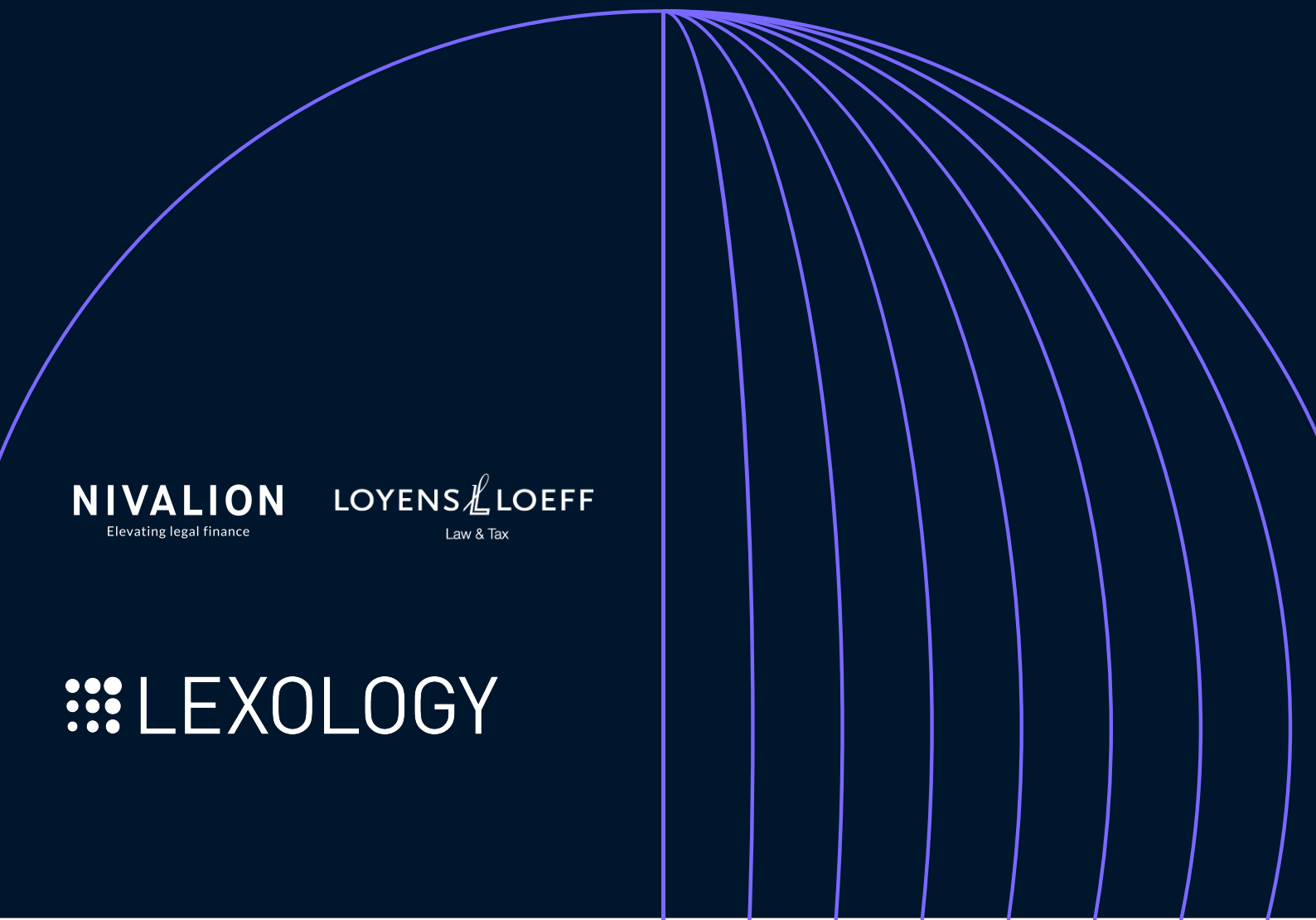
PANORAMIC

LITIGATION FUNDING 2024

Contributing Editors

Jonathan Barnes and **Steven Friel**

Woodsford



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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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Belgium

Isabelle Berger, **Hakim Boularbah**
Nivalion AG, Loyens & Loeff

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Contributors

Belgium

Nivalion AG	
Isabelle Berger	isabelle.berger@nivalion.com
Loyens & Loeff	
Hakim Boularbah	hakim.boularbah@loyensloeff.com

REGULATION

Overview

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

Thus far, the permissibility of third-party litigation funding has not been reviewed by the Belgian courts, which creates an uncertainty detrimental to its development. However, it is commonly accepted by legal scholars and practitioners that third-party litigation funding is valid and permitted under Belgian law.

Nevertheless, the use of third-party litigation funding has remained relatively limited, which might be because its permissibility has yet to be judicially confirmed. Other factors likely contribute to the limited use of third-party funding in Belgium: the costs of Belgian judiciary proceedings are relatively low compared to the legal costs incurred in other jurisdictions. Similarly, the judgment proceeds resulting from litigation or arbitration proceedings under Belgian law tend to be lower than in other – particularly common law – jurisdictions, since concepts such as punitive damages are not available under Belgian law. Additionally, as Belgian courts currently have a substantial backlog, the adjudication timeframes are generally very long, especially compared to other countries. This has proven to be an important drawback to funders. Consequently, third-party litigation funders have shown a relatively modest interest in the Belgium market so far, which has prevented litigants from making vast use of third-party litigation funding.

Restrictions on funding fees

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

There are no specific rules regarding the acceptable amount of a funder's return. As a general rule, a funder's profit should not exceed a litigant's share of the proceeds.

Typically, a funder's share is calculated based on a multiple of the funds contributed, a percentage of the proceeds or a combination thereof. In practice, a funder's success fee commonly ranges between 20 per cent and 50 per cent of the net proceeds (with caps in the event of high amounts in dispute to make sure the funder's success fee remains reasonable).

Specific rules for litigation funding

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

The Belgian legislature has yet to enact a specific law designed to regulate the practice of third-party litigation funding. However, such legislative intervention could prove useful for the provision of legal certainty and the creation of a legal framework relating to third-party litigation funding. Moreover, it would be in line with the declared intention of the Belgian

government to undertake substantial reforms of the Belgian judicial system to enhance access to justice.

Legal advice

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

Lawyers are subject to rules contained in the Lawyer's Code of Ethics (Code of Ethics), which determines the information that is deemed confidential, and hence may not be disclosed to any third party, including the funder. The rule of confidentiality applies, inter alia, to the correspondence exchanged between the lawyer and the client and any written material drafted for the client. These documents benefit from legal privilege and may not be disclosed to the funder without the prior consent of the client. The funder's information rights regarding privileged information must, therefore, be precisely defined in the litigation funding agreement. In practice, such clauses are typically included in the litigation funding agreement and ensure that the disclosure of information to the funder is in accordance with Belgian law and the Code of Ethics.

This is in line with the 17 March 2008 Regulation of the French and German-speaking Belgian Bar governing the relationship between lawyers and third parties (Regulation of the Belgian Bar), according to which professional secrecy does not prevent a lawyer from sharing the client's legal position and objectives, as well as the planned litigation strategy with a third-party funder, provided that the exchange of such information has been previously agreed upon between the lawyer and the client.

Besides the rules of confidentiality, the ethics rules also include the obligation to act in the best interests of the client (as opposed to the interests of a third-party funder or the attorney's interest) and the obligation to act independently.

Regulators

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

Since third-party litigation funding is not regulated under Belgian law, it generally escapes any type of supervision by public bodies. However, depending on the structuring of the funding agreement, it cannot be excluded that a specific funding model may be considered as a regulated service falling under the supervision of the Belgian financial regulator.

Typically, third-party litigation funding differentiates itself from most of the financial services regulated under Belgian law:

- It is not a loan or a credit agreement because the funded party has no mandatory duty to repay the provided funds to the funder but only an obligation to share potential proceeds with the latter. Similarly, third-party funders cannot be seen as credit institutions since they do not publicly collect refundable deposits, or make available credit facilities for their own account.

- It is not a legal protection insurance, as in a litigation funding agreement – unlike under an insurance policy – no premium for the coverage of a future litigation risk is paid.

Funds providing litigation funding may, in some cases, fall within the scope of the EU Alternative Investment Funds Managers Directive (AIFM Directive) implemented under Belgian law by the AFIM Act. The AIFM Directive defines alternative investment funds as any collective investment that raises capital from a number of investors to invest it in accordance with a defined investment policy for the ultimate benefit of the investors.

FUNDERS' RIGHTS

Choice of counsel

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

As a matter of principle, a litigant's lawyer is independent of the third-party funder and must be able to act freely from any instructions from the latter. However, a third-party funder will only invest funds in a process that is conducted by a competent and duly specialised lawyer. The third-party funder will thus carefully examine the qualifications of the chosen lawyer and the reasonableness of their proposed fees and provide funding only if the litigant's choice of counsel can be approved.

Participation in proceedings

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

The role of a third-party litigation funder and such funder's rights of information and participation are typically determined in the litigation funding agreement. Accordingly, a litigant might invite the third-party funder to participate in a court or an arbitral tribunal's hearing or settlement discussions on the basis of a respective clause in the litigation funding agreement, provided that this is in line with the envisioned litigation strategy and the counterparty does not object to it. Even if there is no respective clause in the funding agreement and the counterparty has not been informed about the funder's presence, a third-party funder may attend a court hearing, as state court hearings are open to the public in Belgium.

Veto of settlements

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

It is common practice that a funder is granted veto rights in the funding agreement with respect to a potential settlement. This is to ensure that the third-party funder has the possibility to oppose a settlement which is considered unreasonable on the basis of the

funder's evaluation of the prospects of the case. That being said, in practice, the interests of the funded party and the third-party funder are almost always aligned.

Termination of funding

9 | In what circumstances may a funder terminate funding?

Third-party funders and litigants are free to agree on various grounds or conditions that give reason to terminate a funding agreement. In practice, funders can typically terminate a funding agreement for the following reasons:

- a change in circumstances having a material impact on the chances of success of the funded case;
- a material breach of the litigant's contractual obligations;
- the insolvency of the litigant (it should be noted in this context that the trustee in bankruptcy decides whether the funded procedure may be continued or not); and
- the insolvency or a major change in the creditworthiness of the opposing party.

However, if a funder (unilaterally and without contractual provision allowing it) ceases performance of its contractual obligations, the contract can be legally enforced under Belgian general contract law. Additionally, a funded party can claim damages as a result of the breach of the funding agreement.

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?

Any rights and actions that a third-party litigation funder wishes to exercise during the course of a funded proceedings must be determined in the funding agreement. This may include rights to otherwise confidential information, access to documents, and the power to preclude actions that a litigant is usually free to take. Outside the scope of the funding agreement, there is no requirement for a third-party funder to take any active role in the funded proceedings.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Belgian law prohibits contingency agreements under which the determination of the lawyers' fee depends exclusively on the outcome of the case to be litigated (see article 446-ter of the Belgian Judicial Code (BJC)).

Conversely, lawyers can be partly remunerated by a success fee defined as a percentage of the amount recovered by their clients. As a consequence, Belgian lawyers may enter into contingency fee agreements, provided that their success fee is limited to a reasonable amount and the fee arrangement with their clients provides for minimal remuneration, independent of the case outcome.

Other funding options

12 | What other funding options are available to litigants?

The following options are available:

- legal assistance insurance: pursuant to the Belgian Insurance Act (the Insurance Act), the insurer must bear the costs incurred in connection with the court proceedings of the insurance holder (legal fees and expenses, bailiff's fees, procedural indemnities, costs of technical advice, expert's fees, etc), but has no interest in the financial outcome of the litigation;
- loan or credit facility agreement: the debtor must repay to the creditor the funds placed at its disposal;
- assignment of claims: the original creditor assigns the claim for less than its original worth to an assignee in exchange for an immediate payment from the third-party debt collector who becomes the holder of the claim and a party to the pending or forthcoming litigation proceedings;
- Belgian state legal aid: under strict conditions, a litigant may obtain legal aid from the state; legal aid exempts the litigant in whole or in part from having to contribute to the costs of the proceedings; and
- after-the-event (ATE) insurance: as third-party litigation funding agreements do not always cover the procedural and legal costs the litigant may be ordered to pay to the opposing party, the funded party frequently enters into an ATE insurance contract to have these costs covered.

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?

Depending on the complexity of the case and the territorial jurisdiction, it will take approximately one year following the submission of the claim for a decision to be rendered by a first-instance court in a commercial dispute.

Time frame for appeals

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

There are no official statistics on the number of judgments that are appealed in Belgium. Appeal proceedings are, however, very frequent. Such proceedings may last between one and three years, depending on the complexity and importance of the case and the court that exercises jurisdiction.

As regards arbitral awards, the parties – by an express statement in the arbitration agreement or by a subsequent agreement – may exclude the requirement of an application to set aside the award if none of them is either a natural person having Belgian nationality or their domicile or habitual residence in Belgium, or a legal person having their registered office, principal place of business or branch office in Belgium. In addition, awards rendered by an arbitral tribunal having its seat in Belgium may only be challenged on those limited grounds which are specifically set forth in the Belgian Judicial Code (BJC). Challenges to an arbitral award generally last between one to two years.

Enforcement

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

There are no official statistics on enforcement proceedings. As a rule, judgments are immediately enforceable even if appeal proceedings are pending or may still be brought. In the absence of voluntary payment from the debtor, the intervention of a bailiff will be necessary to proceed to enforcement measures, such as the attachment and sale of the debtor's property or other assets, and garnishment of the debtor's receivables and bank accounts.

As arbitration proceedings are based on the mutual consent of the parties, arbitral awards require enforcement proceedings less often, although such proceedings are not unusual. Arbitral awards, whether foreign or domestic, may only be enforced after the competent court of first instance has granted enforcement following an ex parte application of the award creditor. The grounds for refusal of recognition and enforcement of arbitral awards are specifically listed in article 1721 of the BJC.

COLLECTIVE ACTIONS

Funding of collective actions

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

On 28 March 2014, an act on class actions was introduced in the Belgian Code of Economic Law (CEL). The relevant provisions of the act came into force on 1 September 2014. However, the scope of actions for collective redress has remained limited. These proceedings may only be brought before the Brussels Commercial Court by a group of consumers or small and medium-sized enterprises represented by non-profit organisations

or public bodies against a company and on the ground of an alleged violation of Belgian and European rules expressly provided for in the CEL.

Third-party funding of class actions is not prohibited under Belgian law. Nevertheless, such funding should be disclosed at an early stage of the proceedings so that the judge may rule on its adequacy. Despite its admissibility, third-party litigation funding seems to be of limited interest in the context of class actions, as the CEL provides that a court-appointed administrator must pay any compensation obtained directly to the members of the group under the court's supervision without any possibility for the third-party funder to receive a share of this compensation. This implies that a third-party funder could, in principle, not take a share of the proceeds resulting from the collective action. However, in practice, there might be possibilities to structure a funding agreement in such a way as to overcome this obstacle.

In recent years, there have been some high-profile cases in Belgium wherein the claimants benefited from third-party funding. These were investment recovery cases that involved an important number of claimants, but they did not, however, qualify as class actions. It is also of note that the funders involved were mostly international funders with activities in Belgium.

In November 2020, the European Union issued a new Directive on representative actions for the protection of the collective interests of consumers. This Directive – which was required to be transposed by 25 December 2022, but has yet to be – also provides the possibility for member states to foresee third-party funding of class actions provided that a number of safeguards are put into place. At first glance, the Belgian Act on class actions seems to meet most of the requirements set forth in the Directive. However, as the Directive leaves considerable leeway to the member states, it remains to be seen how the Belgian legislature will transpose the Directive into national law.

Besides class actions, Belgian law also allows for other instruments of collective redress; in particular, actions where:

- numerous claimants act together and unite their claims in one single procedure; or
- a third party purchases various claims and initiates proceedings on behalf of the former claimants.

In such proceedings, claimants and third-party funders may enter into litigation funding agreements and share the proceeds of an award.

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?

Under article 1017 of the Belgian Judicial Code (BJC), the general rule is that the court condemns the losing party to pay the legal costs unless the costs incurred by the successful

party are proven to be excessive or unnecessary. If the plaintiff's claim is partly granted, the legal costs are usually divided equally.

The costs of the proceedings that courts may order the losing party to pay to the successful party are specifically enumerated in article 1018 BJC. The principal costs of the proceedings are the following:

- costs of service, filing and registration with the court registry; these costs are fixed and depend on the nature of the writ filed with the court and on the amount in dispute;
- costs of judicial expertise and other measures of investigation;
- a registration fee of 3 per cent of the principal amount the losing party is ordered to pay under the award, interest excluded, on behalf of the tax authorities if the losing party is ordered to pay an amount exceeding €12,500;
- a procedural indemnity that is a flat-rate contribution to the lawyers' fees; this amount is set by law and adjusted from time to time to account for inflation; and
- since 1 March 2023, the basic indemnity ranges from €210 to €21,000 for claims that can be appraised in monetary terms. If the claim cannot be appraised in monetary terms, the basic amount of the procedural indemnity is €1,680. These amounts may be decreased (to a minimum of €105) or increased (to a maximum of €42,000) by the court under specific circumstances, depending on different criteria, such as the financial capacity of the unsuccessful party, the complexity of the case, existing contractual compensation for the successful party or blatant unreasonable submissions (see article 1022, section 3 of the BJC).

As a consequence, courts may not order the unsuccessful party to pay the litigation funding costs of the successful party. Nevertheless, the intervention of a third-party funder could indirectly be taken into account by courts when fixing the procedural indemnity on the basis of the above-mentioned criteria.

With regard to arbitration proceedings, article 1713, section 6, BJC provides that the final award must fix the costs of the arbitration and decide which party shall bear what proportion of said costs, as article 1017 BJC does not apply.

Moreover, the arbitral tribunal will take all circumstances into account (such as equity arguments). The tribunal is thus not obliged to divide the legal fees in accordance with its award and can design a distribution key specific to the case at hand.

According to the above-mentioned provision, these costs include arbitration costs as well as party costs, defined as 'the fees and expenses of the parties' counsel and representatives' and 'all other expenses arising from the arbitral proceedings' (unless otherwise agreed by the parties). It is generally considered that such costs must be reasonable. We are not aware of any arbitration proceedings having their seat in Belgium in which the unsuccessful party was ordered to pay the funding costs of the successful party. As article 1713, section 6 of the BJC is drafted in general terms, one could, however, argue that funding costs should be taken into consideration in the allocation of costs by the arbitral tribunal.

Liability for costs

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

Unless a claim was specifically assigned to a third-party funder, the funder does not become a party to the funded proceedings as a result of the conclusion of a funding agreement. Accordingly, a court or an arbitral tribunal may not directly order a funder to pay for adverse costs. However, provided that the litigation funding agreement contains an obligation of the third-party funder to cover the adverse cost risk, which is common practice for continental European funders, the unsuccessful funded litigant has an enforceable claim against the funder for the payment of 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?)

According to the text of article 851 BJC, courts may only order a foreign claimant to provide security for the costs and damages potentially arising from the proceedings if the security is requested by a Belgian defendant. This *cautio judicatum solvi* is aimed at protecting Belgian litigants against pecuniary losses caused by foreign claimants who commence proceedings but who do not offer enough security in Belgium to ensure the payment of costs and damages that may result. However, the Belgian Constitutional Court has qualified the granting of such security as discriminatory because it may only be requested from foreign claimants, and the relevant provisions of the BJC must be modified on this point. To date, the Belgian legislature has still not amended 851 BJC. However, the Belgian Supreme Court has addressed the issue by ruling on 10 March 2023 that this provision may be raised against any claimant, irrespective of their nationality, who lives or resides abroad and does not have sufficient assets in Belgium to cover the financial consequences of a potentially unfavourable decision.

The relevant provisions of the BJC relating to arbitration proceedings do not address the issue of security for costs. It is, however, generally assumed that security for costs may be ordered by arbitral tribunals as part of interlocutory measures that arbitrators may adopt on the basis of article 1717, section 1 of the BJC.

Of course, nothing prevents parties to a third-party funding agreement from finding a contractual arrangement on the issue of providing security for costs. Also, when a funder turns out not to be capable of fulfilling its financial obligations, it can generally be held liable for breach of contract.

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

On the basis of the above-mentioned decision of the Belgian Supreme Court, security for costs can only be ordered by Belgian courts if requested against a claimant, irrespective of their nationality, who lives or resides abroad and does not have sufficient assets in Belgium to cover the financial consequences of a potentially unfavourable decision. The existence of a third-party funding agreement is therefore not a criterion for the granting of security for costs under the relevant provision of the BJC (and of its current interpretation).

In arbitration proceedings, it is generally considered that the existence of a third-party funding agreement may not in and of itself justify an order for security for costs by the arbitral tribunal.

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 admitted and frequently used. It is usually offered by foreign insurance companies. However, 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.

Additionally, insurance for legal costs linked to potential liabilities is well instituted and very common in Belgium. Such insurance is often part of other insurances (automobile liability insurance, household insurance, etc).

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 the absence of any statutory act on third-party litigation funding, no legal provision imposes an obligation on the funded party to disclose the existence of a funding agreement. However, it is considered that in specific circumstances the principle of procedural loyalty justifies that the existence of the funding agreement be disclosed to the opposing party and to the court. Such disclosure would notably be necessary to ensure that there is no conflict of interest involving the third-party funder. Moreover, the disclosure of a funding agreement may be ordered by a court if the conditions required for the production of documents under article 877 of the Belgian Judicial Code (BJC) are met (namely, the existence of serious, precise and concordant presumptions that a party or a third-party is in possession of a document containing evidence of a relevant fact). This scenario, however, seems rather unlikely in relation to a funding agreement. In addition, according to the Directive on representative actions, any ‘qualified entity’ should disclose the existence of third-party funding. (A qualified entity is any organisation or public body representing consumers’ interests which has been designated by a member state as qualified to bring representative actions in accordance with the directive.)

As far as arbitration proceedings are concerned, it is generally considered necessary that the existence of a funder (and of the related funding agreement) be disclosed to the arbitral tribunal. Indeed, article 1686 BJC obliges the arbitrator to inform parties of all circumstances that may arise about his or her independence or impartiality. Given that an arbitrator's prior relationships or dealings with the funder may qualify as such a circumstance, disclosing the existence of a funding agreement is important. However, the specific terms and conditions of the funding agreement do not have to be disclosed. Additionally, the principle of fairness of the debates, enshrined in article 1699 of the BJC, imposes a duty on the funded party to disclose the existence of a third-party funder, should the party be aware of potential conflicts of interest between the funder and one or several arbitrators. Potential conflicts of interest occur more frequently in arbitration proceedings, as arbitrators may have worked before with third-party funders when acting as a lawyer.

In the context of international arbitration, the 2021 ICC Rules of Arbitration foresee the obligation of the parties to disclose the intervention of third-party funders. A similar duty of disclosure of a non-party's direct economic interest in the outcome of a dispute is suggested by the Guidelines of the International Bar Association on Conflicts of Interest in International Arbitration.

There is no such requirement in the rules of the major Belgian national arbitration organisation (namely, the CEPANI). However, in a November 2021 seminar, a majority of the participants advised including a disclosure obligation in the CEPANI Arbitration Rules – although this has yet to be implemented.

Independent of the applicable procedural rules, in any case, an arbitrator is required to disclose all information that could give rise to reasonable doubts as to his or her independence and impartiality. Non-compliance with this rule may constitute a ground for annulment of the arbitral award.

Privileged communications

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

Communications between litigants and their lawyers are considered privileged. Consequently, they will not be allowed as evidence by the courts or arbitrators, and disclosing such information may constitute an offence that could be criminally prosecuted.

The above does not apply to communications between litigants and their funders. As a consequence, the confidentiality of communications and documents exchanged between litigants and third-party funders must be provided for in the funding agreement.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

To our knowledge, there are no reported disputes between litigants and third-party funders in Belgium.

Other issues

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

Third-party funding is still relatively rarely used in Belgium, and there is no established rule or case law regarding this topic. Therefore, many questions remain unanswered. It is thus crucial that a clear and transparent contract be drawn up between the funded party and the third-party funder to cover all the relevant aspects of the funding relationship, including the interactions between the third-party funder and the litigant's lawyer.

UPDATE AND TRENDS

Current developments

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

With the increase of collective and follow-on actions and a growing interest in the enforcement of arbitral awards against sovereign states in Belgium, it is likely that third-party funding will develop over the next few years with the growing presence of Continental European and British funders.

This forecast is endorsed by the resolution of the European Parliament of 13 September 2022, regarding recommendations to the European Commission on regulations of litigation funding in the European Union. These recommendations may encourage the start of a legislative process at the European and national levels and, therefore, stimulate the third-party litigation funding market in countries such as Belgium.