil and commercial proceedings before the Ukrainian courts and in arbitration proceedings seated in Ukraine.

At the same time, third party funding is not known on the market and in practice it is not used in proceedings before the Ukrainian courts and in arbitration proceedings seated in Ukraine.

Some Ukrainian parties resort to third party funding from non-Ukrainian funders to pursue their claims in foreign jurisdictions, including the United Kingdom, and in arbitrations seated outside Ukraine.

In the event that a party nevertheless wishes to use third party funding in Ukraine, the Rules of Professional Conduct contain a requirement that an attorney practising in Ukraine, when representing a client, may not take into account instructions from other parties. Furthermore, an attorney intending to share any privileged documents or information with a third party (i.e., funder) shall obtain the client's consent.

Although strictly not third party funding, there is a rather common practice in Ukraine for lawyers to handle cases under conditional fee agreements. The Rules of Professional Conduct expressly allow such way of structuring the payment to an attorney.

However, recently the Supreme Court stated that a provision of a contract between a client and an attorney allowing a conditional fee is void. In the view of the Supreme Court, the outcome of a litigation may not be the subject of the legal services contract.²

Not all judges of the Supreme Court agreed with such position and there is a dissenting opinion that a conditional fee agreement does not in fact breach any mandatory rule of Ukraine.³ Therefore, further developments in Ukrainian court practice on conditional fee agreements may be expected.

Ukrainian procedural rules for civil and commercial litigation, as well as the Arbitration Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, provide for the standard rule of 'costs follow the event', which can help reduce financial burden suffered by the party to the dispute.

1 Olexander Droug is a partner at Sayenko Kharenko.

2 Resolution of the Supreme Court dated 12 June 2018 in case No. 462/9002/14-ц.

3 Dissenting opinion of Vasyl Krat, judge of the Supreme Court, dated 12 June 2018 in case No. 462/9002/14-ц.

There is also a market in Ukraine for acquisition of non-performing loans and distressed debt in general. Factoring companies, debt collection companies and other financial companies frequently purchase claims from corporates and banks and then enforce them in their own name. However, we do not consider this to constitute third party funding.

We continue to follow the development in Ukraine in this sphere.

UNITED ARAB EMIRATES: DUBAI INTERNATIONAL FINANCIAL CENTRE

Mohamed El Hawawy, Pavlo Samothrakis, Anna Fomina and Monika Humphreys-Davies¹

I MARKET OVERVIEW

The Dubai International Financial Centre (DIFC) is a free zone within the United Arab Emirates (UAE), which was established in 2004. The DIFC is a common law jurisdiction – an enclave within the UAE’s otherwise civil law legal system – and has its own courts (DIFC Courts), where proceedings are governed by the Rules of the DIFC Courts (RDC), which are closely modelled on the English Civil Procedure Rules. The DIFC also has its own civil and commercial legal framework, which is different from the UAE law onshore. As part of that framework, the DIFC has its own Arbitration Law,² which is based on the UNCITRAL Model Law.

The UAE, and the Middle Eastern region in general, has not been a traditional market for litigation funding, and that has been mostly because funders have perceived Middle Eastern jurisdictions as not offering the level of certainty and predictability they look for in the legal process. However, the introduction of common law free zones such as the DIFC (and more recently Abu Dhabi Global Market), with their own courts and arbitration laws, gives rise to more attractive new markets for funders.

Since their establishment in 2011, the DIFC Courts’ caseload has increased steadily, and they are becoming the preferred dispute resolution forum in the region for both local and regional parties, as well as parties from other international jurisdictions. According to DIFC’s annual report for 2017, the total number of cases before the DIFC Courts and arbitration was 520 with the average value of 24,425,369 dirhams at the Court of First Instance and arbitration and with the average value of the enforcement cases being 49,538,813 dirhams.³ In the first half of 2018, the DIFC Courts reported 64 per cent increase in the number of cases compared to the same period in 2017.⁴ This, in turn, indicates potential for growth for litigation funding.

As things stand, there are no funders based in the DIFC. However, various international funders have funded disputes in the DIFC in the past or have expressed interest in doing so in the future.

One point that has attracted some interest from international funders is the enforcement of foreign arbitral awards through the DIFC as a conduit jurisdiction to the wider UAE jurisdiction (see Section VI).

1 Mohamed El Hawawy and Pavlo Samothrakis are partners, Anna Fomina is a practice development lawyer and Monika Humphreys-Davies is an associate at Ince & Co Middle East LLP.

2 DIFC Law No. 1 of 2008, as amended.

3 2017 Annual Report, <http://annualreview.difccourts.ae>.

4 <http://gulfbusiness.com/dubais-difc-courts-notes-64-increase-cases-first-half-year/>.

II LEGAL AND REGULATORY FRAMEWORK

The DIFC is a relatively new common law jurisdiction, being established in 2004. As a result, it does not have the same history of changing attitudes to third party funding (TPF) and champerty as that shared by other common law jurisdictions. The DIFC legislation is silent on the issue of TPF and champerty, but having its origins in the English common law system, the DIFC jurisdiction has inherited much of the same modern approach to these issues.

The position in England is that maintenance and champerty are no longer crimes or torts under English law, but that champertous agreements, as a matter of public policy, are unenforceable. TPF agreements, if properly structured, have been held to be in the public interest and not champertous. This is relevant, because English court judgments have persuasive authority in the DIFC Courts.

However, any English law precedent must be approached with caution, because the DIFC Courts recently issued Practice Direction No. 2 of 2017 (PD), which creates new rules that are similar, but not identical, to the English law position.

In adopting the PD, the DIFC Courts have opted for a light-handed approach to regulation, with the main requirement being that of disclosure of the fact of TPF and the identity of the funder. It is worth noting that Subsection 3 of the PD makes it clear that the PD 'is without prejudice to any subsequent determination of the DIFC Courts regarding LFAs ('Litigation Funding Agreements') in general or any specific LFA in particular (or any part thereof)'.⁵ This means that we can expect further pronouncements of the DIFC Courts regarding the TPF that will continue shaping the procedural requirements to TPF in the DIFC.

Currently, the TPF market in the DIFC is not regulated, but things may change shortly as the DIFC is considering expanding the powers of the DIFC Courts to issue regulations regarding TPF (see Section VII).

It is worth noting that contingency fees, or 'no win no fee' arrangements and agreements where a lawyer is rewarded by way of a share of the proceeds, are prohibited in the DIFC court proceedings. Conditional fee arrangements (where the legal representatives receive an uplift in fees, as opposed to a share in the proceeds, in the event that the client is successful) are permitted.⁶

III STRUCTURING THE AGREEMENT

TPF in the DIFC is growing in popularity, but is yet to reach the levels comparable with funding available in other common law jurisdictions. As a result, the TPF agreement structure is borrowed heavily from the structures typical in other common law jurisdictions, and the parties can expect to negotiate similar provisions relating to exclusivity, withdrawal, confidentiality, pricing, settlement and liability for costs.

The DIFC Courts have not yet had an opportunity to consider specific clauses in contractual disputes between funders and claimants. In one case,⁷ the claimant's funders filed a Part 8 claim with the DIFC court to protect and preserve its interest in the funding agreement following a change of legal representation by the claimant without finalising the replacement

5 <http://difccourts.ae/practice-direction-no-2-2017-third-party-funding-difc-courts>.

6 <http://difccourts.ae/difc-courts-code-best-legal-professional-practice-march-2013>.

7 *Vannin Capital PCC PLC v. Mr Rafed Abdel Mohsen Bader Al Khorafi and ors* 2014 DIFC CFI 036.

payment mechanism under the funding agreement. The funders obtained an order that the defendants pay the sum adjudged by the DIFC court to the claimant (in excess of US\$11 million) into court and that this sum be held by the court until the parties reach settlement or until final award or judgment. This indicates the willingness of the DIFC Courts to uphold the rights of the funders under TPF agreements, which is a positive trend in this jurisdiction.

IV DISCLOSURE

The PD requires the funded party to disclose the fact of funding and the identity of the funder. The PD also sets out when and how notice must be given. For a standard claim (RDC Part 7), notice must be given in the case management information sheet, which needs to be submitted before the case management conference (CMC) pursuant to RDC 26.3. Alternatively, if a party enters into a TPF agreement after the CMC, notice must be given in writing to all the other parties, as well as the DIFC Courts' Registry, within seven days of entering into the agreement. In all other claims, written notice must be served to all other parties to the dispute as well as the DIFC Courts' Registry, where proceedings have yet to be commenced, as soon as practicable after commencement, including within the claim form or the particulars of claim, and in instances where the agreement was entered into after the proceedings were commenced, notice must be given within seven days from the date of the agreement.⁸

The PD also makes it clear that there is no notice requirement for claims made in the Small Claims Tribunal unless those claims are transferred to or appealed to the Court of First Instance, in which case notice must be given in accordance with the procedures outlined above.

This move towards transparency has its advantages, but parties should bear in mind potential consequences that this may entail. The PD does not require disclosure of a copy or of any part of the TPF agreement, but it is notable that the court may order such disclosure. TPF agreements often contain confidential and privileged information, so it is sensible that there is no standard requirement to disclose an agreement. It remains to be seen in which circumstances the DIFC Courts would order the disclosure of an agreement or parts of it. Being a common law jurisdiction, the DIFC Courts recognise the concept of privilege, and therefore the parties can seek to protect their interests by utilising carefully drafted non-disclosure and common interest clauses in TPF agreements.

Finally, while there is no general requirement to disclose any information about TPF in DIFC arbitrations, the tribunals can exercise their powers to order such disclosure.

V COSTS

The position in relation to the liability of funders for adverse costs, security for costs and recovery of costs of securing TPF in the DIFC is broadly similar to the position in the UK.

The PD clarifies that the DIFC Courts have inherent jurisdiction to make costs orders against third parties, including funders, where the court deems appropriate. However, the PD is silent on the amount of costs that can be so recovered. It remains to be seen whether a cap similar to the Arkin cap on costs recoverable from third party funders will apply.

⁸ <http://difccourts.ae/practice-direction-no-2-2017-third-party-funding-difc-courts>.

A defendant may seek an order for security for costs against a third party funder, and the DIFC Courts have jurisdiction to make this order if it is satisfied, having regard to all the circumstances of the case, that it is just to do so.

RDC Rule 25.103 clarifies that the defendant may seek an order for security for costs against someone other than the claimant, and the court can make such an order if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and one or more of the conditions in Rule 25.104 applies. RDC Rule 25.104 stipulates two conditions: that the person has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him or her; or has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property that the claimant may recover in the proceedings, and is a person against whom a costs order may be made.

In addition, the PD says that the court may take into account the fact of disclosure of TPF when deciding on the application for security for costs, but the fact of funding shall not by itself be determinative.

The PD does not address the question of whether the costs of TPF are recoverable in DIFC court proceedings; therefore, this remains an area of uncertainty.

In line with other major jurisdictions, the arbitration legislation in the DIFC does not authorise arbitrators to make costs orders against third parties as they are not parties to the arbitration agreement. The position regarding recoverability of TPF costs in DIFC-seated arbitrations has not been addressed in case law yet. In England, the judgment in *Essar v. Norscot*⁹ addressed this issue, finding that the definition of 'other costs' in Section 59(1) of the English Arbitration Act 1996 includes TPF costs. Notably, Section 38(5) of the DIFC Arbitration Act, which defines the scope of what constitutes costs of arbitration, is not as wide as Section 59(1) of the Arbitration Act 1996.

VI THE YEAR IN REVIEW

One type of case often discussed in the context of TPF is the enforcement of foreign arbitral awards in the DIFC. The past 10 years have seen the rise and fall (almost) of the DIFC Courts as a conduit jurisdiction for enforcement of foreign arbitral awards and judgments in the onshore UAE jurisdiction. The historical difficulties involved in enforcing foreign arbitral awards and judgments in the local UAE courts led claimants to seek an alternative route via the DIFC Courts, which gave rise to its emergence as a conduit jurisdiction. In relation to the enforcement of foreign arbitral awards, claimants have successfully obtained judgments from the DIFC Courts to enforce such awards in the DIFC in the absence of any connection between the parties or the facts of the case and the DIFC.¹⁰ The intention of such parties was then to enforce the DIFC court judgment in Dubai courts, which is a straightforward procedure. This trend was followed by claimants seeking to enforce foreign judgments in the DIFC¹¹ purely with a view to enforcing it onshore. Both trends were welcomed by many local practitioners, as these promised to simplify the process for enforcement of foreign arbitral awards and judgments in Dubai and the UAE generally, although doubts always remained regarding other emirates.

9 *Essar Oilfields Services Ltd v. Norscot Management Pvt Ltd* [2016] EWHC 2361 (Comm).

10 *(1) Egan (2) Eggert v. (1) Eava (2) Efa* [2013] DIFC ARB 002.

11 *DNB Bank ASA v. Gulf Eyadah Corporation and Gulf Navigation Holdings* PJSC CA 007/2015.

At the time of writing, it appears that these recent trends have been halted by the establishment of the Judicial Tribunal for the Dubai Courts and the DIFC Courts (JT) by Dubai Decree No. 19 of 9 June 2016, and the recent decisions that have followed. The JT's remit is to determine conflicts of jurisdiction between the DIFC Courts' and Dubai courts' jurisdiction. The concern raised regarding the use of the DIFC Courts as a conduit jurisdiction has usually been framed in terms of a potential conflict between the DIFC Courts and Dubai courts to enforce foreign arbitral awards and judgments. It is not surprising therefore that many of the cases submitted to the JT revolved around the issue of enforcement. The decisions published by the JT to date indicate that it is likely to find in favour of the Dubai courts' jurisdiction whenever there are parallel proceedings issued in the DIFC and Dubai courts. It is likely that we will see an increase in the number of defendants commencing local court proceedings as a strategic step with a view to derailing the process of enforcement of foreign arbitral awards and judgments before the DIFC Courts. It is also worth noting that the JT has demonstrated willingness to dismiss challenges to DIFC jurisdiction in the absence of parallel proceedings in the Dubai courts.

It should be noted that these developments do not affect the enforcement of foreign arbitral awards against defendants and assets based in the DIFC itself, or the enforcement of DIFC-seated arbitration awards onshore.

In 2016, the Emirates Maritime Arbitration Centre opened its doors to parties as a new specialised maritime arbitration centre with a default seat in the DIFC. There are also indications that Dubai International Arbitration Centre is considering moving its default arbitration seat from onshore Dubai to the DIFC. These developments show the growth of the DIFC as an arbitration jurisdiction.

VII CONCLUSIONS AND OUTLOOK

The DIFC Courts have dedicated significant attention on developments in TPF worldwide and to creating a regulatory environment that benefits parties' access to TPF. In June 2017, the DIFC issued a consultation paper proposing amendments to the DIFC Court Law 2004 specifically addressing the issue of TPF. The consultation paper proposed an amendment that would give the Chief Justice of the DIFC Courts powers to issue regulations regarding TPF in the DIFC Courts. According to the paper, the intention is to enable the DIFC Courts to 'monitor the conduct of parties and practitioners before the DIFC Courts in relation to TPF of the DIFC Courts' proceedings, mirroring a global trend towards increased regulation of this swiftly changing industry'. The outcome of the consultation remains to be seen, but it is clear that the DIFC Courts are keen to ensure that TPF in the DIFC is available to the parties and is appropriately regulated.

Another development in the DIFC Courts that will be interesting to watch in the coming years is the establishment of the Technology and Construction Division (TCD) to deal with construction and engineering disputes. The TCD offers a forum similar to that of the Technology and Construction Court of England and Wales. It is staffed with specialist judges who are able to handle complex technical disputes that, until now, have mostly been referred to arbitration by parties in the region.

UNITED STATES

*Sean Thompson, Dai Wai Chin Feman and Aaron Katz*¹

I MARKET OVERVIEW

The US market for third party litigation finance has grown at an increasing rate over the past several years.² Although the current size of the asset class is unknown, it is estimated that over US\$1.75 billion has been collectively raised by dozens of commercial funding entities since 2016, contributing to overall commercial funding commitments of up to US\$5 billion.³

i Types of claims

Third party funding is typically used for two main categories of claims: commercial and consumer. Commercial claims predominantly consist of business-to-business disputes with substantial amounts in controversy (often in excess of US\$10 million). Common commercial claims include breach of contract, business torts, antitrust violations, intellectual property infringement and trade secret theft. Funding also exists in insolvency and distressed scenarios. For example, liquidation trustees may obtain funding to pursue claims on behalf of bankruptcy estates. Commercial funders also frequently finance *qui tam* or ‘whistle-blower’ suits.

By contrast, consumer claims that receive funding are brought on behalf of individual claimholders and are typically mass tort or personal injury in nature. Individually, such claims tend to be far smaller in magnitude than funded commercial claims.

ii Funding entities

In the commercial arena, major litigation funders can be generally categorised as follows:

- a* large, publicly traded entities (such as Burford Capital and Bentham IMF);
- b* US-based private funds (such as Parabellum Capital, Longford Capital and Lake Whillans);
- c* privately held foreign-based funders (such as Therium);
- d* funders focused on smaller opportunities (such as LexShares and Legalist); and

1 Sean Thompson is director of intellectual property strategies and general counsel, Dai Wai Chin Feman is director of commercial litigation strategies, and Aaron Katz is co-founder, chief investment officer and managing principal at Parabellum Capital LLC.

2 Roy Strom and Ben Hancock, Litigation Funders Face Their Hardest Sell: Big Law, *The American Lawyer* (28 June 2018), available at <https://www.law.com/americanlawyer/2018/06/28/litigation-funders-face-their-hardest-sell-big-law>.

3 Ben Hancock, Who Rules the World of Litigation Funding?, *The American Lawyer* (30 March 2017), available at www.nationallawjournal.com/supremecourtbrief/id=1202782561037/Who-Rules-the-World-of-Litigation-Funding?mcode=1202615549854&curindex=8&slreturn=20170916103347.

e lesser known, smaller entities, some of which are backed by single investors or raise capital on an investment-by-investment basis.

iii Other funding-side market participants

The commercial market also includes various other actors beyond litigation funders. Entities functioning as brokers are increasingly present. Multi-strategy investment funds such as Fortress Investment Group and DE Shaw & Co are also active in the litigation finance space. Others, including Soros Fund Management, have expanded their involvement to consumer funding.⁴

Moreover, a growing secondary market exists, in which hedge funds and other investment managers increasingly participate.⁵ For example, in June 2018, funder LexShares launched LexShares Private Market, an exchange for secondary market transactions available to qualified institutional buyers.⁶ The Special Situations Group of investment bank Jefferies brokers secondary transactions as well.

iv Consumers of litigation funding

Litigation funding has traditionally been described as a means for low-resourced claim holders to pursue affirmative litigation they may not otherwise be able to afford. In recent years, however, consumers of funding have grown to include parties of all sizes and wherewithal that seek to finance litigation for various reasons. Motivations may include unlocking working capital, monetising the value of legal claims on an accelerated basis, and obtaining favourable accounting treatment for legal expenditures. Consumers currently span the spectrum from capital-constrained corporate claimholders, to pro bono legal services organisations, to publicly traded Fortune 500 companies.

The law firm market has also evolved. Whereas law firm consumers of funding were once thought to be boutique or plaintiff-contingency focused in nature, some of the largest US law firms now utilise litigation finance.⁷

v Products

While single-case, early-case financing remains a common model for the financing of attorneys' fees or out-of-pocket expenses or some combination of the two, major funders have increasingly shifted toward portfolio funding. Portfolios allow a law firm or corporate to obtain funding for a collateral pool of multiple cases. Portfolios generally provide more

4 Miles Weiss, *Soros Backs Personal Injury Lawsuits in Market With 20% Returns*, Bloomberg (27 June 2018), available at <https://www.bloomberg.com/news/articles/2018-06-27/soros-backs-personal-injury-lawsuits-in-market-with-20-returns>.

5 Natalie Rodriguez, *Attys Must Tread Carefully in Litigation Funding's Next Stage*, Law360 (3 April 2018), available at <https://www.law360.com/articles/1025663/attys-must-tread-carefully-in-litigation-funding-s-next-stage>.

6 Business Wire, *LexShares Launches Private Institutional Litigation Finance Exchange* (7 June 2018), available at <https://www.businesswire.com/news/home/20180607005672/en/LexShares-Launches-Private-Institutional-Litigation-Finance-Exchange>.

7 Stephanie Russell-Kraft, *Big Law Embraces Litigation Finance*, Bloomberg (23 March 2018), available at <https://biglawbusiness.com/big-law-embraces-litigation-finance>.

limited returns in exchange for greater principal protection via cross-collateralisation.⁸ In addition, the funding of domestic class actions, while still uncommon, is widely regarded as only available on a portfolio basis due to ethical concerns.

Some funders also provide loans to law firms against legal receivables. Such loans may provide returns akin to fixed income investments rather than the equity-like-returns sought by traditional litigation finance. While law firm lending is hardly a new phenomenon, the participation of commercial litigation funders in the lending market creates new options for law firms to borrow money on a non-recourse basis, albeit at a potentially higher interest rate than traditional legal lenders and lines of credit.

The commercial market has also experienced an uptick in claim monetisation, through which funds are advanced on a non-recourse basis against settlement or judgment. Monetisation may occur in conjunction with or independently of traditional litigation funding. Common in appeal and enforcement proceedings, monetisation may also be available earlier in the litigation process to access value inherent in otherwise illiquid legal claims. While monetisation funding is typically thought to be used as working capital, funding proceeds are often unrestricted in use.

Finally, funders are actively working to market defence-side products. Such products have yet to become mainstream, perhaps due to difficulties in defining success, negotiating returns or limiting a defendant's ultimate exposure.

II LEGAL AND REGULATORY FRAMEWORK

Litigation finance in the United States is primarily governed by three areas of law: state common law and statutory limitations on providing financial assistance to litigants; state statutes governing debtor-creditor arrangements; and attorney ethics rules.

i Maintenance, champerty and barratry

The most widely discussed limitations on litigation finance have been the common law doctrines of maintenance, champerty and barratry. Such doctrines are relevant for US litigation finance because they were common law torts under English law at the time of the founding and thus incorporated into the laws of many US states. '[M]aintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.'⁹

The original rationale for these restrictions was to prevent feudal lords from funding claims by their retainers as a means of increasing their real estate holdings.¹⁰ With the decline of the feudal system, and with it feudal lords supporting large numbers of retainers, the original impetus for restrictions on helping others prosecute suits fell away, '[b]ut champerty, now joined with maintenance in a sort of indissoluble hendiadys, remained an offense for

8 Matthew Denney, Portfolio Finance May Minimize Litigation Funding Risks, Law360 (20 February 2018), available at <https://www.law360.com/articles/1013718/portfolio-finance-may-minimize-litigation-funding-risks>.

9 *In re Primus*, 436 U.S. 412, 425 (1978).

10 Max Radin, Maintenance by Champerty, 24 *Cal. L. Rev.* 48, 64 (1935) (noting that the torts were 'specifically directed [to] the support given by a feudal magnate to his retainers in all their suits, without any reference to their justification,' which 'became in fact one of the means by which powerful men aggrandized their estates . . .').

which a new basis had to be found'.¹¹ That new basis was 'the fundamental distrust of legal procedure and of lawyers' and the desire to reduce litigation, on the grounds that litigation itself was a vice to be avoided.¹²

In the US, '[t]he consistent trend across the country is toward limiting, not expanding, champerty's reach'.¹³ Courts in a number of states, including Arizona, California, Connecticut, New Jersey, New Hampshire, New Mexico and Texas, have determined that those states never incorporated those torts from English law.¹⁴ Other states, such as Massachusetts, have expressly abolished the doctrines.

In states where restrictions on maintenance and champerty persist, they do not typically constitute independent torts. Instead, they tend to exist as either criminal offences or, more commonly, defences to a contract action.¹⁵

There is a high degree of variation among states that continue to enforce restrictions on maintenance and champerty as to what constitutes a violation. For instance, New York continues to recognise champerty as a contractual defence, but the doctrine is limited in a number of important ways. Under New York law, individuals and companies may not 'solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon'.¹⁶ Nonetheless, the statute does not apply where 'things in action, or any claims or demands' have a purchase price in excess of US\$500,000.¹⁷ Additionally, the New York Court of Appeals has held that for an assignment or purchase to be champertous, the 'primary purpose' of the purchase or assignment must be 'for the very purpose of bringing such suit'.¹⁸ Thus, in practice, champerty is 'limited in scope'.¹⁹ Particularly because almost all commercial litigation transactions involve claims in excess of US\$500,000 and almost never involve the assignment of the claim, very few commercial transactions, if any, would run afoul of New York law.

11 id. at 66.

12 id.

13 *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011).

14 Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, Report on the Ethical Implications of Third-Party Litigation Funding (2013).

15 *Burnes v. Scott*, 117 U.S. 582, 589 (1886) ('The question raised by the present assignment of error is not whether a champertous contract between counsel and client is void, but whether the making of such a contract can be set up in bar of a recovery on the cause of action to which the champertous contract relates. We must answer this question in the negative.');

Malibu Media, LLC v. Zumbo, No. 13-729, 2014 WL 2742830, at *5 (M.D. Fla. 17 June 2014) ('[A] plaintiff does not forfeit a valid claim against a defendant merely by entering a champertous contract with a third party').

16 N.Y. Judiciary Law §§ 488-89.

17 N.Y. Judiciary Law § 489(2).

18 *Justinian Capital SPC v. WestLB AG*, 65 N.E.3d 1253, 1256 (N.Y. 2016) (internal quotations omitted).

19 *Trust for the Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp.*, 918 N.E.2d 889, 894 (N.Y. 2009).

ii Usury

Although it is very uncommon for a commercial litigation transaction to be structured as a loan, it is conceivable that, in some situations, parties would wish to use a traditional debt structure for their transaction. Such transactions may implicate state laws against usury, which limit the rate of interest that can be charged to borrowers.

Generally, for a transaction to be usurious, it must involve ‘(1) a loan of money, (2) an absolute obligation to repay the principal, and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower’.²⁰ A key element in determining whether the transaction involves a loan ‘is whether repayment was based on a contingency’.²¹ If repayment is based on a contingency, then it is considered an investment rather than a loan, and it is accordingly not subject to usury laws.²²

Usury laws are generally not implicated in commercial litigation finance because it is typically non-recourse in nature. The lack of an absolute obligation to repay has led most courts to characterise these transactions as investments, rather than loans.²³

iii Attorney ethical rules

Professional conduct rules governing lawyers may also affect transactions between funders and law firms. Rules directed to the professional independence of a lawyer are often the most relevant to litigation finance transactions.

Rule 5.4(a) of the Model Rules of Professional Conduct provides that ‘[a] lawyer or law firm shall not share legal fees with a nonlawyer’ other than in certain specified circumstances, such as payments to a lawyer’s estate after the lawyer’s death or compensation payments to non-lawyer employees of a law firm. The comments to Rule 5.4 note that the Rule’s provisions ‘express traditional limitations on sharing fees,’ which ‘are to protect the lawyer’s professional independence of judgment’, as well as place ‘limitations on permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another’. Every state has implemented some form of a professional responsibility rule that tracks the language of Model Rule 5.4 to some degree.

Courts have generally found that a lawyer’s execution of a commercial litigation contract does not violate Rule 5.4. For example, in *Hamilton Capital VII, LLC, I v. Khorrami, LLP*, the New York Supreme Court held that a transaction in which a loan to a law firm in exchange for ‘a percentage of the [l]aw [f]irm’s gross revenue’ did not violate Rule 5.4(a), notwithstanding that the firm’s gross revenue was ‘essentially composed of contingent fees earned on client settlements and verdicts’.²⁴ The court noted that ‘[p]roviding law firms access to investment

20 *Anglo-Dutch Petroleum Intern., Inc. v. Haskell*, 193 S.W.3d 87, 96 (Tex. App. Houston [1 Dist.] 2006).

21 *id.*

22 *id.*

23 *Dopp v. Yari*, 927 F. Supp. 814, 823 (D.N.J. 1996) (‘[T]he collection of interest in excess of the lawful rate is not usurious if collection of the entire interest is at risk and depends upon a contingent event and provided the contract was entered into in good faith and without the intent to evade the usury laws’); *Kraft v. Mason*, 668 So. 2d 679, 684 (Fla. App. 4 Dist. 1996) (‘[W]hen the loan was given, any talk of recovery was pure speculation. Quite possibly, there would be no successful recovery from the antitrust litigation, and [plaintiff] might have collected nothing beyond the pay back of the loan. This contingent nature of any ‘interest’ to [plaintiff] makes the agreement non-usurious.’); *Nyquist v. Nyquist*, 841 P.2d 515, 518 (Mont. 1992) (rejecting argument that a transaction was usurious because ‘[n]o certainty ever existed that the plaintiffs in that litigation would prevail and receive a damage award’).

24 No. 650791/2015, 2015 WL 4920281, at *4 (N.Y. Sup. Ct. 17 Aug. 2015).

capital where the investors are effectively betting on the success of the firm promotes the sound public policy of making justice accessible to all, regardless of wealth'.²⁵ Similarly, in *Lawsuit Funding, LLC v. Lessoff*, the New York Supreme Court found that a litigation funding agreement providing that the funder would 'receive a portion of the contingent legal fee that [attorneys] were expected to receive if five specifically named lawsuits were adjudicated in favor of [the attorneys'] clients' did 'not violate Rule 5.4(a) and was not unenforceable as against public policy'.²⁶

In contrast, on 30 July 2018, the Professional Ethics Committee of the New York City Bar Association (the Association) published a non-binding advisory opinion stating that certain non-recourse agreements between law firms and funders violate Rule 5.4(a)'s prohibition on fee-sharing.²⁷ The Association distinguished between 'traditional "recourse" loan agreement[s] . . . in which a lawyer's payments are not contingent on the receipt or amount of legal fees in particular matters', which it concedes are permissible under the Rule, from 'funding arrangement[s] in which the lawyer's payments are contingent on the lawyer's receipt of legal fees'. The Association concluded that the latter is impermissible where 'the lawyer's payments are tied to the lawyer's receipt of fees in one or more matters',²⁸ which would apply to single-case and certain portfolio transactions. In support, the Association reasoned that '[r]ightly or wrongly, the rule presupposes that when nonlawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer'.²⁹

No court or other bar association has considered the Association's opinion to date. It therefore remains to be seen what, if any, influence the Association's opinion has on courts, disciplinary bodies or the industry. However, several leading legal ethicists have criticised the opinion – with some even calling for its withdrawal – on three main grounds.³⁰

First, commentators have taken issue with the Association's suggestion that litigation funding arrangements involving payments that are contingent on a lawyer's receipt of legal fees could impinge on a lawyer's independence. The opinion does not explain how litigation funding can improperly influence lawyers, so it is not clear what specific issues the Association finds problematic. In practice, all reputable commercial litigation funders expressly disclaim by contract any ability to control litigation.

Moreover, commentators argue that it is difficult to reconcile the Association's view that traditional, recourse lending from banks complies with Rule 5.4, while non-recourse commercial funding does not. As one noted, banks often require law firms to agree to terms

25 id. at 5.

26 No. 650757/2012, 2013 WL 6409971, at *1, *6 (N.Y. Sup. Ct. Dec. 4, 2013).

27 New York City Bar Association Committee on Professional Ethics, Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees (30 July 2018), available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees>.

28 id. at 2, 4.

29 id. at 5-6.

30 Anthony E. Davis and Anthony J. Sebok, New Ethics Opinion on Litigation Funding Gets It Wrong, *The New York Law Journal* (31 August 2018), available at <https://www.law.com/newyorklawjournal/2018/08/31/new-ethics-opinion-on-litigation-funding-gets-it-wrong>; Peter R. Jarvis and Trisha Thompson, New York City Bar Opinion on Commercial Litigation Funding Raises Concerns, Holland & Knight LLP Client Alert (20 August 2018), available at <https://www.hklaw.com/publications/New-York-City-Bar-Opinion-on-Commercial-Litigation-Funding-Raises-Concerns-08-20-2018>.

that pose far more serious risks to a lawyer's independent judgment than non-recourse litigation funding.³¹ In addition, to the extent the perceived issue is lawyers improperly allowing their own financial considerations to drive settlement considerations, commentators maintain that the risks of a lawyer's independence being compromised are more salient with respect to traditional bank lending.

Second, with respect to the Association's assertion that litigation funding arrangements are not within the enumerated list of acceptable arrangements set forth in Rule 5.4(a), commentators have observed that the enumerated practices set forth in the list are not a comprehensive list of practices that are permissible under the rule. As stated in Comment [14] to the ABA Model Rules, the rules of professional conduct are 'rules of reason' that 'should be interpreted with reference to the purposes of legal representation and of the law itself'. Notably, the American Bar Association's Standing Committee on Ethics and Professional Responsibility had long recognised two types of arrangement presently enumerated in Rule 5.4 – non-lawyer employee participation in profit-sharing plans and the sharing of court-awarded legal fees with non-profits – as permissible under the rule before it was amended to expressly permit such arrangements. Accordingly, commentators note that litigation finance arrangements – which did not exist in the United States at the time Rule 5.4 was promulgated – need not be explicitly enumerated by the rule to be permissible.³²

Third, commentators have criticised the Association's characterisation of the relevant case law. In particular, commentators have remarked that the Association mischaracterised the leading New York cases on litigation funding agreements, including *Hamilton Capital and Lawsuit Funding*, as standing only for the proposition that lawyers who enter into agreements that allegedly violate Rule 5.4 cannot use the fact that the agreements are unethical to avoid the repayments required by the agreements. Instead, the courts in both *Hamilton Capital and Lawsuit Funding* expressly found that the litigation funding agreements at issue complied with Rule 5.4.³³

III STRUCTURING THE AGREEMENT

The structure of litigation finance transactions remains largely opaque. The private nature of the industry is largely attributable to the relative immaturity of the market, combined with concerns related to disclosure. As a result, there are few instances of funding agreements in the public domain. For example, in 2017, the production of a Therium investment contract

31 Davis and Sebok, *supra*.

32 See also Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2017 ed.), at 1420 ('New York courts have created what I call a 'litigation funding exception' to Rule 5.4(a)').

33 The *Lawsuit Funding* court cited the Delaware Superior Court for the propositions that '[t]he Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest' and 'there is no real 'ethical' difference whether the security interest is in contract rights (fees not yet earned) or accounts receivable (fees earned) in so far as Rule of Professional Conduct 5.4, the rule prohibiting the sharing of legal fees with a nonlawyer, is concerned'. See PNC Bank, *Delaware v. Berg*, No. 94C-09-208-WTQ, 1997 WL 527978, at *10 (Del. Super. Ct. January 21, 1997).

in litigation was a newsworthy event.³⁴ Furthermore, funding agreements are widely regarded as bespoke in nature, as they are highly customised to the particular idiosyncrasies of a given litigation, counterparty or jurisdiction.

Nevertheless, funding agreements will typically be structured to address certain core issues. Such issues are discussed below, but may vary depending on the type of product at issue. For instance, the issues raised by early-stage funding differ from those attendant to monetisation or appeal hedging.

i Single-case or portfolio

Single-case and portfolio transactions differ considerably. As an initial matter, the funder's counterparty in a single-case is the claimholder, whereas a portfolio counterparty is typically a law firm.

Portfolios are typically cross-collateralised to protect a funder's investment principal. To mitigate against adverse case selection, portfolios may be exclusive, contain rights of first refusal, or require the inclusion of additional cases over time.

ii Ethical and regulatory issues

Depending on the nature of the transaction, various ethical and regulatory issues should be addressed. For example, funders would be well advised to cede all litigation control to parties and their counsel to avoid champerty challenges, as well as provide claimholders the opportunity to seek independent counsel in negotiating the agreement. Structuring the agreement as a purchase of claim proceeds – rather than a purchase or assignment of the claim itself – is another common means of avoiding champerty challenges. Also, in the class action context, funding on a single-case basis is discouraged due to restrictions on fee-sharing with non-lawyers. Further, some jurisdictions have limits on maximum contingency stakes which should be considered in structuring returns.

Some states also have various requirements regarding the disclosure of key financial terms and use of disclaimers, as well as registration and fee caps.³⁵ Such requirements are geared toward consumer transactions, rather than commercial.

To address jurisdiction-specific issues, a funding agreement may contain a choice-of-law clause designating a favourable state's laws. Provided that the chosen state bears a connection to the transaction, the choice-of-law clause may enhance the funding agreement's enforceability.

iii Recourse

The commercial funding market largely advertises itself as non-recourse in nature. However, recourse arrangements do exist, and the nature of such recourse would be addressed by a funding agreement.

34 Ben Hancock, How Jones Day Unmasked a Litigation Funding Deal and Won, *The American Lawyer* (29 October 2017), available at <https://www.law.com/americanlawyer/sites/americanlawyer/2017/10/29/how-jones-day-unmasked-a-litigation-funding-deal-and-won>.

35 Ark. Code Ann. §§ 4-57-104, 4-57-109; Ind. Code §§ 24-4.5-1-201.1, 24-4.5-1-301.5, 24-4.5-3-110, 24-4.5-3-110.5, 24-4.5-3-202, 24-4.5-3-502, 24-12 et. seq.; Me. Rev. Stat. tit. 9-a, §§ 12-101 – 107; Neb. Rev. St. § 25-3301-3309; Ohio Rev. Code § 1349.55; Okla. Stat. tit. 14-A, §§ 3-801 – 3-817; Tenn. Code §§ 47-16-101 – 110; Vt. Stat. tit. 8, §§ 2251 – 2260.

iv Return and waterfall

Returns are typically structured as a multiple of capital invested or committed, a percentage of the gross or net recovery, an interest rate or internal rate of return, or any combination of the foregoing. Portfolios have less risk due to cross-collateralisation, and accordingly tend to have lower returns. The higher the perceived risk – which could be based upon merits, jurisdiction, adversary or collectability – the greater return a funder will seek. A funder's return may also increase over time to account for duration risk.

With respect to the waterfall, funders may demand priority for a portion or all of their return, and inhibit a claimholder's ability to grant junior interests on the litigation proceeds. Following the funder's initial recovery, the next levels in the waterfall may be apportioned on a complete or percentage basis to any of the funder, the claimholder, and the law firm. Some claimholders may also negotiate the right to pre-pay a funder's return.

v Funding commitment, budget and counsel compensation

Funders may limit their maximum commitment to a certain dollar amount, as well as commit to fund some or all legal fees or expenses, or both. Counsel may be compensated on an hourly, reduced fee or hybrid-contingency basis. In any scenario, funding agreements may set a case budget to which counsel must adhere. Budgets may limit expenditures on an aggregate basis or through various case stages, helping to hedge risk and mitigate the effects of information asymmetry.

Funding may be disbursed as fees accrue on a monthly or quarterly basis, or may be tied to milestones. Milestones may include major events in the litigation, such as filing the complaint, defeating a motion to dismiss, and defeating summary judgment and *Daubert* motions. Milestones may also vary by case type. For example, in patent litigation, payment may be contingent on surviving inter partes review or receiving a favourable claim construction. Funding may also include commitments to finance the defence of counterclaims.

vi Representations and warranties

In light of information disparity between claim holders and funders, funding agreements commonly contain representations and warranties regarding various pertinent issues, such as the claim holder's creditworthiness and disclosure of material information regarding its claims. Such representations and warranties are not typically available in portfolio transactions.

vii Control

Sophisticated funders typically disclaim any right to control litigation or settlement for ethical and regulatory reasons. However, they may obtain contractual entitlements to be apprised of major developments (including settlement discussions), as well as receive material non-privileged information and work product throughout the course of the litigation for investment monitoring purposes.

viii Non-monetary consideration

A case may be resolved on non-monetary terms. For example, a contract dispute may result in the reinstatement of the parties' agreement. Where such a scenario is possible, funding agreements may provide metrics to value non-monetary consideration. In addition, where settlements or judgments create future cash streams (e.g., future royalties or licensing fees), such streams may be assigned in whole or in part to the funder to achieve its return.

ix Common interest and confidentiality

Funding agreements routinely provide that the existence of the parties' arrangement is confidential. Further, to enhance privilege protections afforded to materials shared with funders and mitigate the risk of waiver, funding agreements may provide that any exchange of information is pursuant to a common legal interest.

x Termination rights

Litigation funders typically reserve the right to terminate funding. Funding agreements may delineate circumstances justifying termination, such as the occurrence of a materially adverse event, fraud or bad faith. Agreements may also allow unilateral termination in exchange for a penalty.

xi Dispute resolution

In keeping with the private nature of third party funding, funders may insist that disputes related to funding agreements be subject to confidential arbitration.

IV DISCLOSURE

i Federal regulations

At the federal level, no Federal Rule of Civil Procedure mandates the automatic disclosure of funding arrangements. Legislative and lobbying efforts to require the disclosure of litigation finance have been largely unsuccessful.³⁶

Roughly half of federal circuit courts³⁷ and one-quarter of federal district courts³⁸ require the disclosure of outside parties with a financial interest in the outcome of a litigation.³⁹ The purpose of that disclosure is to avoid judicial conflicts of interests.⁴⁰ Accordingly, court rules are typically restricted to the disclosure of publicly owned outside parties, which would not apply to the vast majority of litigation funding entities.

36 In 2014 and 2016, the Advisory Committee on Rules of Civil Procedure declined to adopt proposals to amend Fed. R. Civ. P. 26 to 'require the disclosure of third-party litigation funding arrangements in any civil action filed in federal court'. See Minutes of Advisory Committee on Civil Rules at 13 (30 October 2014).

37 3rd Cir. L. R. 26.1.1(b); 4th Cir. L. R. 26.1(2)(B); 5th Cir. L. R. 28.2.1; 6th Cir. L. R. 26.1(b)(2); 10th Cir. L. R. 46.1(D); 11th Cir. L. R. 26.1-1(a)(1); 11th Cir. L. R. 26.1-2(a).

38 Ariz. Form - Corporate Disclosure Statement; C.D. Cal. L. R. 7.1-1; N.D. Cal. L. R. 3-15, Standing Order for All Judges of the N.D. Cal.; M.D. Fla. Interested Persons Order for Civil Cases (does not apply to all judges); N.D. Ga. L.R. 3.3; S.D. Ga. L. R. 7.1; N.D. Iowa L. R. 7.1; S.D. Iowa L. R. 7.1; Md. L. R. 103.3(b); E.D. Mich. L. R. 83.4; W.D. Mich. Form - Corporate Disclosure Statement; Neb. Form - Corporate Disclosure Statement; Nev. L. R. 7.1-1; E.D. N.C. L. R. 7.3; M.D. N.C. Form - Disclosure of Corporate Affiliations; W.D. N.C. Form - Entities with a Direct Financial Interest in Litigation; N.D. Ohio L. Civ. R. 3.13(b); S.D. Ohio L. R. 7.1.1; E.D. Okla. Form - Corporate Disclosure Statement; N.D. Okla. Form - Corporate Disclosure Statement; N.D. Tex. L. R. 3.1.(c), 3.2(e), 7.4; W.D. Va. (Form - Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation); W.D. Wis. (Form - Disclosure of Corporate Affiliations and Financial Interest).

39 The Western District of Texas permits parties to use interrogatories to inquire regarding financially-interested non-parties. See W.D. Tex. L.R. CV-33.

40 See, e.g., 5th Cir. L. R. 28.2.1 ('The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue'); C.D. Cal. L.R.

With the exception of the Northern District of California, which requires parties to disclose the identity of funders in class and collective actions only,⁴¹ court rules mandating disclosure of financially-interested outside parties do not expressly apply to litigation funding.⁴² Nor do court rules require disclosure beyond the identity, and sometimes the nature of the financial interest, of the outside parties. Thus, while the existence of a funder's interest may be subject to disclosure, details of the funding arrangement remain confidential absent court order.

ii State regulations

At the state level, Wisconsin is the only state requiring the disclosure of litigation funding in commercial litigation. Wisconsin passed a law in March 2018 requiring parties in civil litigation to disclose funding arrangements. The 2017 Wisconsin Act 235 requires parties, '[e]xcept as otherwise stipulated or ordered by the court', to 'provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise'. This disclosure is automatic and does not require a discovery request from the adverse party.

With respect to privilege issues, Indiana, Nebraska and Vermont have enacted statutes providing that litigation funding arrangements do not undermine the attorney-client privilege or work-product doctrine.⁴³

iii Discovery disputes

The rising popularity of litigation funding has led to defendants increasingly seeking discovery concerning funding agreements. Defendants' stated rationales vary from the desire to determine if privilege has been waived via disclosure to a funder, to challenging adequacy requirements under Fed. R. Civ. P. 23, to seeking transparency regarding the control of litigation. Plaintiffs, on the other hand, resist disclosure on the grounds of relevance, confidentiality, and privilege. Plaintiffs further argue that motions to compel disclosure of funding are motivated purely by voyeurism and lead to unnecessary ancillary litigation that needlessly prolongs and increases the cost of disputes.

Courts have largely shielded funding-related documents from disclosure on the basis of privilege.⁴⁴ Such courts have held that case-related communications with a funder are

7.1-1 (instituting disclosure requirements '[t]o enable the Court to evaluate possible disqualification or recusal').

41 N.D. Cal. L. R. 3-15 ('In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim').

42 In 2016, the Northern District of California declined to amend its rules to expressly enumerate litigation funders as entities with financial interests in civil actions. US District Court for the Northern District of California, Notice Regarding Civil Local Rule 3-15, available at www.cand.uscourts.gov/news/210.

43 Ind. Code Ann. § 24-12-8-1; Neb. Rev. St. § 25-3301; Vt. Stat. tit. 8, § 2255.

44 See, e.g., *Space Data Corp. v. Google LLC*, 2018 WL 3054797, at *1 (N.D. Cal. 2018) (denying motion to compel on grounds of relevance and proportionality); *Lambeth Magnetic Structures, LLC v. Seagate Technology (US) Holdings, Inc.*, Nos. 16-538, 16-541, 2018 WL 466045, at *1-2 (W.D. Pa. 18 Jan. 2018) (affording work-product protection to funding agreement and communications with funder); *Viamedia, Inc. v. Comcast Corporation*, No. 16-5486, 2017 WL 2834535, at *3 (N.D. Ill. 30 June 2017) (holding that communications with funders are entitled to work-product protection); *Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd.*, No. 15-01735, 2016 WL 7665898, at *5 (S.D. Cal. 20 Sept. 2016) (noting that many

entitled to work-product or common interest protection, or both.⁴⁵ Claims to work-product are enhanced when materials are shared following execution of a non-disclosure agreement.⁴⁶ Courts have also found that documents related to litigation funding are irrelevant as a matter of law and therefore not subject to disclosure.⁴⁷

Notably, a federal court recently balanced competing interests by ordering the production of litigation funding agreements on an *ex parte* and in camera basis. In *In re National Prescription Opiate Litigation*, 2018 WL 2127807, at *1 (N.D. Ohio 2018), District Judge Dan Polster required attorneys to ‘submit to the Court *ex parte*, for *in camera* review, the following: (A) a letter identifying and briefly describing the [third-party] financing; and (B) two sworn affirmations – one from counsel and one from the lender – that the [third-party] financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel’s obligation of vigorous advocacy, (3) affect counsel’s independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement.’

V COSTS

The United States generally follows the ‘American Rule’, under which attorneys’ fees are not shifted to prevailing parties absent a contractual or statutory basis, or egregious or frivolous conduct. While prevailing parties may be entitled to recover costs at the conclusion of a litigation, such costs are typically limited to certain statutorily enumerated line items that comprise a miniscule proportion of the total costs incurred.⁴⁸

courts have found that work product protection is applicable to litigation finance documents); *United States v. Homeward Residential, Inc.*, No. 12-461, 2016 WL 1031154, at *6 (E.D. Tex. 15 Mar. 2016) (‘The Court finds that the litigation funding information is protected by the work product doctrine. The litigation funding documents were between [litigant] and actual or potential litigation funders and were used to possibly aid in future or ongoing litigation.’); *United States v. Ocwen Loan Serv., LLC*, No. 12-543, 2016 WL 1031157, at *6 (E.D. Tex. 15 Mar. 1 2016) (same); *In re Int’l Oil Trading Co.*, 548 B.R. 825, 835 (Bankr. S.D. Fla. 2016) (concluding that the documents concerning the negotiation of a litigation funding agreement were protected by the attorney-client privilege and the work-product doctrine and citing the ‘common enterprise’ approach); *Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co.*, No. 07C-12-134-JRJ, 2015 WL 1540520, at *4 (Del. Super. Ct. 31 Mar. 2015) (concluding that litigation funding documents were protected by the attorney-client privilege and the work-product doctrine); *Doe v. Soc’y of Missionaries of Sacred Heart*, No. 11-02518, 2014 WL 1715376, at *3 (N.D. Ill. 1 May 2014) (‘[T]he Financing Materials identified by Plaintiff in his privilege log constitute opinion work product. These materials incorporate opinions by Plaintiff’s counsel regarding the strength of Plaintiff’s claims, the existence and merit of certain of Defendants’ defenses, and other observations and impressions regarding issues that have arisen in this litigation.’) (internal quotations omitted); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 07-565, 08-478, 2011 WL 1714304, at *3 (E.D. Tex. 4 May 2011) (‘All of the documents were prepared . . . with the intention of coordinating potential investors to aid in future possible litigation. The Court holds that these documents are protected by the work product protection.’).

45 See *id.*; but see *Acceleration Bay LLC v. Activision Blizzard, Inc.*, Nos. 16-453, 16-454, 16-455, 2018 WL 798731, at *2-3 (D. Del. Feb. 9, 2018) (rejecting common interest and work product privilege assertions); *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (rejecting common interest privilege assertion with respect to materials shared prior to the consummation of a funding agreement).

46 See *Mondis Tech., Ltd.*, above.

47 See, e.g., *Kaplan v. S.A.C. Capital Advisors, L.P.*, 12-9350, 2015 WL 5730101, at *5 (S.D.N.Y. 10 Sept. 2015).

48 See 28 U.S.C. § 1920 (providing that the following categories of costs are taxable: clerk and marshal fees, transcript fees, printing and witness fees, copying costs, docket fees, and compensation of court-appointed experts and interpreters).

Accordingly, where a funder backs a losing case, it is rare that the party in litigation itself is liable for significant costs. Funding agreements thus rarely – if ever – provide security for adverse costs. To the contrary, litigation funders typically disclaim any liability for adverse cost awards. Moreover, third party funding is typically restricted to cases with extremely strong merits, thereby reducing the likelihood of fee-shifting on the basis of frivolous claims.

However, funders frequently finance prevailing parties that ultimately obtain an award of attorneys' fees (as well as costs). Indeed, the availability of attorneys' fees under a contractual or statutory fee-shifting provision, or otherwise under the common law in circumstances warranting punitive damages, is a feature that litigation funders find attractive in underwriting cases. In those circumstances, the funding agreement will likely provide that the fee award be added to the litigation proceeds and treated as ordinary damages. Then, the fees will be recovered pursuant to the agreed-upon return and waterfall structure.

To date, no US court has considered whether the existence of third party funding affects a prevailing party's entitlement to recover attorneys' fees in a commercial case. Nor has a US court considered whether a prevailing party is entitled to an enhanced recovery by virtue of additional costs incurred due to third party commercial funding.⁴⁹ In the event either issue is litigated, the procurement of funding should not affect a prevailing party's recovery. That is because fee awards are traditionally decided independently of the means that a case is funded – whether from the claimant's own funds, a loan, a line of credit, an attorney contingency arrangement or a third party funder.

VI THE YEAR IN REVIEW

Over the past 18 months, the litigation finance market has experienced significant growth through increasing adoption by litigants, law firms, and investors. Existing players, including LexShares and Lake Whillans, announced the closures of funding rounds,⁵⁰ and the market also saw several new entrants.

The industry's growth has been accompanied by attempts to regulate disclosure and interpret relevant ethical rules. In addition to Wisconsin's recent legislation and the New York City Bar Association's advisory opinion, discussed above, Senate Judiciary Committee Chairman Chuck Grassley and Senators Thom Tillis and John Cornyn proposed federal legislation requiring disclosure of funding agreements in civil lawsuits.⁵¹ The Litigation Funding Transparency Act of 2018 would require counsel in federal class actions to produce funding agreements and 'disclose in writing to the court and all other named parties to the class action the identity of any commercial enterprise, other than a class member of class counsel of record, that has a right to receive payment that is contingent on the receipt

49 However, a court has taken third-party funding into account in awarding fees to a prevailing party in public interest litigation. See *NorCal Tea Party Patriots v. Internal Revenue Service*, No. 13-341, 2018 WL 3957364, at *2 (S.D. Ohio 17 Aug. 2018) ('there is an important societal interest in rewarding attorneys and third party funders who engage in public interest litigation').

50 Darcy Reddan, *Litigation Finance Platform Closes US\$25M Fund*, Law360 (25 January 2018), available at <https://www.law360.com/articles/1005586/litigation-finance-platform-closes-25m-fund>; Darcy Reddan, *Lake Whillans Closes US\$125M Litigation Funding Round*, Law360 (4 January 2018), available at <https://www.law360.com/articles/998726/lake-whillans-closes-125m-litigation-funding-round>.

51 The text of the bill is available at <https://www.judiciary.senate.gov/imo/media/doc/115.xxx%20-%20Litigation%20Funding%20Transparency%20Act%20of%202018.pdf>.

of monetary relief in the class action by settlement, judgment, or otherwise'.⁵² It would also require the same disclosure in multi-district litigations. The bill was introduced on 10 May 2018 and referred to the Senate Judiciary Committee, which has yet to take any action on the measure.⁵³

Furthermore, while commercial litigation funding has continued to gain widespread endorsement, the consumer market segment has faced enhanced scrutiny in light of concerns specific to transacting with individual claimholders.⁵⁴ New York legislators have also introduced potential consumer-side legislation to regulate interest rates, impose registration requirements, and implement disclosure requirements for key funding terms.⁵⁵

VII CONCLUSIONS AND OUTLOOK

The current consensus is that the US litigation funding industry will continue to grow for the foreseeable future. Funding entities are proliferating in response to the influx of demand from investors seeking high, non-correlated returns, and more jurisdictions are endorsing funding as permissible and supportive of public policy. Moreover, awareness of funding among claimholders and law firms still remains relatively low, indicating that a significant proportion of the market remains ripe for growth.

The next year will likely witness material developments in the issue of disclosure, as more courts are confronted with discovery motions regarding third party funding and proposed legislation undergoes review. Ethical questions may continue to percolate, particularly in the event that model rules of professional conduct are amended to expressly address the permissibility of portfolio funding. Finally, as capital continues to flow to the industry, funders will likely develop new strategies to increase demand and gain market share.

52 id.

53 www.congress.gov/bill/115th-congress/senate-bill/2815/committees.

54 Matthew Goldstein and Jessica Silver-Greenberg, Prosecutors Investigate Firms That Offer Plaintiffs Early Cash, *The New York Times* (19 March 2018), available at <https://www.nytimes.com/2018/03/19/business/litigation-finance-subpoena-settlement-advance.html>; Matthew Goldstein and Jessica Silver-Greenberg, How Profiteers Lure Women Into Often-Unneeded Surgery, *The New York Times* (14 April 2018), available at <https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html>; Matthew Santoni, Litigation Funder Seeks Bond for Ex-NFLer's US\$500K Advance, Law360 (20 July 2018), available at <https://www.law360.com/articles/1065623/litigation-funder-seeks-bond-for-ex-nfler-s-500k-advance>.

55 Andrew Denney, NY Lawmakers Considering Bills to Regulate Consumer Litigation Funding, *New York Law Journal* (29 May 2018), available at <https://www.law.com/newyorklawjournal/2018/05/29/ny-lawmakers-considering-bills-to-regulate-consumer-litigation-funding>.

ABOUT THE AUTHORS

JAN OLAV AABØ

Arntzen de Besche Advokatfirma AS

Jan Olav Aabø is a senior lawyer in Arntzen de Besche's litigation and arbitration group based in Oslo. Jan Olav has extensive experience in advising clients in domestic and international disputes. He regularly acts for clients in a variety of industry sectors, including oil and gas, accounting, financial services, and manufacturing.

For four years until 2017, Jan Olav was general counsel at KPMG Norway, where, among other things, he handled professional indemnity issues.

JOANA ALBUQUERQUE

BCH Lawyers

Joana is a lawyer based in Lisbon, Portugal. She is qualified to practise in Portugal and Brazil and is of counsel at BCH Lawyers. With nearly 20 years' experience, she enjoys a practice that spans a wide range of international commercial transactions and international arbitration proceedings, with a special focus on transaction matters and disputes concerning plant construction, industrial engineering and civil construction projects.

Joana graduated in law at the Pontifical Catholic University of Rio de Janeiro in 2000, and obtained her Master of Laws from the University of Cambridge in 2003. She was also formerly a partner and senior lawyer with prominent international law firms in Brazil.

Joana is the General Secretary of the Infrastructure and Economic Development Commission of the Brazilian Bar Association, Rio de Janeiro Chapter, and she was a recommended lawyer in *The Legal 500 Brazil* in 2015 and 2016 for projects and infrastructure.

FEDERICO BANTI

Osborne Clarke

Federico heads the Italian dispute resolution practice acting for Italian and international clients in both judicial and arbitration procedures. He advocates for clients in all types of commercial disputes, mainly in cases with international or cross-border profiles, always giving special attention to the procedural strategy. He has conducted both *ad hoc* and institutional arbitrations to final award, including under the ICC and CAM rules. Federico is a member of the International Arbitration Group of Osborne Clarke, which handles complex, multi-jurisdictional, international arbitration proceedings.

He regularly advises on corporate matters predominantly in relation to disputes involving shareholders, corporate management and supervisory bodies. He has considerable experience in insolvency matters dealing with both disputes and restructuring procedures.

Federico also has niche experience in litigation related to financial intermediaries and insurance matters, and with reference to the role of fiduciaries. He assists clients and mutual aid societies operating in the healthcare sectors.

Federico is a key member of the Italian focus group on third party litigation funding, a practice that is only just taking its first steps within the Italian market but which offers great potential for the firm's litigation and arbitration clients.

Federico graduated in 1999, *summa cum laude*, from the LUISS University in Rome and has been a member of the Milan Bar since 2002. Prior to joining Osborne Clarke, he was a partner at a leading Italian law firm.

ADRIANE NAKAGAWA BAPTISTA

Atelier Jurídico

Mrs Nakagawa Baptista has experience in construction and investment arbitration at state level, in addition to having acted in bilingual procedures. She is familiar with procedures administered by the International Chamber of Commerce (ICC), the CIESP-FIESP Mediation and Arbitration Chamber (CMA CIESP-FIESP), the Arbitration and Mediation Centre of the Brazil–Canada Chamber of Commerce (CAM CCBC), the Stockholm Chamber of Commerce (SCC) and the Permanent Court of Arbitration (CPA), and with application of the UNCITRAL Arbitration Rules. She also works as a researcher in the international trade area, at the Global Trade and Investment Centre of the São Paulo School of Economics at the Getulio Vargas Foundation in São Paulo.

She has a Bachelor of Laws from the University of São Paulo (2007), an LLM in international and European commercial law from Leiden University (2011), and is a PhD candidate at the University of São Paulo (2023).

She is fluent in English, Spanish and French.

MARTIN BERNET

Bernet Arbitration / Dispute Management

Martin Bernet is one of Switzerland's leading dispute resolution practitioners with more than 30 years of experience in international arbitration and litigation. Working in his own independent practice, he offers services as an arbitrator, as well as counsel or co-counsel in arbitration and litigation proceedings. Before establishing his own independent practice, Martin Bernet was a partner with the Swiss law firm Schellenberg Wittmer Ltd for 29 years, heading the firm's dispute resolution team in Zurich and serving as managing partner for a number of years.

MELODY CHAN

White & Case

Melody Chan is a partner in White & Case's dispute resolution practice, based in Hong Kong. Her practice focuses on cross-border arbitration and high-stakes multi-jurisdictional litigation. She advises on disputes in the financial services, technology, oil and gas, and power sectors, as well as on matters in connection with joint ventures and insolvency

proceedings. Melody has represented clients in international arbitrations under the rules of major arbitral institutions, including ICC and HKIAC. Melody also handles contentious and non-contentious regulatory and employment matters and is qualified in Hong Kong, England and Wales, and Australia.

DAI WAI CHIN FEMAN

Parabellum Capital LLC

Dai Wai Chin Feman is director of commercial litigation strategies and responsible for the development and execution of Parabellum's commercial litigation investment strategies. Prior to joining Parabellum, Dai Wai was a litigation partner at Dorsey & Whitney LLP, where he specialised in commercial and antitrust litigation. Dai Wai has broad experience in complex disputes concerning breaches of contract, competition, tortious interference, trade secrets, restrictive covenants, licensing, rights of first refusal, shareholder oppression, soft intellectual property and securities. He has advised and represented clients ranging from Fortune 100 companies to closely held family businesses through all phases of litigation, from case assessment through trial, appeal and enforcement proceedings. While in private practice, Dai Wai was named a *Super Lawyers* Rising Star in Business Litigation for four consecutive years. He is active in the Asian American Bar Association of New York, where he is a board member, vice-chair of the Judiciary Committee, and former co-chair of the Litigation Committee. He is also a Fellow of the New York City Bar Association Leadership Council on Legal Diversity, and a member of the New York City Bar Association's Professional Ethics Committee. Dai Wai received his AB, *cum laude*, from Georgetown University and his JD from New York University School of Law.

EVA DE GÖTZEN

Osborne Clarke Studio

Eva is an arbitration expert and member of the firm's dispute resolution team in Milan.

She advises and assists both Italian and international clients, across a number of industry sectors, in bringing claims or defending actions in both domestic and international arbitration proceedings (ICC, LCIA, *ad hoc*) as well as in civil and commercial litigation disputes. She is highly regarded in the market, with particular skills in solving both conflict of laws and conflict of jurisdiction issues in relation to multinational disputes and in adopting a practical, 'hands-on' approach to working with clients.

Eva qualified at the Milan Bar in 2012. Prior to joining Osborne Clarke in 2017, she worked for a leading commercial firm in Milan.

She holds a law degree *magna cum laude* and a PhD in international law from the University of Milan.

Eva is currently a teaching assistant to the International Law Chair at the University of Milan, faculty of law, and has cooperated in the publication of Cases and Materials on EU Private International Law (S Bariatti, Oxford, 2011).

IHEANYICHUKWU DICK

Uche Nwokedi & Co

Iheanyichukwu Patson Dick is a barrister and solicitor of the Supreme Court of Nigeria. He read law at University of Calabar, Nigeria, and was called to the Nigerian Bar in 2003.

He has been practising law in Nigeria for many years and is currently a senior counsel at Uche Nwokedi & Co. He represents clients in commercial transactions and frequently appears before federal and state authorities as well as adjudicators, arbitral tribunals and courts. He is the author of the Nigerian Investment Law and Practice Guide, a ground-breaking publication that addresses legal issues relating to the Nigerian investment industry.

OLEXANDER DROUG

Sayenko Kharenko

Olexander Droug is a partner at Sayenko Kharenko, with more than 10 years of experience, who specialises in dispute resolution and restructuring with a special focus on arbitration and commercial litigation.

Olexander Droug advises local and foreign clients on all stages of dispute resolution proceedings, including in complex multi-jurisdictional proceedings involving Ukraine, the UK, Cyprus, the BVI, Switzerland, the Netherlands and other fora, as well as arbitration under arbitration rules of all major international arbitral institutions (LCIA, ICC, SCC), CIS-based arbitral institutions, ICSID Arbitration Rules and UNCITRAL Arbitration Rules. Mr Droug also advises clients on obtaining and implementing interim relief, including in support of arbitration proceedings and litigation, as well as on recognition and enforcement in Ukraine of arbitral awards and foreign court judgments. Mr Droug has represented the clients in the proceedings relating to banking, financial, securities, M&A, shareholders, trade, telecommunication, construction, aviation, product liability, as well as sports-related disputes. He also has significant experience in representing both lenders and borrowers in financial restructurings and related disputes.

MOHAMED EL HAWAWY

Ince & Co Middle East LLP

Mohamed El Hawawy has wide litigation experience before the courts in the Middle East handling civil, commercial and criminal cases. His focus is on the shipping, insurance and aviation sectors.

Mohamed advises on both contentious and transactional shipping matters. On the contentious side he advises clients on carriage of goods by sea, ship arrests, bunkers, pollution, general average, salvage, grounding and insurance claims. His transactional shipping advice to clients covers charterparties, bills of lading, ship finance, registration, mortgage and hire purchase. Mohamed advises insurers, reinsurers and brokers on a range of insurance claims in sectors including life, property, liability, marine and energy insurance. In the aviation sector, Mohamed advises on air carriage disputes, including passenger and cargo carriage; and aircraft lease, mortgage and registration.

PASCAL EMEMONU

Uche Nwokedi & Co

Pascal Anayo Ememonu is a senior counsel at Uche Nwokedi & Co, and an editor in the law reporting and publication unit of the firm.

With about nine years of experience at the Bar, he is a solid and aggressive litigator, with core competence in energy and natural resources law (particularly in relation to concession interest acquisitions), election petitions, intellectual property and dispute resolution

methods. Pascal's experience includes negotiating and settling agreements for both upstream and downstream projects.

He is a member of the Nigerian Bar Association, the International Bar Association and the Intellectual Property Association.

ANNA FOMINA

Ince & Co Middle East LLP

Anna Fomina is a senior associate and practice development lawyer.

Anna joined Ince & Co in London in 2006. Since moving to Dubai in 2010, Anna has guided clients based in the UAE and abroad in insurance and shipping disputes in the Middle East before the UAE courts, including the DIFC Courts. She has also represented clients in cases before English courts, and handles international arbitrations in London and the UAE conducted both *ad hoc* and under the rules of LMAA, LCIA, DIFC-LCIA, DIAC and ADCCAC. She also advises on sanctions and compliance issues.

In her role, Anna monitors legal developments in all the firm's core sectors and develops and delivers tailored in-house training programmes for clients' legal and commercial teams.

JASON GEISKER

Maurice Blackburn Lawyers

Jason Geisker is a principal at Australia's leading class actions law firm, Maurice Blackburn Lawyers. He is also the principal legal adviser to Claims Funding Australia Pty Ltd, the litigation funding arm of Maurice Blackburn. Jason is a recognised class action litigator throughout Australia with more than 13 years of high-profile class action litigation and 25 years of civil and commercial litigation experience. Since joining Maurice Blackburn in 2003, he has acted on a number of significant class actions and complex commercial claims including the *Volkswagen, Audi* and *Skoda* diesel emission class actions, various shareholder class actions against the Australian Wheat Board; Nufarm; Gunns; and Tamaya Resources, as well as the City Pacific Mortgage Fund collapse litigation. He is one of the select few class action lawyers recommended by *Doyle's 2018 Guide* in the field of commercial litigation and dispute resolution in NSW.

For over 20 years Jason has also actively worked on various legal and policy reforms including access to justice issues and civil procedure. Jason writes and presents widely across the industry and shares his expertise as a member of the Law Society of NSW, Australian Restructuring Insolvency and Turnaround Association, American Association of Justice and Law Council of Australia Federal Litigation and Dispute Resolution Section.

MIRDIN GNÄGI

Nivalion AG

Mirdin Gnägi is an associate at Nivalion AG, a Swiss third party litigation and arbitration funder focusing on continental Europe. He holds a BA in international relations from the University of Geneva and a degree in law from the University of Lucerne.

ROHAN HAVELOCK

Adina Thorn Lawyers

Rohan is a consultant to Adina Thorn Lawyers, providing legal advice, analysis and research within the scope of its practice areas. Rohan is also a senior lecturer at the Faculty of Law, University of Auckland, teaching and researching in contract law, equity, insurance law and restitution.

Rohan is frequently asked to comment on commercial law and insurance law issues by the news media, including on national radio and television.

Previously Rohan practised in commercial litigation for five-and-a-half years at one of New Zealand's leading law firms, where he was a senior associate. There he worked on New Zealand's largest-ever construction litigation, involving a multimillion dollar claim that went to trial in the High Court for nine months, before a settlement was reached.

Rohan has published numerous articles in national and international journals in the areas of contract law, equity, insurance law, restitution and construction law. He is a contributing editor of *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, 2014).

Rohan is a graduate of the University of Auckland. He holds a degree of bachelor of laws (honours), bachelor of arts, and master of laws (first-class honours) from the University of Cambridge, where he was a Leonard Coling Scholar.

DUARTE G HENRIQUES

BCH Lawyers

Duarte Henriques is a lawyer and arbitrator based in Lisbon, Portugal and a partner at BCH Lawyers. Since 1990, he has acted as both counsel and arbitrator in several litigation and arbitration cases related to investment, banking and finance, and corporate, commercial and construction disputes. He serves as sole arbitrator, chair or member of tribunals in domestic and international arbitration proceedings, and as counsel in domestic and international arbitration proceedings, both institutional and *ad hoc*. Duarte Henriques advises major banking and finance institutions, insurance companies, construction companies and technology and software solution providers in litigation and arbitration disputes. Duarte Henriques specialises in banking and finance law, business and commercial law, mergers and acquisitions, agency and distribution, construction, intellectual property and third party funding.

Duarte Henriques is listed as an arbitrator for several institutions, including the VIAC, CIETAC, the HKIAC and WIPO. He is a member of several international associations, including the Russian Arbitration Association, LCIA, IBA, ICC and ICCA. Duarte Henriques is a member of the ICC Commission on Arbitration and ADR Task Force on Financial Institutions and International Arbitration, and of the Task Force on Third-Party Funding in International Arbitration of the International Council for Commercial Arbitration (ICCA) and the School of Law at Queen Mary University of London.

He has been recently admitted to the SVAMC Tech List (Silicon Valley Arbitration and Mediation Center's 2017 list of the world's leading technology neutrals) and to the list of specialised arbitrators of the International Distribution Institute.

Duarte Henriques is the author of several works on international arbitration.

URS HOFFMANN-NOWOTNY

Schellenberg Wittmer Ltd

Urs Hoffmann-Nowotny is a partner in the Zurich office of Schellenberg Wittmer Ltd and a member of the dispute resolution group. He graduated Dr. iur. from Zurich University and was admitted to the bar in Switzerland in 2006. Urs Hoffmann-Nowotny's practice focuses on domestic and international litigation and arbitration. He advises and represents parties before Swiss courts and arbitral tribunals in a wide range of commercial matters. He has special expertise in banking litigation, having acted as counsel to financial services providers in numerous disputes with private and institutional clients, as well as corporate law disputes and in proceedings on enforcement of foreign judgments and arbitral awards, including civil attachments.

MONIKA HUMPHREYS-DAVIES

Ince & Co Middle East LLP

While in the firm's London office, among various other matters Monika Humphreys-Davies assisted with English court proceedings regarding a damages claim arising from freezing orders as well as with LMAA arbitration proceedings dealing with shipowners' cargo claims and their claims for detention and demurrage.

Since joining the firm's Dubai office, Monika has assisted with five SIAC arbitrations dealing with termination of OSV construction contracts and a high-value dispute concerning the supply of defective parts to a manufacturer of offshore drilling units in the Middle East.

In addition to the above, Monika also assists with matters proceeding before the UAE courts.

JUSTINA IBEUNJO

Uche Nwokedi & Co

Justina Onyinyechi Ibeunjo (née Unegbu) is a senior counsel at Uche Nwokedi and Co. She has extensive and dynamic experience in various aspects of legal practice, including energy, oil and gas, intellectual property, maritime, law reporting, legal drafting and conveyancing, arbitration, civil and criminal litigation.

She is actively involved in local and international arbitrations. She is currently the head of the law reporting and publication unit in Uche Nwokedi & Co, and one of the editors of *Nigerian Oil and Gas Cases*, a specialised law report that publishes all judgments with respect to disputes arising from or related to oil and gas industries in Nigeria.

AARON KATZ

Parabellum Capital LLC

Aaron co-founded Parabellum Capital and serves as chief investment officer and managing principal. He is also a member of the firm's Investment Committee. Aaron is a recognised leader in the US commercial litigation finance market. Before starting Parabellum, Aaron co-founded its predecessor, the Legal Risk Strategies and Finance business at Credit Suisse. He developed many of the innovative investment structures that are considered mainstream today. Previously, Aaron spent 16 years practising litigation at both the trial and appellate levels at major firms, including Davis Polk & Wardwell and DLA Piper, as well as the US

Department of Justice. He served as an Assistant US Attorney for the Southern District of New York in Manhattan and clerked for the Honorable Anita Brody, United States District Judge for the Eastern District of Pennsylvania. Aaron received his BA, *magna cum laude*, from the Yeshiva University, and his JD, *cum laude*, from Harvard Law School.

ZBIGNIEW KRUCZKOWSKI

Linklaters C Wiśniewski i Wspólnicy Spółka Komandytowa

Zbigniew Kruczkowski is a Polish qualified lawyer (*radca prawny*) and counsel with over 20 years of experience in providing legal advice for litigation and arbitration matters. His expertise involves disputes relating to commercial, company, property, insolvency as well as unfair competition issues decided in Polish common courts. He has also considerable expertise of domestic as well as international commercial and investment arbitrations. Zbigniew has successfully represented a wide range of clients, including global corporations and financial institutions in their most challenging disputes, often for high-profile issues drawing considerable Polish media attention. He often publishes and gives lectures on dispute resolution-related matters.

HUGH A MEIGHEN

Borden Ladner Gervais LLP

Hugh A Meighen is a senior associate in BLG's international trade and arbitration group based in Toronto. He specialises in international commercial, investment and construction arbitration in the telecommunications, oil and gas, and mining sectors, as well as investment protection disputes arising under investment protection laws and treaties. He has acted in international arbitrations governed by a variety of procedural rules, including the arbitration rules of the ICC, LCIA, UNCITRAL, ICDR, BCICAC and DIAC. Prior to joining BLG, Hugh practised in London and the Middle East in the international arbitration group of Freshfields Bruckhaus Deringer LLP and was assistant legal counsel at the Permanent Court of Arbitration in The Hague, where he assisted arbitral tribunals in international investment arbitrations. In addition to various book chapters, articles and commentaries, Hugh co-authored *A Guide to the PCA Arbitration Rules* (Oxford University Press, 2014). Hugh is a qualified lawyer in New York State and a barrister and solicitor in Ontario. He earned his BCL and LLB degrees from the McGill Faculty of Law in 2009 (Dean's List) and a BA degree *cum laude* from Princeton University in 2005. From 2017 to 2019, Hugh has been recognised by *Global Arbitration Review* for inclusion in *Who's Who: Arbitration List of Future Leaders*.

LUIZ OLAVO BAPTISTA

Atelier Jurídico

Luiz Olavo Baptista has practised law for over 50 years and has acted as counsel and arbitrator both in Brazil and abroad. He has advised international corporations, governments and individuals in matters related to international investments and negotiations, and he has participated in the drafting of international agreements.

He has acted as arbitrator in commercial and investment disputes, in proceedings at the United Nations Compensation Commission, under the MERCOSUR Protocol for the Resolution of Controversies, before the ICSID, the Stockholm Chamber of Commerce and

the ICC International Court of Arbitration. He also participates in the leading Brazilian arbitration organisations.

He was a member of the WTO Appellate Body (2001 to 2009), which he chaired in 2008. He was a member of The Hague Permanent Court of Arbitration (1996–2002) and in 1998 was designated Special Representative for Brazil in a fact-finding and mediation mission related to trade issues.

He received his law degree from the Pontifical Catholic University of São Paulo in 1964, his PhD from Panthéon-Assas University (Paris II) in 1981 and he is a Doctor of Laws *honoris causa* (University of Lisbon, 2009 and the Ribeirão Preto Faculty of Law of the University of São Paulo). He is a retired full professor of international law at the Faculty of Law of the University of São Paulo and is fluent in English, Spanish, French, Italian and Portuguese.

LESLIE PERRIN

Calunius Capital LLP

Leslie Perrin is the chairman of Calunius Capital LLP, an office he has held since January 2009.

Since its establishment in November 2011, Leslie has also been the chairman of the Association of Litigation Funders of England and Wales, and in that capacity is deeply involved in the development of litigation funding as an international phenomenon. At around the time of this appointment, Leslie was named by *The Times* as one of ‘those lawyers we believe to be the most influential in society right now’.

Leslie has more than 30 years’ experience of litigation markets, having been successively head of litigation, managing partner and senior partner at international law firm Osborne Clarke. One of his cases still holds the record for a UK jury award of defamation damages against an insured defendant. In other cases, he became recognised as one of the pioneers of group actions in the UK.

For nine years until 2015, Leslie was also the senior independent director of DAS, the UK market leader in legal expenses insurance.

CARL PERSSON

Roschier Advokatbyrå AB

Carl Persson is a senior associate in Roschier’s dispute resolution practice in Sweden. Carl specialises in commercial dispute resolution. His practice covers arbitration and litigation, and he has experience in disputes across a wide range of different areas, including oil agreements, gas agreements, director and auditor liability, M&A transactions, shareholders’ agreements, sale and purchase agreements, financial agreements and insurance agreements.

Carl is ranked as a future leader in *Who’s Who Legal: Future Leaders – Arbitration 2019* and *Who’s Who Legal: Future Leaders – Litigation 2019*.

REIN PHILIPS

Redbreast Associates NV

Rein is managing director and co-founder of Redbreast Associates, an internationally oriented Dutch litigation fund.

Before setting up Redbreast Rein worked as an insolvency and restructuring lawyer at RESOR in which capacity he represented multinational corporations, investors, banks and other stakeholders in formal and informal restructurings, insolvency matters and related disputes.

Rein is a fellow and member of INSOL International and member of INSOL Europe. He regularly publishes and lectures on matters of litigation finance and insolvency law.

PAVLO SAMOTHRAKIS

Ince & Co Middle East LLP

Pavlo Samothrakis practises in all areas of shipping law, acting for owners, charterers and cargo interests in a wide range of charterparty and bill of lading disputes, ship arrests, admiralty and general commercial matters. Pavlo has represented owners of vessels and other parties in the shipping and offshore industries in relation to several recent maritime casualties within the Middle East region. In addition, Pavlo advises on a variety of non-contentious matters such as the drafting of charterparties, contracts of affreightment, sale of goods contracts, vessel sale and purchase agreements, and vessel financing arrangements. Pavlo also represents clients in construction, energy and international trade in both local and international arbitrations and court proceedings.

MATTHEW SECOMB

White & Case

Matthew Secomb is a partner in White & Case's international arbitration practice. His practice concentrates on international commercial arbitration with a focus on energy-related and construction disputes. He has been involved in arbitrations under most of the major institutional rules as well as in *ad hoc* arbitrations. He is admitted to practise in Australia and England and Wales, and is an *avocat* at the Paris Bar. He also acts regularly as arbitrator, having chaired or sat as sole arbitrator and co-arbitrator in arbitrations under various rules.

Matthew spent nearly 10 years in White & Case's Paris office before moving to Singapore in 2015. Prior to joining White & Case, Matthew was counsel to the ICC International Court of Arbitration. He also teaches regularly at various universities, including as an adjunct associate professor in energy arbitration at the National University of Singapore, Faculty of Law.

DANIEL SHARMA

DLA Piper UK LLP

Daniel Sharma has extensive experience in advising clients in international disputes. He regularly acts for private companies, as well as governments, governmental institutions and international organisations, in a variety of industry sectors, including infrastructure, power, aviation, oil and gas, automotive, chemicals, pharmaceuticals, financial services and manufacturing. He is licensed to practise in Germany (Rechtsanwalt) and additionally as a solicitor of the Senior Courts of England and Wales. Daniel has advised clients with regard to *ad hoc* and institutional arbitrations in English, French and German, and under different rules, including ICC, SIAC, DIS, CIETAC, UNCITRAL and ICSID. He regularly sits as an arbitrator. Daniel is also highly experienced in antitrust laws and represents clients in private antitrust litigation proceedings. Daniel is chair of the firm's global India group.

JOHAN SIDKLEV

Roschier Advokatbyrå AB

Johan Sidklev heads Roschier's dispute resolution practice in Sweden. Johan specialises in commercial dispute resolution and has extensive experience in international arbitration, often concerning energy-related disputes with an East–West angle. He has acted as counsel in a significant number of international arbitrations in Stockholm, London and Paris in relation to oil and gas, construction and distribution matters. In the area of investment arbitration, Johan has experience of arbitrators' appointments, and of advising both private investors and various governments as counsel, *inter alia*, in matters concerning the Energy Charter Treaty. He is the current president of the Swedish Arbitration Association.

Johan is recognised as one of the leading experts in Sweden within dispute resolution by international directories such as *Chambers Global*, *Chambers Europe*, *The Legal 500* and *Who's Who Legal*.

JENNY TALLIS

Maurice Blackburn Lawyers

Jenny Tallis is a special counsel at Australia's leading class actions law firm, Maurice Blackburn Lawyers, and senior legal adviser to Claims Funding Australia Pty Ltd, the litigation funding arm and wholly owned subsidiary of Maurice Blackburn. Jenny has 10 years of high-profile class action experience at Maurice Blackburn and prior to that gained extensive experience in civil and commercial litigation working in Sydney, Adelaide and London on a wide range of commercial and insurance-related disputes for plaintiff and corporate defendants.

The focus of Jenny's more than 25-year career has been to counter poor corporate conduct and promote greater accountability towards stakeholders. Since joining Maurice Blackburn in 2007, she has conducted a number of significant, complex and successful securities class actions, including those against Australian Wheat Board, OZ Minerals, Transpacific Industries, Leighton Holdings and Bellamy's Australia Limited. As part of Maurice Blackburn's social justice practice, Jenny also had the conduct of a large negligence claim brought on behalf of intellectually and psychiatrically disabled residents of a boarding house.

Jenny is a member of the Law Society of NSW and Australian Lawyers for Human Rights.

EIVIND TANDREVOLD

Arntzen de Besche Advokatfirma AS

Eivind Tandrevold specialises in commercial dispute resolution. As a senior lawyer in Arntzen de Besche's litigation and arbitration team based in Oslo, Eivind handles a wide range of contractual and tortious disputes. In recent years, he has acted in some of the most sensitive and high-profile claims instituted against professional service-providing companies in Norway.

Further to acting in litigation and arbitration proceedings, Eivind regularly advises clients on risk management issues.

SEAN THOMPSON

Parabellum Capital LLC

Sean Thompson is director of intellectual property strategies and general counsel, and is responsible for the development and execution of Parabellum's intellectual property investment strategies. He also serves as the firm's general counsel. Sean is an experienced IP litigator, having represented both patent owners and accused infringers. Before joining Parabellum, Sean was senior litigation counsel at Blackbird Technologies, a leading patent monetisation company. At Blackbird, he served as lead counsel on numerous patent litigations at the district court and Federal Circuit levels. Sean was previously an IP litigator at WilmerHale, where he represented some of the largest technology and pharmaceutical companies in the world. He litigated cases involving patents directed to a wide range of technologies, including semiconductors, unmanned aerial vehicles, and pharmaceutical products. Sean began his career as a commercial litigator at Cravath, Swaine & Moore LLP. He earned his joint JD/LLM from Cornell Law School, where he was an editor of the *Cornell Law Review*. He received his BA from Boston College and his MS from the London School of Economics.

ADINA THORN

Adina Thorn Lawyers

Adina Thorn has a high level of experience and expertise in the areas of commercial, construction and property litigation/disputes resolution. Adina has also been involved in organising and bringing multimillion-dollar representative actions funded by litigation funders.

Adina has acted for clients in all levels of court in New Zealand and has been involved in hundreds of mediations, arbitrations and adjudications. She also appeared as counsel in the landmark Supreme Court of New Zealand decision concerning barristerial immunity.

Adina has dual qualifications in law and property, and is frequently asked to comment by the media in relation to property and construction issue, including on television and radio.

Adina is a current member of the New Zealand Law Society, Institute of Directors in New Zealand (Inc), Property Institute of New Zealand (Affiliate), Women in Property and Auckland Property Investors Association APIA.

Adina is a graduate of the University of Auckland and holds bachelor of laws (honours) and bachelor of property degrees.

ADAM WALLIN

White & Case

Adam Wallin advises clients on a broad range of litigation and arbitration matters. His practice covers a wide spectrum of international commercial disputes and internal and regulatory investigations. Adam has experience of arbitrations under the rules of various arbitral institutions, and litigation in the English courts. He also has significant experience of counselling clients on eDisclosure and discovery issues. Adam relocated from the London office of White & Case to the firm's Singapore office in 2017.

MARCEL WEGMÜLLER

Nivalion AG

Marcel Wegmüller is a co-founder and managing partner of Nivalion AG, a Swiss third party litigation and arbitration funder focusing on continental Europe. He has many years of experience in the funding of judicial and, in particular, arbitration proceedings in various European jurisdictions, and has played a key role in establishing the first Swiss provider, which he led as managing director until 2016. Prior to that, he held senior positions in the areas of strategy and corporate development and legal and compliance for various units of the Credit Suisse Group. He is a Swiss lawyer, holds a degree in law from the University of Zurich, and has completed executive programmes at INSEAD and at the London Business School. He regularly publishes and speaks at conferences on the topic of litigation funding.

ANTONIO WESOLOWSKI

Calunius Capital LLP and Wesolowski Abogados SLP

Antonio Wesolowski is the general counsel for Spain and Latin America and joined Calunius in 2017.

Antonio's professional career includes extensive experience in banking and finance law, both as a transactional adviser to banks and corporate entities and as specialised litigator. He previously worked in Clifford Chance's litigation and arbitration, and banking and finance departments in Madrid, and in the Spain and Portugal operations legal division of the European Investment Bank in Luxembourg. In 2017, he co-founded Wesolowski Abogados, which is based in Madrid.

His practice is mainly focused in cross-border corporate, project and asset finance transactions, as well as in large-scale insolvencies and restructuring situations. He also has extensive experience in derivatives litigation, consumer mass claims, infrastructure and energy projects in Spain and Latin America, and general commercial litigation, including shareholder disputes and directors' liability matters.

Antonio has degrees in law and in economics from the University of Navarra and studied at Bentley University of Boston and at Princeton University.

Appendix 2

CONTRIBUTING LAW FIRMS' CONTACT DETAILS

ADINA THORN LAWYERS

Level 4, 40–42 Eden Crescent
Auckland 1140
New Zealand
Tel: +64 9 304 0661
Fax: +64 9 309 6091
adina@adinathorn.co.nz
rohan@adinathorn.co.nz
www.adinathorn.co.nz

ARNTZEN DE BESCHE ADVOKATFIRMA AS

Bygdøy Allé 2
0257 Oslo
Norway
Tel: +47 23 89 40 00
elt@adeb.no
joa@adeb.no
www.adeb.no

ATELIER JURÍDICO

Alameda dos Maracatins, 780 – Cj
1702, 901 and 902 Moema
São Paulo 04089-001
Brazil
Tel: +55 11 3285 0706/5053 2990
lob@atelierjuridico.com
an@atelierjuridico.com
www.atelierjuridico.com

BCH LAWYERS

Rua Fialho de Almeida 32-1
1070-129 Lisbon
Portugal
Tel: +351 213 853 899
Fax: +351 213 878 440
dghenriques@bch.pt
jalbuquerque@bch.pt
www.bch.pt

BERNET ARBITRATION / DISPUTE MANAGEMENT

Mühlebachstrasse 173
8008 Zurich
Switzerland
Tel: +41 44 385 2020
mb@bernet-arbitration.ch
www.bernet-arbitration.ch

BORDEN LADNER GERVAIS LLP

East Tower, Bay Adelaide Centre
22 Adelaide Street West
Suite 3400
Toronto, ON
M5H 4E3
Canada
Tel: 416 367 6614
Fax: 416 367 6749
hmeighen@blg.com
www.blg.com

CALUNIUS CAPITAL LLP

11 Haymarket
London SW1Y 4BP
United Kingdom
Tel: +44 203 142 8335
leslie.perrin@calunius.com

www.calunius.com

DLA PIPER UK LLP

Westhafen Tower
Westhafenplatz 1
Frankfurt
60327
Germany
Tel: +49 69 271 33 220
Fax: +49 69 271 33 100
daniel.sharma@dlapiper.com
www.dlapiper.com

INCE & CO MIDDLE EAST LLP

The Maze Tower, Level 10
Sheikh Zayed Road
PO Box 123004
Dubai
United Arab Emirates
Tel: +971 4307 6000
Fax: +971 4307 6001
mohamed.elhawawy@incelaw.com
pavlo.samothrakis@incelaw.com
anna.fomina@incelaw.com
monika.humphreys-davies@incelaw.com
www.incelaw.com

**LINKLATERS C WIŚNIEWSKI
I WSPÓLNICY SPÓŁKA
KOMANDYTOWA**

Building Q22, 32nd floor
Aleja Jana Pawła II 22
00-133 Warsaw
Poland
Tel: +48 22 526 5000
Fax: +48 22 526 5060
zbigniew.kruczkowski@linklaters.com
www.linklaters.com

MAURICE BLACKBURN LAWYERS

Level 32
201 Elizabeth Street
Sydney, NSW 2000
Australia
Tel: +61 2 9261 1488
Fax: +61 2 9261 3318
jgeisker@mauriceblackburn.com.au
jtallis@mauriceblackburn.com.au
www.mauriceblackburn.com.au

NIVALION AG

Erlenweg 6
6312 Zug/Steinhausen
Switzerland
Tel: +41 41 748 43 00
marcel.wegmueller@nivalion.ch
mirdin.gnaegi@nivalion.ch
www.nivalion.ch

OSBORNE CLARKE

Corso di Porta Vittoria 9
20122 Milan
Italy
Tel: +39 02 5413 171
Fax: +39 02 5413 1706
federico.banti@osborneclarke.com
eva.degotzen@osborneclarke.com
www.osborneclarke.com

PARABELLUM CAPITAL LLC

156 West 56th Street, Suite 902
New York
NY 10019
United States
Tel: +1 212 726 2640
sthompson@parabellumcap.com
daiwai@parabellumcap.com
akatz@parabellumcap.com
www.parabellumcap.com

REDBREAST ASSOCIATES NV

Anna van Buerenplein 41
2595 DA The Hague
Netherlands
Tel: +31 85 822 6380
rein.philips@redbreast.com
www.redbreast.com

ROSCHIER ADVOKATBYRÅ AB

Brunkebergstorg 2
PO Box 7358
103 90 Stockholm
Sweden
Tel: +46 8 553 190 00
Fax: +46 8 553 190 01
johan.sidklev@roschier.com
carl.persson@roschier.com
www.roschier.com

SAYENKO KHARENKO

10 Muzeyny Provulok
Kiev 01001
Ukraine
Tel: +380 44 499 6000
Fax: +380 44 499 6250
odrout@sk.ua
www.sk.ua

SCHELLENBERG WITTMER LTD

Löwenstrasse 19
PO Box 2201
8021 Zurich
Switzerland
Tel: +41 44 215 5252
Fax: +41 44 215 5200
urs.hoffmann-nowotny@swlegal.ch
www.swlegal.ch

UCHE NWOKEDI & CO

Five Ways
2 Adeniyi Olanrewaju Street
Off Admiralty
Lekki Phase 1
Lagos
Nigeria
Tel: +234 903 804 0000/817 333 4441
j.unegbu@unc-legal.com
d.iheanyichukwu@unc-legal.com
p.ememonu@unc-legal.com
www.unc-legal.com

WESOLOWSKI ABOGADOS SLP

46 Núñez de Balboa
28001 Madrid
Spain
Tel: +34 917 359 035
antonio.wesolowski@calunius.com
antonio.wesolowski@wesolowski.es
www.calunius.com
www.wesolowski.es

WHITE & CASE

9th Floor Central Tower
28 Queen's Road Central
Hong Kong
Tel: +852 2822 8750
Fax: +852 2845 9070
mchan@whitecase.com

8 Marina View #27-01
Asia Square Tower 1
Singapore 018960
Tel: +65 6347 1325/1374
Fax: +65 6225 6009
msecomb@whitecase.com
matthew.secomb@whitecase.com
adam.wallin@whitecase.com
www.whitecase.com

THE LAWREVIEWS

For more information, please contact info@thelawreviews.co.uk

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

Christopher Kandel
Latham & Watkins LLP

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP

THE ASSET MANAGEMENT REVIEW

Paul Dickson
Slaughter and May

THE ASSET TRACING AND RECOVERY REVIEW

Robert Hunter
Edmonds Marshall McMahon Ltd

THE AVIATION LAW REVIEW

Sean Gates
Gates Aviation LLP

THE BANKING LITIGATION LAW REVIEW

Christa Band
Linklaters LLP

THE BANKING REGULATION REVIEW

Jan Putnis
Slaughter and May

THE CARTELS AND LENIENCY REVIEW

John Buretta and John Terzaken
Cravath Swaine & Moore LLP and Simpson Thacher & Bartlett LLP

THE CLASS ACTIONS LAW REVIEW

Richard Swallow
Slaughter and May

THE CONSUMER FINANCE LAW REVIEW

Rick Fischer, Obrea O Poindexter and Jeremy Mandell
Morrison & Foerster

THE CORPORATE GOVERNANCE REVIEW

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