Litigation Funding 2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Litigation Funding*, which is available in print and online at www.lexology.com/gtdt.

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Canada, France, Russia and Thailand.

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

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

LEXOLOGY
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France

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REGULATION

Overview

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

The legality of third-party litigation funding is well established in France. Nevertheless, the French market for third-party litigation funding is still comparatively small. Among other factors, this may be attributed to the fact that French law traditionally did not recognise class actions or punitive damages and that civil and commercial courts generally grant only limited cost awards for legal fees.

However, recent practice shows that third-party litigation funding has increased in specific market segments, such as antitrust damages litigation or small mass consumer claims.

In addition, the resort to third-party funding has grown significantly in the field of international arbitration over the past 10 years. Professional organisations support this evolution. The Paris Bar Council has explicitly endorsed the use of third-party funding, noting that third-party funding 'is favourable to the interest of litigants and attorneys of the Paris Bar, particularly in international arbitration' (Paris Bar Council, Resolution dated 21 February 2017, the Paris Bar Council Resolution or the Resolution).

Restrictions on funding fees

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

There are no explicit limits on the fees and interest funders can charge. The determination of fees and interest is therefore subject to the parties' freedom of contract.

That said, limited case law suggests that if seised of a dispute over a funder's remuneration, French courts may reduce the contractually agreed funder's fee if the fee is considered disproportionate or excessive in comparison to the services rendered by the funder. The French Court of cassation has previously held that the agreement to pay a physical person funder 30 per cent all net amounts recovered in an inheritance dispute could, in principle, be subject to judicial reduction if found to be disproportionate (Cass. 1ere civ., 23 November 2011, No. 10-16.770). In that case, the Court of cassation quashed a decision by the Versailles Court of Appeal, which had refused to reduce the contractually agreed remuneration of 30 per cent. The Court of cassation remanded the matter to the Paris Court of Appeal, which ultimately reduced the remuneration to 15 per cent, taking into account the relatively short duration of the proceedings and the reduced scope of the service rendered by the funder (Paris Court of Appeal, Pole 3, 1st chamber, 17 October 2012, No. 11/22443).

Specific rules for litigation funding

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

There are no specific legislative or regulatory provisions applicable to third-party funding. Third-party funding agreements are therefore governed by the general law of obligations. That said, French courts are not bound by the qualification given by the parties to a third-party funding agreement. They have the power to requalify a contractual relationship whenever the actual relationship between the parties is found to resemble that of a contract governed by a specific legal regime, such as an insurance contract, a banking contract or a partnership agreement. In the case of a requalification, the funding agreement would be subject to the relevant specific legal regime and the applicable regulatory provisions governing such contracts.

In addition, the specific rules of professional conduct that govern the attorney-client relationship will impact (at least indirectly) the third-party funding relationship.

Lastly, there is quite a substantial amount of soft law and legal doctrine pertaining to third-party litigation funding in France (see, eg, Club des Juristes, Commission financement de procès par les tiers, Raaport sur le financement du procès par des tiers, June 2014; Barreau de Paris, Le financement de l'arbitrage par les tiers (third-party funding), 21 February 2017 (the Paris Bar Association Report)).

Legal advice

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

Attorneys advising clients in relation to third-party funding must abide by the rules of professional conduct that govern the exercise of the legal profession in France (ie, Law No. 71-1130, dated 31 December 1971 as amended by Law No. 90-1259, dated 31 December 1990 and Implementing Decree No. 91-1197; Decree No. 2005-790, dated 12 July 2005; and the National Internal Regulations adopted by the National Council of French Bar Associations, the CNB).

The rules that are most relevant to advising clients in relation to third-party funding include the duty of professional secrecy, the duty of independence and the prohibition to charge contingency fees in litigation and domestic arbitration.

Under French law, the duty of professional secrecy is a rather broad one. It applies to any type of communication (written or oral) or information exchanged between an attorney and her client. It is a mandatory rule that may neither be waived by the client nor otherwise derogated from. Violation by the attorney is subject to disciplinary and criminal sanctions. A client is, however, free to independently communicate documents or information received from attorneys to third parties, including third-party funders.

Attorneys also have a duty of independence to their clients. This duty applies to any strategic decision throughout a proceeding, including the choice of whether to settle or withdraw an action. An attorney may thus not receive instructions from a third-party funder, as explicitly reiterated by the CNB in its Resolution relating to third-party litigation funding, dated 20-21 November 2015. This duty also implies that an attorney advising a financed party may not simultaneously advise the funder. For the avoidance of doubt, French law allows for third-party funders to pay attorney fees directly to the funded party's attorney. This does not impact the attorney-client relationship.

Moreover, French law prohibits attorneys from charging fees on a full contingency basis. This restriction is not considered to apply to international arbitration.

In addition to the afore-mentioned rules of professional conduct, the Paris Bar Council Resolution specifically addresses attorneys advising clients in relation to third-party funding by making various recommendations. Specifically, the Paris Bar Council Resolution:

- reiterates the prohibition for attorneys advising a financed party to provide legal advice to the funder;
- emphasises the prohibition for attorneys to communicate documents or information directly to third-party funders (without, however, prohibiting clients from sharing any documents, including legal advice received, with their funder) and notes that attorneys should avoid any meeting with the third-party funder without the funded client present;
- advocates in favour of revising the rules that govern disputes with respect to attorney fees (ie, articles 174 et seq of Decree No. 91-1197 dated 27 November 1991), such as to extend these rules explicitly to third-party funders who would then be considered subrogated to the rights and obligations that funded clients may have vis-à-vis their attorneys. This recommendation is based on the Paris Bar Association Report (which provided the basis for the Paris Bar Council Resolution) and which observed that the applicability of articles 174 et seq of Decree No. 91-1197 to third-party funders could also potentially be provided for in the funding agreement;
- invites attorneys advising clients in arbitration to encourage them to disclose the existence of third-party funding and advise them with respect to the consequences that could potentially arise in the absence of a disclosure (notably the potential setting aside of an arbitral award and potential impediments relating to its execution in the event that links between the funder and an arbitrator are subsequently discovered);
- invites attorneys to recommend to their clients that the management of the third-party funding agreement, the distribution of costs and fees and the recovery of any monetary awards in their favour be done with the aid of the Caisse des Règlements Pécuniaires des Avocats, an entity established within each French bar association, which monitors the payment of attorney fees.

Regulators

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

At present, there is no public body with any particular interest in or oversight over third-party litigation funding.

FUNDERS' RIGHTS

Choice of counsel

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

In principle, clients have the freedom to select an attorney of their choice. In practice, it is accepted that a third-party litigation funder may present a funded party with its choice of counsel if the funded party is not yet represented and requests advice from the funder in that respect. By the same token, whenever a third-party funder is dissatisfied with a party's choice of counsel, the funder is under no obligation to enter into a funding agreement.

Participation in proceedings

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

In domestic litigation, court hearings are generally open to the public, which means that third-party funders are free to attend without special permission. However, absent instances in which the parties to an arbitration agree for the hearings to be public, arbitration hearings are generally confidential. The participation of third-party funders is, therefore, subject to the prior agreement of the opposing party. The same principle applies to the participation of third-party funders in settlement meetings.

Veto of settlements

8 | Do funders have veto rights in respect of settlements?

It is common practice for third-party funding agreements to address questions such as the initiation of settlement negotiations and the acceptance of a settlement. Moreover, litigants and funders quite frequently agree in advance on certain minimum and maximum amounts for potential future settlements.

This said, if seized, a French court retains the power to cancel a settlement agreement or requalify the agreement if the court finds that a funded party's freedom to enter into a settlement agreement was infringed upon.

Termination of funding

9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances in which funding may be terminated.

A first category of circumstances includes pre-defined events that are likely to have a major effect on the risk presented by the proceedings. These include:

- a court or regulatory decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown detrimental facts;
- a change in the case law that has a decisive impact on the ongoing proceeding;
- a loss of evidence or the appearance of detrimental evidence; and
- a major change in the creditworthiness of the respondent.

Under such scenarios, a funder would typically be entitled to terminate the funding agreement and would bear any costs incurred or caused until the termination, as well as costs that occur as a result of the termination.

A second category of circumstances involves breaches of the funding agreement by the financed party. In such a case, the funder

can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, in light of the existence of a contractual breach, the litigant might be obliged to reimburse the funder for its costs and expenses.

Other permitted activities

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

As a corollary of their duty of independence, attorneys advising a financed party may not take any instructions from the party's funder. Likewise, in accordance with their obligation of professional secrecy and confidentiality, attorneys may not meet with their clients' funder in the client's absence. When there is a conflict of interest between the client and funder, the attorney has to follow the client's instructions.

With respect to the conduct of the proceedings, any rights and actions the funder intends to exercise in the course of the litigation have to be contractually agreed with the client. This typically includes the funder's right to receive certain types of information, access to documents produced during the proceedings and the right to be consulted on important procedural decisions, such as the conclusion of settlement agreements, the waiver or withdrawal of claims, or the initiation of parallel or additional proceedings.

Moreover, the funding agreement will also typically stipulate the types and extent of the funder's obligations.

Otherwise, there is no requirement for third-party funders to take any active role outside of the specific context of the funding agreement.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Aside from international arbitration, French law prohibits attorney remuneration on a full contingency basis (National Internal Regulations adopted by the National Council of French Bar Associations, article 11). However, attorneys may agree to a partial contingency fee. Such a partial contingency fee must be agreed to in advance.

Other funding options

12 | What other funding options are available to litigants?

Other funding options available to litigants include legal cost insurance and legal aid.

Legal cost insurance is widely available and frequently used in France. Legal cost insurance contracts are agreements entered into to cover the costs of legal proceedings before the need to litigate arises. The extent and limits of coverage will depend on the specific insurance policy, which will typically be limited to specific types of claims. In addition, after-the-event litigation insurance contracts may be concluded after a dispute arises, in view of covering a potential adverse cost award in the event of an unfavourable outcome.

Legal aid is a measure of state-funded support that may cover part or the totality of a litigant's cost and fees in court litigation. Legal aid is available to physical persons only and requires a demonstration of insufficient financial resources. Legal aid may be requested before or after the initiation of a legal proceeding. The request is submitted to the court adjudicating the dispute.

In international arbitration, the law firm can fund the case through a contingency fee agreement. In all other cases, only partial contingency fee agreements are allowed.

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

According to the latest statistics available from the French Ministry of Justice, commercial courts of first instance reached decisions over an average duration of 5.5 and 5.4 months in 2017 and 2018, respectively. Depending on the complexity of a matter, the duration may be longer.

In domestic or international arbitration, the duration is normally between one and three years, depending on the complexity of a case.

Time frame for appeals

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

According to the latest statistics available from the French Ministry of Justice, litigants appealed 14.8 per cent of commercial court decisions of first instance in 2017. The average duration of appeal proceedings was between 13.3 and 13.5 months in 2017 and 2018, respectively.

Domestic arbitration awards are not subject to appeal, unless the parties agreed otherwise (Code of Civil Procedure, article 1489). No information is publicly available as to the number of appeal proceedings against arbitral awards rendered in domestic arbitrations. Domestic arbitration awards may be subject to set-aside proceedings.

As regards international arbitration awards, a set aside proceeding is the only remedy available to attack the award (Code of Civil Procedure, article 1518). No publicly available information exists as to the number of set aside proceedings against arbitral awards rendered in France (whether domestic or international). Our research suggests that courts rule on approximately 20 set-aside applications per year.

Enforcement

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings.

In principle, a judgment rendered by a French court is enforceable, provided that it is final and binding and that the rendering court has not suspended its enforcement. Decisions of courts of first instance are provisionally enforceable by law unless the law or the issued decision provide otherwise. In the event of an appeal, a party may apply to stop the provisional enforcement of the decision where there is a serious argument for annulment or reversal and where enforcement is likely to lead to manifestly excessive consequences. If a court of appeal reverses a first-instance judgment, the party who had enforced the judgment must not only return what it had obtained from the counter-party, but also compensate the counter-party for any loss suffered.

In general, the enforcement of a final judgment or arbitral award in France is rather inexpensive and expedient. Most notably, the presentation of an enforceable judgment recognising a claim will generally suffice to obtain the attachment of the judgment-debtor's assets located in France (save for assets owned by a foreign state, which are subject to a specific legal enforcement regime or if the debtor is insolvent).

COLLECTIVE ACTIONS

Funding of collective actions

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

French law introduced class actions in 2014 with respect to matters of consumer protection (see Law No. 2014-344, dated 17 March 2014, which modified the French Code of Consumption). Subsequent amendments have broadened the scope of class actions to include matters of health, data protection, environmental law and discrimination (see Law No. 2016-1547 dated 18 November 2016). According to a report by the French National Assembly, 21 class actions have been introduced in France between October 2014 and June 2020.

Third parties face no restrictions on funding class actions. However, regarding class actions relating to consumer protection, the French Code of Consumption provides that the consumer association, which initiated the legal action for the indemnification of aggrieved consumers must immediately pay any sum it receives in litigation into an account with the Caisse des dépôts et consignations. This is a specific bank account which can only be debited to pay out sums due to the interested parties (Code of Consumption, article L-423-6). According to commentaries, it is doubtful whether a direct payout of proceeds to a third-party funder is permitted under this provision. The relevant funding agreement(s) should, therefore, be worded accordingly.

COSTS AND INSURANCE

Award of costs

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

The French Code of Civil Procedure provides that the losing party will be ordered to bear all legal costs (Code of Civil Procedure, article 696). Legal costs include, among others, court fees, translation fees and expert fees, as well as attorney fees to the extent they are regulated (Code of Civil Procedure, article 695). However, French courts may also order the successful party to bear part or all of the legal costs (Code of Civil Procedure, article 696).

In addition, courts have discretion to order the losing party to bear any other sums not included in the regulated legal costs as defined under article 695 of the Code of civil procedure, such as additional attorney fees, which exceed the regulated fee in a given dispute (Code of civil procedure, article 700). We are not aware of any cases in which such other sums would have included litigation funding costs of the prevailing party. In any case, costs under article 700 are usually not awarded on the basis of the actual costs incurred by a party but on a discretionary basis. As a result, they usually represent only a fraction of the actual attorney fees incurred by the prevailing party.

In domestic and international arbitration, the tribunal has the discretion to order the parties to pay costs and, if so, in which proportion. This could potentially include third-party funding costs of the prevailing party.

Liability for costs

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

If the third-party funding agreement provides for the funder to cover adverse costs, which is common practice for Continental European funders, the funder has a contractual obligation to hold the unsuccessful funded party harmless for adverse costs. The successful adverse party, however, has no enforceable right against the funder (no reflex effect of the contractual obligation towards the funded party).

In the absence of a contractual commitment to that effect, there is no independent legal basis under French law for courts to order a third-party funder to pay for adverse costs.

Security for costs

19 May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

The Code of Civil Procedure does not explicitly provide for the possibility to order a claimant or a third-party to provide security for costs.

However, in practice, parties to domestic litigation may succeed in obtaining an order for the provisions of security for costs against the opposing party – but not against a third party – a *provision ad litem*, by making a request for interim measures to that effect. For such an order to be granted, the requesting party bears the burden of proving that the substantive obligation that is the subject of the dispute is undeniable.

Likewise, parties to international arbitration proceedings have succeeded in obtaining orders of security for costs against a funded claimant by filing a request for interim measures. For such remedies to be successful, the requesting party must demonstrate that security for costs is urgently required under the circumstances of the case and that the requesting party would incur irreparable harm in the absence of such an order.

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

We are not aware of state court proceedings in which the presence of a third-party funder triggered a request for security for costs.

As regards domestic and international arbitration proceedings seated in France, the presence of a third-party funder may potentially have an impact on the evaluation of a security for costs request. However, in practice, the existence of third-party funding is not as such considered sufficient to justify an order for security for costs.

Insurance

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

ATE insurance is not necessarily common in France. Although no legal or regulatory restrictions limit this type of product, there is currently no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases. Moreover, if the funder has an exclusive solution for the coverage of adverse costs by way of ATE insurance on offer, ATE-insurance can also be included in the litigation funding agreement (one-stop-shop).

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

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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

In principle, French law does not oblige a party to a domestic litigation to disclose a funding agreement to the opposing party or the court. Likewise, there is no legal basis for courts to order such a disclosure.

With regard to arbitration proceedings, the Paris Bar Council Resolution provides that attorneys of funded parties must encourage their clients to disclose the existence of third-party funding to the arbitral tribunal to allow arbitrators to identify potential links with the funder.

Privileged communications

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

Any communication between an attorney and his or her client is privileged and must not be disclosed to outside parties. In contrast, communications between funded parties or their attorneys and third-party funders are not covered by attorney–client privilege. It is standard practice for such communications to be covered by a contractual duty of confidentiality in the funding agreement.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

We are not aware of any disputes between litigants and their funders. There is, however, at least one reported dispute in which a successful respondent initiated an action against the funder of the unsuccessful claimant, attempting to enforce a costs award against the claimant in its capacity as a third-party beneficiary to the funding agreement (see, Versailles Court of appeal, 1 June 2006, 12th chamber, No. 05/01038, *Société Foris AG v SA Veolia Propreté*). While the lower court had decided to grant the claim and to order provisional enforcementagreement, that ruling was overturned by the Versailles Court of appeal for lack of jurisdiction.

Other issues

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

No.

UPDATE AND TRENDS

Current developments

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

The uncertainty and challenges that came with the covid-19 crisis have increased the demand for third-party litigation funding in France and throughout Europe and sparked an interest in less common and more sophisticated funding products, such as portfolio funding, claim or award monetisation, and the funding of defence cases.

Coronavirus

27 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

To address the covid-19 pandemic, a series of regulations were adopted in early 2020 that suspend or extend court filing deadlines or statutory limitation periods, or that suspend certain enforcement actions.

For instance, penalty or termination clauses sanctioning the non-performance of an obligation within the contractually-required time frame cannot be enforced if the deadline for the performance of the obligation was between 12 March 2020, the beginning of the first state of emergency related to the covid-19 crisis, and the expiration of one month after that state of emergency's end date, namely on 10 August 2020. These measures were taken in the context of a general lockdown imposed between March and May 2020.

Moreover, in some disputes that arose as a consequences of the covid-19 crisis, courts have also recognised the existence of a force

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majeure situation, justifying the suspension of contractual performance. By way of background information, the conditions of force majeure are the following: an event (1) beyond the debtor's control, which could not reasonably have been foreseen at the time the contract was concluded, (2) whose effects cannot be avoided by appropriate measures and (3) which prevents the performance of the obligation by the debtor (Civil Code, article 1218). Impossibility of performance is understood to mean a real impossibility (ie, an insurmountable obstacle) and not mere difficulties. Finally, force majeure is to be assessed specifically according to the circumstances of each case, the obligations in question and the date they were entered into. Some courts have characterised the epidemic a a force majeure event in the light of the specific circumstances of the case, based on the contractual clauses in question (see, eg, Paris Court of Appeal, Pole 1, 2nd chamber, 28 July 2020, Nos. 20/06689 and 20/06675, *EDF (SA) vGazel Energie Génération (SAS) and Association française indépendante de l'électricitéet du gaz* and *EDF (SA) v Total Direct Energie (SA), Association française indépendante de l'électricité et du gaz and RTE (SA)*).

On 14 October 2020, a new state of emergency related to the covid-19 crisis has been declared (Decree No. 2020-1257 dated 14 October 2020). It remains to be seen whether further regulations similar to those in early 2020 will be adopted.

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