

Third party litigation funding (1) 1/33/22

Litigation tends to be costly. In addition to upfront duties payable when a claim is filed, claimants wishing to protect their rights and interests in court have to pay legal costs such as lawyer fees for representation at court hearings.

Not all claimants have the funds required for litigation, and a successful outcome is never guaranteed. Claimants in all court proceedings risk losing the duties they have paid and the chance to recover the legal costs incurred, without ever receiving any financial satisfaction from the defendant. More risk lies in the fact that even a favourable court ruling may become impossible to enforce should the defendant's solvency extremely deteriorate.

All these points form a basis for developing various models for funding litigation, especially in Anglo-Saxon jurisdictions such as Australia and the US. In continental Europe and Latvia, none of those models have caught the attention of potential parties to litigation. Let's now take a look at the third-party litigation funding model.

Third-party litigation funding is essentially an agreement under which someone who is not a party to a dispute pays some or all of the litigation expenses incurred by a party to litigation (usually the claimant) in exchange for the right to receive some of the benefit the litigation seeks to recover. Most third-party litigation funding agreements work under the principle that if the litigation is not successful, the recipient doesn't have to repay those funds. This means that the financial risk of litigation passes from the claimant to the litigation funder.

The person that actually receives litigation funding is not always the claimant – there is also a business model under which funding for litigation is received by someone that provides legal assistance to the person holding a claim right. While a wide variety of claims are financed in international practice, claims for damages arising from a breach of competition, claims made by a group of consumers, and an insolvency administrator's claims against the debtor's former directors are especially popular. Litigation funders will fund separate claims as well as corporate claim portfolios that may cover a large number of claims. Litigation funding may be enlisted at any stage of litigation – before the claim is made, during court hearings, and after a ruling has taken effect and awaits enforcement.

In Latvia, litigation parties are not liable to reveal the source of litigation funding to the court or other litigation parties, which should make third-party litigation funding especially attractive. An obligation to reveal the source of litigation funding exists in jurisdictions that are traditionally more restrictive on third-party litigation funding, such as Singapore and Hong Kong. In certain jurisdictions, such as Greece and Ireland, third-party litigation funding is subject to a general prohibition. In Latvia, a party to litigation funded by a third party may reveal the existence of such external funding as part of his litigation strategy to demonstrate the strength of his claim, which may prompt the defendant to concede when negotiating a settlement.

From a legal policy perspective, third-party litigation funding improves people's access to the courts, as claimants having a viable claim but lacking free cash have a real chance to file and maintain a claim in court, thereby achieving adequate protection of their rights and interests.

No obstacles to third-party litigation funding can be found in Latvian legislation because there are no rules on such funding at all. Institutional investors operating in Latvia have yet to discover claim rights as a potential investment target. This lack of practice might be due to most claims in Latvia being filed for

comparatively small amounts and rarely reaching an amount to justify litigation-related risks taken by an institutional investor.

In Latvia, potential claimants can also apply to institutional litigation funders abroad, yet we should always bear in mind there is little chance of such funding being awarded. Before receiving funds, any potential claim will be subject to a due diligence review by the funder's experts. In practice, investors take several months to scrutinise an application for litigation funding, and the decision to award funding is mainly based on the strength of the claim, the time frame it could be satisfied, and whether it's possible to enforce the court ruling. Taking all these factors into account, the potential litigation funder will decide whether or not to award funding for litigation.

There are currently several litigation funding solutions available on the market. For example, a legal assistance agreement with a legal assistance provider for a success fee. It's also possible to enter into an agreement with an insurance company to insure legal costs, including litigation expenses. Yet none of these solutions is seen as third-party litigation funding, and they can be used in Latvia only in special circumstances.

In conclusion, we note that the lack of free cash should not be an obstacle to filing and maintaining a claim in court. Potential claimants should be aware that various litigation funding solutions are available on the market, including the opportunity to enter into a third-party funding agreement with an investor.

/To be continued/