



# LITIGATION FUNDING

# GLOBAL TRENDS AND OUTLOOK

This White paper has been produced in conjunction with:

**CLYDE & CO**

Litigation funding is a billion dollar industry that is reshaping litigation around the world. Initially established in Australia, the funding of litigation has become increasingly common in the U.K., the U.S. and Canada, and is growing in, among other jurisdictions, Germany, the Netherlands, and South Africa. It has the potential to impact significantly the litigation environment; for example, in the U.K., the presence of funders willing to invest in shareholders' collective actions is regarded as having been a fundamental ingredient in the rise of group investor actions in recent years.

The industry is still developing, with new entrants and types of investment continuing to change its boundaries and geographical reach.<sup>1</sup> Whilst there are some common threads, important local differences determine the use, form and impact of litigation funding in each jurisdiction, and its potential growth.

This paper provides an overview of litigation funding and discussion of its current and future impact in different jurisdictions worldwide.

## LITIGATION FUNDING BASICS

At its most basic, litigation funding involves an exchange between the disputing party and the funder. The disputing party receives funds from the funder (often to cover the costs of the dispute) and the funder receives a return on its investment, either as an agreed sum or as a share of the proceeds of the dispute. If the case is lost, the funder covers the costs or, depending on the costs rules applying to the dispute, the funding agreement may include After the Event (ATE) insurance to cover adverse costs orders. If the case is won, the disputing party will benefit from the proceeds, and the funding party will receive the fee previously agreed in the funding agreement. Third party funding can be used in both litigation and arbitration.

While the types of claims that are most commonly funded vary across funders and jurisdictions, generally, funders seek high-value litigation with the potential for greater returns.<sup>2</sup> Funding is common in consumer and shareholder collective redress actions, antitrust litigation, non-class action shareholder disputes and insolvency and liquidation proceedings.

Litigation funders have expanded into new areas by capitalising on legislative developments. For example, on 1 January 2016, a litigation funding firm, Hausfeld, launched in Germany, with funding provided by Burford *"in the wake of substantial activity from the European Commission and Bundeskartellamt, the adoption of the European Directive on Competition Damages Actions..."*<sup>3</sup>

## TYPES OF FUNDERS

The vehicles offering litigation financing are varied and growing. All the major players specialise in litigation funding, while other firms may include the funding of litigation within a diverse investment portfolio. Funders may be backed by institutional investors (publicly listed or private), a permanent capital vehicle, a private equity or hedge fund, closed end funds, either dedicated to litigation funding or with funding as part of their operations or a high net worth individual.

## WHO ARE THE FUNDERS? A SNAPSHOT

### • United States<sup>4</sup>

"Commercial" funders include two publicly listed companies, Juridica Investments and Burford Capital, recently joined by Bentham Capital, which is a subsidiary of Australian listed IMF Bentham Limited providing litigation finance for large disputes in the U.S. and international arbitration.<sup>5</sup>

Private-equity litigation funding firms include Parabellum Capital and Juris Capital.

"Law-firm" funders include Law Finance Group, Counsel Financial Services, Advocate Capital, Amicus Capital Services, and Appeal Funding Partners.

"Consumer" funders moving into business-to-business litigation financing by offering services to attorneys include LawCash, RD Legal Funding, Case Funding, Peachtree Financial Solutions, Ardec Funding, and American Asset Finance.



ASPENRE

- **United Kingdom**

The U.K. based Association of Litigation Funders (“ALF”) currently has seven funders as members, but that is likely to comprise only a fraction of the market. Its members are Burford Capital, Calunius Capital, Harbour Litigation Funding, Redress Solutions, Therium Capital Management, Vannin Capital, and Woodsford Litigation Funding.

One U.K. broker, The Judge, which specialises in ATE insurance as well as litigation funding, claims that there are more specialist litigation funding companies in the U.K. than in any other jurisdiction.

- **Australia**

One of the largest funders in Australia is IMF Bentham, which is Australia’s oldest funder and is listed on the ASX. IMF Bentham has a range of experience in funding class actions, commercial litigation and insolvency matters. Other large funders in Australia are International Litigation Partners, a Singaporean Hedge Fund, and Litigation Capital Management Finance which listed on the ASX in December 2016. Offshore funders, such as Harbour litigation funding and Burford Capital, are also prominent and growing.

- **Canada**

Numerous international funders have been involved in Canadian cases in the last 5 years, including Harbour Fund, Bridgepoint, Lexfund, Therium Holdings and Claims Funding International. In 2016, Bentham Ltd. opened a Toronto office. There are also a number of domestic entities such as Balmoral Fund and 2016 start-up Legalist, which uses big data and algorithms to predict chances of success when deciding which cases to fund.

## LITIGATION FUNDING - THE GLOBAL IMPACT

Litigation funders are entrepreneurial and able to utilise their knowledge and experience in the extraction of a commercial return from the claims process. They have contributed to and accelerated the spread of different types of claims and litigation from one country to another. Funders have linked with the American plaintiff bar, which is also exporting know-how and initiatives globally.

The impact of litigation funding goes beyond the introduction of capital to enable claims that might otherwise not have been pursued. This has industrialised the litigation process, feeding, in turn, its future development.

## THE GLOBAL SPREAD OF THE U.S. PLAINTIFF BAR - THE NETHERLANDS

Together, litigation funders and American lawyers have often demonstrated that they can work around local obstacles, and succeed in an otherwise inhospitable legal environment.

For example, the recently settled Fortis action<sup>6</sup> and the ongoing Volkswagen investor class action in the Netherlands have been run with the involvement of litigation funders and American lawyers. The Fortis settlement is a good example of funders taking an innovative approach to address restrictive local rules. Through a complex financing structure, the lawyers reportedly managed to be remunerated on a damages percentage basis, even though contingency fees are forbidden.<sup>7</sup> Another example of such innovation is the formation of the Volkswagen Investor Settlement Foundation in The Netherlands, which seeks to recover losses on Volkswagen securities that were publicly traded outside the U.S. under the Dutch Act on Collective Settlement of Mass Damages (“WCAM”). The American law firm financing the Foundation, Bernstein Litowitz, is also leading the class action in the U.S. regarding Volkswagen American Depository Receipts.<sup>8</sup>

The Olympus litigation in Japan is another example. American lawyers supported and directed strategy for the institutional investors who were represented by a local “front” law firm.<sup>9</sup> Other case examples of this transference of expertise include Petrobras and Tesco.<sup>10</sup>

## MAINTENANCE AND CHAMPERTY

Certain long-established legal principles have slowed but not stopped the spread of litigation funding and have been a crucial factor in determining the shape of the global litigation map. In particular, the torts of maintenance and champerty originated in England, and have historically prohibited unconnected parties from funding litigation. Maintenance is the act of a third party encouraging or maintaining litigation, usually by providing financial assistance. Champerty is a type of maintenance where a third party funds litigation in return for a share of any judgment proceeds. Maintenance and champerty are not permitted in Ireland and in respect of court proceedings in Hong Kong and Singapore and have accordingly acted as a barrier to the development of a funding market. For those countries where litigation funding is permitted, the approach can vary between and within the jurisdictions.<sup>11</sup> Most commonly, courts will consider whether financing arrangements are contrary to public policy and unenforceable as a result. A properly structured litigation funding agreement, which limits the level of interference with the control of the litigation and the relationship between client and lawyer, will not be deemed champerty or maintenance.<sup>12</sup>

## “THIRD PARTY” FUNDING - THE FUNDER/LAWYER DYNAMIC

Litigation funding is commonly regarded as referring to the provisions of financing by a third party not otherwise involved in the litigation. Such funding arrangements are conceptually (and in many jurisdictions, due to the bar on contingency fees, necessarily legally) distinct from the situation where a plaintiff law firm funds the litigation, usually on a “no win, no fee” basis. While funding of litigation has long been a feature of American litigation, this has typically been provided by the plaintiffs’ bar via the mechanism of contingency fee agreements - i.e. by the plaintiff law firms funding both class actions (whether industrial disease claims, shareholder actions or mass tort claims) and individual commercial cases. Litigation funders are increasingly becoming part of the litigation landscape in the U.S. and, in many cases, the scope of their involvement is driven by what is permitted under law firm ethical rules.<sup>13</sup> Increasingly, funders are providing capital directly to law firms on a recourse basis, or on a non-recourse basis across a multiple portfolio, but, again, the investment in law firms seen in other jurisdictions is limited by the legal ethics rules preventing fee-sharing.<sup>14</sup>

Outside of the U.S., litigation funding has developed in a different way - specifically, with a separation of capital and control (at least direct control) over the litigation. For example, due to the prohibition on contingency fees in Australia, litigation funding first rose in prominence in that jurisdiction to assist company administrators and liquidators to pursue debts on behalf of creditors. Contingency fees are barred in Germany and the conservative legal culture has almost certainly also slowed the spread of third party litigation funding.

In Canada, direct financing by law firms of class actions is common. Contingency arrangements are frequent and it is not unusual in class actions for the plaintiff bar to keep some of the risk and reward inherent in those arrangements by choosing to fund any cash flow gap with a loan rather than through a funding arrangement. Several provinces also have public funds that can provide finance and indemnities against costs for class actions that meet specific criteria in return for a share of the recovery. England has perhaps leapfrogged Australia, as it permits lawyers’ contingency fees in the form of damages based agreements (DBAs). Under DBAs, the lawyer does not charge the client as the matter progresses, but receives a percentage of damages (the “contingency fee”) in the event of a win. Take up of such arrangements has, so far, been low, with uncertainty over whether firms are permitted to enter into concurrent hybrid DBA arrangements, which would allow firms to charge both on a time and a contingency basis, being a key factor.

Costs’ rules have had a significant influence on how litigation funding has developed. Outside the U.S., the “loser pays” principle has been attractive to funders and assisted in the development of funding models covering adverse costs risks. Even where there are few restrictions and the costs rules are favourable, a litigation culture is required to fuel demand.

## THE GLOBALISATION OF SECURITIES CLASS ACTION LITIGATION - THE ROLE OF LITIGATION FUNDING

The growth of litigation funding has been fuelled by, and contributed to, the spread of class or collective actions around the world. Securities class action litigation against entities and their Directors & Officers (D&Os) is a global issue, and developments in one part of the world may significantly impact other jurisdictions. This is perhaps best illustrated by the decision of the U.S. Supreme Court in *Morrison v. National Australia Bank*.<sup>15</sup> *Morrison* broadly held that the U.S. courts do not have jurisdiction over claims by non-US investors who purchased their shares in a non-U.S. company outside of the U.S. As a result, foreign investors who purchased shares in a foreign company on a foreign exchange, cannot pursue claims in the U.S. courts and must look elsewhere for redress. This has been one of the drivers behind the growth in collective actions in England, including the Tesco action, which has been in part fuelled by the inability of investors who purchased shares on the London Stock Exchange (LSE) to join the proceedings filed in the U.S.

*Morrison* also contributed to a growing interest in utilising the collective action regime in the Netherlands and the collective settlements procedure under WCAM, and its impact has undoubtedly played a part in the landscape of the VW litigation. The role of third party litigation funders has been a core part of the development of securities class actions in Australia, and has been pivotal in the development of collective actions against financial institutions and commercial entities and their D&Os in England.<sup>16</sup> Litigation funders (and in some cases the U.S. plaintiff bar) are extending their territorial reach, and are front and centre in some of the largest multi-jurisdictional claims against companies and directors, with the VW litigation in Germany, the Netherlands and the United States being a prime example.

### United States

The U.S. has a long history of third party funding. A recent survey conducted by Burford Capital reports that nearly 30% of private practice attorneys and firms report using litigation funding – this covers contingency fees and the use of third party funders.<sup>17</sup> As the rules on champerty and maintenance have been relaxed or abolished, a third party litigation funding market has developed for private litigation, class actions and international arbitration. The market for third party funding currently includes consumer and commercial funders as well as funders offering financing to law firms. Financing can include recourse, non-recourse, single case and portfolio financing.

The development of third party funding has not been without controversy with those opposing its development pointing to the lack of visibility and regulation as compared to the plaintiff bar.



## Canada

Similarly to the U.S., Canada has a developed class action regime, and litigation funding is an important and growing part of the class action landscape. Funding for individual commercial actions was recognised by the Ontario Supreme Court in 2015.<sup>18</sup> In contrast to the U.S., adverse costs awards are the norm in Canada, and there is a developed ATE market to cover those costs, which has, in turn, driven the extension of funding arrangements to enable the funders to take a slice of the damages.

While the Canadian courts have regularly approved third party funding agreements for class actions, they continue to contend with issues concerning funding arrangements, disclosure, privilege, representations and the scope of funder's rights.<sup>19</sup>

## England and Wales

The litigation funding industry is well established, and litigation funders are involved in funding a wide range of disputes, ranging from collective redress to individual commercial claims and arbitrations, and providing funding to both plaintiffs and law firms. Funding is increasingly offered on a portfolio basis, enabling funders to finance lower value claims, and litigation financing is becoming increasingly popular. The MasterCard claim, (Walter Hugh Merricks CBE v Mastercard Incorporated and Others) brought on behalf of British debit and credit card holders using the recently introduced collective action regime in the Consumer Rights Act 2015, is funded by Burford.<sup>20</sup>

## Scotland

Unlike in England and Wales, the historic prohibition of maintenance and champerty is not a part of Scots law. Whilst there is no prohibition or restriction of third party litigation funding, the courts will not enforce any funding agreement which is contrary to public policy. Where a funder is deemed by the court to be in control of the proceedings and to have a direct interest in the subject matter, the court can find the third party funder liable to pay the opponent's judicial expenses. Such a finding can be made even where it is contrary to the terms of the litigation funding agreement. This, however, is rarely done in practice.

Third party litigation funders are common in Scotland, particularly for personal injury claims. Personal injury solicitors will often be affiliated with a particular litigation funder who will fund the litigation and meet any adverse costs if the action is not successful. Third party litigation funders such as Quantum, Compensate and Restitution are used in Scotland. Other English funders are known to be expanding into Scotland.

On 3 June 2017 the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill was introduced. The Bill allows for multi-party actions to be brought in Scottish courts for the first time. It will also allow solicitors to enter into damages based agreements with their clients. Such agreements between solicitors and their clients are currently unenforceable in Scotland. If the Bill is enacted, these changes may increase interest in third party litigation funding in Scotland, either

as stand-alone funders, or in collaboration with Scottish solicitors.

## Ireland

As confirmed in May 2017 by Ireland's Supreme Court in *Persona Digital Telephony Ltd v Minister for Public Enterprise*, maintenance and champerty remain part of Irish law and litigation funding is, therefore, prohibited.<sup>21</sup>

## France

Litigation funding is permissible in France, but the market remains largely undeveloped, with the relatively low costs of litigating likely being a factor. Alter Litigation is the first major litigation funder in France. Lawyers are prohibited from entering into "no win, no fee" arrangements as it is only possible to have a success fee if a fixed fee will be paid in any event.

## Germany

The torts of maintenance and champerty do not exist in Germany, and third party funding is widely accepted. However, the use of litigation funding is still developing and is not common outside of cases relating to bank loans, cartel cases and, more recently, the Volkswagen investor and consumer collective claims. The latter is being funded by the consumer platform [www.myrights.de](http://www.myrights.de) on the basis of a 35% success fee. No legislative or regulatory provisions exist, but court decisions have looked at issues such as what amounts to a reasonable share of the proceeds. It is not uncommon for funders to purchase claims directly.

## Spain

Parties have considerable flexibility in choosing the manner in which they wish to fund their case, but the litigation funding market is still developing. Contingency and success fee structures are available but remain rare in practice, having been prohibited until recently.

## The Netherlands

With the exception of collective actions, litigation funding is not common in the Netherlands. It is, however, a growing market and funders are prepared to purchase claims directly. "No win, no fee" arrangements are prohibited for lawyers, but it is possible to use a form of conditional fee agreement to cap fees on the basis that the cap will be dispensed with if the litigation is successful. There are instances where Dutch foundations will "bridge the gap" and contract with the clients on a "no win, no fee" basis and on an alternative basis with the lawyer.

## Poland

Litigation funding is permitted but not common in Poland. A lack of predictability in judicial outcomes, and delays in proceedings have made the jurisdiction unattractive to funders.

## Australia

Increasingly, and particularly in the context of class action proceedings, litigation funders play a significant role. A recent study found that almost 50% of federal class actions in the last six years were funded.<sup>22</sup> Funding is common across all



types of claim and is particularly prevalent in the insolvency context. There is a long held view that litigation funders will bring greater numbers of class actions on behalf of people injured in major industrial accidents and mass latent injury claims. Securities class actions are regarded as simpler in terms of assessment of damages and the identification of a class than other mass claims, such as products and cartel claims.

The proliferation of class action law suits in Australia has created a lucrative environment for litigation funders. Well-established firms are actively competing against new entrants in the market for opportunities to fund litigation. Although contingency fees are not permitted, risk sharing between funders and law firms does take place on a “no win, no fee” conditional basis.

### India

Litigation funding is currently not permitted in India and contingency fees are banned. Tentative steps have been taken towards admission of foreign law firms which are currently prohibited. In the absence of reform of the fees system, a plaintiff lawyers’ market is not anticipated.

### Hong Kong

Third party funding of commercial disputes is generally not permitted in Hong Kong. There are limited exceptions, however, including insolvency proceedings to enable liquidators to pursue various claims. It remains to be seen what exact boundaries on litigation funding will be acceptable to the higher courts. Hong Kong has recently taken steps to permit litigation funding for arbitration.<sup>23</sup>

### Singapore

Third party funding is prohibited in Singapore unless the funder can show a genuine commercial interest in the dispute. Contingency fee arrangements with lawyers are not allowed, but litigants are able to purchase ATE insurance to protect against the risk of having to pay the other side’s costs. From March 2017, litigation funding has been permitted for international arbitration and related court and mediation proceedings.<sup>24</sup>

### People’s Republic of China

There are no laws expressly prohibiting litigation funding in China, but there are currently no professional funders active in the market for litigation/arbitration.

### Dubai International Financial Centre (“DIFC”)

DIFC legislation does not address third party litigation funding, but there is a significant developing interest. Unlike onshore UAE proceedings, a successful party in DIFC Court litigation is generally able to recover legal costs, and funders tend to view the litigation process, which is closely modelled on the English Commercial Court, the common law system and experienced international judiciary, as providing greater certainty of outcome. The recent DIFC Court case of *Al Khorafi v Bank Sarasin*<sup>25</sup> is known to have involved a litigation funder.<sup>26</sup> From our discussions with funders we believe there are other extant cases currently before the DIFC Courts that are third party funded. Arbitration funding is also an active market in the Middle East.

While there is no express DIFC legislation dealing with litigation funding, in a signal that it is seen to be accepted in the DIFC Courts, a recently issued procedural Practice Direction requires a party using third party funding in respect of litigation in the DIFC Courts to disclose the fact of the funding to the other parties. It also expressly confirms that the courts have the power to order costs against a non-party.<sup>27</sup>

Pure contingency fee arrangements for legal representatives acting in litigation in the DIFC Courts are not permitted.

### United Arab Emirates (“UAE”)

Litigation funding is not prohibited under UAE law, but it is still very rare. Whilst the UAE onshore regime has potential, funders treat it with extreme caution given the procedural challenges and the general perception that it is a relatively high litigation risk.

Pure contingency fee arrangements for legal representatives acting in litigation in the UAE courts are not permitted.

### South Africa

Contingency fees have been permitted for some time in South Africa, but the exact parameters of litigation funding remains subject to debate. Following the relaxation of the rules against champerty in 2014, a nascent litigation funding industry has become a driving force behind some of the largest claims before the South African courts, with current funders currently numbering approximately four.

The ongoing *Nkala and others v Harmony Gold Mining Company Ltd* class action is run by a South African plaintiff law firm backed by funding from the U.K. and U.S., and strengthened by relationships with American attorneys developed through asbestosis litigation. Going forward, we may well see scope for litigation funding in insolvency litigation as well as for class actions related to environmental pollution and consumer product recalls.

### Brazil

Third-party funding is neither formally prohibited nor legally permitted in Brazil. At present, there are only a few funders operating in the Brazilian market. Leste Credit is a subsidiary of Brazilian LesteGroup dedicated to investing in legal disputes in cooperation with U.K. based funder, Woodsford Litigation Funding.<sup>28</sup>

## EFFECT ON THE DYNAMICS OF LITIGATION - A DEFENDANT’S PERSPECTIVE

There is no doubt that the presence of a litigation funder changes the dynamics of the litigation process. While the ultimate impact of litigation funding will be highly fact and jurisdiction specific, we highlight some key considerations for defendants. The experience and quality of funders also varies widely and this will have an impact on how the plaintiffs’ case is run.

- **Funder presence**

Where a litigation funder is involved, defendants should consider how this may impact the plaintiffs’ approach to the litigation and their own tactics in responding to and resolving the claim. In many cases, particularly in private



litigation, and in jurisdictions such as Germany where there is no disclosure regime, defendants will only have a suspicion or will simply not know whether a funder is involved.

- **Early tactics**

Defendants may consider raising strong defences very early in the proceedings to prompt early settlement negotiations.

Any result will need to not only be acceptable to the plaintiff (and, in class action cases, its group members), but also ensure a commercial return for the funder. This should be factored into any settlement strategy.

Where the claim is strong, defendants may consider applying costs pressure on the funder through, for example, security for costs, where available, against a funder.

Defendants should also consider the possibility of raising defences which go to the relationship between the plaintiff and the defendant and are more difficult for the funder to evaluate.

- **Case management**

The structure of the funding agreement may impact on how the case is staffed by the plaintiff law firm.

Consideration should be given to the impact of funding on case resourcing on both sides. For example, defendants might consider whether there will still be opportunities for defendants to serve plaintiffs with disclosure/witness statements that may cause the plaintiff to lose the appetite to continue due to dwindling funds.

- **Settlement dynamics**

The funder is likely to be front and centre in settlement negotiations. Funder involvement will change the percentages of recovery, driving the strategy in any given case. Whilst the pressure points will shift, they will still exist. For example, there will be some cases in which it may make sense for the defendants to sit tight because the economics only work for the plaintiffs if early settlement is achieved.

- **Costs**

In England and other countries with a “loser pays” principle, case law has shown that funders can, in the right case, be ordered to meet adverse costs awards, but the case law in these jurisdictions is still developing.

## DEVELOPMENT OF LITIGATION FUNDING - THE FUTURE

Despite a number of well-publicised failures, business is booming for litigation funders. In reality, even these failures may amount to no more than a form of “natural selection”, inherent in any growing market.<sup>29</sup> There has been an increasing internationalisation of litigation funders backing proceedings and collecting claims in a number of jurisdictions, and it appears that this trend will continue.

It will be interesting to see whether the litigation funding market develops into the “litigation finance” market many anticipate. It is becoming increasingly regarded as an attractive option for corporations wishing to invest their

capital elsewhere, rather than tying it up in litigation, with sophisticated users of litigation finance utilising a pending dispute/portfolio of claims as a contingent asset to raise capital.

Funders are diversifying their investments and moving into new products, such as appeals hedging and monetisation and global judgment enforcement. They are also becoming increasingly creative in how they fund cases. For example, they may fund part of the claim or only disbursements, and provide appeal and post settlement financing (which bridges the gap between judgment and recovery of the settlement sum).

Funders are also increasingly looking at taking on claims portfolios, where they may be willing to accept higher risks on some cases, in the expectation of higher returns on others. Typically, the portfolio is structured so that if the first case loses, then the funders’ outlay is added to the general amount outstanding, and the funder will be paid from the next case that wins. Litigation funder Burford Capital announced in January 2016 that it had agreed to provide \$45 million of funding to a U.K. FTSE 20 company (reported to be BT)<sup>30</sup> to finance a ‘portfolio’ of litigation<sup>31</sup>, and Burford has also funded Grant Thornton’s insolvency litigation portfolio.<sup>32</sup> However, the rate and spread of this type of funding is not uniform, and it is not yet commonplace in Canada and Australia. There is also a growing industry for brokers who link litigants and investors. We anticipate that we will also see more direct funding to, and investment in, law firms, where permitted. In the U.K., Burford Capital has taken steps to set up its own law firm.<sup>33</sup>

Plaintiff law firms and litigation funders jointly advertising for potential claims and recoveries following high-profile events is likely to continue to develop. The VW shareholder litigation in Germany and The Netherlands has the potential to be a game changer for litigation cultures in those countries. In contrast, the RBS Rights Issue Litigation in England originally grew out of “grass roots” retail shareholder action groups, rather than the initiative of institutional investors, as in the Tesco claims in the U.K. The Nkala action is another example of funders and law firms spending considerable time seeking potential plaintiffs to join the class.

## ARE THE VULTURE FUNDS CIRCLING

Public company failures have provided an opportunity for funds, commonly referred to as “vulture funds” to pick over the carcasses and buy up the debt in an amount that provides them with enough control to bring a claim, typically against the entities’ directors and auditors. In some instances, funds have bought the debt in several companies to fund claims against a professional services firm defendant run as a portfolio.

In Canada, a funder may sue in the name of the undertaking in exchange for an agreement to fund the litigation and, subject to the approval of the bankruptcy court, will take a super priority in the recoveries. The question of whether the funder can be regarded as the plaintiff in this situation has not been fully decided, and is currently at issue in the *Deloitte & Touche v. Livent Inc.* litigation in which the Supreme Court’s decision is awaited.<sup>34</sup>



In October 2016, Australia's federal court stayed an action as an abuse of process, where the funder, Melbourne City Investments ("MCI"), had purchased a small parcel of shares in a publicly listed company and then instituted group proceedings with the funder's sole director and shareholder retained as solicitor in the litigation. The court found that the sole purpose of the creation of MCI was to buy up shares and bring class actions as lead plaintiff to enable legal fees to be earned.<sup>35</sup>

Although some litigation funders offer funding to defendants, this is not common, due in part to difficulties around benchmarking success, although portfolio funding offered to law firms or corporations increasingly includes some defendant claims. Insurers may also look at litigation financing options for pursuing subrogation claims, and some global law firms view this as a potential area for growth.

The growth of litigation funding has not been without its critics. The industry remains very lightly regulated. Most countries have no legislative or regulatory provisions applying to the sector, and there have been calls for regulation in a number of countries to address issues as varied as control, registration and minimum capital requirements.

The use of litigation funding in class actions will continue to be an area ripe for further consideration by the courts, both in the U.S. and elsewhere, and we predict that issues such as disclosure of funding agreements, the reasonableness of settlements and fee recovery will continue to be hotly contested.

## ADDENDUM

### LITIGATION FUNDING BASICS - STRUCTURE AND RATE OF RETURN

The process of tendering for and securing financing is broadly similar for all funders. First, the funder undertakes a high level analysis of all aspects of the claim, and is also likely to obtain input from lawyers in support of the viability of the proposed action. Preliminary terms of agreement are drawn up between the plaintiff and the funder. Next, the funder spends a period - typically between three weeks and three months completing a more thorough investigation of the claims (due diligence), after which the terms of agreement are accepted, modified or rejected.

Key factors funders consider when evaluating a claim include:

- any potential issues with enforcement of the award or judgment;
- the merits of the claim itself, including jurisdiction, liability and facts;
- a reasonable estimate of the quantum, depending on the damages claimed;
- the solvency of the defendant; and
- issues relating to the process of the dispute, such as legal or other costs, the likely duration of the case, rights of appeal, and, if an arbitration, the arbitrators involved.

Funding agreements usually follow a simple formula:

- Estimated cost of case is X.
- Estimated quantum is Y.
- The funder will cover the costs and: (a) if the case is won, the funder receives a multiple of X or a percentage share of Y, or some combination of the two; (b) if the case is lost, the funder absorbs the costs. The terms of a funding agreement, however, can vary greatly depending on the characteristics of the claim and the funder. For example, the agreement may include a time variable whereby the percentage of damages the funder receives increases as time passes and more money is invested in the claim, or a quantum variable which provides for a different percentage recovery for the funder on separate portions of damages.

Funding agreements in the U.S. and U.K. are typically accompanied by a non-disclosure agreement to protect the agreement from disclosure to the other party in the litigation.

A typical return is reportedly 20-40 percent<sup>36</sup> of the expected gross judgment or settlement of the case, with an uplift if the case takes longer than expected to be resolved, or costs more than initially budgeted. Depending on the case, the rate of return can be much higher. In 2014, Burford Capital publicised the outcome of an arbitration in which it funded Rurelec PLC regarding a dispute against the government of Bolivia. Burford earned a 73% return on its initial investment of \$15 m, receiving a total of \$26 m of the award.<sup>37</sup>

Such high rates of return have caught the eye of legislatures. In the U.S. in late 2015, Senate Judiciary Committee Chairman, Chuck Grassley, and Senate Majority Whip, John Cornyn, asked three funders in the U.S. to disclose their returns on investments, as well as many other terms of their funding agreements as part of an ongoing investigation into



the industry amid growing concern about the impact of litigation funding on the civil justice system.<sup>38</sup> In Australia, in January 2017, the Victorian Government asked the Victorian Law Reform Commission to review litigation funding practices in Victoria<sup>39</sup> following cases such as the Huon litigation in which an entire \$4.5m settlement was split between the lawyers and the litigation funder.

## LITIGATION BASICS: PRE-LITIGATION FINANCE

Before committing to litigation, funders may also provide funding to identify whether a case is worth running. One funder, Augusta Ventures, is offering such pre-litigation finance as a standalone option in the U.K. for cases of less than £1m.<sup>40</sup> We are not aware of any funders offering pre-litigation funding as a standalone product in the U.S.

Financing disputes at such an early stage, when facts or points of law relevant for the outcome remain unknown or undecided, is subject to a significant degree of uncertainty and might be regarded as high risk. Therefore, pre-litigation funding may be more attractive to funders as part of a portfolio.<sup>41</sup> The funder's relationship with the law firm, and the evidence available to support the merits, are factors to be considered before funding pre-litigation steps. In the U.K., if a litigation funder agrees to provide pre-litigation financing, it is not uncommon for this to be on terms requiring that if the claim proceeds (even without the funder's involvement) it will receive a return of two or three times the amount of the pre-litigation funding provided.

Pre-litigation financing may be offered as an option in a number of jurisdictions: in Australia it is offered as a funding option (typically a budgeted sum to investigate the merits of a case and modelling to see if it is worth pursuing) on a non-recourse basis. The litigation mechanisms in place in a particular jurisdiction will play a part in both the promotion and uptake of this funding option.

This type of funding is not common in class action litigation in Canada, where short limitation periods and the absence of pre-action mechanisms increase the likelihood that in-depth merits analysis and identification of any additional targets in the litigation will only likely take place once the class action has been filed.

## LITIGATION FUNDING - SHAREHOLDER COLLECTIVE ACTIONS IN THE U.K.

Some of the most high-profile collective actions being pursued in the U.K. with the benefit of litigation funding are:

- Royal Bank of Scotland (RBS) – claims for c.£1.2bn against RBS on behalf of more than 100 institutional clients and 35,000 individual shareholders in relation to RBS' 2008 rights issue following the acquisition of ABN Amro. The majority of shareholder groups settled with RBS in either December 2016 (for 41.2p per share), April 2017 (for 43.2p per share) or June 2017 (for 82p per share).<sup>42</sup> The trial, which had been scheduled for May 2017, has been vacated. Only a handful of investors remain and they have been given until July 2017 to prove that they can fund the continuation of their claims. (Funders: Hunnewell Partners (BVI) Limited and London and Northern Capital Partners Limited).

- Tesco – claim for c.£100m against Tesco on behalf of more than 125 institutional funds in relation to Tesco's £263 million over-statement of profits in October 2014, which allegedly resulted in a significant fall in its share price. (Funder: Bentham Europe).

## LITIGATION FUNDING FOR INTERNATIONAL ARBITRATION

The market for financing international arbitration is rapidly evolving. Initially, third party funding was introduced to resolve an inability to recover the costs of arbitration. Today the market is sophisticated and has developed into arbitration finance in a similar manner to litigation. Funding is likely to be under consideration in most investment treaty cases and in all of the major centres for arbitration.

The Middle East is an active market for funding of international arbitration, while interest is growing in Asia. This trend is likely to continue, particularly now that the rules have been liberalised in Hong Kong and Singapore.

The main institutional rules do not expressly address third party funding arrangements and funding options will depend on factors such as the location of the parties, the seat of the arbitration, the laws of the seat and where enforcement will be sought.

In the international arbitration sphere it is becoming 'the norm' for parties to at least consider seeking funding for part or all of their case. Funding is increasingly seen as a means of sharing the risk and allowing parties to focus finances on the business rather than the dispute. The key arbitration jurisdictions of Hong Kong and Singapore have recently enacted legislation to allow third party funding of arbitration – they have adopted a cautious approach but recognised that this step was necessary to maintain their growth as arbitration centres. International arbitration funders are also increasingly considering portfolio funding, rather than only considering individual disputes. In the context of investment treaty arbitration, ICSID are in the process of consulting on their Arbitration Rules and will consider whether the rules should provide for funding, perhaps to enable tribunals to order that any funding arrangements will be disclosed. These revisions will likely come into force in 2018.



## COUNTRY FOCUS

### UNITED KINGDOM

#### *Is litigation funding regulated?*

Litigation funding is not currently specifically regulated, and the Ministry of Justice stated in January this year that the case “was not yet made” for regulation.<sup>43</sup> The Association of Litigation Funders provides a form of self-regulation for members via a Code of Conduct, and courts may apply existing law to funding arrangements. For example, U.K. courts have discretion to issue an order for costs against a non-party, such as a funder.

Litigation funding by solicitors and barristers is not permitted with the exception of conditional fee agreements (CFAs) and damages based agreements (DBAs).

Funders registered and based in the U.K. are regulated to some extent by the Financial Conduct Authority as investment firms, but the litigation funding product is not.

#### *Are there rules governing the disclosure of funding agreements?*

There is no express obligation on a litigant to disclose either the fact of litigation funding or the funding agreement itself to the opposing party or to the court.

There has been concern as to whether a funded party's privilege is lost where documents concerning the case are communicated to the third party funder. However the documents will generally retain their privileged status as against the world and the funder is obliged not to disclose them to anyone.

#### *What are the costs rules applying to litigation?*

The usual costs position in England and Wales is that the winning party can reclaim costs of the litigation from the losing party. CFAs permit the lawyer to charge their base fee for the case plus a success fee which comprises a percentage uplift on those fees (capped at 100%). Prior to 2013, it was possible for a successful party to recover both the success fee and any after-the-event (ATE) insurance premium from the losing party. Following reform of the litigation system in 2013, plaintiffs must bear the cost of their own ATE insurance premiums and their lawyers' success fee as they are no longer recoverable from the losing party. These changes markedly worsened plaintiffs' potential costs exposure, resulting in increased demand for third party funding.

#### *Do any particular issues arise in relation to class (or collective) actions?*

There are no provisions or judicial decisions on litigation funding that are specific to collective actions.

#### *Can the funder be required to pay security for costs?*

The defendant can seek security for costs against a litigation funder under CPR rule 25.14. For example, in *The RBS Rights Issue Litigation* the Court ordered security for costs against one of two funders and drew distinction between a purely commercial funder and a funder associated with a well-known business man and philanthropist.<sup>44</sup>

The Courts have recently considered the question of compelling disclosure of the identity of a funder in the context of an application for security for costs and concluded that they have power to do so.<sup>45</sup> It is clear, however, that the application

for disclosure must not just be tactical, and the application for security must have at least a realistic prospect of success.<sup>46</sup>

#### *Can the funder be held liable to pay adverse costs?*

*Arkin v Borchard Lines Ltd and Others*<sup>47</sup> provided that a funder could be liable for adverse costs, but, absent impropriety or active involvement in the proceedings, the funder was only liable for costs up to the amount of its investment in the claim (the Arkin cap). This principle was affirmed in *Excalibur Ventures LLC v Texas Keystone Inc and others*<sup>48</sup> in which the Court held that where costs were awarded against the funded party on a more onerous (an indemnity) basis, the funder will normally be liable on the same basis.

## UNITED STATES

#### *Is litigation funding regulated?*

Currently, there are limited regulations in the U.S. addressing litigation funding. With the recent growth of the U.S. litigation funding market, there are growing concerns about issues of (i) control over suits; (ii) conflicts of interest; (iii) fee-sharing arrangements; (iv) privilege and confidentiality; (v) disclosure of funding; and (vi) liability for costs. At present at least 10 states have adopted laws regulating the extension of cash advances to plaintiffs awaiting settlement pay-outs.<sup>49</sup> Also, the Consumer Financial Protection Bureau (CFPB) is reportedly investigating the industry in order to address excesses, and it recently brought a number of actions involving post-settlement and structured settlement funders. In 2012, the United States Chamber Institute of Legal Reform suggested a number of changes including: limits/prohibitions on investors' control of proceedings; banning contact between third party funders and lawyers when the client is not present; banning law firm ownership of third party funders; and requiring full disclosure of funding arrangements.<sup>50</sup> In June 2017, it wrote to the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts to renew its proposal for amending the Federal Rules of Civil Procedure to require the disclosure of third-party litigation funding arrangements in any civil action filed in federal court.<sup>51</sup>

In the U.S., funders cannot appoint or dismiss counsel, make settlement decisions or direct strategy because, in addition to the champerty rules, this may violate the ethical duties of loyalty and independence of attorneys.

#### *Are there rules governing the disclosure of funding agreements?*

The disclosure requirement landscape continues to shift. The Advisory Committee on Civil Rules (Federal) has considered the issue of automatic initial disclosure of funding agreements and it remains on the agenda. The Fairness in Class Actions Litigation Act of 2017,<sup>52</sup> proposed in the House of Representatives, includes provisions requiring third party funders to promptly disclose to the court and all parties in all class actions any entity with a “contingent right to receive compensation” from any settlement, judgment or other relief.

Concerns over waiver of privilege may limit what a funder can see, as there are doubts as to whether attorney-client privilege will protect from disclosure documents given to funders. However, there is case law suggesting that documents



reviewed by litigation funders may be protected under the work-product doctrine.

*What are the costs rules applying to litigation?*

In general each party bears its own costs and parties are not entitled to costs recovery unless statute or regulation provides otherwise.

*Do any particular issues arise in relation to class (or collective) actions?*

A number of cases have addressed disclosure of litigation funding in the context of class certification and whether the funding agreement had relevance to the adequacy of the plaintiff counsel's resources to prosecute the action. In *Kaplan v S.A.C. Capital Advisors*,<sup>53</sup> a New York federal judge dismissed a defendant's request to compel the production of funding information, finding that defendants provided "no non-speculative basis for raising such concerns" about the funder's resources, control, or ability to adequately represent the class. However, another federal judge in California held in *Gharbe v Chevron Corp.*,<sup>54</sup> on a motion to compel, that a defendant was entitled to discovery of a claimant's litigation funding agreement. The court held that "under the circumstances of this case, the litigation funding agreement is relevant to the adequacy determination" for class certification. In that case, however, the plaintiff conceded the funding agreement's relevance, and simply cited a contractual duty of confidentiality. The court reasoned that the confidentiality provision did not prohibit the plaintiff from producing the agreement.

*Can the funder be required to pay security for costs?*

Courts do not generally order a party to pay security for costs unless a party is seeking a preliminary injunction or temporary restraining order.

*Can the funder be held liable to pay adverse costs?*

Generally the losing party does not pay the successful party's legal fees, except in certain specific cases. The court, however, does have discretion to order that the unsuccessful party pay legal fees if they engaged in frivolous conduct in the litigation. There is no published case applying New York law holding a third-party litigation funder liable for adverse costs including attorney's legal fees. A funding agreement might address this issue and whether a funder would be liable for any adverse costs orders.

## CANADA

*Is litigation funding regulated?*

There are no specific statutory or regulatory provisions governing litigation funding. Legislation does govern the parameters of lawyers' fee arrangements, usually providing for court oversight. However litigation funding is regulated by the courts, particularly in the context of class action litigation. The applicable principles have developed (and continue to develop) on a gradual, case by case, basis.

While not abolished, the rules on champerty and maintenance have been relaxed (this varies by province) as a matter of common law. The courts, especially in the context of class actions, exercise oversight on funding arrangements and recovery levels. There is a reluctance to sanction a percentage

recovery by funders that is considered too high (generally above 50%, and less for class actions).

A funding agreement must not impair the lawyer and client relationship or the lawyer's professional duties, and must not diminish the representative plaintiff's right to instruct and control the litigation, following *McIntyre Estate v Ontario*<sup>55</sup> and *Schenk v Valeant Pharmaceuticals*.<sup>56</sup> *Schenk* is a private litigation matter and is regarded as paving the way for greater use of funding in non-class action commercial litigation. The case also shows that the courts may intervene on the question of a fair return to the client as the approval of the funding agreement was denied by the court (but the rate of return was amended in accordance with the court's decision).

Regulators have started to investigate and examine the products; for example *Bridgepoint* was issued with a cease and desist order by the Ontario and British Columbia regulators in 2016<sup>57</sup> for offering a product which was considered to be a contract of insurance.

*Are there rules governing the disclosure of funding agreements?*

The courts' approval of the funding agreement is required in class actions, and privilege can be waived by seeking court approval (even where this is done on an ex parte basis).<sup>58</sup> There are divergences between the Canadian provinces on this point. This is an issue that is examined on a case by case basis – the court may ask to see the documents in order to determine what parts, if any, are disclosable.

*What are the costs rules applying to litigation?*

Costs follow the event in Canada (although costs recovery is limited by tariff in Quebec). These cost shifting rules have assisted in developing the litigation funding market in Canada, which started from the provision of ATE insurance to cover adverse costs risk. This protection is particularly attractive in class action litigation, where the lead plaintiff is putting their name to a statement of claim, and is potentially at risk of a large adverse costs order. It is also developing as a commodity product in personal injury claims.

*Do any particular issues arise in relation to class (or collective) actions?*

Courts in class actions have a statutory duty to consider and regulate the remuneration of attorneys under contingency fee agreements and any contracts for litigation funding. Litigation funding agreements call for court approval as the judge is required to protect general members of the public who are potential members of the class. Approval can be sought before certification, and the Court must be satisfied that the agreement is fair and reasonable to the class.<sup>59</sup>

What is reasonable will depend on the facts. Public class action funding (Ontario/Quebec) takes 10% and is treated as an informal benchmark in class actions, as the courts generally take the view that the private market should be more competitive than public funds: a 7-8% rate of return should be appropriate. Recently, the Ontario courts have applied a greater degree of scepticism when reviewing agreements.

*Can the funder be required to pay security for costs?*

Yes. In some cases this may be a condition of approval of the funding agreement by the Court.<sup>60</sup>



*Can the funder be held liable to pay adverse costs?*

ATE insurance is becoming more common to protect against adverse cost risk. In the class action context, typically class counsel will indemnify the representative plaintiffs against an adverse costs award and is, in turn, indemnified by the third party funder. This creates huge risk for plaintiff counsel and the courts have therefore been concerned to ensure that the funders' indemnity can only be withdrawn upon reasonable grounds.

## AUSTRALIA

*Is litigation funding regulated?*

There is no mandatory licensing or supervision of litigation funding. However, funding arrangements are monitored by the Australian Securities and Investments Commission (ASIC) which requires funders to have adequate arrangements for managing conflicts of interest.<sup>61</sup> Due to provisions in the Corporations Act, 2001 most funding arrangements entered into by liquidators will require the approval of the court.

The courts also exercise a degree of supervision over funding arrangements, particularly in the context of class actions. While the torts of maintenance and champerty have been abolished in some states and relaxed in others, the funding contract must still be consistent with public policy considerations.<sup>62</sup>

In *Tamaya Resources* the court refused permission to amend the pleadings where the funder was acting on both sides of the record in two actions arising from the same factual dispute but commented that "the desirability of permitting such arrangements is something which warrants investigation by the legislature".<sup>63</sup>

*Are there rules governing the disclosure of funding agreements?*

Parties to class actions proceeding in the Federal Court will be subject to a requirement to disclose any litigation funding agreement (by which litigation funding is to pay or contribute to the costs of the proceedings at/prior to the initial case management conference). In all other cases, disclosure is generally not required. Where disclosure takes place the agreement will usually be heavily redacted on the grounds of privilege.

*What are the costs rules applying to litigation?*

Costs follow the event in Australia, so usually the losing party will be required to pay the winning party's costs.

*Do any particular issues arise in relation to class (or collective) actions?*

The Federal Court Act of Australia 1976 provides that the court must approve the settlement or discontinuance of a class action. A key question is whether the court will approve the funding commission set out in the agreement, typically at settlement or after judgment.

Prior to the decision in *Money Max* in October 2016 funders could only recover fees from those who had entered into a funding agreement with them.<sup>64</sup> Consequently, class actions had largely proceeded on the basis of a closed class where all members had signed up to the funding agreement. However, in *Money Max*, the court approved an application for the class action to be conducted on a common fund basis, enabling

the burden of the funder's fee to be spread across all class members who stand to benefit from the action whether or not they have signed up to a funding agreement (although those who do not agree can opt out). The court will intervene to ensure that the rate of commission is reasonable. In *Blairgowrie Trading Ltd v AllCo Finance Group Ltd* the court found that 30% of the net settlement sum (after deduction of legal costs) was reasonable.<sup>65</sup> This potentially paves the way for class actions to be started sooner, as the plaintiff team will not have to focus on building the class to the same extent.

*Can the funder be required to pay security for costs?*

Security for costs is often ordered against a funded party. The funding agreement is often tendered in response to a security for costs application and there will be consideration of the funder's ability to meet indemnity obligations in terms of adverse costs. A recent decision<sup>66</sup> suggests that litigation funders may be able to use indemnity arrangements (here a deed of indemnity together with a bank guarantee for the costs of enforcement) as an alternative to paying money into court.

*Can the funder be held liable to pay adverse costs?*

Legislation has conferred the right for the courts to impose costs orders against non-parties, and there have been several cases in which the funder has been ordered to pay costs.<sup>67</sup>



- <sup>1</sup> For example in the U.S. crowdfunded models such as Lexshares Inc and Trialfunder are on the increase, while in the U.K., Invicta Capital Funding launched in April with funding provided by Treasury Capital, which has access to institutional investors (<https://www.lawgazette.co.uk/news/new-litigation-funder-targets-100k-plus-claims/5061091.article>).
- <sup>2</sup> For example, funding of individual commercial actions is much more common in England than in Canada, where the practice is common in class actions. Such distinctions and differences can be explained in part by the growth and development of collective action mechanisms in those jurisdictions
- <sup>3</sup> Press release <https://www.hausfeld.com/news/global/hausfeld-and-burford-capital-announce-30-million-german-venture>
- <sup>4</sup> Radek Goral, Justice Dealers: The Ecosystem of American Litigation Finance, 21 Stan. J.L. Bus. & Fin.98,135-36 (2015)
- <sup>5</sup> IMF Bentham launched a new fund for U.S. cases in February 2017. Together with a large U.S. hedge fund, IMF Bentham will invest \$200 million in an investment vehicle to increase its U.S. capabilities, allowing Bentham to make larger investments and strengthen its position as one of the world-leading companies in litigation funding.
- <sup>6</sup> The Fortis action was an investor claim relating to the acquisition of ABN AMRO and was settled in March 2017, (<https://www.veb.net/artikel/05925/veb-reaches-settlement-of-over-12-billion-on-behalf-of-fortis-shareholders>). It was announced in June 2017 that the settlement has not been declared binding by the Amsterdam Court of Appeal due to concerns over the distribution of the settlement amount between active and non-active claimants ([https://www.forsettlement.com/pdf/EN\\_Decision%20Fortis%20Settlement\\_160062017\\_040.pdf](https://www.forsettlement.com/pdf/EN_Decision%20Fortis%20Settlement_160062017_040.pdf))
- <sup>7</sup> The Globalization of Securities Litigation, John C. Coffee Jr, 19 September 2017, <http://clsbluesky.law.columbia.edu/2016/09/19/the-globalization-of-securities-litigation/>
- <sup>8</sup> <http://volkswageninvestorsettlement.com/qa/>
- <sup>9</sup> The Globalization of Securities Litigation, John C. Coffee Jr, 19 September 2017, <http://clsbluesky.law.columbia.edu/2016/09/19/the-globalization-of-securities-litigation>
- <sup>10</sup> Omers Administration Corp & 111 Ors v Tesco Plc HC-2016-003088
- <sup>11</sup> In the U.S. for example, the Supreme Court of Massachusetts abandoned the doctrines of maintenance and champerty in *Saladini v. Righellis* (1997). Delaware and Minnesota, however, continue to apply the rules of champerty. In many other states, courts have found that the doctrines never applied. In Canada, the courts have held that third party funding is not in itself champertous, but a court must consider the specific terms of the agreement in order to determine if it is champertous (*Bayens v Kinross Gold* (2013) and *Schenk v. Valeant* (2015)). In Australia, many states have abolished maintenance and champerty by legislation and therefore in these states funding agreements can only be set aside for public policy reasons.
- <sup>12</sup> In Australia, there is no public policy objection to the control of the litigation, although there are strict regulations around conflicts of interest.
- <sup>13</sup> For example, in consumer cases, funders will often work in tandem with lawyers operating on a contingency fee basis to cover plaintiff expenses which lawyers are prohibited from doing. Radek Goral, Justice Dealers: The Ecosystem of American Litigation Finance, 21 Stan. J.L. Bus. & Fin. 98, 135–36 (2015)
- <sup>14</sup> Transactions involving limited portfolios may risk falling under the prohibition but litigation funders and law firms have attempted to find work arounds. Radek Goral, Justice Dealers: The Ecosystem of American Litigation Finance, 21 Stan. J.L. Bus. & Fin. 98, 135–36 (2015).
- <sup>15</sup> 561 U.S. 247 (2010)
- <sup>16</sup> For further details of the main actions please see the addendum.
- <sup>17</sup> The 2016 Litigation Finance Survey <http://www.burfordcapital.com/blog/2016-litigation-finance-survey/>
- <sup>18</sup> *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215.
- <sup>19</sup> *Metzler v. Gildan Activewear*, 2010 ONSC 1486, *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, and *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974.
- <sup>20</sup> A decision is awaited from the Competition Tribunal on whether the claim should be allowed to proceed to a full trial following a hearing in January 2017.
- <sup>21</sup> Unreported, Denham J, Clarke J, MacMenamin J, Dunne J and McKechnie J, Supreme Court, 23 May 2017.
- <sup>22</sup> The “Empirical Study of Australia’s Class Action Regimes, Fourth Report: Facts and Figures on Twenty Four Years of Class Actions in Australia” Vince Morabito, 29 July 2016.
- <sup>23</sup> The Hong Kong Law Commission supported the use of litigation funding in arbitration in October 2016, and the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 had its first reading before the legislative council in January 2017. The bill proposes light touch regulation by implementing a code of practice to be complied with by third party funders to ensure control remains with the funded party.
- <sup>24</sup> Civil Law (Amendment) Act 2017 and accompanying Civil Law (Third Party Funding) Regulations 2017.
- <sup>25</sup> CFI 026/2009
- <sup>26</sup> The involvement of Vannin Capital is apparent from their involvement proceedings to recover payments under a funding agreement with the defendants (*Vannin Capital PCC PLC v (1) Mr Rafed Abdel Mohsen Bader Al Khorafi and others* [2014] DIFC CFI 036).
- <sup>27</sup> Practice Direction 2 of 2017 – Third Party Funding in the DIFC Courts (PD 2/2017).
- <sup>28</sup> <http://www.leste.com/eng/leste-credit/>, <http://woodsfordlitigationfunding.com/international-arbitration-leste-credit/>
- <sup>29</sup> Blackrobe Capital Partners shut down in 2013 after struggling to attract enough investment and Juridica Investments announced in November 2015 that it would cease making new investments.
- <sup>30</sup> <https://www.thelawyer.com/bt-signs-45m-litigation-funding-deal-with-burford-capital/>
- <sup>31</sup> <http://www.burfordcapital.com/newsroom/burford-capital-provides-45-million-in-litigation-financing-to-ftse-20-company/>



- <sup>32</sup> <http://www.burfordcapital.com/newsroom/grant-thornton-signs-insolvency-portfolio-financing-deal-burford/>
- <sup>33</sup> <http://www.burfordcapital.com/newsroom/burford-capital-launches-abs-law-firm-burford-law-akin-gump-hire/>
- <sup>34</sup> (Case 36875).
- <sup>35</sup> Melbourne City Investments Pty Ltd (MCI) v Treasury Wine Estates Limited [2016] FCA 787.
- <sup>36</sup> [http://www.burfordcapital.com/wp-content/uploads/2015/03/Litigation\\_Funding\\_Report-1.pdf](http://www.burfordcapital.com/wp-content/uploads/2015/03/Litigation_Funding_Report-1.pdf)
- <sup>37</sup> In this case Burford provided its client with money to run its business rather than funding the legal fees: Clyde & Co International Arbitration 1/3LY.
- <sup>38</sup> <https://www.grassley.senate.gov/news/news-releases/grassley-cornyn-seek-details-obscure-third-party-litigation-financing-agreements>
- <sup>39</sup> <http://www.lawreform.vic.gov.au/projects/litigation-funding/litigation-funding-terms-reference>
- <sup>40</sup> Augusta Ventures offers funds towards the costs for an opinion from a solicitor and, if the case has merits, from counsel also. If Augusta agrees to finance the case, the funding will be included in the overall case budget. If it decides not to proceed with the litigation, the client will not have to pay the money back unless it wants to have sight of counsel's opinion. The solicitor and counsel will be expected to work on the basis of a partial conditional fee agreement. <https://www.lawgazette.co.uk/news/litigation-funder-pledges-money-to-probe-merits-of-case/5052824.article>
- <sup>41</sup> Radek Goral, Justice Dealers: The Ecosystem of American Litigation Finance, 21 Stan. J.L. Bus. & Fin. 98, 127–29 (2015).
- <sup>42</sup> The subscription price in the Rights Issue was 200p per share
- <sup>43</sup> <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-12-19/HL4216/>
- <sup>44</sup> [2017] EWHC 1217 (Ch)
- <sup>45</sup> Wall v Royal Bank of Scotland Plc [2016] EWHC 2460 (Comm) and The RBS Rights Issue Litigation (see above).
- <sup>46</sup> The RBS Rights Issue Litigation
- <sup>47</sup> [2005] EWCA Civ 655
- <sup>48</sup> [2016] EWCA Civ 1144
- <sup>49</sup> These states are Maine, Ohio, Nebraska, Vermont, Indiana, Oklahoma, Arkansas, Arizona, Tennessee and New York. Legislation has been proposed in many other states including Kentucky, Alabama and New Jersey.
- <sup>50</sup> No proposals other than the Class Action legislation referred to below have as yet been taken up on a federal level. The ILR continues to advocate for a federal regime of regulation in particular for the reform of civil procedure rules to require disclosure of funding arrangements.
- <sup>51</sup> [http://filehost.thompsonhine.com/uploads/Proposal-to-Amend-Rule-26-for-Third-Party-Litigation-Funding-Disclosure\\_53eb.pdf](http://filehost.thompsonhine.com/uploads/Proposal-to-Amend-Rule-26-for-Third-Party-Litigation-Funding-Disclosure_53eb.pdf)
- <sup>52</sup> <https://www.congress.gov/bill/115th-congress/house-bill/985/text?q=%7B%22search%22%3A%5B%22fairness+in+class+action+litan%22%5D%7D>
- <sup>53</sup> 146 F.Supp.3d 588 (S.D.N.Y. 2015)
- <sup>54</sup> 2017 WL 956628 (N.D. Cal. 2017).
- <sup>55</sup> Attorney General) (2002), 61 O.R. (3d) 257
- <sup>56</sup> (2015) ONSC 3215
- <sup>57</sup> <https://www.fsco.gov.on.ca/en/about/enforcement/cdo/pages/co-bridgepoint.aspx>
- <sup>58</sup> Plimmer v. Google, Inc. 2013 BCSC 681
- <sup>59</sup> Berg v Canadian Hockey League, 2016 ONSC 4466
- <sup>60</sup> In Dugal v. Manulife Financial Corp., 2011 ONSC 1785 (Ont. S.C.J.) the funder had no assets in Canada so the court's approval of the agreement was subject to posting security for costs. In Bayens v. Kinross Gold Corporation, 2013 ONSC 4974. The defendants did not oppose the funding agreement on condition that the court ordered the funder to provide security for costs. The court approved the funding agreement and ordered a staggered posting of security for costs.
- <sup>61</sup> ASIC regulatory guide 248: Litigation Schemes and Proof of Debt Schemes – Managing Conflicts of Interest.
- <sup>62</sup> Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd (NSW) [2006] HCA 41.
- <sup>63</sup> Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm) [2016] FCAFC 2.
- <sup>64</sup> Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited [2016] FCAFC 148.
- <sup>65</sup> [2015] FCA 811.
- <sup>66</sup> Australian Property Custodian Holdings Limited (in Liq) v Pitcher Partners [2015] VSC 513
- <sup>67</sup> Gore v Justice Corp Pty Ltd [2002] FCA 354 and Ryan Carter and Esplanade Holdings Pty Ltd v Caason [2016] VSCA 236.