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A Cross-Jurisdictional Comparison of the Use of Commercial Litigation Funding in Insolvency in Selected Jurisdictions

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ACADEMIC PAPER

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Acknowledgement

At the beginning of 2021, Associate Professor Sulette Lombard (University of South Australia) and Professor Christopher Symes (University of Adelaide) approached INSOL International with a proposal to undertake a funded project on litigation funding in insolvency.

The results of this much-needed research project are contained within the pages of this Academic Paper, "A Cross-Jurisdictional Comparison of the Use of Commercial Litigation Funding in Insolvency in Selected Jurisdictions". Each of the contributions to the paper address the issue of litigation funding under the same or similar headings, providing very interesting insights into litigation funding in the selected jurisdictions of Australia, Canada, England and Wales, Germany, Ireland, the Netherlands, New Zealand, Singapore, South Africa and the United States.

This report, which falls just short of 300 pages, not only provides insight into the 10 jurisdictions covered, it also shares the results of surveys undertaken with insolvency practitioners and litigation funders. In addition, the report includes two examples of typical litgation funding documents, one from Australia and one from South Africa, which members will no doubt find very useful.

This Academic Paper reveals that the use of commercial funding in insolvency proceedings is generally perceived as a positive development, but also highlights concerns that presently exist. The report also reveals the importance of jurisdictional context when considering the use of litigation funding in insolvency, as insolvency practitioners operating across borders are no doubt aware.

INSOL International acknowledges the contribution to this project by those practitioners and litigation funders who participated in the surveys, as well as the contributions made by the authors of the various country reports included in the paper.

INSOL International would like to congratulate Sulette Lombard and Christopher Symes on the successful completion of this project.

November 2022

Foreword

The notion of external financial support to pursue litigation in insolvent liquidations is by no means a novel concept and commercial litigation funding has been used with success in insolvency proceedings for a number of years in various jurisdictions. Concerns regarding the extent to which proposed regulatory changes (devised to address issues in respect of funded class actions) could affect the operation of litigation funding in insolvency formed the basis of a paper delivered at an INSOL International Academic Colloquium in Singapore in 2019.

The paper led to interesting discussions. Conversations with those who attended the event made it clear, very quickly, how different the approach is to the operation of insolvent litigation funding across the world. Some jurisdictions are still hampered by doctrines that prohibit any use of commercial litigation funding, whereas others have started developing guidelines, or even attempted regulations, in respect of the operation of commercial litigation funding for insolvency matters. These conference discussions and follow-up conversations gave birth to the idea of a research project to investigate and compare the use of commercial litigation funding in insolvency in a number of jurisdictions – particularly relevant due to insolvency law that operates across jurisdictional borders.

In an attempt to ensure broad representation of different types of jurisdictions (for example, common law and civil law jurisdictions; jurisdictions where litigation funding is commonly used and those where use of this mechanism is in its infancy; jurisdictions where a number of large commercial funders are operating with industry revenue amounting to millions and those were funders are only starting to enter the market), 10 jurisdictions were selected for the purpose of a cross-jurisdictional comparison – Australia, Canada, England and Wales, Germany, Ireland, the Netherlands, New Zealand, Singapore, South Africa, and the USA.

The comparative study, both in respect of the academic reports for each of the jurisdictions, as well as perspectives obtained from insolvency practitioners and commercial funders through their participation in surveys, provided interesting insights and much food for thought. The report revealed that the use of commercial funding in insolvency proceedings is generally perceived as a positive development, but also highlighted concerns that presently exist. The report also revealed the importance of jurisdictional context when considering the use of litigation funding in insolvency, as insolvency practitioners operating across borders are no doubt aware.

Undertaking a comparative research project spanning 10 jurisdictions initially sounded like an extremely challenging and daunting task. However, the manner in which the academic collaborators in each of the jurisdictions engaged with and supported the project, made it a very rewarding experience and we gratefully acknowledge their approach and contributions.

The research has been funded by a generous grant provided by INSOL International and its findings were presented at the INSOL International Academic Colloquium in London (June 2022). We are particularly grateful to Dr David Burdette for his steadfast support of the project and to Ms Sanrie Lawrenson for her meticulous editing of the final report. We also acknowledge the support of our respective Universities (the University of South Australia and the University of Adelaide) and the Universities where each of our academic collaborators work. Finally, we thank our hard-working research assistant, Tim Bost.

We look forward to readers' comments and to continuing our research in this growing, important area.

This report reflects the law as at 28 October 2022.

Associate Professor Sulette Lombard (Project Co-Lead)
Professor Christopher F Symes (Project Co-Lead)

November 2022

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Professor Jassmine Girgis is at the Faculty of Law in the University of Calgary. Professor Girgis researches and writes in the areas of director and officer liability, bankruptcy and restructuring law, and contract law. Her research primarily focuses on corporate restructuring and director and officer liability, and where they intersect. She also writes extensively on corporate rescue and its intersection with law and economics and with the public interest. She has received numerous fellowships and grants for her work on director and officer liability and bankruptcy and insolvency and has presented and published widely, in Canada and internationally. She has been retained as an expert witness, and she authors several chapters in the materials used in contract and bankruptcy law classes in law faculties across Canada, *Cases and Material on Contracts* and *Canadian Bankruptcy and Insolvency Law, Cases, Text and Materials*. Professor Girgis was awarded the Paul Martin Scholarship, a full scholarship to undertake her graduate work at the University of Cambridge. Prior to that, she was the Silver Medalist in her graduating year from Western Law and served as the Law Clerk to the Honourable Mr. Justice J. Edgar Sexton of the Federal Court of Appeal. She is a member of the Law Society of Alberta.

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PART A

JURISDICTIONAL OVERVIEWS

AUSTRALIA*

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1. Jurisdictional context

Australia is a federation of six states and two self-governing territories – each with their own constitutions, parliaments, governments and law. The Australian Constitution determines division of legislative powers between state governments and federal government. Based on the principles of the Australian Constitution, the Commonwealth Government alone is able to legislate in respect of corporations and bankruptcy. The legislation that is relevant for the purposes of this study will therefore apply uniformly across Australia.

Legislation regarding insolvency of corporations and insolvency of individuals is separated, with statutory principles dealing with corporate insolvency to be found in the Corporations Act 2001 (Cth). Personal insolvency (insolvency of individuals) is referred to as "bankruptcy" and is legislated in terms of the Bankruptcy Act 1966 (Cth).

Since Australia follows a common law legal system (as a result of which the doctrine of precedent applies), case law remains an important source of law in addition to the above statutory principles. The judgments of the High Court of Australia (which is the highest court in Australia and the final court of appeal for every court in Australia) therefore carry significant weight.

Corporate insolvency is legislated in terms of the Corporations Act 2001 (Cth). Due to this, the Australian corporate regulator, the Australian Securities and Investments Commission (ASIC) fulfils an important regulatory function in relation to corporate insolvency and the regulation of insolvency practitioners, with insolvency practitioners (called liquidators) having to apply to ASIC for registration. Applicants for registration must be able to demonstrate completion of academic requirements in accounting and commercial law and are typically accountants by training. All liquidators are private individuals and there is no government liquidator.

* The authors wish to acknowledge the valuable contribution of their research assistant, Mr Tim Bost, to this project; with sincere appreciation for his dedication and diligence.

2. General overview of litigation funding in Australia

2.1 Historical development, market overview and prevalence

Traditionally, doctrines of maintenance[1] and champerty[2] operated to prevent the use of litigation funding, as both were regarded as a criminal offence and common law tort in Australia.[3] However, the operation of these doctrines has been curtailed to various degrees across the state and territory jurisdictions in Australia. The common law crimes and torts of maintenance and champerty have been abolished by legislation in four Australian jurisdictions.[4] The legislation abolishing the common law torts and crimes of maintenance and champerty in these jurisdictions provides that contracts involving champerty and maintenance could still be illegal, insofar as they operate against public policy.[5] Champerty remains a civil wrong in three jurisdictions: Queensland, Western Australia and the Northern Territory; whereas Tasmania expressly abolished the common law tort of champerty.[6]

In 2006, the Australian High Court determined that litigation funding agreements are enforceable, even where involving champerty and maintenance, as long as they are not illegal in any other way, or against public policy.[7] This decision provided significant impetus for the development of the litigation funding industry.

Despite these developments, the law of champerty may remain relevant, not only in those states where the crime and / or the tort have not expressly been abolished, but also insofar as public policy considerations could still come into play when considering the enforceability of a funding agreement.[8]

The legitimacy of litigation funding in an insolvency context was established in Australia in 1996, based on particular principles of insolvency law. Australian insolvency legislation

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1 According to T Mann (ed), *Australian Law Dictionary* (3rd ed, Oxford University Press, 2018), maintenance refers to "[the support of] litigation in which one has no lawful interest".

2 Champerty is a specific form of maintenance that involves "giving finance to support another person's litigation for ultimate reward" (the reward typically being the ability to share in the fruits of a successful action). See T Mann (ed), *Australian Law Dictionary* (3rd ed, Oxford University Press, 2018) in this regard.

3 *Clyne v NSW Bar Association* (1960) 104 CLR 186.

4 New South Wales (Maintenance, Champerty and Barratry Abolition Act 1993 (NSW)); South Australia (Criminal Law Consolidation Act 1935 (SA), Sch 11, inserted in terms of the Statutes Amendment and Repeal (Public Offences) Act 1992 (SA), s 10); Victoria (Wrongs Act 1958 (Vic), s 32, and the Abolition of Obsolete Offences Act 1969 (Vic)); as well as the Australian Capital Territory (Civil Law Wrongs Act 2002 (ACT), s 221(1)).

5 Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), s 6; Criminal Law Consolidation Act 1935 (SA), Sch 11; Wrongs Act 1958 (Vic), s 32(2); and Civil Law Wrongs Act 2002 (ACT), s 221(2).

6 Civil Liability Act 2002 (Tas), s 28E.

7 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

8 Parliamentary Joint Committee on Corporations and Financial Services, "Litigation funding and the regulation of the class action industry", *Final Report* (December 2020) at p 16 (paras 2.33–2.36).

provides for a broad description of the property of the insolvent party,[9] as well as for the statutory power of sale of the insolvency practitioner, whether it is as trustee in bankruptcy,[10] or liquidator in the case of corporate insolvency.[11] Relying on these provisions, the court held in *Re Movitor Pty Ltd (rec and mgr apptd) (in liq) v Sims*[12] (reported in 1996) that a liquidator is permitted to enter into an agreement to assign an insolvent company's right of action to a third party, indicating that:

> "the reason why the sale of a bare right of action by a trustee in bankruptcy or a liquidator does not involve maintenance and champerty is that, being a sale under statutory authority, to do that which Parliament has authorised, either expressly or by necessary implication, cannot involve the doing of anything that is unlawful".[13]

A series of decisions immediately following *Re Movitor Pty Ltd (rec and mgr apptd) (in liq)* endorsed this approach,[14] leading ultimately to broad acceptance of litigation funding in respect of insolvent litigation.[15] Even though the English decision in *Re Oasis Merchandising Services Ltd*[16] was considered in Australia, the court found that "wrongful trading" type recoveries will be regarded as "property of the company", on the basis of the formulation of the relevant Australian legislation.[17]

The endorsement of litigation funding by a clear majority of the High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,[18] in a context other than insolvency, extended the application of litigation funding further.

Based on the number of reported judgments in which court approval is sought for an insolvent litigation funding agreement, use of commercial litigation funding in insolvency appears reasonably common. However, it should be recognised that the number of reported judgments does not give an accurate indication of usage of commercial litigation funding, as approval for the litigation funding agreement under section 477(2B) of the Corporations Act 2001 (Cth) could also be obtained from creditors, and as some

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9 Bankruptcy Act 1966 (Cth), s 5 (in the case of personal insolvency) and Corporations Act 2001 (Cth), s 9 (in the case of corporate insolvency).

10 Bankruptcy Act 1966 (Cth), s 134(1)(a).

11 Corporations Act 2001 (Cth), s 477(2)(c).

12 (1996) 64 FCR 380.

13 *Re Movitor Pty Ltd (rec and mgr apptd) (in liq)* (1996) 64 FCR 380 at p 391.

14 See, eg, *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 132 FLR 363; *Re Tosich Construction Pty Ltd* (1997) 73 FCR 219; *Bank of Melbourne Ltd v HPM Pty Ltd (in liq)* (1997) 26 ACSR 110; *Re William Felton & Co Pty Ltd* (1998) 145 FLR 211; *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583; *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357; *Re Imobridge Pty Ltd (in liq) (No 2)* [2000] 2 Qd R 280, etc.

15 See T Cini, "Litigation Funding Arrangements in Corporate Insolvencies", *Insolvency Law Journal* Vol 6 (1998) at p 171 for an analysis of the earlier insolvent litigation funding cases.

16 [1998] Ch 170. In this case the court found that recoveries under wrongful trading provisions could not be assigned to a funder, as this would not be considered "property" of the company (at p 173).

17 See, eg, *Elfic Ltd v Macks* (2001) 181 ALR 1 at para 98.

18 (2006) 229 CLR 386.

judgments may be unreported. More information could perhaps be obtained about this matter by asking insolvency practitioners about the use of commercial litigation funding.

The exact number of litigation funders currently operating in the Australian jurisdiction is unknown,[19] although it is suggested that there are approximately 33 funders operating in this jurisdiction.[20] The major players are Omni Bridgeway Limited and Litigation Capital Management Limited (LCM), with a 33% and 22.8% share of industry revenue, respectively.[21] The Australian based funder, IMF Bentham, merged with Omni Bridgeway (a company that was founded in the Netherlands in 1986) in November 2019, and IMF Bentham changed its name to Omni Bridgeway Limited. Omni Bridgeway Limited is listed on the Australian Securities Exchange and has offices in Sydney, Amsterdam, Toronto and London. LCM was founded in 1998 and is one of the world's first litigation funders. It is listed on the London Stock Exchange and has offices in Sydney, Melbourne, Brisbane, London and Singapore.

The industry has grown significantly over the last five years, and industry revenue is expected to increase to AUD 173.5 million the five years through 2021-22 (at an annualised 8.7%); with a forecast that it will continue to grow to AUD 212.4 million over the five years through 2026-27 (at an annualised 4.1%).[22]

Commercial litigation funding is used in a range of different contexts and even though the practice of commercial litigation funding has its roots in insolvency litigation, funded investor-related litigation has outgrown all other types of lawsuits. Current segmentation of cases involving commercial funders appears to be along the following lines:[23]

- investor-related litigation: 29.7%;
- industrial relations litigation: 25.1%;
- other: 7.4%;
- consumer protection litigation: 26.5%; and
- environmental law litigation: 11.3%.

[19] Parliamentary Joint Committee on Corporations and Financial Services, "Litigation funding and the regulation of the class action industry", *Final Report* (December 2020) at p 35 (para 4.24).
[20] *Ibid*.
[21] V Baikie, "Litigation Funding in Australia", *IBISWorld Industry (Specialized) Report* OD5446 (June 2022) at p 8.
[22] *Idem*, p 9.
[23] *Idem*, p 8.

2.2 Regulatory framework

Statutory requirements in the Corporations Act 2001 (Cth) that agreements made by a liquidator require creditor or court approval where the term of the agreement is more than three months,[24] have created an opportunity for the court to become involved in "approving" litigation-funding agreements. As a result, a system of "judicial oversight" in respect of insolvent litigation funding agreements has developed. This development has succeeded, to some extent, in filling the "regulatory gap", due to the court having developed a set of common law guidelines or principles that will be taken into consideration when approving insolvent litigation funding agreements. These are typically related to matters such as the prospects of success of the proposed litigation; possible oppression; the nature and complexity of the cause of action; the extent to which the liquidator has canvassed other funding options; the level of the funder's premium; consultations with creditors; and the risks involved in the claim.[25]

An analysis of the court's application of these principles in cases where approval is sought for an insolvent litigation funding agreement appears to indicate a willingness to engage meaningfully with concerns surrounding use of litigation funding. This factor, as well as an indication by the court that it will not merely "rubber-stamp" whatever is put before it by the liquidator but instead carefully scrutinise the proposed agreement,[26] may allay some concerns in respect of a regulatory gap.[27] The court is clear, however, that the standard required for approval under section 477(2B) of the Corporations Act 2001 (Cth) does not involve exercise of a commercial judgment in respect of the terms of the agreement, but only requires an assessment of whether the entry into the litigation funding agreement is a proper exercise of the liquidator's power, and not ill-advised or improper.[28]

Judicial involvement in litigation funding is restricted to approval of litigation funding arrangements and does not encompass oversight of litigation funders as such. The court therefore does not assume the role of a "litigation funding regulator".

Since July 2020 litigation funders became subject to a plethora of new formal regulatory measures, with the adoption of regulations determining that these bodies fall under the umbrella of the financial services regulatory regime.[29] These regulatory measures consequently required litigation funders to hold an Australian Financial Services Licence (AFSL) to comply with the requirements of the Managed Investment Scheme (MIS) regulatory framework under the Corporations Act 2001 (Cth). Prior to this, litigation

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24 Corporations Act 2001 (Cth), s 477(2B).

25 See, eg, *Re ACN 076 673 875 Ltd (rec'r & mgr apptd) (in liq)* [2002] NSWSC 578 at paras 17-34; and *Re Leigh; AP & PJ King Pty Ltd (in liq)* [2006] NSWSC 315 at para 25, and endorsed by the Full Court in *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2011] FCAFC 89.

26 *Stewart; in the matter of Newtronics Pty Ltd* [2007] FCA 1375 at para 26.

27 See S Lombard and C Symes, "Judicial Guidelines for Insolvent Litigation Funding Agreements", *Insolvency Law Journal* Vol 28 (2020) at pp 165–180.

28 *Re Gerard Cassegrain & Co Pty Ltd (in liq)* [2013] NSWSC 257 at para 11.

29 Corporations Amendment (Litigation Funding) Regulations 2020 (Cth).

funders were exempt from these requirements. Further changes to the regulatory framework were proposed in terms of the Corporations Amendment (Improving Outcomes for Litigation Funding Participans) Bill 2021.

Since then, this Bill has lapsed with the change of government that took place in May 2022 and it is unlikely that the Bill will be reintroduced. The Full Court of the Federal Court has furthermore indicated that litigation funding schemes are *not* managed investment schemes that will be subject to Chapter 5C of the Corporations Act 2001 (Cth).[30] It also appears as if further regulatory changes are afoot, with the Australian Treasury having commenced a consultation process focused on exemptions for litigation funding schemes. A number of reforms are proposed, including explicitly exempting litigation funding schemes from the MIS regulatory framework; AFSL requirements; as well as product disclosure and anti-hawking provisions of the Corporations Act 2001 (Cth).[31] If these changes are accepted (which appears to be likely at this stage) litigation funders will not be subject to any dedicated, formal regulation.

Lastly, the Association of Litigation Funders of Australia (ALFA) provides Best Practice Guidelines that set out standards of practice for its members. The impact of these is doubtful for two reasons; firstly, the guidelines are not mandatory, and secondly, ALFA does not seem to have broad membership – for example, the two major players in the Australian market (Omni Bridgeway Limited and LCM, who together hold approximately 50% of the market revenue share) are not among the members of the association.

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

An obvious purpose of litigation funding is to provide the financial means to pursue litigation that a claimant may not otherwise have been able or willing to pursue, due to lack of financial resources or risk aversion. However, the precise role of a funder would depend on the terms of the funding agreement. It is interesting to note that services advertised on some litigation funding firm websites include matters such as "offering dispute resolution expertise"; "supporting business development efforts of partner law firms"; "providing strategic and management assistance", and so on. According to the most recent Parliamentary Joint Committee (PJC) Report into litigation funding, the services provided by litigation funders "often include indemnities or security for adverse cost orders, supervising lawyers and coordinating class actions".[32] This appears to indicate that the services offered by a litigation funder could likely go beyond the mere provision of financial support and could include aspects such as case / project management. Some of these services may be more relevant to the class action context, rather than the

[30] *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103.
[31] See https://treasury.gov.au/consultation/c2022-308630 for further information in this regard.
[32] Parliamentary Joint Committee on Corporations and Financial Services, "Litigation funding and the regulation of the class action industry", *Final Report* (December 2020) at p 190 (para 13.7).

insolvency context. Reasons for this include, for example, that there could be a more significant need for services such as case management when the litigation involves a large number of plaintiffs (as in class actions), less of a need for pre-claim investigation by the funder where the insolvency practitioner could fulfil this role, and so on.

3.2 Regulatory obligations

Litigation funders are currently required to hold an AFSL, even though it appears as if this requirement may be removed.[33] At the moment, as an AFS licensee, a litigation funder would be subject to several obligations, including general obligations; financial obligations; obligations in respect of risk management systems; and external dispute resolution obligations.

To comply with financial obligations as an AFS licensee, an entity must, for example, have available adequate financial resources to provide the financial services covered by the AFSL and to carry out supervisory arrangements.[34] However, ASIC is very clear on the fact that it should not be regarded as a prudential regulator[35] and that the AFSL requirements to have adequate financial resources:

> "are not focused on ensuring that AFS licensees meet their financial obligations to clients and are not designed to manage the credit risk of licensees, prevent businesses from failing due to poor business models or cash flow problems, or to provide compensation to consumers who suffer a loss. In short, the financial requirements are not designed to act as security to meet a particular liability, nor are they intended to protect against credit risk more generally".[36]

AFSL holders are furthermore, among other things, obliged to act honestly, efficiently and fairly in providing financial services; maintain an appropriate level of competence to provide financial services; have adequate financial technical and human resources to provide the financial services covered by the licence; be a public company; have appropriate arrangements for managing conflicts of interest; comply with licence conditions and financial services laws; take reasonable steps to supervise its representatives; be a member of the Australian Financial Complaints Authority; maintain an internal dispute resolution procedure; and hold adequate coverage of professional indemnity insurance.

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[33] See discussion under para 2.2 above.

[34] Corporations Act 2001 (Cth), s 912A(1)(d).

[35] See ASIC Regulatory Guide 166, "Licensing: Financial requirements" (April 2021) at p 6 (RG 166.5), as well as Australian Securities and Investments Commission, Submission No 39 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, "Inquiry into Litigation Funding and the Regulation of the Class Action Industry" (29 July 2020) at p 23.

[36] Australian Securities and Investments Commission, Submission No 39 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, "Inquiry into Litigation Funding and the Regulation of the Class Action Industry" (29 July 2020) at p 23 (para 105).

Litigation funders, as AFSL holders, are also required to have appropriate arrangements for managing conflicts of interest. ASIC Regulatory Guide 248, entitled "Litigation schemes and proof of debts schemes: Managing conflicts of interest" furthermore provides guidelines in respect of managing conflicts of interests in respect of those entities that are exempted from the Corporations Regulations for litigation schemes. Detailed information is provided about matters such as the types of conflict that could arise, key practices to satisfy the obligation, and so on.

The most recent PJC Report highlights as a particular concern the extent to which some law firms and litigation funders are related parties, or "linked" in some way.[37] As a result, the PJC recommended that the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and the Legal Profession Uniform Conduct (Barristers) Rules 2015 be amended to "prohibit solicitors, law firms and barristers from having a financial or other interest in a third-party litigation funder that is funding the same matters in which the solicitor, law firm or barrister is acting".[38]

3.3 Funding premium

Typically, litigation funding agreements provide that the litigation funder be reimbursed for the costs it incurred during the proceedings and be paid a premium / commission to compensate the risk that the funder accepts. The premium / commission is calculated either as a percentage of the sum of money recovered, a multiple of the costs incurred by the litigation funder, or the higher / lower of any of these amounts. A litigation funding agreement could also provide for a "project management fee", and / or "settlement administration fee", in addition to the funder's commission, where relevant.[39]

There is currently no legislation or regulation that expressly puts a cap on the fees that litigation funders can charge. Theoretically, Australian courts would be able to set aside a litigation funding agreement where the funding premium is considered "unfair", based on "equitable" principles of contract law such as illegality, unconscionability, and public policy.[40]

3.4 Procedural aspects

3.4.1 Control of proceedings and involvement in settlement proceedings

A question that often arises in the context of commercial litigation funding is the extent to which litigation funders are permitted to assume control of the funded proceedings. As indicated above, insolvent litigation funding arrangements are perceived not to offend the rules against champerty and maintenance on the basis that it is an exercise of the statutory

[37] Parliamentary Joint Committee on Corporations and Financial Services, "Litigation funding and the regulation of the class action industry", *Final Report* (December 2020) at p 274 (paras 15.82-15.104).
[38] *Idem*, p 282 (para 15.105), Recommendation 26.
[39] *Idem*, p 193 (para 13.16).
[40] As recognised by the High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

right of the insolvency practitioner to dispose of the property of the insolvent party. In the case of litigation, the "property" that is disposed of could be either the proceeds of a successful action or the bare cause of action itself.[41] Case law clearly indicates that an insolvency practitioner is within rights to give up control of proceedings where a cause of action is assigned to an outsider for a fee.[42] In cases where the litigation funder is willing to fund proceedings in exchange for a share of the proceeds of a successful outcome, the litigation funder would be permitted to negotiate contractual terms that would allow some influence in respect of the proceedings, as long as the liquidator remains involved, and an acceptable measure for resolving disputes is provided for.[43]

Whereas control of the proceedings was previously regarded as relevant to determine whether the funding agreement offended against principles of champerty and maintenance, a more compelling reason why it is an important consideration these days might be that liquidators ceding control of the proceedings could potentially be in danger of "compromising their duty 'to act in the best interests of creditors'".[44] The court made it clear in *Elfic Ltd v Macks* that where the cause of action is not assigned to the funder, the liquidator "remains responsible under the Law [corporations legislation in force at the time] for its conduct" and that the role of liquidator "carries onerous legal responsibilities and is one which must be unfettered and is largely non-delegable".[45]

A litigation funding agreement could determine the extent to which a funder should be involved in respect to settlement of proceeding. In *Clairs Keeley (a firm) v Treacy*,[46] the court indicated that it was reasonable for a litigation funder to "have some say and control in relation to settlement", based on recognition of the commercial necessity of funders being able to control the risk inherent in their investment.[47]

3.4.2 Right to abandon proceedings

A further question is whether a litigation funder could abandon the funded proceedings. There are no regulations or legislation prohibiting a contractual arrangement that the funder could terminate the litigation funding agreement without cause on giving notice. In fact, it is recognised that "the funder's reservation of the right to terminate funding under the…funding agreement…is a commercially reasonable and appropriate term".[48] Factors that could lead to this include commercial viability of the claim, a material change to the legal merits of the claim, or to the value of the claim.[49] Should the agreement be cancelled

41 See *Re Movitor Pty Ltd (rec and mgr apptd) (in liq)* (1996) 64 FCR 380 at p 391.
42 *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 132 FLR 363 at p 401.
43 See, eg, *Re Tosich Construction Pty Ltd* (1997) 73 FCR 219 at p 236; *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583 at pp 596-597; and *Re City Pacific Ltd* [2017] NSWSC 784 at paras 24-25.
44 T Cini, "Litigation Funding Arrangements in Corporate Insolvencies", *Insolvency Law Journal* Vol 6 (1998) at pp 179-180 and 185.
45 *Elfic Ltd v Macks* (2001) 181 ALR 1 at para 105.
46 (2004) 29 WAR 479.
47 *Ibid* at p 489 (para 55), quoting *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357 at p 363.
48 *Re Ascot Vale Self Storage Centre Pty Ltd (in liq)* [2019] VSC 794 at para 137.
49 https://www.lexology.com/library/detail.aspx?g=7d946e31-9877-42a6-bd12-8b4eb32864a7.

while litigation is in process, the funder could be responsible to pay adverse costs and provide security of costs incurred up to the date of termination.[50]

In *Nom de Plume v Ascot Vale Storage (No 2)*[51] the court recognised the inevitable relationship between the right to withdraw funding and the ability to exercise some degree of control over the litigation through that measure.[52] The court considered authorities regarding litigation funding outside the insolvency context as applicable to liquidators and noted that a right on the part of a funder to terminate the agreement is "almost inevitable".[53] Even though this case involves creditor funding, rather than funding by a commercial litigation funder, the court's acceptance of the right to withdraw funding and degree of influence that could consequently be exercised, is insightful. Tellingly, the court remarked that a "liquidator cannot expect a blank cheque to pursue whatever litigation he or she so wishes".[54]

3.4.3 Liability for adverse cost orders and security for costs

The "loser pays" (also called "costs follow the event") model is followed in Australia, which means that the court could order the losing party to compensate the costs of the prevailing party. The rationale for the rule was explained as follows in *Oshlack v Richmond River Council*:

> "The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation. As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, an often unnecessary, burden on the scarce resources of the publicly funded system of justice".[55]

The funder is not a party to the proceedings and will therefore not automatically be captured by the "loser pays" rule. However, the litigation funding agreement could

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50 *Ibid*, with reference to *Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd* [2016] WASC 159.
51 [2020] VSCA 70.
52 *Nom de Plume v Ascot Vale Storage (No 2)* [2020] VSCA 70 at para 107.
53 *Idem*, para 109, with reference to *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455 at para 33.
54 *Ibid*.
55 (1998) 193 CLR 72 at p 97.

determine that the litigation funder be responsible for an adverse cost order. The court also has the discretion to order costs against a non-party under certain circumstances,[56] one of which is where:

> "the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made".[57]

In the insolvency context, the extent to which a litigation funder is obligated to cover adverse cost orders is relevant insofar inability or unwillingness to do so would have a clear detrimental impact on unsecured creditors. This is particularly the case where a negligible anticipated return to creditors, due to the size of the premium payable to the funder, is justified on the basis that creditors only stand to win, and that they cannot be any worse off. The initial judicial view in relation to this aspect is that the fact that a funding agreement does not provide for the funder to be liable for the costs of an unsuccessful action, "cannot prevent such an arrangement being a disposition of the company's property and so within the statutory power of disposition on any terms and in any manner the liquidator considers appropriate".[58] Instead, the court relied on the likelihood of "[c]ommercial practicalities" that would ensure that liquidators take appropriate measures of protection in respect of the potential liability to meet the defendant's costs, should the action fail.[59] In subsequent cases, the court appeared to place a more significant emphasis on the relevance of this aspect.[60] Safeguards against adverse cost orders is clearly an important factor when considering interests of creditors, and also potentially regarding oppression in relation to the other party.[61] However, a contractual safeguard has limited utility where the litigation funder is not in a position to meet its obligations under the funding agreement. The financial position of the proposed funder is therefore an important aspect that would also have to be taken into consideration, as is the availability of After the Event (ATE) insurance, which is permitted and used in litigation funding agreements in Australia.

An order for security for costs against a plaintiff is to protect the defendant against the risk of being deprived, through the plaintiff's inability to pay, of the benefit of a costs order made for that purpose, should the defendant be successful. The discretion to order

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56 As confirmed by the Australian High Court in *Knight v FP Special Assets* (1992) 174 CLR 178 at p 190.

57 *Idem,* pp 192–193. A good overview of the principles regarding costs against funders is provided in *Turner v Tesa Mining (NSW) Pty Ltd* [2019] FCA 1644 at paras 20-41.

58 *Re Movitor Pty Ltd (rec and mgr apptd) (in liq)* (1996) 64 FCR 380 at p 396.

59 *Ibid*.

60 *Re Imobridge Pty Ltd (in liq) (No 2)* [2000] 2 Qd R 280; and *Re Leigh; AP & PJ King Pty Ltd (in liq*) [2006] NSWSC 315 at paras 35–36.

61 *Jones, Saker, Weaver and Stewart, re Southern Limited (in liq) (rec and mgr apptd)* [2012] FCA 1072 at paras 42 and 45.

security for costs is based on, for example, rule 42.21(1)(d) of the Uniform Civil Procedure Rules 2005 (NSW), section 1335 of the Corporations Act 2001 (Cth), and so on. According to the Australian High Court, the court will exercise its discretion to award security for costs only after having taken into account all relevant factors and circumstances.[62]

Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd[63] provided the Australian High Court with an opportunity to address the question of whether failure by a litigation funder to provide an indemnity for the costs awarded against the funded party constituted an abuse of process. The court held that "[t]he proposition that those who fund another's litigation must put the party funded in a position to meet any adverse cost order is too broad a proposition to be accepted" and "has no doctrinal root".[64] Even though litigation funders therefore appear not to be required to provide security for costs, it would seem a standard practice to do so. *Turner v Tesa Mining (NSW) Pty Ltd*,[65] provides a more recent example of a funder being required to provide security for costs. Payment into court or a bank guarantee from an Australian bank would be acceptable security. Security could also include, for example, a deed of indemnity proffered by an overseas-based ATE insurer under particular circumstances, provided that it is appropriately worded.[66]

4. Litigation funding and insolvency

In an insolvency context, funding would be required for the purposes of funding preliminary investigations to assess the possibility of recovery or enforcement actions, examinations, actions against directors for breach of duties, or voidable transaction proceedings.

4.1 Mechanisms to fund insolvency proceedings

Insolvency proceedings could be funded in a number of ways – the most obvious being from company funds. However, where a company is in insolvent liquidation, a lack of funds to pursue litigation could present a real obstacle. Under those circumstances, other means that could be considered to support litigation include the (government-funded) Assetless Administration Fund (AA Fund), creditor funding in exchange for priority, conditional cost arrangements, and commercial litigation funding.

The AA Fund was established by the Australian Government and is administered by ASIC. The purpose of the AA Fund is to support proceedings in companies with few or no assets. There are three types of grants available under the AA Fund, each operating in terms of a

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62 *PS Chellaram & Co Ltd v China Ocean Shipping Company* (1991) 102 ALR 321 at p 323.
63 (2009) 239 CLR 75.
64 *Ibid*, para 43.
65 [2019] FCA 1644.
66 *Re DIF III Global Co-Investment Fund LP v BBLP LLC* [2016] VSC 401 at paras 82–83 provides an example where the ATE policy was regarded as sufficient security, whereas *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699 indicates when an ATE policy may not be regarded as providing sufficient security.

set of "Guidelines". These are Director Banning Grants,[67] Asset Recovery Grants,[68] and Other Matter Grants.[69] The types of grants available indicate a focus on recovery proceedings and enforcement proceedings. Grant guidelines furthermore emphasise misconduct.

An insolvency practitioner could also negotiate with company creditors to provide an indemnity for costs of litigation. Creditors are incentivised to do so in terms of section 564 of the Corporations Act 2001 (Cth), according to which the court has a discretion to give those creditors an advantage over others in respect of property recovered under a successful action.

Insolvency litigation could furthermore be financially supported in terms of a "no win – no fee" costs agreement between the insolvent company and the lawyer. In that instance, the lawyer agrees not to charge any fees for his services unless and until there is a successful outcome. The lawyer thus carries the risk of an unsuccessful outcome to some extent. Due to the exposure to higher risk, the lawyer could charge an "uplift fee" (that is , charge higher fees than those under a standard cost agreement). Depending on the terms of the "no win – no fee" costs agreement, the lawyer could still be entitled to recover outlays. The "no win – no fee" arrangement also typically does not involve the lawyer being liable for the costs of the other party, should the case be "lost". A client who enters into a "no win – no fee" costs agreement therefore remains liable for the costs of the other party in the case of an unsuccessful outcome.[70]

The final option available to provide financial support for insolvent litigation, is for an insolvency practitioner to approach a commercial litigation funder (on its own, or in combination with a "no win – no fee" costs agreement with the lawyer), to support the litigation.

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67 See here for more information in relation to Director Banning Grants Guidelines.

68 See here for more information in relation to Asset Recovery Grants Guidelines.

69 See here for more information in relation to Matters other than Director Banning Grant Guidelines.

70 Contingency fee arrangements are generally not permitted in Australia. The only exception to this is in the state of Victoria, where contingency fees in class actions commenced in the Supreme Court of Victoria are permitted. This came about as a result of amendments to the Supreme Court Act 1986 (Vic), following the passing of the Justice Legislation Miscellaneous Amendments Bill 2019 (Vic). The "new" s 33ZDA of the Supreme Court Act 1986 (Vic) empowers the court to order that lawyers representing the plaintiff be permitted to recover a contingency fee. With the emphasis on class actions, this is not an option that will typically be available in the context of insolvency litigation.

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

There is no legislative requirement for creditors to be given details of any funding agreements. Some litigation funding agreements are going to be commercially confidential and therefore it may be unsound to provide all creditors with detailed information. This is supported by legislation and case law that when considering a request for access to reasons for orders made pursuant to section 477(2B) of the Corporations Act 2001 (Cth) for approving the entry by the liquidators into a litigation funding deed, it is appropriate to give the liquidators an opportunity to make submissions on which parts of the material to which access is sought, is considered confidential and therefore should remain suppressed.[71]

Whilst there is no legislative provision requiring all creditors or a majority to approve a litigation funded proceeding taken by the insolvency practitioner, there are occasions when creditors are asked to approve the intended litigation funding. As already observed, section 477(2B) of the Corporations Act 2001 (Cth) provides that the creditors or a court need to approve of any agreement, including a litigation funding agreement, as it will exceed three months. In *Robinson, in the matter of Reed Constructions Australia Pty Ltd (in liq)*[72] a meeting of creditors passed a resolution authorising the liquidator to enter into a litigation funding agreement. However, it contained a condition precedent to its operation, namely that court approval to enter into the agreement had to be obtained within one month. The liquidator applied to the court for, essentially, retrospective approval. The court observed that, while the creditors had approved the entry into the funding agreement (which could obviate the need for seeking court approval), in this case it was a condition of the funding agreement that it would terminate if court approval was not obtained. The court granted retrospective approval. Conversely, in *Marsden, in the matter of Unified Business Communications Group Pty Ltd (in liq)*[73] a meeting of creditors refused to approve a litigation funding agreement that the liquidator had entered into, but which was subject to creditor approval. Ultimately, the liquidator sought approval from the court *nunc pro tunc* to enter into the litigation funding agreement and the court, after considering all the factors outlined below for the approval under section 477(2B) of the Corporations Act 2001 (Cth), approved the litigation funding agreement. The court's discretion is not restricted by creditors rejecting the litigation funding agreement and *Buiscex Ltd v Panfida Foods Ltd (in liq)* offers an interesting example of a successful application to court for the approval of a litigation funding agreement, in spite of it being unanimously rejected by creditors. The court decided to override the creditor resolution opposing the funding agreement for a number of reasons, including the fact that there was no evidence to the fact that a better deal could have been done, as well as the public

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71 *Re Octaviar Administration Pty Ltd (in liq)* [2014] NSWSC 344. Federal Court of Australia Act 1976 (Cth), s 37AF(1) provides that the court may, by making a suppression order or non-publication order, prohibit or restrict the publication or other disclosure of information.

72 *Robinson, in the matter of Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594.

73 *Marsden, in the matter of Unified Business Communications Group Pty Ltd (in liq)* [2018] FCA 272.

interest element in relation to pursuing possible breaches of duty involving losses of significant magnitude.[74]

Creditors have been favoured with increased control in insolvency matters since 2017.[75] This has meant creditors can require the insolvency practitioner to convene meetings,[76] request a court to inquire into the administration of the company by the insolvency practitioner,[77] appoint a reviewing liquidator[78] and, in the most serious scenarios, remove the insolvency practitioner.[79] With such "tools" the creditors can most certainly influence litigation funding arrangements being made by the insolvency practitioner. However, there is no direct legislative provision that empowers creditors with rights to challenge the funding agreement.

4.2.2 Relevance of litigation funding arrangement providing benefit to creditors

There is an expectation that an insolvent estate that has used a litigation funder would do so to provide a benefit to creditors. However, case law indicates that the court would be willing to approve litigation funding agreements in instances where a successful outcome is likely to benefit only the liquidator and the funder. For example, in *Re Cardinal Group Pty Ltd (in liq)*, a case involving an application to amend a statement of claim, the court noted that:

> "even if the proceedings were pursued to seek to recover the liquidators' costs or funding which had been devoted to the conduct of the proceedings, it seems to me that that is a proper purpose, where liquidators would less readily accept appointment, and litigation funders would less readily fund proper proceedings in liquidation, if liquidators could not recover their remuneration or litigation funders could not recover the funding which they provided".[80]

In *Hall v Poolman*[81] Palmer J was critical of the liquidators who brought an action where the return to creditors was at best "nominal" or "token" and stated that the liquidators should have sought directions from the court about whether to commence the funded litigation. However, on appeal, the court expressed general disagreement with the trial judge, emphasising the relevance of the public interest in pursuing proceedings related

74 *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357.
75 Insolvency Practice Schedule (Corporations) 2016 (Cth), s 1-1(2)(b).
76 *Idem,* s 75-15.
77 *Idem*, s 90-10.
78 *Idem*, s 90-24.
79 *Idem*, s 90-35.
80 *Marsden v Screenmasters Australia Pty Ltd, Re Cardinal Group Pty Ltd (in liq)* (2015) 110 ACSR 175 at para 34. Also see *Re Imobridge Pty Ltd (in liq) (No 2)* [2000] 2 Qd R 280 at para 39.
81 *Hall v Poolman* [2007] NSWSC 1330 at para 388.

to a breach of duty.[82] The importance of the public interest element was subsequently also recognised in proceedings not involving a breach of duty, but antecedent transactions.[83]

4.2.3 Other measures to protect interests of creditors

Courts will provide some scrutiny that will serve to protect the interests of creditors. The standard imposed under section 477(2B) of the Corporations Act 2001 (Cth) concerns an assessment by the court that entry into the agreement is a proper exercise of power and not ill-advised or improper on the part of the liquidator, rather than being a matter of the court exercising commercial judgment.[84] In doing this assessment the court will have the interests of creditors in mind. As noted above in *Hall v Poolman* there is an expectation on insolvency practitioners to apply to the court for directions when contemplating a funding agreement and it is then for the court to determine whether the proposed proceedings would be in the creditors' interests and whether the pursuit of the proceedings would correspond with doing justice to the parties involved in the case. The court does not undertake a complete "merits review" of the funding agreement, in that the court does not seek to "second guess" the liquidator's commercial judgment to ensure the creditors are protected.[85] In its protection of creditors, though, the court must be satisfied that there is no error of law, bad faith or lack of prudence in the circumstances.[86]

Creditor interests are also protected through the obligations owed by the insolvency practitioner,[87] as well as means by which creditors have increased control in insolvency matters.[88]

5. Insolvency practitioners and litigation funding

5.1 Insolvency practitioner obligations

Insolvency practitioners in participating with a litigation funder keeps their existing obligations, powers and duties. Insolvency practitioners in owing a fiduciary duty must act honestly and avoid conflicts of interest in all aspects of their administration including participating in litigation, and they owe a professional duty of care so they must act with a reasonable degree of care and skill when they are arranging and participating in litigation funding. Insolvency practitioners are required to exercise their own discretion in

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82 *Hall v Poolman* (2009) 71 ACSR 139 at para 187.

83 *Marsden v Screenmasters Australia Pty Ltd, Re Cardinal Group Pty Ltd (in liq)* (2015) 110 ACSR 175 at para 63.

84 *McGrath & Anor re HIH Insurance Ltd & Ors* (2010) 78 ACSR 405.

85 *Re Leigh; AP & PJ King Pty Ltd (in liq)* [2006] NSWSC 315 at para 23.

86 *Needham, in the matter of Bruck Textile Technologies Pty Ltd (in liq)* [2016] FCA 837 at para 29; *Corporate Affairs Commission v ASC Timber Pty Ltd* (1998) 29 ACSR 109 at p 118; and *Stewart; in the matter of Newtronics Pty Ltd* [2007] FCA 1375.

87 See para 5.1 below.

88 See para 4.2.1 above.

administering the affairs of the company and they cannot delegate this professional judgment and discretion.[89]

The insolvency practitioner should be assiduous in reporting to creditors about matters of the administration and, when appropriate, inform them of any litigation that is contemplated and how it is to be funded. The insolvency practitioner should be able to provide a reasonable response to any queries from creditors relating to the litigation funding.

The corporations legislation demands of insolvency practitioners that they do everything to collect the property of the company in a liquidation,[90] and the use of litigation funders can assist with this work. There is specific legislative power[91] to initiate litigation in order to recover company property and the insolvency practitioner must give careful consideration of the prospects of success and likely recovery given the potential costs and time implications. There is a broad statutory provision[92] that gives a liquidator the power to do anything expedient with reference to, or conducive to, the beneficial pursuit towards completion of the winding-up of affairs and distribution of property however this power was not held to support a liquidator entering into a litigation funding agreement without return to the creditors.[93]

As the litigation funding is likely to be in place for more than three months it is important to note that the corporations' legislation[94] restricts an insolvency practitioner from entering into any agreement on behalf of the company where the agreement or obligations of a party to the agreement may be discharged by performance more than three months after the agreement has been effected. The reason for the restriction is because a long agreement might unfruitfully delay the finalisation of the winding-up.[95] The insolvency practitioner must seek approval of the creditors, a committee of inspection or the court to lift this restriction. The litigation funding agreement is often the subject of an application before the court to exercise its discretion in approving the entering into the agreement by the liquidator.

5.2 Factors to consider when contemplating litigation funding

There are many factors for insolvency practitioners to consider when they contemplate a commercial litigation funder agreement and, given that there will need to be approval in terms of section 477(2B) of the Corporations Act 2001 (Cth) for this agreement, there is the additional consideration of how the court will view this application.

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89 An insolvency practitioner is able to seek advice and to appoint agents and in the litigation funding context they may even engage a litigation funding broker to seek out the funders and their interest.
90 Corporations Act 2001 (Cth), s 478(1).
91 *Idem*, s 477(2)(b).
92 *Idem*, s 477(2)(m).
93 *Fortress Credit Corp (Australia) Pty Ltd v Fletcher* [2015] NSWCA 85.
94 Corporations Act 2001 (Cth), s 477(2B).
95 https://murrayslegal.com.au/blog/2020/06/16/insolvency-litigation-funding-too-much-hand-holding/.

The insolvency practitioner must address the substantial list of principles[96] or factors that have been established over the years by the court. This list includes *inter alia*, how the interests of all creditors are served by this agreement, have the creditors been consulted, has the availability of other funding options been explored, what is the nature and complexity of the cause of action, what are the prospects of success in taking this litigation, and has there been due diligence in respect of choice of funder. The court will be interested in the insolvency practitioner showing that there is a good and solid reason for concluding that the winding-up will be enhanced by the funding agreement.

Costs orders loom large as a consideration for insolvency practitioners wanting to take an action. There is the potential for costs orders to be made against insolvency practitioners. Whilst company assets are usually responsible for the costs, a court can order that those costs be paid by the liquidator if the liquidator is adjudged to have acted unreasonably, recklessly or negligently and his conduct has led to the unnecessary incurring of costs.

Of course, the insolvency practitioner will have the usual factors such as what are the terms of the agreement and the details therein, such as the control of the conduct of the litigation, the mechanisms for resolving disputes and the all-important premium that is to be paid to the litigation funder.

5.3 What are litigation funders looking for?

Litigation funders are looking for involvement to fund claims at four stages of litigation, namely the assessment (for example public examinations), then the proceedings, the appeal (if any), and the enforcement. It is said that the golden rule for litigation funders is that they want to be satisfied that the costs of prosecuting the claim are in proportion to the likely recoverable value of the claim. In assessing whether they will fund litigation there are six funding criteria that litigation funders use, and these are the liability, merits of the claim, the quantum, the recoverability, the costs of litigation, and finally, any peculiarities of the case.

To assist them with their assessment of the claim, litigation funders require the insolvency practitioner to provide supporting information, a brief outline of the claim, an insolvency practitioner's report, the pleadings (including drafts), relevant documents such as critical evidence, correspondence between the parties, letters of demand, written advice from a barrister and / or solicitor, an estimate of the costs of the litigation up to a fully contested hearing, and the asset searches that have been undertaken for the proposed defendants.

Many litigation funders will not provide funding for actions where the minimum claim value is low such as AUD 10 million or less, whilst other funders will work with the insolvency practitioners to see if the funding can be tailored to the particular claim, provided that it

[96] Summarised in *Hughes, in the matter of Sales Express Pty Ltd (in liq)* [2016] FCA 423; *Re 77738930144 Pty Ltd (in liq)* [2017] NSWSC 452. See also S Lombard and C Symes, "Judicial Guidelines for Insolvent Litigation Funding Agreements", *Insolvency Law Journal* Vol 28 (2020) at pp 165–180.

meets the funding metrics of the litigation funder. The funding metrics can vary but funding costs need to be around 10% of the claim value. For example, a litigation funder will have satisfied their metrics if 10% goes to funded legal / insolvency practitioner costs, 30% goes to litigation funder commission (which is three times the return on investment), 10% goes to unfunded costs (speculative fees / overruns) and then the balance of 50% goes into the insolvency administration as a return to creditors.[97]

6. Litigation funding agreement

6.1 Typical structure of agreement

In attempting to find a typical structure of a litigation funding agreement, an Australian funder provided their "Commercial Claim Funding Agreement" which they use for insolvency litigation funding. The agreement was approximately 10 pages with additional pages for schedules.[98]

The headings that appear in the funding agreement include: Background, Definitions and Interpretation, Cooling off Period, Funding, Claims for Payments, Reimbursable amount and Additional sum, Appeal of the Proceedings, Funder's Indemnity, Representative and Conduct of Proceedings, Commencement and Termination, Representations and Warranties by Claimant, Confidentiality, Notices, Good and Services Tax, Input Tax Credits, Dispute Resolution, Governing Law, Assignment, Conflicts Management Policy, and Amendments to the Agreement. The first of the schedules to this agreement required populating of such matters as description of claims, name of respondents and legal representatives, particulars of investigative work, amounts of funding for both investigative work and the proceedings and the enforcement work divided into legal costs and disbursements, details of the additional sum being either as a percentage of any resolution amount or a number to times the reimbursable amount (a multiple) and a similar treatment for appeals, an amount for the indemnity for an order for costs and security for costs, any condition precedents, and conflict disclosure.[99]

The typical structure therefore does incorporate standard consumer protection measures such as recommending independent legal advice and a cooling-off period of five business days, the ability to terminate by providing written notice within 28 business days or immediately where there has been a material breach, and warranties regarding representations where for example, untrue or incorrect representations can result in termination in three business days.

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[97] Lisa Brentnall, Senior Litigation Manager, Litigation Lending, Presentation 19 August 2020. Personal Insolvency Forum, Piper Alderman (copy of PowerPoint presentation on file with authors).

[98] See Appendix A.

[99] *Ibid*.

6.2 Protection of confidential information in relation to funding agreement

Legal professional privilege is generally not available to protect against disclosure of a litigation funding agreement. However, for funded class action proceedings commenced in the Federal Court and some state courts, claimants are required, on a confidential basis, to disclose the litigation funding agreement to the court, and to other parties.[100] Commercial terms may be redacted.[101] Confidentiality of certain terms of the funding agreement could furthermore be maintained on the basis of provisions such as section 37AF of the Federal Court of Australia Act 1976 (Cth), where these documents are regarded as of a "commercially confidential and sensitive kind".[102]

The matter of confidentiality in relation to the funding agreement was addressed in a number of recent cases, with confidentiality orders being granted in *Krecji (liquidator), in the matter of Community Work Pty Ltd (in liq)*,[103] *Hancock (liquidator), Re South Townsville Developments Pty Ltd (in liq)*[104] and *Kogan, in the matter of Rogulj Enterprises Pty Ltd (in liq)*.[105] In *Hancock (liquidator), Re South Townsville Developments Pty Ltd (in liq)* the court emphasised the fact that confidentiality orders were sought as to further the interests of the creditors and to prevent the defendants from obtaining an unfair advantage not available to ordinary litigators by learning the terms and conditions under which the plaintiff was able to pay its legal costs and expenses.[106] Similar sentiments were echoed by Cheeseman J in *Kogan, in the matter of Rogulj Enterprises Pty Ltd (in liq)*, with the court noting that "[t]he clear public interest in the due and beneficial administration of the estates of insolvent companies for the benefit of creditors is a relevant consideration in favour of granting an order under s 37FA".[107]

However, in *Hancock liquidator of South Townsville Developments Pty Ltd (in liq) (No 2)*,[108] Griffiths J considered that the defendants were entitled to access portions of the agreement which were relevant to how they should conduct a security of costs application.[109] It was reasoned that their forensic decisions concerning security for costs should be made on an informed basis, and it may well be, for example, that having regard to the relevant terms of the funding agreement they would not press for a separate order providing security for costs.[110]

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[100] See, eg, Federal Court Class Actions General Practice Note (GPN-CA) at para 6.
[101] *Ibid*. Also see *Coffs Harbour City Council v Australia and New Zealand Banking Group Ltd (trading as ANZ Investment Bank)* [2016] FCA 306.
[102] *Re Australian Institute of Professional Education Pty Ltd (in liq)* [2018] FCA 642 at paras 32–36.
[103] [2018] FCA 425.
[104] [2019] FCA 71.
[105] [2021] FCA 856.
[106] [2019] FCA 71 at para 11.
[107] [2021] FCA 856 at para 31.
[108] [2019] FCA 622.
[109] *Idem*, para 11.
[110] *Idem*, para 20.

CANADA*

Jassmine Girgis

1. Jurisdictional context

Canada is a federation, comprised of the Federal Government, ten provinces and three territories. It derives its authority to make laws from the Constitution of Canada, the supreme law of Canada. The Constitution Act, 1867,[1] which is a significant part of the Constitution of Canada, sets out the structure of the Government of Canada, including the justice and taxation systems, the structure of the provincial governments, and the division of powers between the Federal and the provincial governments. The Constitution Act, 1982,[2] is also a significant part of the Constitution of Canada, and contains the Charter of Rights and Freedoms,[3] which ensures that Canadians' basic human, legal and political rights and freedoms are protected from government interference.

Due to the colonisation of North America by Great Britain and France, Canada has a bijural legal system, comprised of both common law and civil law, and two official languages, English and French. The Constitution Act, 1867, provides that "property and civil rights in the province" fall exclusively within provincial jurisdiction.[4] Quebec exercises this power in a civil law environment, whereas the other provinces exercise it in a common law one. The Canadian territories are not party to the division of powers established in the Constitution Act, 1867, but they exercise their jurisdiction over property and civil rights through federal legislation in a common law environment. The Constitution Act, 1982, also "recognizes and affirms" the "existing" aboriginal and treaty rights in Canada and protects aboriginal title.[5]

In Canada, bankruptcy and insolvency law falls under federal jurisdiction and is governed primarily by two acts: the Bankruptcy and Insolvency Act,[6] and the Companies' Creditors Arrangement Act.[7] The BIA governs personal and corporate insolvency as well as commercial restructurings and consumer proposals, and the CCAA governs corporate restructuring for companies owing more than CAD 5 million in debt. Restructurings, or

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1 (UK) 30 & 31 Vict, c 3, reprinted in RSC 1985m Appendix II, No 5 (Constitution Act, 1867).

2 Being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (Constitution Act, 1982).

3 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

4 Constitution Act, 1867, s 92(13).

5 Constitution Act, 1982, s 35(1).

6 RSC 1985, c B-3 (BIA).

7 RSC 1985, c C-36 Companies' Creditors Arrangement Act (CCAA). The following federal insolvency statutes also create or regulate insolvency: Winding-up and Restructuring Act, RSC 1985, c W-11; Farm Debt Mediation Act, SC 1997, c 21; and Canada Business Corporations Act, RSC 1985, c C-44, Part IX, ss 94-101 and 192 (CBCA).

arrangements, can also occur under the Canada Business Corporations Act,[8] if they only affect bondholders or other holders of debt security.[9]

2. General overview of litigation funding in Canada

2.1 Historical development, market overview and prevalence

The doctrines of maintenance and champerty operated at common law to protect the administration of justice by preventing the funding of litigation by non-litigants or parties with no interest in the matter. These doctrines were described in *McIntrye Estate v Ontario (Attorney General)*[10] as follows:

> "Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, became involved with disputes (litigation) of others in which the maintainer has no interest whatsoever. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty".[11]

The common law regarded maintenance and champerty as both torts and crimes, and "the presence of either was capable of rendering contracts unenforceable as being contrary to public policy".[12] The targeted contracts, namely any form of litigation funding agreements, including contingency fee agreements, gave rise to two concerns. The first concern was that by linking counsel's compensation to the success of the action, lawyers would be tempted to use any, potentially unethical, means to win, and secondly, that in doing so, lawyers would be acting in their own best interests, thereby damaging the lawyer / client relationship.[13]

These doctrines, however, ended up giving rise to "unintended consequence[s]", by erecting barriers to protect the administration of justice from those who might prey on vulnerable litigants for their own financial gain, and they also prevented claimants from accessing justice.[14] In other words, these doctrines "prohibited access to the courts to litigants with legitimate claims in need of adjudication, but who could otherwise not afford

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8 CBCA, Part IX, ss 94-101 and 192.

9 *Idem*, s 192; and R Wood, *Bankruptcy and Insolvency Law* (2nd ed, Canada: Irwin Law Inc, 2015) at pp 13-14.

10 [2002] 218 DLR (4th) 193, OJ No 3417 (*McIntrye Estate*). See generally H Meighen, "The Third Party Litigation Funding Law Review: Canada" (January 2021), available here (Litigation Funding Law Review).

11 *McIntrye Estate*, para 26.

12 *Idem*, para 23.

13 *Idem*, paras 51-52.

14 British Columbia Law Institute, "Study Paper on Financing Litigation" (October 2017), available here (Financing Litigation) at p 2.

to bring them forward",[15] thereby failing to protect both the administration of justice and vulnerable litigants.[16]

As public policy concerns about access to justice became more prevalent, Canadian courts started to question their approach to the doctrines, and eventually determined that these types of fee arrangements were not inherently champertous. Rather, these agreements should be examined on a case-by-case basis to ensure the concerns which gave rise to the prohibition against maintenance and champerty were not present. One of the earliest cases to loosen the rules was *Goodman v The King*,[17] where the court took a narrower approach to maintenance. In *Goodman v The King*, the court maintained that third-party funding does not, alone, amount to maintenance; rather, the third party must be acting in bad faith. Specifically, the court stated that "there must exist that officious interference, that introduction of parties to enforce rights which others are not disposed to enforce, that stirring up of strife".[18] The British Columbia Court of Appeal extended this approach to the doctrine of champerty in *Monteith v Calladine*.[19]

In the last several decades, most Canadian provinces enacted legislation allowing for contingency fee arrangements between lawyers and their clients in single party litigation and in class actions. Third-party litigation funding (TPLF), a process whereby an uninvolved third party wholly or partially funds the litigation in return for a fee, has also arisen in the context of single-party commercial litigation and was most recently endorsed by the Supreme Court of Canada (SCC), the highest court in Canada, in insolvency proceedings in *9354-9186 Quebec inc. v Callidus Capital Corp (Bluberi)*.[20] TPLF can also be used for class actions, and a few provinces have amended their class proceedings legislation to address it.

In *Bluberi*, the SCC allowed TPLF in insolvency proceedings. The SCC determined that increased flexibility of the rules on litigation funding meant these agreements could be used as interim financing in a restructuring proceeding under the CCAA, "when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act".[21] For the purposes of the CCAA, the SCC distinguished between litigation funding agreements (LFA) that contain or incorporate plans of arrangement (which need to be submitted to a creditors' vote), and those that do not (which do not require a vote).[22] In *Bluberi*, the TPLF was approved as separate from a plan of arrangement, and therefore, did not need to be put to a creditors' vote.

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15 *Ibid*.
16 *McIntyre Estate*, para 72, and Financing Litigation, p 2. See also *Fischer v Kamala Naicher*, 8 Moo Ind App 170 at p 187, cited in *Newswander v Giegerich*, [1907] 39 SCR 354 at p 361.
17 [1939] SCR 446.
18 *Ibid*, p 447.
19 (1964), 49 WWR 641 (BCCA). See Financing Litigation, p 3.
20 2020 SCC 10 (*Bluberi*).
21 *Idem,* para 97.
22 *Idem,* para 103.

Today, agreements traditionally seen as champertous are not *prima facie* prohibited on the basis of being third-party funding agreements. Rather, where an agreement is submitted to the courts, courts will approve it if the funder does not have an improper motive, namely, "officious intermeddling or stirring up strife".[23]

The relaxation of the rules around maintenance and champerty has led to an increase of litigation funding, and it will likely continue to increase given the SCC's decision in *Bluberi*.[24] Moreover, as litigation costs increase, lawyers will increasingly look to outside funding as contingency fees are no longer sufficient to meet litigation costs.[25]

Research shows there are at present 11 international funders that have opened offices in Canada and in August 2020, Omni Bridgeway, one of the biggest funders, received over 560 applications for funding in Canada.[26]

The Canadian market includes the Australian funder, Omni Bridgeway (formerly known as Bentham IMF); an American funder, Augusta Ventures and Woodsford; the United Kingdom-based litigation finance company, The Judge; the Irish funder, Claims Funding International PLC; the British funder, Redress and Harbour; an American funder, Galactic TH Litigation Funders LC; and BridgePoint Financial Services Inc.[27] Also in the market are Rhino Legal Finance, Lexfund Management Inc, Harbour Litigation Funding, and Balmoral Wood.

2.2 Regulatory framework

Contingency fee agreements between solicitors and representative plaintiffs in class action proceedings are regulated under provincial class action proceedings legislation,[28] but most of these provincial statutes do not specifically address TPLF. Where TPLF is mentioned, the amount of detail varies. The Ontario's Class Proceedings Act, 1992 addresses TPLF, and makes the agreements contingent on court approval. [29] The court must be satisfied that the agreement is fair and reasonable, the agreement does not

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[23] *McIntyre Estate*, para 34.

[24] S Kari, "Third Party Litigation Funding", *Canadian Lawyer*, 3 January 2017, available here (Third Party Litigation Funding); and G Meckback, "Why it might get easier for plaintiffs to fund their lawsuits", *Canadian Underwriter*, 21 May 2020, available here.

[25] "Emerging risks and trends for Directors & Officers liability Insurance", available here.

[26] Litigation Funding Law Review.

[27] C O'Brien and N Chettiar, *Third Party Litigation Funding: A Pathway to Justice or a Wolf in Sheep's Clothing* (November 2016), available here.

[28] For example, under the Ontario Class Proceedings Act, 1992, SO 1992, c 6, s 32(2.1) a court shall not approve a fee agreement unless it determines the fees and disbursements to be paid under the agreement are fair and reasonable, taking into account the results achieved for class numbers, the degree of risk assumed by counsel, the proportionality of the fees and disbursements in relation to the amount of the settlement, and any other matter the court considers relevant. Under the British Columbia Class Proceedings Act, RSBC 1996, c 50, s 38(2), an agreement for fees and disbursements between a solicitor and the representative plaintiff is unenforceable unless it is approved by the court.

[29] E Cinar and F Ciambella, *At a Glance: Regulation of Litigation Funding in Canada* (November 2020), available here (E Cinar and F Ciambella, "At a Glance").

impact the plaintiff's rights to instruct its counsel or control the litigation, the funder can satisfy an adverse costs award, and any prescribed requirements are met.[30] In Alberta, the Class Proceedings Act simply states that "[r]epresentative parties may seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class".[31]

In general, there are no public bodies that regulate TPLF.[32] There is, however, a risk that structuring funding agreements as indemnity against adverse costs awards could trigger insurance protections – funders should apply for declarations that they are providing funding and not insurance from the provincial insurance regulation body.[33]

There are currently no indications of future law reform. However, with the SCC's *Bluberi* ruling, there might be a renewed interest in regulating these agreements.

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

In TPLF the commercial litigation funders' role "is the financing of disputes".[34] These funders are not parties to the litigation – they agree to pay some or all of the litigant's litigation costs in exchange for a fee or a portion of the settlement or recovery.[35] Under the LFA, the funder may also provide working capital to the litigant's business.[36]

3.2 Regulatory obligations

Other than the provisions on TPLF in select provincial class action legislation, TPLF remains generally unregulated in Canada. Lawyers do not have ethical duties specifically in relation to TPLF, although their duty of candour to clients requires them to discuss TPLF if applicable to their retainer.[37]

Lawyers' contingency fees are governed by the provincial law societies.

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30 Class Proceedings Act, 1992, SO 1992, c 6, s 33.1(9).
31 Class Proceedings Act, SA 2003, c C-16.5, s 39(8).
32 E Cinar and F Ciambella, "*At a Glance*".
33 *Ibid*.
34 R Howie and G Moysa, "Financing Disputes: Third-Party Funding in Litigation and Arbitration", *Alberta Law Review* Vol 57:2 (2019), available here (Financing Disputes) at p 466.
35 *Idem*, p 467.
36 *Idem*, p 471.
37 See, for example, E Cinar and F Ciambella, "*At a Glance*", and Law Society of Ontario, *Rules of Professional Conduct*, Ch 3.

3.3 Funding premium

If a funder approves a loan, it negotiates an LFA with the litigant. The LFA terms outline the loan amount (including interest rate and whether it compounds), the loan term, the payment schedule, applicable fees, and administration fees. Funders often have set interest rates, although the rate may vary between provinces. The funder will advance funds through wire transfer once it executes the LFA.[38]

Although the term "loan" is used, these agreements are in fact investments, "with a return calculated as a percentage of the settlement or judgment if one is obtained".[39]

There are no regulations or provisions limiting fees, but the agreement must be reasonable and fair, and determined, in large part, by the amount of the fees and the way they are structured. As the court in *McIntyre Estate*[40] said, the purpose of the agreement must be examined, as one of the reasons for common law rules against champerty was to protect vulnerable litigants from being exploited by funders. Accordingly, "[a] fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose – i.e., taking advantage of the client".[41] Case law has said the following about the limit of fees and interest, and their impact on the fairness and reasonableness of an agreement:

- *Houle*:[42] the fairness and reasonableness of an LFA depends on the circumstances of the litigation. "The [funder] must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching, and champertous";[43]

- *Dugal v Manulife Financial Corp*: the court-approved LFA entitled the funder to a commission of 7% of the amount of a settlement or judgment, after deducting the fees and disbursements of counsel and administration expenses;[44]

- *Metzler Investments GMBH v Gildan Activewear Inc*: the LFA provided that the compensation paid to the funder was dependent on the amount of money that would be recovered from the litigation in the end. It did not have a cap, nor did it have a relationship to the money expended by the funder. The judge found the agreement

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38 Financing Litigation, p 109.

39 J Kalajdzic, P Cashman and A Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding", *American Journal of Comparative Law* Vol 16 (2013) in Financing Litigation at p 120; and The Judge, "Litigation Funding & Legal Fees Insurance, Working with in-house lawyers to identify the most cost effective way to manage their legal spend" at p 6, available here.

40 *McIntrye Estate*, para 76. See generally, Litigation Funding Law Review.

41 *McIntyre Estate*, para 76

42 *Houle v St Jude Medical Inc*, 2017 ONSC 5129 (*Houle*) at para 52, aff'd, 2018 ONSC 6352.

43 *Idem*, para 63.

44 2011 ONSC 1785 (*Dugal*), para 6.

unfair and unreasonable, and therefore champertous, as it was "impossible to conclude that [it would] not amount to 'over compensation'";[45]

- *Bayens v Kinross Gold Corporation*: the court-approved LFA entitled the funder to be repaid any adverse costs and receive a percentage of the net recovery to the class if the litigation was successful. It would receive 7.5% of the net recovery if the action was resolved prior to the certification hearing, and 10% recovery if it resolved after the resolution of certification; and[46]

- *Schenk v Valeant Pharmaceuticals International Inc*:[47] the court declined to approve the agreement, finding that it constituted champerty and maintenance. The agreement did not have a cap, potentially allowing the funder to receive more than 50% of any recovery. The court did go on to note that in a commercial litigation context, 30-50% returns may be commercially reasonable, and said that the case at hand could reasonably qualify for that amount, since it "involves a plaintiff of modest means seeking to pursue significant litigation against corporate defendants involving complicated subject matter and very significant damages being claimed". However, it was not reasonable in this case because the "open-ended exposure to [the plaintiff] could result in [the funder] retaining a lion's share of any proceeds… [meaning the agreement] does not provide access to justice to [the plaintiff] in a true sense, but rather provides an attractive business opportunity to [the funder] who suffered no alleged wrong".[48]

3.4 Procedural aspects

3.4.1 Control of proceedings and involvement in settlement proceedings

Although third-party funders fund the litigation, the client has the right to control the proceedings – all strategy and litigation decisions remain with the lawyers and their clients, not with the third-party funders.[49] Counsel must take instructions from the client, and their recommendations must be entirely in their client's best interests.[50]

Funders will typically require updates on the progress of the matter, and they can sometimes offer tips on litigation strategy.[51]

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45 [2009] OJ No 5696, CanLII 41540 (ONSC) (*Metzler*), paras 71-72.
46 2013 ONSC 4974 (*Bayens*), para 15.
47 2015 ONSC 3215 (*Schenk*).
48 *Idem*, para 17.
49 Financing Disputes, p 480.
50 *Ibid*. See also G Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape", in J P Sarra *et al*, *Annual Review of Insolvency Law 2018*, (Thomson Reuters) at p 221.
51 T Sulan, N Loewith and N Tzoulas, "Litigation Funding: Six Frequently Asked Questions", Lexpert (13 November 2017), available here.

3.4.2 Right to abandon proceedings

LFAs will typically contain provisions allowing the funder to terminate the proceedings, upon notice. If these provisions are fair and reasonable, in that they give the funder limited rights to terminate upon identifiable events, and do not give the funder complete discretion, courts appear to be willing to accept them. In *Schenk*, although the court refused to approve the LFA, the judge found *obiter* that the agreement was reasonable on the grounds that the funder had the right to terminate on seven days' notice if it became unsatisfied with the merits of the claim, or if the plaintiff's costs exceeded the budget by 25%.[52] In *Dugal*,[53] the approved LFA allowed the funder to terminate if the plaintiffs breached their obligations under the agreement. In *Bluberi*, the funder had the right to terminate the litigation if it was "no longer satisfied with the merits or commercial viability of the litigation".[54]

In *Houle*, the court did not approve the termination clause, finding it provided such "extensive rights to trigger the termination provision" that it was effectively giving the funder full discretion over the trajectory of the litigation.[55]

3.4.3 Liability for adverse cost orders and security for costs

In Ontario, defendants can recover from a litigation funder if the funder had indemnified the representative plaintiff in an approved funding agreement.[56]

A litigation funder may be required to provide security for costs. A defendant can apply for security for costs in Ontario if:[57]

- the plaintiff is ordinarily resident outside Ontario;
- the plaintiff has another proceeding for the same relief pending in Ontario or elsewhere;
- the defendant has an order against the plaintiff for costs in the same or another proceeding that remains unpaid in whole or in part;
- the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets to pay the costs of the defendant;

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52 *Schenk*, para 23.
53 *Dugal*, para 6.
54 *Bluberi*, para 19.
55 *Houle*, para 96. See also Financing Disputes, pp 480-81.
56 N Loewith, P Rand and P Bouchard, "Snapshot: litigation funding costs and insurance in Canada" (30 November 2021), available here.
57 *Ibid*.

- there is good reason to believe that the action is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant; or

- a statute entitles the defendant to security for costs.

In *Dugal*, the court ordered security for costs because the funder, Claims Funding International PLC, an Irish corporation, had no assets in Canada, and had not proven its ability to satisfy a costs awards.[58] In *David v Loblaw*,[59] the court ordered the Australian funder to provide an undertaking as a means to satisfy a security for costs order. Although the defendant objected to the undertaking, worried about having to pursue the funder in its home jurisdiction, the court noted that the funder had attorned to the court's jurisdiction and waived its jurisdictional defences. The court also looked to the fact that the Australian legal system is similar to Ontario's, meaning it would be easy to enforce an Ontario court order in Australian courts. Finally, the funder said it would adhere to the Ontario court orders "as if both its Australian parent and its Canadian subsidiary were physically present" in Ontario.[60]

4. Litigation funding and insolvency

4.1 Mechanisms to fund insolvency proceedings

In Canada, the SCC allowed TPLF for insolvency proceedings in *Bluberi* in 2020, where the SCC approved an LFA between the debtor and Bentham IMF, now Omni Bridgeway, a company that offers dispute financing.

Within the last 40-50 years, most Canadian provinces enacted legislation or regulations permitting the use of contingency fee agreements.[61] Ontario was one of the last provinces to allow these agreements, enacting legislation only in 2004, after the Ontario Court of Appeal decided the case of *McIntyre Estate*. *McIntyre Estate* held that contingency fee agreements for lawyers were not "*per se* champertous" and maintained that the concern which led to the prohibition at common law could be addressed with the proper regulatory schemes governing lawyers and their fees.[62] Ultimately, the Ontario Court of Appeal concluded that "the historical rationale for the absolute prohibition [on the common law of champerty] is no longer justified".[63]

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58 *Dugal*, para 35.
59 2018 ONSC 6469 (*Loblaw*).
60 *Idem*, paras 16-18.
61 *McIntyre Estate*, para 56. See, for example, Contingency Fee Agreements, O Reg 563/20; The Class Actions Act, SS 201, c C-12.01; The Class Proceedings Act, SM 2002, c 14; and Class Actions Act, SNL 2001, c C-18.1.
62 *McIntyre Estate*, para 70.
63 *Ibid*.

In *McIntyre Estate* the plaintiff, wanting to commence an action against Imperial Tobacco and Venturi Inc for her husband's wrongful death, sought a declaration from the court that the proposed contingency fee agreement with her lawyers was not prohibited by the Champerty Act.[64] Justice O'Connor, for the court, commented on the effect of these agreements on increased access to justice, maintaining that "there is a strong case to be made that the continuation of a per se prohibition against contingency fee agreements actually tends to defeat the fundamental purpose underlying the law of champerty – the protection of the administration of justice and, in particular, the protection of vulnerable litigants".[65]

McIntyre Estate held that it should be the financier's motives that determine whether the agreement or arrangement is champertous, as in, "[i]f the motive is genuine and arises out of concern for the litigant's rights, it is not maintenance. Similarly, if that interest of such party arises genuinely from an intent in the outcome, it is not maintenance and this is not restricted to blood relationships".[66] Justice O'Connor went on to articulate four principles on maintenance / champerty:[67]

- champerty is a subspecies of maintenance. Without maintenance, there can be no champerty;

- for there to be maintenance, the person allegedly maintaining an action or proceeding must have an improper motive, which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse;

- the type of conduct that has been found to constitute champerty and maintenance has evolved over time so as to keep in step with the fundamental aim of protecting the administration of justice from abuse; and

- when the courts have had regard to statutes such as the Champerty Act and the Statute Concerning Conspirators, they have not interpreted those statutes as cutting down or restricting the elements that were otherwise considered necessary to establish champerty and maintenance at common law.

Moreover, public policy concerns about access to justice had evolved considerably, given the rising cost of litigation. Courts later acknowledged that the shift to allow these funding agreements had occurred because litigants were unable to achieve success without the assistance of third-party funders.[68]

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64 An Act Respecting Champerty, RSO 1897, c 327.
65 *McIntyre Estate*, para 72.
66 *Idem*, para 29, citing *S v K*, 1986 CanLII 2789 (ON SC), 55 OR (2d) 111 at p 117 OR.
67 *Idem*, para 34.
68 *Houle*, para 52, aff'd, 2018 ONSC 6352.

After *McIntyre Estate*, in 2004 Ontario passed Regulation 195/04 – Contingency Fee Arrangements,[69] which set out the requirements of a valid contingency fee arrangement between lawyers and clients. Most recently, in 2020 Ontario's Class Proceedings Act, 1992,[70] which already addressed contingency fees for class proceedings, was amended to include provisions specifically addressing TPLF.[71] Class action legislation in most other provinces addresses contingency fees, but not TPLF.[72]

Outside the context of class proceedings, there is no similar regulation or guideline on general TPLF, which is largely governed by case law.

4.1.1 Class action funding

Courts recognise that TPLF agreements can promote access to justice, and they approve them if they are fair and reasonable.

In 2009, in *Metzler Investments GMBH v Gildan Activewear Inc*, the court did not approve the indemnification agreement in a class action proceeding because there was no cap on the amount of compensation paid to the funder. The fee was entirely dependent on the amount of money that would be recovered from the litigation, and had "no relationship to the amount of money paid by [the funder], the period of time in which those monies are outstanding, the degree of risk assumed by [the funder], or the extent of its exposure to costs".[73] Accordingly, it was "impossible to conclude that this Agreement [would] not amount to 'over compensation' to the extent that it [would be] unreasonable and unfair to those who will bear its expense".[74]

In 2011, in *Dugal*,[75] the court approved TPLF for a class action proceeding. In this case, Strathy J (as he was then) noted that, unlike in *Metzler*, he did not have to wait for the outcome of the litigation to decide whether the agreement was champertous. He maintained that assessing the propriety of the motive required looking at "the nature and amount of the fees to be paid",[76] and here, the agreement provided for the third-party funder to indemnify the plaintiffs against the defendants' costs, in return for a 7% share of any recovery in the litigation. The court also noted, however, that there was a general lack

[69] Contingency Fee Agreements, O Reg 195/04, repealed. Now see Contingency Fee Agreements, O Reg 563/20. These were enacted under the Solicitors Act, RSO 1990, c S 15.
[70] Class Proceedings Act, 1992, SO 1992, c 6.
[71] *Idem*, s 33.1.
[72] See, for example, The Class Actions Act, SS 201, c C-12.01, s 41; Class Actions Act, SNL 2001, c C-18.1, s 38; Class Proceedings Act, RSBC 1996, c 50, s 38; and Class Proceedings Act, SA 2003, c C-16.5, s 38.
[73] *Metzler*, para 71.
[74] *Idem*, para 72.
[75] *Dugal*, paras 18 and 19.
[76] *Idem*, para 19.

of guidance in this area, as other Canadian cases prior to *Dugal* had approved funding agreements but had not provided reasons.[77]

In *Houle v St Jude Medical Inc*,[78] the court confirmed that the approval of third-party funding agreements must be done on a case-by-case basis, and laid out the following four criteria to be considered when assessing these agreements, namely that the:[79]

- agreement must be necessary to provide access to justice;
- access to justice facilitated by the agreement must be substantively meaningful;
- agreement must be fair and reasonable, facilitating access to justice while protecting the interests of the defendants; and
- funder must not be overcompensated for assuming the risks of an adverse costs award, as this would make the agreement unfair, overreaching, and champertous.

4.1.2 Single party commercial litigation

In 2015, because TPLF was still relatively new in Ontario and its principles still relatively undeveloped, the court extended the principles of class action case law to single-party commercial litigation in the case of *Schenk v Valeant Pharmaceuticals International Inc.*[80] In this matter the court did not approve the agreement, noting, "the open-ended exposure to [the plaintiff] could result in [the funder] retaining the lion's share of any proceeds" and that such an agreement did not provide access to justice for the plaintiff but rather "an attractive business opportunity to [the funder] who suffered no alleged wrong".[81] Specifically, the funder may have been entitled to an unfair amount from the plaintiff, as the agreement allowed more than 50% recovery and did not provide a cap.[82]

4.1.3 Insolvency litigation funding

In *Bluberi*, the SCC approved TPLF in the context of insolvency. The LFA was approved as interim financing, and not as a plan of arrangement, meaning it did not need to be put to a creditors' vote prior to receiving court approval. A "plan of arrangement" or compromise is not defined in the CCAA, but, as the court explained, it refers to a plan between the debtor and its creditors that compromises creditors' rights, whereas an LFA is "aimed at extending financing to a debtor company to realize on the value of a litigation asset does

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77 See, for example, as noted in *Dugal*, paras 21-23; *Hobshawn v Atco Gas and Pipelines Ltd* (May 14, 2009), Action 0101-04999 (Alta QB) and *MacQueen v Sydney Steel Corp* (October 19, 2010), Action 218010 (NSSC).

78 *Houle*, aff'd, 2018 ONSC 6352.

79 *Idem*, para 63, aff'd, 2018 ONCA 88.

80 *Schenk*, para 17.

81 *Ibid*.

82 *Idem*, para 14.

not necessarily constitute a plan of arrangement".[83] The SCC found that the CCAA supervising judge appropriately exercised his discretion in focusing on the "fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case" in the CCAA proceeding.[84]

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

Courts have taken different stances regarding the confidentiality of the LFA. They have found privilege attaches to entire agreements in some cases, and in others, that it attaches only to sections dealing with "litigation strategy, budget, and other sensitive topics".[85] Professor Janis Sarra argues that the case law on sealing orders is "very clear" and requires creditors to be given access to the LFA on a confidential basis, after undertaking not to disclose, so as to "have an informed basis on which to make submissions on the interim financing criteria and any prejudice to their interests".[86]

In Canada, insolvent litigation funding has been approved as interim financing and not as a "plan of arrangement" or a "compromise" under the CCAA. Interim financing does not require creditor approval whereas a "plan of arrangement" or a compromise cannot be imposed on creditors unless a majority of creditors representing two thirds in value of the creditors, or a class of creditors, approve it.[87]

In *Re Crystallex International Corp*,[88] the court approved the interim financing despite it being opposed by virtually all the creditors. The supervising judge had found that the loan was not a plan of arrangement, in that the rights of the noteholders were not compromised or taken away by the loan, and creditor approval was therefore not required.[89] The court came to the same conclusion regarding interim financing in *Bluberi*.

Although the CCAA does not require creditors' approval for interim financing, section 11.2 provides discretion to the supervising judge to approve it, and to grant a security or charge in favour of the lender in the amount that the judge considers appropriate.[90] The applicant debtor company bears the burden of showing that the order sought is appropriate in the circumstances and that it has been acting in good faith and with due diligence.[91]

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83 *Bluberi*, para 102.
84 *Idem*, para 107.
85 Financing Disputes, p 482.
86 J Sarra, "Brueghel's Brush: A Portrait of the CCAA", *Canadian Business Law Journal* (2020-2021) Vol 64 at 72, p 95, available here (Brueghel's Brush).
87 CCAA, s 6(1).
88 2012 ONSC 2125, upheld, 2012 ONCA 404 (*Crystallex*).
89 *Idem*, paras 91-92.
90 CCAA, s 11.2(1) and (2).
91 *Bluberi*, para 49.

4.2.2 Relevance of litigation funding agreement providing benefit to creditors

Although a creditor vote is not required, a supervising judge must consider creditors' interests, and any prejudice that may arise.[92]

Creditors can appeal interim financing decisions, but in *Bluberi*, the SCC held that "a high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings [and] as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably".[93] The court also warned that appellate courts should not be substituting their own discretion in place of the CCAA judge.[94]

4.2.3 Other measures to protect interests of creditors

In CCAA proceedings, the interests of all parties are considered when the supervising judge appropriately exercises their discretion to focus on the "fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case" in the CCAA proceeding.[95]

5. Insolvency practitioners and litigation funding

5.1 Insolvency practitioner obligations

There are no identified insolvency practitioner obligations specifically directed at litigation funding.

5.2 Factors to consider when contemplating litigation funding

Lawyers' duties to their clients are unaffected if the proceedings are funded by a third party. Lawyers must act in the best interests of their clients, abide by their duty of loyalty to their clients, and act as instructed by their clients.[96]

With regard to the funder, there are no legal requirements as to the contents of an LFA, though it should contain a procedure on resolving conflict between the funder and litigant. It should also specifically state that control over litigation rests with the client and that counsel's obligations always remain with their client.[97]

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92 Brueghel's Brush, p 96.
93 *Bluberi*, para 53.
94 *Ibid*.
95 *Idem*, para 107.
96 Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2014, ch 3; and Law Society of Alberta, *Code of Conduct*, Edmonton: LSA, 2018, ch 3.2.
97 Financing Disputes, pp 478-88.

5.3 What are litigation funders looking for?

Commercial litigation funders are in the business of financing disputes; they are not parties to the litigation. These funders pay some or all of the litigation costs in exchange for a fee or a portion of the litigant's settlement or recovery. Under the LFA, the funder may also provide working capital to the litigant's business.[98]

6. Litigation funding agreement

6.1 Typical structure of agreement

There is no "industry standard" set of terms in LFAs, but certain provisions or sections are found in most LFAs, namely:[99]

- terms on the amount of return to which the funder is entitled in the event of a successful resolution. This can be a set amount or a percentage, which may depend on the costs and risks the funder incurs (courts have approved higher returns in commercial litigation proceedings, as they do not raise the same class protection policy concerns as class proceedings);[100]

- the different payment stages. This section addresses how the claimant can make funding requests during the different phases of the proceeding, and the funder's obligations to advance funds;[101]

- representations and warranties. These will differ depending on whether the plaintiff is an individual or a corporation;[102]

- LFAs will usually set out the priority and timing of payments, or how payments will be distributed, between the parties involved. The funder is compensated first for its expenses. If the lawyers or claimants have also advanced funds, the distributions are made on a *pro rata* basis. After the funder has been paid its returns, the proceeds are divided between the lawyers for their fees, and then the remainder is paid to the claimant;[103]

- there will be a provision stating that the client has decision-making authority throughout the litigation. Clients have the right to control the litigation and instruct counsel;

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98 *Idem*, pp 466-71.
99 Financing Litigation, and Financing Disputes.
100 Financing Disputes, pp 478-79.
101 In this regard, see Woodsford, "A Practical Guide to Litigation Funding", available here.
102 *Ibid*.
103 *Ibid*.

- provisions dealing with conflicts of interest between the funder, counsel, and the client. These provisions might include acknowledgments that the LFAs do not create lawyer-client relationships between the funder and the claimants, and that counsel's duty is to always act in the clients' interests;[104]

- there may be a dispute resolution mechanism in the agreement. This would be applicable to, for example, disagreements between the funder and the client over whether to accept a settlement offer;[105]

- provisions addressing privilege and confidentiality. The client will inevitably have to disclose material to the funder that is subject to litigation and solicitor-client privilege;[106] and

- A termination provision allowing the funder to terminate the agreement upon notice, either at its discretion or upon the occurrence of a condition precedent, will usually be included in an LFA.[107]

6.2 Protection of confidential information in relation to funding agreement

The LFA itself is not a privileged document, although the materials provided to the funder by the claimant are typically subject to litigation and solicitor-client privilege.[108] However, what exactly must be disclosed to the defendant when the litigation involves a funding agreement, is unsettled.[109]

In class actions or insolvency proceedings, claimants must submit these agreements to the court for approval[110] and provide the full agreement to the court, but can provide opposing sides with redacted versions. In single party commercial litigation falling outside the class proceedings, there is no requirement to disclose the existence of the LFA to the opposing side, although claimants may opt to do so.[111]

Under the Ontario Class Proceedings Act, a plaintiff must file a copy of the LFA with the court and provide a copy to the defendant, although the plaintiff may redact "information that may reasonably be considered to confer a tactical advantage on the defendant" from

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[104] Financing Disputes, pp 479-80. See also *Houle*, para 31.
[105] T Sulan, N Loewith and N Tzoulas, "Litigation Funding: Six Frequently Asked Questions", Lexpert (13 November 2017), available here; and Financing Disputes, pp 480.
[106] Financing Disputes, p 481.
[107] *Idem*, p 480.
[108] In *Bayens*, the judge ruled that the LFA was not a privileged document (at para 41).
[109] Third Party Litigation Funding.
[110] In *Davies v The Corporation of the Municipality of Clarington*, 2019 ONSC 2292, the plaintiff failed to seek court approval for the LFA. When the plaintiff argued that it should recover loan interest as a disbursement, the court refused, maintaining that the defendants were not made aware of their exposure to the interest, and that the court did not have the opportunity to consider the fairness and reasonableness of the agreement. See at paras 71-72 in this regard.
[111] Financing Disputes, p 483.

the copy provided to the defendant.[112] How much information is redacted or whether parts of the agreement may be subject to privilege, varies by court.

In *Loblaw* the court determined that a claimant may provide the opposing side with a redacted copy as long as an unredacted copy was provided to the court.[113] Otherwise, "knowledge of the precise terms of the financing and the indemnity provisions would provide [defendants] with tactical advantages in how the litigation would be prosecuted or settled".[114] In *Hayes v The City of Saint John et al*,[115] the motion for funding was filed on an *ex parte* basis. The court ordered the claimants to provide notice to the defendants, but not copies of the record until the court heard the preliminary argument on whether the LFA should be sealed.

In *Fehr v Sun Life Assurance Company of Canada*,[116] the court determined that in the context of a class proceeding, it was a matter of public policy for TPLF to not be privileged, and even went so far as to say that "disclosure of a third party agreement should be mandatory".[117] The court emphasised the importance of transparency on the regulation of TPLF, maintaining that if funders "operate clandestinely", it might perpetuate "abuses or interference with the administration of justice".[118] It also noted that in this case, since the defendant was "affected" by the application for approval for TPLF, it had the right to disclosure of the agreement, and a right to be heard on the motion for its approval.[119] The court did advise that these agreements should not contain privileged information, such as the strengths or weaknesses of the proposed case.[120]

Bluberi involved litigation funding in the context of insolvency, but, like a class action proceeding, the LFA was put to the court for approval. The CCAA supervising judge ruled that although the LFA does not constitute a privileged document, the portions of the agreement on the potential return for the funder could be redacted. The court acknowledged that even though this information is sometimes disclosed in class action proceedings or proceedings under the CCAA, it should remain confidential in this case because it would "provide the defendant with a tactical advantage in how the litigation

[112] Class Proceedings Act, 1992, SO 1992, c 6, ss 33.1(4)-(6).
[113] *Loblaw*, paras 20-21.
[114] *Berg v Canadian Hockey League*, 2016 ONSC 4466 at para 15, quoted in *Loblaw*.
[115] 2016 NBQB 125, partially overturned, but not on the certification of the class proceeding, 2018 NBCA 51, application for leave to appeal dismissed, 2019 CanLII 25896 (SCC).
[116] 2012 ONSC 2715.
[117] *Ibid*, para 91.
[118] *Ibid*, paras 89-90.
[119] *Ibid*, para 9.
[120] *Ibid*, paras 8-12.

would be prosecuted or settled, [which is] the very essence of what the litigation privilege is designed to protect".[121]

[121] *Arrangement relative à 9354-9186 Québec Inc (Bluberi Gaming Technologies Inc) -and- Ernst & Young Inc*, 2018 QCCS 1040 at para 84, quoting *Seedlings Life Science Ventures LLC v Pfizer Canada Inc*, 2017 FC 826 at paras 83-84.

ENGLAND AND WALES

Peter Walton

1. Jurisdictional context

Insolvency law in England and Wales (both personal and corporate) is primarily found in the Insolvency Act 1986 (the Act) and the Insolvency Rules 2016.[1] Both the Act (as primary legislation) and the Insolvency Rules (as secondary legislation) were passed by the United Kingdom (UK) Parliament and have been amended many times over.

England and Wales is a common law jurisdiction where the doctrine of precedent applies. Case law relevant to insolvency matters may be based upon interpretation of the insolvency legislation or general common law and equitable principles which are applicable in addition to statutory provisions. The civil court system (as opposed to the criminal system) has its own hierarchy depending upon location of the parties, nature of the claim and value of the claim. Generally larger cases are heard in the High Court with less valuable cases being dealt with in the County Court.[2] Appeals from the County Court are generally heard in the High Court. The Civil Division of the Court of Appeal hears appeals from the High Court. The Supreme Court is the final court of appeal and hears appeals from the Court of Appeal (and in some limited circumstances directly from the High Court) on points of law of general public importance.

The Insolvency Service is an executory agency within the UK Government's Department of Business, Energy and Industrial Strategy. It is responsible for the Government's insolvency policy and the regulation of insolvency practitioners (as well as having certain investigatory and enforcement functions). Where a company is wound up by the court, the Official Receiver (an employee of the Insolvency Service) is appointed initially as liquidator. The Official Receiver may be subsequently replaced as liquidator in certain circumstances by a private sector insolvency practitioner. Apart from in such compulsory liquidations, all other corporate insolvency office holders[3] are private sector insolvency practitioners who must be licensed by a recognised professional body.[4]

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1 SI 2016/2014.

2 The Act, s 117.

3 Such as administrators, administrative receivers, supervisors of company voluntary arrangements and monitors of statutory moratoria.

4 The Act, ss 390-398. The Insolvency Service acts as oversight regulator in ensuring that the recognised professional bodies and their members adhere to the law and professional conduct rules. Although there were initially seven recognised professional bodies in 1986, that number has now dwindled to only two – the Insolvency Practitioners Association and the Institute of Chartered Accountants in England and Wales. Licensed insolvency practitioners are required to pass the Joint Insolvency Examination Board examinations as well as have satisfying experience and other requirements of the licensing professional body. Insolvency practitioners are subject to a code of ethics adopted by the recognised professional bodies. The Association of Business Recovery Professionals is the main trade body for the whole of the private sector insolvency profession (which includes lawyers as well as insolvency practitioners).

Administrators and liquidators have a range of actions available to them in their efforts to investigate the reasons for a company's insolvency and to take action where appropriate to swell the assets available to the company. Such causes of action include statutory office holder actions against directors for wrongful trading[5] or fraudulent trading,[6] and actions attacking transactions at an undervalue[7] or voidable preferences.[8] Office holders may also bring company actions not based upon such statutory rights given to them in their capacity as office holders, but based upon the rights of the company. Examples of such company actions would be breach of directors' duties and breach of contract actions.

2. General overview of litigation funding in England and Wales

2.1 Historical development, market overview and prevalence

At common law the meaning of maintenance is the support provided by a third party to a party to litigation in which the party providing support has no legitimate interest. Champerty is seen as an aggravated form of maintenance where the non-party providing support is entitled to a share of the proceeds of the action.[9] Although criminal and tortious liability for acts of maintenance and champerty have been abolished,[10] this does not prevent a contract from being unenforceable by being treated as contrary to public policy or otherwise illegal.[11]

Although an assignment of a property right which brings with it various rights of enforcement will generally be valid, assignments of bare causes of action are generally invalid[12] but debts are assignable and suing on an assigned debts is not contrary to public policy.[13]

Legislation effectively prevents either doctrine impacting upon the validity of an assignment of a bare cause of action in corporate insolvency (whether it be a company action which has always fallen within an insolvency exception[14] or an office holder action which since 2015 has been assignable[15]). The statutory exception for office holder actions does not apply to individual insolvency, so both doctrines still apply in personal bankruptcy to office holder actions.

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5 The Act, ss 214 and 246ZB.
6 *Idem*, ss 213 and 246ZA.
7 *Idem*, s 238.
8 *Idem*, s 239.
9 See generally *Halsbury's Laws of England* vol 22 Contract (5th ed, 2012) at para 438.
10 Criminal Law Act 1967, ss 13 and 14.
11 *R (on the application of Factorframe Ltd) v Secretary of State for the Environment, Transport and the Regions (No 8)* [2002] EWCA Civ 932.
12 *Trendtex Trading Corp v Credit Suisse* [1982] AC 679.
13 *Camdex International Ltd v Bank of Zambia* [1998] QB 22.
14 The Act, ss 165 and 166; Sch 4, para 6; Sch B1, para 60; and Sch 1 para 2. See, eg, *Seear V Lawson* (1880) 15 Ch D 426; *Re Oasis Merchandising Services Ltd* [1997] 1 BCLC 689; and *Rawnsley v Weatherall Green & Smith Ltd* [2009] EWHC 2482 (Ch).
15 The Act, s 246ZD.

Prior to 2015, a typical third-party insolvency funder (subject to its own assessment of claims being offered to it) would seek to take an assignment of any company actions and would financially support an office holder action. Since the changes to the law made in 2015 enabling office holder actions to be assigned, a funder will now usually seek to take an assignment of any cause of action, as it then controls how the action is progressed and if and when it is settled.

One issue that faced an insolvency funder prior to 2015 (and which still faces non-insolvency funders in general commercial litigation) is that it could not exercise control over how an office holder action was pursued. If it attempted to exercise control over how the action proceeded, such interference was likely to be found to be champertous.[16]

Conditional fee agreements (CFAs) and after-the-event (ATE) insurance have been increasingly common since they were first legalised[17] and brought into force in 1995 when a percentage uplift was made legal. Until 2016 that uplift and the ATE premium could be separately recovered from a losing defendant, with the effect that defendants would often have to pay (in additional to their own fees) the winner's legal fees, an uplift (often 100%) and the ATE premium (often a similar figure). The losing defendant might therefore be liable for up to three times the legal fees of the winning claimant.

The separate recoverability of the uplift and the ATE premium in insolvency litigation was abolished in 2016[18] - almost immediately after the date (2015) when insolvency office holder actions became assignable. The combination of these changes led to a far busier market for funders, which prior to 2015 was reasonably small (less than 10% of the market) whilst now it is closer to 50% of the insolvency litigation market.[19] There is no single list of funders, but a reasonable estimate would be between 60 and 80.

Commercial funders are commonly encountered in large litigation but do not have the benefit of the explicit statutory insolvency exceptions to maintenance and champerty. They are therefore still prevented from taking an assignment of a bare cause of action. However, recent case law has relaxed the traditionally stringent application of the doctrines of maintenance and champerty to commercial funding of litigation in exchange for a percentage of the net proceeds. A funding agreement with a commercial funder is unlikely to be challenged successfully unless it is seen to undermine the purity of justice or corrupt public justice.[20] It is generally understood that if a funder is to make a disproportionate

16 *Grovewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80.
17 Conditional Fee Agreements Order 1995 (SI 1995/1674).
18 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 5 and Saving Provision) Order 2013 (SI 2013/77), art 4 (the commencement of which was delayed for three years in regard to insolvency litigation).
19 P Walton, *Insolvency Litigation Funding – in the best interests of creditors?* (April 2020), A report commissioned by Manolete plc with the support of the Insolvency Practitioners Association and the Institute of Chartered Accountants in England and Wales, at para 4.
20 *Sibthorpe v London Borough of Southwark* [2011] EWCA Civ 25.

profit or has excessive control over how the litigation is conducted, the funding agreement may still fall foul of the maintenance and champerty doctrines.[21]

2.2 Regulatory framework

There is no dedicated legislation or regulatory framework applicable to commercial litigation funders. The voluntary Association of Litigation Funders has a Code of Conduct which provides some guidance (an explicit warning for example not to take control of funded litigation) and minimum capital requirements for its members. It is a voluntary scheme (with only 13 members currently) and is an example of comparatively light touch self-regulation. The courts do not appear to have considered the Code of Conduct.

The Ministry of Justice has oversight of the litigation funding market but has shown no appetite to regulate the market.

There are no indications that there is any plan but to let the market operate without any specific controls, relying upon the courts and insolvency professional bodies to regulate behaviour. There remains the possibility of regulation of the third-party funding market but unless a particular case throws up a major public concern, regulatory reform seems unlikely, certainly for the foreseeable future.

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

Litigation funders will primarily provide financial support for legal proceedings. The ability to assist with aspects such as project management administration or pre-claim investigation will be dependent upon the case. Most funders are willing to fund investigations and, as part of that, court-based private examinations[22] of directors to see if evidence can be found for an action. If the action is being brought by the office holder with the assistance of funding, the funder will be careful not to attempt to exercise control over the litigation otherwise it will risk a claim of champerty. If the funder has taken an assignment, the claim then belongs to the funder who will exercise autonomy over the claim.

3.2 Regulatory obligations

Litigation funders do not require licensing from the Financial Conduct Authority under the Financial Services and Markets Act 2000 (even though some are authorised for activities other than litigation funding) and are not subject to any legal requirements for record-keeping beyond general requirements for all companies under the Companies Act 2006.

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[21] The general principles have recently been held to remain applicable to a case where a solicitor attempted to take an assignment of a cause of action from a client (*Farrar v Miller* [2022] EWCA Civ 295).

[22] The Act, s 236.

There are also no legal requirements in relation to capital adequacy, but, as mentioned above at paragraph 2.2, the voluntary Association of Litigation Funders has a Code of Conduct which requires its members to have adequate capital. Only a minority of funders are part of this association and case law has highlighted that some funders have capital reserves which are inadequate to cover any adverse costs order.[23]

Some major law and insolvency practitioner firms have entered into arrangements with specific funders to fund their own (or their clients') cases. Some insolvency practitioner firms have acted in some of their own cases as a commercial funder and been made personally liable for costs where the action has not been successful.[24] There are clearly concerns of a potential conflict of interest in such cases, but the current governance system applicable to such cases relies upon the general regulatory regimes of the legal and insolvency practitioner professions.

3.3 Funding premium

Typically, funders have traditionally operated on a three times capital committed for funding an action. If they take an assignment the profit margin may be higher.

There is no cap on how much a funder may be paid or retain from the net proceeds of a successful action. The terms of the funding or assignment will be a matter for negotiation between the funder and the office holder. There is a limit on how much lawyers may claim on their uplifts under a CFA agreement. Lawyers may only claim a premium of up to 100% of their fee (in addition to their fee). The percentage uplift will be negotiated prior to entering into a retainer with the lawyer.

3.4 Procedural aspects

3.4.1 Control of proceedings and involvement in settlement proceedings

Generally, funders will prefer to take an assignment of an action so that they can control the litigation and make the decision to settle or to proceed with the action. Prior to 2015, when assignment of office holder actions in corporate insolvency was still champertous, they had to be careful in funding an action not to interfere in how it was run. This is no longer a concern where the funder takes an assignment, but remains an issue if the office holder does not agree to an assignment but instead agrees to enter into a funding agreement.

If the cause of action is not assigned by the office holder, the funder must be careful not to assume control of how the action proceeds. If a litigation funder is acting only as a funder of a case being brought by an office holder, the funder cannot take control of the action. Such assumption of control would be likely to lead to a successful claim that the

[23] *Re Hotel Portfolio II UK Ltd* [2020] EWHC 233 (Comm).
[24] *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 2995 (Ch).

funding agreement is void due to being champertous. Since 2015, most insolvency actions are now assigned to the funder and so full control over the action is assumed by the funder who owns the action.

Some office holders have observed that some funders, who have taken an assignment of a cause of action, are too ready to settle a strong claim to make a quick turnaround on their investment. However, that is, of course, a commercial decision for the funder once it has taken an effective assignment of the cause of action. If a claim is funded by a funder (rather than the claim being assigned), the funder cannot take control of the claim and so the decision whether to settle will remain with the office holder.

3.4.2 Right to abandon proceedings

It is usually written into any funding agreement that there will be limits on the funding being provided or funding may only be committed for certain parts of an action. Once the limits of the funding agreement have been reached, the funder may decide to withdraw further support. This may leave the office holder having to identify alternative sources of funding, or in the absence of such alternatives, abandon the action. The power to abandon and terminate is obviously more straightforward where an assignment of the cause of action has been made to the funder who will have the absolute right to abandon the proceedings. Where such a decision is made, the office holder or company may have the contractual right to have the action re-assigned.

3.4.3 Liability for adverse cost orders and security for costs

Adverse cost orders are available in England and Wales. This is unlikely to involve a personal costs order against an office holder, but such orders are possible depending on the facts.[25] Office holders are often very cautious about this risk and many now favour avoiding the risk entirely by using a funder.

The court furthermore has the power to make a non-party, such as a funder, liable for a winning defendant's costs.[26] In exercising this discretionary power, the court has on occasion limited the liability of a funder using the *Arkin*[27] Cap – limiting the liability to an amount equal to the funding provided (this is not an invariable practice[28]).

A commercial litigation funder can also be required to provide security for costs. If it is not able to show it has assets (or ATE insurance) to cover possible adverse costs, the action may be discontinued by the court.[29] ATE insurance is widely available, and it is often used

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25 *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 2995 (Ch).
26 Senior Courts Act 1981, s 51.
27 Named after the case *Arkin v Borchard Lines Ltd (Nos 2 & 3)* [2005] 1 WLR 3055.
28 *Davey v Money* [2019] EWHC 997 (Ch).
29 If the court is of the view that an order for security for costs would stifle the claim, the court may refuse to make the order. An example where this occurred is *Absolute Living Developments Limited (In Liquidation) v DS7 Limited* [2018] EWHC 1432 (Ch).

by funders. Some funders effectively self-insure by using their own funds as adverse costs cover. The courts generally allow ATE to be used as effective security for costs, but they have on occasion refused to regard it as sufficient cover depending upon its terms.[30]

4. Litigation funding and insolvency

Recent empirical evidence[31] identifies the following types of actions to be typical insolvency actions taken with the support of a third-party funder, and suggests a percentage breakdown of their respective incidence: (i) non-payment of a director's loan: 29%, (ii) breach of directors' duties: 20%, (iii) breach of contract: 15%, (iv) transactions at an undervalue: 13%, (v) voidable preferences: 9%, (vi) unlawful dividend: 7%, (vii) wrongful trading: 4%, and (viii) miscellaneous: 3%.

4.1 Mechanisms to fund insolvency proceedings

It is increasingly rare for an insolvent estate's own money to completely finance insolvency litigation, or at all. There are a great many insolvent companies with few, if any, assets. In such cases, the office holder will often only receive a fee for their work if litigation is successful. Although it is different at the top of the market where a company's assets may be sufficient to cover the costs of litigation, it is still, even in these cases, common for office holders to consider funding options in satisfying their duty to act in the best interests of creditors.

Although creditors will often be offered the opportunity to fund an action by an office holder, such agreements are not common in practice. The creditors will potentially be liable for the office holder's costs and adverse costs of the opposing party if the action fails. There is no specific legislative provision to allow creditors who do provide this type of support to receive an uplift on their contribution if the action is successful. In the last century it was relatively common for Her Majesty's Revenue and Customs (HMRC), which is often the most significant creditor in a case, to have provided funding for litigation funding, but this is only encountered rarely in practice. In effect, there is little, if any, Governmental financial support for insolvency litigation.

In terms of the options available to an office holder, the choice is typically either to (i) run the action using lawyers on a CFA with adverse costs insurance (ATE insurance) where the CFA allows for up to 100% uplift on lawyers' fees if successful,[32] and ATE premiums often are only payable if the action is successful, (ii) use a litigation funder to fund the action being taken by the office holder in exchange for a share of the proceeds, or (iii) assign the cause of action to a third-party funder.

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30 *Re Hotel Portfolio II UK Ltd* [2020] EWHC 233 (Comm).

31 P Walton, *Insolvency Litigation Funding – in the best interests of creditors?* (April 2020), A report commissioned by Manolete plc with the support of the Insolvency Practitioners Association and the Institute of Chartered Accountants in England and Wales at para 6.2, available here.

32 Courts and Legal Services Act 1990, s 58; and Conditional Fee Agreements Order 2013 (SI 2013/689), art 3.

Prior to 2015, company insolvency actions were often assigned to a third-party funder but office holder actions could not be assigned. Since 2015, when the ability to assign office holder actions was introduced, assignments of both company and office holder actions have been possible. In practice most funders now prefer to take an assignment of any action with a percentage of net proceeds going to the estate.

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

Creditors do not have a general right to information about the content of the funding agreement, but it seems likely that an office holder would normally be willing to disclose details of the agreement if a creditor requested such information. Creditor approval for entering into a litigation funding agreement is not required, but most office holders will consult with major creditors and offer the chance to creditors to fund the action themselves before entering into a funding agreement or assigning a cause of action to a funder.

Creditors will potentially be able to challenge a funding agreement – it is clearly possible that a breach of duty action against the office holder could be brought by a creditor alleging that the office holder has not acted in the best interests of the creditors by entering into the particular litigation funding agreement. The court will require clear evidence to question the commercial decision-making of an office holder.[33]

4.2.2 Relevance of litigation funding arrangement providing benefit to creditors

There is no general requirement that creditors should benefit in some way from the funding arrangement. It is entirely possible for the proceeds to be largely or completely eaten up by payment to the funder and payment of the costs and expenses of the office holder.

4.2.3 Other measures to protect the interests of creditors

A creditor, unhappy with the conduct of an office holder, can bring an action asking the court to scrutinise the office holder's actions. There is no automatic scrutiny by the courts, even in a compulsory liquidation.

5. Insolvency practitioner and litigation funding

5.1 Insolvency practitioner obligations

An office holder owes various duties to act in the best interests of creditors and could so be sued for misfeasance, have their actions reversed by the court or be removed as office

[33] See S Baister, "Fiduciaries and the Financing of Insolvency Litigation: Some Legal and Practical Considerations", *Wolverhampton Law Journal* Vol 5 (2020) at pp 26-27.

holders. [34] It is clear that the decision facing an office holder as to how to realise the value of a cause of action is often "nuanced and difficult".[35] Even if there is money in the insolvent estate, the office holder will often still consider whether to run an action using CFAs and ATE on the one hand, or to engage with a funder. A combination of these approaches may also be considered.

5.2 Factors to consider when contemplating litigation funding

It appears that office holders need to have in mind the following fundamental propositions when contemplating litigation:

(a) the fiduciary nature of their duties;

(b) acting in what they believe to be the best interests of the creditors;

(c) keeping proper records of their decision-making processes so as to be able to account for expenditure made;

(d) ensuring that both their time costs and any costs such as legal costs are best value for money;

(e) exercising proper commercial judgment when realising any asset, but when realising a cause of action they will need to take legal advice;

(f) considering the whole range of funding options and a judgement must be made as to which is in the best interests of the creditors, not merely which is most likely to ensure the payment of the office holder's fees;

(g) that it may be necessary to approach a number of funders or assignees in order to ensure that the office holder can be seen to be taking reasonable care to act in the best interests of creditors; and

(h) office holders must recognise the risks inherent in different funding options.

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[34] It will often be sensible or good practice to provide a defendant with the opportunity to acquire (or settle) the claim prior to an office holder taking other action, such as using a funder. Failure to do so will not automatically call into question the decision made by the office holder. An aggrieved creditor (this class of creditors may include the defendants themselves) must show that the decision of the office holder was perverse in that it was so utterly unreasonable and absurd that no reasonable office holder would have made it. This is a "formidable test" (see *Re Edengate Homes (Butley Hall) Ltd* [2022] EWCA Civ 626 at para 44).

[35] *Absolute Living Developments Limited (In Liquidation) v DS7 Limited* [2018] EWHC 1432 (Ch) at [33].

On the basis of the above, it is suggested that the factors below serve as a useful checklist when using a funder or assignee:

(a) Does the funder have a demonstrable track record in financing insolvency litigation claims?;

(b) What is the minimum case size that the funder will consider?;

(c) Is the finance that is provided open-ended or subject to a defined limited commitment by the funder?;

(d) Is a counsel opinion essential for the case to be considered?;

(e) Does the funder offer an assignment option, or funding only?;

(f) Can the office holder retain a percentage interest in the final outcome?;

(g) Can the office holder sell the claim in its entirety at the outset, taking a single once-off payment into the estate?;

(h) Does the funder provide the office holder and the estate with a clear and full adverse cost indemnity, or does the office holder need to source ATE as well?;

(i) What is the financial strength of the funder that backs its indemnity and will that satisfy any security for costs issue?;

(j) Does the office holder get to choose the legal team who works on this case going forward?;

(k) Where has the office holder assigned the case: will the office holder remain involved or at least be kept regularly informed of progress on the case? Can the office holder participate in any alternative dispute resolution meetings if the office holder chooses to do so?;

(l) Can the office holder receive some money into the estate upfront to defray some / all of the office holder's and the lawyer's work-in-progress, and how does the office holder recover any remaining outstanding costs incurred prior to the assignment / funding agreement?;

(m) Will the legal team have to work on a full or partial CFA or do they get paid as the work is completed, at base rates?;

(n) Can the office holder's litigation support / further investigation costs be covered by the funder?; and

(o) What percentage of the final recovery will the estate get? Does that percentage increase as the recovery level increases?[36]

5.3 What are litigation funders looking for?

It is clearly the case that funders often make their money by making quick settlements with the threat of expensive litigation if the defendant does not settle. Speed of settlement is essential. The simpler the cause of action the better for as it will make settling more straightforward if the case is simple. Funders will generally wish to assess a cause of action as at least 70% likely to succeed, but this will vary from action to action and funder to funder.

6. Litigation funding agreement

6.1 Typical structure of agreement

There are no typical consumer protection terms implied in the litigation funding agreement.

6.2 Protection of confidential information in relation to funding agreement

There is generally a requirement to disclose the terms of any funding agreement where a defendant applies to the court for an order for security for adverse costs. The court will require evidence that the funder is able to cover any future adverse costs order, and so information relevant to that consideration will have to be disclosed to the court and the other parties.[37]

There would appear not to be any legal professional privilege. Such agreements have been considered by the courts when considering applications for security for adverse costs orders and so the agreements have been accessed by the defendant and considered by the court.

Non-privileged communications are furthermore generally discoverable.

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[36] This list is taken from Appendix One to P Walton, *Insolvency Litigation Funding – in the best interests of creditors?* (April 2020), A report commissioned by Manolete plc with the support of the Insolvency Practitioners Association and the Institute of Chartered Accountants in England and Wales.

[37] *Michael Philips Architects Ltd v Riklin* [2010] BLR 569 and *Geophysical Service Centre Co v Dowell Schlumberger (ME) Corp* [2013] EWHC 147 (TCC) are cases where the terms of ATE policies were commented on by the court.

GERMANY

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1. Jurisdictional context

German insolvency proceedings are regulated by the Insolvency Code (Insolvenzordnung, InsO). This came into effect in 1999 and replaced both the Bankruptcy Code (Konkursordung, KO) of 1877 and the Settlement Code (Vergleichsordnung) of 1935.

Insolvency proceedings are special enforcement procedures with the primary aim of maximising the return to creditors by liquidating all the assets that belong to the insolvent estate, continuing the business with an insolvency plan, or selling the business. If it is in the best interest of the creditors, the Insolvency Code favours continuing the going concern of a business over liquidating it.[1]

In principle, creditors are treated in accordance with the *par conditio creditorum* principle. In order to prevent a few creditors from running for the debtor's assets at the first sign of crisis, the insolvency law replaces individual enforcement actions with a collective debt collection system and coordinated distribution of the assets. In this way, the debtor's assets are safeguarded for the benefit of the debtor and its creditors. These assets can be used to continue business operations, which ideally can enable a higher return to creditors because the business itself may be worth more than its assets in a piecemeal liquidation. Self-administration is a special form of insolvency proceeding. In this case, the debtors or their management remain in possession of the insolvent estate and manage the business under the supervision of a trustee.

In recent years, the focus has been on restructuring the debtor's financial obligations and rescuing the business. The most important rescue-oriented reforms enacted into law were the Law to Further Facilitate the Restructuring of Companies (*ESUG*) of 2012, which focuses on self-administration, the insolvency plan and the creditor's position; and the Law on the Stabilisation and Restructuring Framework (*StaRUG*) of 2020,[2] which implemented the EU Preventive Restructuring Directive of 2019 (PRD 2019). While some businesses are worth rescuing and should, therefore, be afforded a second chance, the purpose of insolvency proceedings is also to remove from the market businesses that are financially and economically unviable to avoid spill-over effects on other market participants and their business operations. Therefore, insolvency proceedings can have a cleansing effect for the market.

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1 *InsO*, s 1.

2 1 January 2021, BGBl. I at pp 3436 and 3452 of 21 August 2021 (latest changes).

2. General overview of litigation funding in Germany

2.1 Historical development, market overview and prevalence

In 1998, Foris AG began offering litigation funding in Germany professionally for the first time. Insurance companies were organisations originally specialised in this business area (for example, Allianz and Ergo). Litigation funding has been part of risk management ever since.[3] In recent years, however, many large insurance companies have abandoned this business while other players have entered the market, for example Omni Bridgeway AG took over ROLAND ProzessFinanz AG in 2019 and is the global leader in litigation funding and juridical risk management since 2021.[4]

In the past, the market was mainly divided between small companies. Now larger litigation funders are forming due to legal tech, competition law and class actions. A few years ago, it was hard to find someone who wanted to take the risk, but today the litigation funder is actively looking for promising legal action. Litigation funding represents a relevant market for risk financing.[5] The exact number of litigation funders operating in Germany is not known. However, according to the *AnwaltsBlatt*, a German specialised magazine for lawyers and legal professionals,[6] there are 22 litigation funders in Germany.[7] However, not all of them are comfortable to finance litigation arising in the context of insolvency.

Commercial litigation financing is used in various contexts, including contractual claims / breaches of contract (for example, from a contract for work, employment contract, purchase contract, partnership agreement, cooperation agreement, construction contract, etcetera); claims under compensation law (for example, from breach of contract, violation of protective laws, product liability, doctor's liability, notary liability, lawyer's liability, architect's liability, illegal encroachment on absolutely protected rights, etcetera); inheritance claims (for example, validity of a will, compulsory portion right, mandatory donation portion, etcetera); a claim from an apportionment procedure (for example, divisions under company law but also under matrimonial division etcetera); and claims under enrichment law.[8] Litigation funding is further also used for corporate law claims (shareholder, and merger and acquisitions disputes), antitrust claims (individually or collectively), investor lawsuits, patent disputes and claims for damages.[9] The inquiries most frequently accepted by litigation funders come from the fields of law dealing with architects and engineers, capital investment law, medical liability law and inheritance law.[10]

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3 https://content.beck.de/NZI/NZI_06_2011_Prozessfinanzierung_1.pdf.
4 https://omnibridgeway.com/de/prozessfinanzierierung/streitbeilegung/insolvenzrecht.
5 https://anwaltsblatt.anwaltverein.de/de/anwaeltinnen-anwaelte/anwaltspraxis/mit-hohem-einsatz.
6 The *AnwaltsBlatt* provides information for all lawyers and legal professionals about news in the different areas of law as well as information and discussions about legal amendments and case law.
7 https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2021-223.pdf.
8 https://pragerlaw.com/prozessfinanzierung/.
9 https://drs.deminor.com/de/prozessfinanzierung/was-ist-prozessfinanzierung.
10 https://www.anwalt24.de/lexikon/prozessfinanzierer.

Commercial litigation funders are also involved in inheritance litigation, unlike in other jurisdictions. Litigation funders such as Omni Bridgeway AG fill the gap left by the limited scope of legal expenses insurance. It is possible to finance out-of-court and in-court assertion of monetary claims under the condition of the respective dispute value limits and determined probabilities of success. Areas of application of commercial litigation funding in inheritance disputes include the ascertainment of the status of the inheritance, assertion of claims for supplementary compulsory portions and challenges to wills. As in other contexts, the commercial litigation funder assumes the cost risk in the event of a loss and receives a percentage of the profit in the event of a win (no win, no fee).

Generally, any type of commercial litigation is financed by third parties when a profitable return can be expected at a reasonable risk. In the recent past, commercial litigation funding has been used more and more frequently in class actions, insolvency proceedings or model proceedings. In this way, individual small lawsuits are bundled into a total litigation value.[11] The best example of this is the financing of class action lawsuits due to the emissions scandal at Volkswagen and Mercedes,[12] or the matter of Air Berlin.[13]

2.2 Regulatory framework

There are no direct legal provisions for commercial litigation funding during insolvency proceedings. However, the existing legal framework of national law, such as the *InsO* or PRD 2019, which also has an influence on the permissible framework of commercial litigation funding of commercial disputes, must be taken into account. The draft resolution of the European Parliament, which will directly regulate commercial litigation funding in the future, represents a more stringent regulation.[14]

There are no public bodies or regulators overseeing litigation funders as such, but the BaFin (German regulator for banks and insurance companies) would have oversight of any activities concerning the financial and insurance sector. There are different authorities which have an influence on jurisdiction among others, such as the Federal Bar Association (BRAK) as well as the Federal Supreme Court and the European Court of Justice. The Bundesrat (the upper house of the German government)[15] has requested the German

[11] E Jones and J Weißbach, *Eupäisches Parlament wird über neue Regeln für Prozessfinanzierung beraten*, 21 September 2021, available here.

[12] Both Volkswagen and Merceded equipped its diesel cars with cheating software (the so-called Dieselgate). In the aftermath, both auromotive companies recalled many of its diesel models in connection with the emissions control system and consumer filed for class action lawsuits. There are currently judgments pending from the German Federal Court of Justice and the European Court of Justice in those matters.

[13] BGH-Urteil II ZR 84/20, 13 Juli 2021, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&client=12&pos=0&anz=1&Blank=1.pdf&nr=120886.

[14] PR_INL (europa.eu).

[15] Deutscher Bundesrat, Entschließung des Bundesrates „Maßnahmen zur bewältigung zivilgerichtlicher Massenverfahren und zur Sicherung der Funktionsfähigkeit der Justiz", Drucksache 342/22 (Beschluss), 07.10.22, available here.

government to pass a law to deal with the increasing numbers of class action law suits, including a supervisory body to deal with litigation funders.[16]

There are indications of law reform in this area. On 1 October 2021 the Law for the Promotion of Consumer-Friendly Offers in the Legal Services Market (Legal Tech Law)[17] came into force. In the process, contingency fees for lawyers and new rules for debt collection agencies were laid down. Within this framework, the possibility of litigation funding was created for lawyers within a certain scope. This refers to bearing court costs, administrative costs or costs of other parties. [18]

Further regulation could furthermore come at European level. The European Parliament is discussing new rules for commercial litigation funding. A draft resolution setting[19] out of the framework for a possible set of rules was presented in June 2021. This draft represents a tightening up of the Associations' Litigation Directive from 2020,[20] which is intended to additionally protect consumers from excessively high fees and avoid a conflict of interest on the part of third-party financiers. The BRAK is in favour of the draft for the introduction of minimum standards, which are intended to protect the law-seeker. The Legal Tech Association Germany does not see any need for regulation and criticises that the representation of litigation funders is a distorted picture.[21]

There are no specific regulations about litigation funding in insolvency as such. Article 10 of the PRD 2019 regulates the financing of collective redress actions. This also includes mass proceedings financed by a litigation funder and that no conflict of interest may arise in the financing by third parties if the defendant is, for example, a competitor of the financier.[22] Furthermore, applicable insolvency law of the *InsO* must be considered in litigation funding in an insolvency case. As already mentioned, the first obligation of the insolvency or restructuring administrator is to satisfy creditors to the best of his ability, which applies at all times during an insolvency and, thus, also in the context of litigation financing in insolvency proceedings.

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16 Passing a law until 25 December 2022 is necessary to comply with Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), OJ L 110, 1.5.2009, p 30–36.

17 https://www.haufe.de/recht/kanzleimanagement/lockerung-beim-erfolgshonorar-u-prozessfinanzierung-fuer-anwaelte_222_530538.html.

18 J Weißbach and S Benke, *Gesetzgeber plant Reform für erfolgshonorare und Prozessfinanzierung*, 20 November 2020, available here.

19 PR_INL (europa.eu).

20 https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32020L1828.

21 *Legal Tech Verband lehnt Initiative zur strengeren Regulierung von Prozessfinanzierung ab – Legal Tech Verband Deutschland,* available here.

22 https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32020L1828.

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

Depending on the size and scope of the case, potential claimants provide an expense and evidence of the case, as well as their lawyer's assessment so that the litigation funder can conduct its own thorough assessment and verification of the chances of success of the litigation, and the creditworthiness of the opposing party. If this is assessed positively, the funder assumes the entire process costs (or a significant part – depending on negotiation) and thus the process risk. In return, the litigation funder receives a share of the collected amount if it is successful. The market has come up with various and sometimes complex models of costs and proceeds (including ones that are worth exploring and comparing). Some litigation funders also provide support with strategy development and project management (such as Omni Bridgeway AG). Many have developed their own network of financial advisors, experts, investigators, insiders and a wealth of experience waiting to be shared.

3.2 Regulatory obligations

There are currently no direct regulatory obligations imposed on litigation funders. As a result, there are, for example, no direct rules imposing detailed record keeping obligations on a commercial litigation funder, or rules around capital adequacy requirements. Only the takeover report discloses the involvement of the financing to the outside world. Also, a litigation funder is not fundamentally subject to the duty of confidentiality, like a lawyer.[23] This may change in future, with the draft resolution for new directives from 2021 proposing an authorisation system for litigation funders administered by the respective national supervisory authorities.[24]

Litigation funding by a lawyer is prohibited.[25] Excluded from this are the conditions described in the Legal Tech Act. As already discussed,[26] the possibility of litigation funding was created for lawyers within a certain framework.[27]

In the past, conflicts of interest were only regulated for lawyers in litigation funding.[28] An insolvency practitioner shall furthermore at all times act in the best interests of the best possible satisfaction of creditors.[29] Article 10 of the Representative Actions Directive also requires a commercial litigation funder to avoid conflicts of interest, such as an action

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23 https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2021-223.pdf.
24 EU-Parlament wird über neue Regeln für Prozessfinanzierung beraten (pinsentmasons.com).
25 Federal Lawyers' Act (*BRAO*), s 49b (2), sentence 2, available here.
26 See para 2.2 above.
27 Legal Tech-Gesetz: Kompromiss für Anwaltschaft und Inkassobranche? (legal-tech.de).
28 https://www.haufe.de/recht/kanzleimanagement/lockerung-beim-erfolgshonorar-u-prozessfinanzierung-fuer-anwaelte_222_530538.html.
29 *InsO*, s1.

against a competitor of the funder.[30] A financier must also act in the collective interest of consumers and creditors. Accordingly, there must be no conflict of interest for either insolvency practitioners or commercial litigation funders. There appears to be regulatory interest in respect of conflicts of interest and the draft of the Legal Affairs Committee of the European Parliament provides for a new set of rules to ensure stronger safeguards against conflicts of interest in litigation funding.[31]

3.3 Funding premium

The funding premium is negotiated and provided for in terms of the litigation funding agreement. Depending on the contract, the litigation funder typically receives a share of 20% to 50% of the claimed amount,[32] depending on the business model and claim. Each litigation funder has its own minimum for the amount in dispute. Litigation below that would not be financed at the stated percentage, as otherwise the expected return would be too low for the calculated risk. A litigation funder selects the cases to be financed on the basis of profitability and the associated probability of success.

There are no statutory caps on premium so far. However, this could change in the near future. The Legal Affairs Committee of the European Parliament is discussing a set of rules to regulate third-party litigation funding in the European Union. One of the major criticisms is that justice for the plaintiff, who is financed by a litigation financier, is only a secondary concern. The focus is exclusively on economic interests. The actual advantage of commercial litigation funding, which is that consumers can assert their rights without being exposed to the risk of high legal costs and thereby ensure more justice, is not fulfilled – Australia is explicitly mentioned as a negative example.[33] Litigation funders in Australia consider consumer product liability claims to be too risky and unprofitable and therefore charge excessive fees. Thus, a litigation funder decides which cases even get the chance of justice.[34] The draft resolution therefore proposes to effectively protect European Union citizens from financial exploitation by litigation funders, by, among other measures, imposing a cap on fees.

3.4 Procedural aspects

3.4.1 Contol of proceedings and involvement in settlement proceedings

With commercial litigation funding, the funder has no direct influence on the procedure. In the most common cases, a process is financed with a participation in the proceeds and

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30 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p 1-27.

31 PR_INL (europa.eu).

32 https://www.anwalt24.de/lexikon/prozessfinanzierer.

33 PR_INL (europa.eu).

34 E Jones and J Weißbach, *Eupäisches Parlament wird über neue Regeln für Prozessfinanzierung beraten*, 21 September 2021, available here.

the assumption of the cost risk. Only very rarely does a sale of the claims of action occur in Germany. However, the more services you agree to with a litigation funding company, the more indirect influence it has on the selection of the lawyer (including its own legal advice) and thus also in negotiations about its own interests. However, the lawyer is obliged to inform the litigation funder comprehensively during the entire procedure.[35] This does not apply to measures to terminate proceedings. These may only be carried out by the lawyer with the consent of the litigation funder.[36] The draft resolution of the Legal Affairs Committee of the European Parliament wants to prevent litigation funders from taking too much control over a case.[37]

3.4.2 Right to abandon proceedings

A litigation funder is permitted to terminate the litigation funding agreement on the basis of defined conditions. In the event of a complete termination, the financing of the procedure will also cease. This could typically occur where legal prosecution no longer appears promising.[38]

3.4.3 Liability for adverse cost orders and security for costs

The costs of a legal dispute are to be paid by the unsuccessful party. This is regulated in section 91, para 1 of the Code of Civil Procedure (*ZPO*). This includes the lawyer's statutory fees and expenses, which must be reimbursed by the losing party in all cases.[39] However, the amount to be paid is limited to a sum of EUR 30 million, which is regulated in the Lawyers' Fees Act (*RVG*). [40]

If the party is defeated in a legal dispute, the commercial litigation funder bears the cost risk. However, the funders are generally reinsured.

4. Litigation funding and insolvency

The most common lawsuits funded out of insolvency are those due to existing corporate claims such as outstanding debts or corporate offences. Also funded out of insolvency are actions against directors for breaches of duty that have led to insolvency or deterioration of the company's position. Commercial disputes that are financed by litigation funders are also legal transactions that can be challenged prior to insolvency (avoidace actions) and asset recovery suits. The most common reason for corporate insolvency is the debtor's insolvency according to section 17 of the *InsO*.[41] A distinction is made between the standard insolvency procedure, the insolvency plan procedure and self-administration.

35 https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2021-223.pdf.
36 https://content.beck.de/NZI/NZI_06_2011_Prozessfinanzierung_1.pdf.
37 EU-Parlament wird über neue Regeln für Prozessfinanzierung beraten (pinsentmasons.com).
38 https://www.legial.de/sites/default/files/2020-07/legial-prozessfinanzierung-mustervertrag-2007.pdf.
39 *ZPO*, s 91, para 2.
40 *RVG*, s 22, para 2.
41 *InsO*, s 17.

Furthermore, according to section 270b(1) of the *InsO*,[42] since 2012 protective shield proceedings are intended to further facilitate the restructuring of companies.

4.1 Mechanisms to fund insolvency proceedings

There are several resources available to finance an insolvency proceeding, depending on the type of proceeding. Before the opening of insolvency, a certain liquidity cushion should be saved by not paying invoices. New loans after the opening of insolvency are legally favoured but are rarely granted by banks. Companies therefore turn to alternative financiers (such as leasing companies, factoring banks or funding institutions (for example, AWS and NÖBEG)).[43] In order to be able to continue to pay wages, for example, a pre-financing of the bankruptcy fund in sections 165 to 172 of the *Sozialgesetzbuch* (*SGB*) *Drittes Buch* (III) (SGB 3)[44] statutory insolvency money can be applied for.[45]

Commercial litigation funding is also an option and has recently become more common in class actions and mass procedures.[46] In addition to commercial litigation funding, there are other ways to finance civil litigation as annex to insolvency proceedings. One option is the proceeds from the insolvent debtor's assets or a loan. More often, however, financing is concluded through an insolvency practitioner or a contingency fee agreement with a lawyer, which are, however, very restricted under German ethic and provisions on the renumeration for lawyers. Likewise, the state's process cost aid can be used. Most often, financing is provided by the creditors.

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

The law does not specifically regulate creditor access to information regarding the litigation funding agreement. However, litigation finance firms are not subject to a confidentiality obligation, which means information can be exchanged voluntarily.[47] The creditors' council is entitled to inspect the takeover report of the insolvent estate to the insolvency practitioner.[48] The insolvency practitioner is also accountable to the insolvency court.[49] The draft of the European Union Parliament's Legal Affairs Committee proposes an obligation to disclose litigation funding agreements.[50]

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42 *Idem*, s 270b.
43 https://insights.controller-institut.at/finanzierung-von-unternehmen-vor-in-und-nach-der-insolvenz/.
44 *SGB* 3 - *Sozialgesetzbuch* (*SGB*) *Drittes Buch* (III) - *Arbeitsförderung* - (*Artikel 1 des Gesetzes vom 24. März* 1997, BGBl. I S. 594) (gesetze-im-internet.de).
45 https://link.springer.com/content/pdf/10.1007%2F978-3-658-04116-8_67.pdf.
46 E Jones and J Weißbach, Eupäisches Parlament wird über neue Regeln für Prozessfinanzierung beraten, 21 September 2021, available here.
47 https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2021-223.pdf.
48 *InsO*, s 148.
49 *Idem*, s 58.
50 PR_INL (europa.eu).

Creditor approval for the litigation funding agreement is required in some instances. In the event of a "substantial amount" (dispute value) in process, the approval of the creditors' committee must be obtained.[51] More importantly, agreeing the sharing of proceeds with the funder is an important aspect for the creditors whose dividend is directly influenced thereby. In insolvency proceedings, the creditors' committee is a governing body through which the common interests of the creditors are represented towards the insolvency practitioner and the insolvency court. It is recommendable to obtain two to three offers from various litgation funders and to present the different modelling and possible different outcomes to the creditors' committee (or at the creditors' meeting) to justify the commercial terms, and to prove prudent diligence by the insolvency practitioner in finding the most beneficial conditions of the funding.

In the event of a dispute over the ongoing proceedings, a dispute resolution clause is included in the funding agreement. This procedure is intended to lead to a resolution of the discrepancy between the litigation funder and the insolvency practitioner or to the annulment of the agreement.

4.2.2 Relevance of litigation funding arrangement providing benefit to creditors

Whether there is a benefit (return) for the creditors depends on the successful outcome of the litigation (and enforcement and collections later) and the agreements made beforehand with the litigation funder. In general, the insolvency practitioner has the task of increasing the value of the insolvent estate. The insolvency practitioner has the obligation of the best possible satisfaction of creditors.[52] Accordingly, any action / decision must have a positive benefit for the creditors, and this also includes the financing of legal disputes by a commercial litigation funder.

4.2.3 Other measures to protect interests of creditors

Some of the general principles of insolvency law, such as judicial control, could play a role in protecting the interests of creditors. Judicial control in insolvency proceedings is the responsibility of the insolvency court. Control in insolvency litigation with a commercial litigation funder shall be allocated to the court according to the type of litigation. In addition to judicial control, insolvency practitioner obligations could play a role in the protection of the interests of creditors.

5. Insolvency practitioner obligations and litigation funding

5.1 Insolvency practitioner obligations

The insolvency practitioner is obliged in all his actions / decisions to achieve the best possible satisfaction of creditors, and is required to work carefully, properly and

[51] *InsO*, s 160 I, II No. 3 (see https://content.beck.de/NZI/NZI_06_2011_Prozessfinanzierung_1.pdf).
[52] *Idem*, s 1.

conscientiously. The insolvency practitioner is also obliged to report to the insolvency court and the creditors' council.[53] This includes, for example, drawing up a list of the insolvent estate and the creditors. The insolvency practitioner is liable for culpable breach of his duties.[54]

5.2 Factors to consider when contemplating litigation funding

An insolvency practitioner looks at the following various criteria when selecting a commercial litigation funder:

(a) litigation funder reputation;

(b) prior relationships;

(c) share of revenue / success fee;

(d) required extent of control over the process;

(e) financial ability of the litigation funder;

(f) size of the claim;

(g) scope of the analysis / due diligence;

(h) conditions of the funding agreement; and

(i) whether the funding agreement covers the insolvency practitioner's and solicitor's costs.

5.3 What are litigation funders looking for?

A commercial litigation funder can select the litigation to be financed according to risk and possible return. Almost all litigation funders have identical or at least similar selection criteria, namely: the (i) chances of success must be greater than 50%, (ii) volume of litigation must exceed a minimum dispute value below which it would not be profitable to finance the litigation, (iii) opposing party must be able to pay if it loses the litigation and must therefore not be in an insolvency situation, and (iv) legal representative's staffing and experience are also important criteria.

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[53] *Idem*, s 58.
[54] *Idem*, s 60.

6. Litigation funding agreement

6.1 Typical structure of agreement

There is no typical structure of agreement as the structure depends on the autonomy of the parties involved, based on free negotiation and free contracting.

There is, however, a published contract template that interested parties can refer to. The contract template includes the following:[55]

(a) statement by the claimant;

(b) financial review;

(c) financing services through funder;

(d) revenue sharing;

(e) revenue sharing / settlement;

(f) securing the claims to revenue sharing;

(g) obligations of the applicant;

(h) proposed settlement, right to terminate;

(i) right of termination of the litigation funder;

(j) right of termination of the claimant;

(k) secrecy / duty of confidentiality;

(l) severability clause / substitution clause; and

(m) closing provisions.

6.2 Protection of confidential information in relation to funding agreement

Confidential information in relation to the litigation funding agreement is protected in a number of ways. Firstly, attorney-client privilege in Germany is regulated in section 43 a) II of the Federal Lawyers' Act (*BRAO*). According to this section, a lawyer is subject to professional confidentiality and is obliged to maintain secrecy. This includes everything

[55] https://www.legial.de/sites/default/files/2020-07/legial-prozessfinanzierung-mustervertrag-2007.pdf.

that has become known to the lawyer in the exercise of his profession. Likewise, the persons employed by the lawyer are obliged to maintain confidentiality. A breach of duty has direct consequences under criminal law, and this also refers to the fact that the lawyer must ensure that the confidentiality obligation of his employees is fulfilled to the best of his ability. [56]

Furthermore, in German law, there is no scenario where the financing agreement must be disclosed to the other party. This possibility only exists when transferring the litigation to another jurisdiction. A popular example of this is the transfer of the litigation to American law which will allow for discovery – the production of evidence can be ordered by the court.[57] In the case of commercial litigation funding of a legal dispute (also in the context of insolvency), the deliberate change of jurisdiction is conceivable in order to gain access to the documents of the other party (thus also the funding agreement).

[56] *BRAO*, s 43a.
[57] Discovery | Wex | US Law | LII / Legal Information Institute (cornell.edu).

IRELAND

Irene Lynch Fannon
David Allen

1. Jurisdictional context

The law of companies and corporate insolvency in Ireland is regulated by the Companies Act 2014 (as amended) (the Act) and supplemented by principles of common law. The Office of the Director of Corporate Enforcement is the entity charged with enforcing and encouraging compliance with company law in Ireland, as well as investigating and prosecuting certain suspected offences under the Act. The Company Law Review Group is the statutory body established under the Act with responsibility for advising the Minister for Enterprise, Trade and Employment on the review and development of company law in Ireland.

As with other jurisdictions, insolvency practitioners have a range of mechanisms available to increase the pool of assets available for distribution among the unsecured creditors of the company during liquidation. These include both statutory causes of action, such as claims for contribution orders under section 599 of the Act, claims for unfair preferences under section 604 of the Act, and claims for reckless trading under section 610 of the Act; as well as non-statutory causes of actions such as claims in tort and contract for damages. In practice, however, it has been suggested by the Company Law Review Group that the lack of funding available to the liquidators of insolvent companies has been a key contributor to the paucity of case law concerning many of the mechanisms and remedies available.[1]

2. General overview of litigation funding in Ireland

2.1 Historical overview, market overview and prevalence

The doctrines of maintenance and champerty survive in Ireland by virtue of the Statute of Conspiracy (Maintenance and Champerty) of an unknown date in the 14th century, the Maintenance and Embracery Act 1540, and the Maintenance and Embracery Act 1634, each of which were retained as law by virtue of the Statute Law Revision Act 2007. Pursuant to those statutes, maintenance and champerty remain both torts and criminal offences and the doctrines have operated to prohibit third-party litigation funding in Ireland.

The continued role of the doctrines in Irish law was considered by the Law Reform Commission in 2016. At that time, the Law Reform Commission considered that there was

[1] Company Law Review Group, *Report on the Protection of Employees and Unsecured Creditors,* June 2017 at p 93. This issue is addressed in further detail in a more recent report of the Company Law Review Group. See further, Company Law Review Group, *Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, including Splitting of Corporate Operations from Asset Holding Entities in Group Structures*, December 2021, sections 8 and 9 at pp 37-47. See further below.

a reasonable argument to be made that legislation should be introduced to allow for third-party funding of litigation in order to facilitate access to justice to those who could not afford to pursue claims[2] and sought the views of interested parties as to whether the doctrines of maintenance and champerty should be abolished, as well as whether third-party funding of litigation should be permitted in any particular circumstances. The final report of the Law Reform Commission on this topic is still outstanding.

In the absence of legislative reform, the Supreme Court has reaffirmed the status of the doctrines in Irish law on two occasions in recent years. First, in *Persona Digital Telephony v. The Minister for Public Enterprise*[3] it was held that an agreement between the plaintiff to the proceedings and an independent third-party funder to fund the continuation of the proceedings in return for a share of its proceeds fell foul of the rule against champerty. Second, in *SPV Osus v. HSBC Institutional Trust Services (Ireland) Limited*[4] it was unanimously held by the Supreme Court that an agreement to assign several causes of action to a third party without any independent interest in the litigation was champertous and unenforceable. It is perhaps worth noting that, in each of the decisions, the majority of the Supreme Court members were of the view that it might be desirable to permit third-party funding of litigation in order to facilitate access to justice but felt that there were complex issues of policy involved which fell more appropriately to be considered by the legislature. In *SPV Osus,* for example, Clarke CJ (as he then was) delivered a concurring judgment specifically to repeat the concerns that he had earlier expressed in *Persona* that there was a significant and increasing problem with access to justice that required urgent consideration[5] and that, although it would be preferable for the matter to be addressed by the legislature, a point could be reached where the court would be compelled to intervene if no meaningful action was taken.[6]

It is also important to note that the use of third-party litigation funding in the context of insolvency proceedings has not been the subject of a reported decision of the courts in this jurisdiction to date. As such, it remains untested in the current climate in Ireland whether the liquidator's statutory power of sale could be relied upon as an exception to the prohibitions against maintenance and champerty and the use of litigation funding, as has been the case in a number of other jurisdictions, and, even if so, what the precise scope of that exception would be.

The issue of third-party funding in insolvency proceedings was most recently considered by the Kelly Group Report which made a recommendation to permit third-party funding in insolvency proceedings as an exception to the rules against maintenance and champerty in the following terms:

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2 Law Reform Commission Issues Paper, "Contempt of Court and Other Offences and Torts Involving the Administration of Justice", LRC IP 10-2016.
3 [2017] IESC 27.
4 [2019] 1 I.R. 1.
5 *Idem*, pp 7-8.
6 *Idem*, p 9.

> "The Review Group does see merit, in the more immediate term, in the more limited proposal of the Irish Society of Insolvency Practitioners that third party funding should be available to liquidators, receivers, administrators under the Insurance (No. 2) Act 1983, the Official Assignee or trustees in bankruptcy to fund proceedings intended to increase the pool of assets available to creditors, on condition that the applicant was satisfied that a reasonable case against the prospective defendant existed and would result in increasing the pool of available assets. Such funding arrangements would have an obvious benefit in ensuring that the creditors of a company or individual or members of a company were not left without effective recourse against misfeasance or fraud on the part of the debtor or company concerned".[7]

2.2 Regulatory framework

As yet there has not been a need for a regulatory framework for third-party litigation funding of insolvency proceedings.

3. Role, rights and obligations of litigation funder

There are no litigation funders in Ireland at present. Hence, there is no report possible on the role, rights and obligations of litigation funders in this jurisdiction.

4. Litigation funding and insolvency

4.1 Mechanisms to fund insolvency proceedings

Insolvency proceedings are generally required to be funded out of the assets of the company. There is a recognised exception to the rules against maintenance and champerty, however, which permits the shareholders and creditors (such as Revenue) of a company to fund insolvency proceedings.[8] In *Thema International Fund plc v. HSBC Institutional Trust Services Limited,* a decision arising from protracted litigation concerning the Madoff financial scandal, the Irish court had to consider exceptions to the general rules of champerty and maintenance:

"However, a third party funder who is not guilty of champerty (i.e. who has the sort of legitimate interest in the case identified in the champerty jurisprudence) is, in my view, in a different situation., [...] , Any company which lacks funds always has the possibility that its shareholders (or its creditors) may choose to provide further funding for a whole range of reasons not confined to potential litigation. Commercial judgment will often lead

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7 "Review of the Administration of Civil Justice", *Review Group Report,* chaired by former president of the High Court Peter Kelly, October 2020 at p 325. The report is currently under consideration by the Department of Justice.

8 *Thema International Fund plc v HSBC Institutional Trust Services Limited* [2011] 3 I.R. 654.

to parties with a direct interest in a particular enterprise investing further sums., There is, therefore, in my view a substantial difference between a party who already has an indirect link to the impecunious party and who has, therefore, already got an indirect interest in the relevant litigation, on the one hand, and a party with no such prior link who simply buys into the litigation on the other hand...".

It is also open to the Office of the Director of Corporate Enforcement to commence and therefore fund certain forms of regulatory proceedings, such as proceedings to restrict or disqualify directors.

4.2 Creditor protection and litigation funding

While there has not been third-party litigation funding in insolvency there have been some indications of future reform and the considerations are particularly focused on creditor protection. In addition to the Kelly Report outlined briefly above, the Company Law Review Group issued a report in December 2021 which was made public in early 2022. This report was prepared in response to requests from the relevant Minister to consider various matters surrounding creditors', in particular employees', rights in insolvency. The report entitled "Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, Including Splitting of Corporate Operations from Asset Holding Entities in Group Structures"[9] was essentially focussed on the position of certain vulnerable creditors in the context of aggressive restructuring practices (also referred to above). The report considered a number of issues including the terms of some transactional avoidance measures under Irish law and their utilisation in swelling assets available to the general body of creditors. In that context the report considered the issue of funded litigation in insolvency.

The report explains the context in which it considered third-party funding of insolvency matters:

> "In its discussions on the anti-avoidance provisions referred to elsewhere in this report, the Review Group once again identified the lack of funds available to a liquidator to prosecute proceedings as an issue which was likely to inhibit the utilisation of the sections. As such, the Group felt it appropriate to give some consideration to the issue of third-party funding of litigation, in particular in the limited context of insolvency litigation".

The report noted that:

> "[T]he issue of litigation funding was…considered in two relatively recent decisions of the Supreme Court. First, in *Persona Digital Telephony v. The Minister for Public Enterprise*,[10] where it was held that an arrangement

[9] This report is available at www.clrg.org and the reader is referred to section 8 of the report (2021).
[10] [2017] IESC 27.

> between the Plaintiff and a professional third-party funder to fund the litigation in return for a share of its proceeds offended the rule against champerty".

It then went on to consider the second of the abovementioned cases, *SPV Osus v HSBC Institutional Trust Services (Ireland) Ltd*,[11] where the Supreme Court held that the assignment of various causes of action to a party without any interest in the litigation was champertous and unenforceable. The report summarises important judicial views from both cases:

> "While O'Donnell J. (as he then was) acknowledged that there might be a significant public interest in making litigation more accessible to people of ordinary means, including through the provision of some limited and regulated form of third party funding, the judge considered that the objections of the common law to the commodification of litigation, in particular the assignment of causes of action, retained force and vitality. Clarke CJ delivered a concurring judgment which repeated the concerns he had expressed in Persona that there was a significant and increasing problem with access to justice which required urgent consideration. Although the Chief Justice (as he then was) again expressed the view that the matter ought to be addressed by the legislature, he took the opportunity to emphasise again that a point could be reached where the court would be compelled to intervene if the legislature did not".[12]

The report then noted that:

> "neither of the decisions considered in the previous section related to the use of litigation funding in the more limited and specific context of insolvency proceedings. The possibility of third-party litigation funding in the context of corporate insolvency has not yet been considered in any reported case in this jurisdiction, whereas the use of third-party funding in insolvency proceedings has traditionally operated as an exception to the prohibition against funding in a number of common law countries".

The report went on to note that:

> "[t]he lines of authority in other jurisdictions which have led to the conclusion that assigning a cause of action to a third party is a permissible use of the liquidator's power of sale could lead to the same conclusions in this jurisdiction and could support limited change to rules against third party funding as they apply to liquidation".

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[11] [2019] 1 I. R. 1.

[12] See further, *idem*, p 8. Also see Company Law Review Group Report, section 8.

The report then described how this argument could be made under Irish law. Nevertheless, it concluded that:

> "[i]t seems likely that the effect of the two recent decisions of the Supreme Court in this jurisdiction, together with the uncertainty regarding the scope of the exception in insolvency proceedings just outlined, might well dissuade insolvency practitioners and funders from pursuing an argument or course of action based on existing provisions, particularly in circumstances where maintenance and champerty remain both torts and criminal offences. In conclusion it appears that the best way to address the matter, would be to clarify that there is an exceptional treatment of actions in insolvency already in the Companies Act 2014, legislation which is more recent than the provenance of the rules against champerty and maintenance, and that these provisions operate without prejudice to the continuing rules against maintenance and champerty. This position is reflective of other common law jurisdictions described above. This proposal simply amounts to a clarification of existing law and reflects the proposal described above emanating from the Kelly Report."

Accordingly, the report went on to recommend that further consideration be given to permitting third-party funded litigation in insolvency proceedings in limited circumstances. Given the strength of this recommendation and the fact that it is based on a description of existing law, coupled with the earlier recommendation in the Kelly Report described above, it may be that reform in this area is imminent.

5. Insolvency practitioners and litigation funding

There are no litigation funders in Ireland at present. Hence there is no report on insolvency practitioners and litigation funding.

6. Litigation funding agreement

There are no litigation funders in Ireland at present. Hence it is not possible to show a typical structure of a litigation funder and any protection of confidential information in relation to a funding agreement.

THE NETHERLANDS

Michael Veder
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1. Jurisdictional context

The Netherlands is, what is commonly referred to as, a civil law jurisdiction. Statutes are an important source of law. With regard to litigation funding in insolvency, the Dutch Civil Code (*Burgerlijk Wetboek*, DCC), the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, DCCP) and the Dutch Bankruptcy Act (*Faillissementswet*, DBA) are particularly relevant. Dutch case law, in particular the decisions of the Dutch Supreme Court (*Hoge Raad*), carry significant weight and provide important guidance as to how these statutes must be interpreted and applied. This is particularly true for the Dutch Bankruptcy Act, which in its core dates back to the late 19th century. Without studying a vast amount of Supreme Court decisions, it is impossible to properly understand the operation of insolvency proceedings and their effects. It is also important to note that, as a member state of the European Union (EU), Dutch law is heavily influenced by European legislation in the form of directives (such as the EU Directive on restructuring and insolvency)[1] and regulations (such as the EU Insolvency Regulation).[2] The interpretation of such EU legislation is ultimately decided by the Court of Justice of the EU.

2. General overview of litigation funding in the Netherlands

2.1 Historical development, market overview and prevalence

The Dutch market for third-party litigation funding (TPLF) is on the rise.[3] Since the turn of the millennium, initiatives have been set up to provide litigation funding in the Netherlands.[4] More and more, lawyers are being paid by a third party instead of their client.[5] It should be noted that – in comparison to countries such as Australia, the United States and the United Kingdom – litigation finance in the Netherlands finds itself in an early

1 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

2 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). (Take note that EU legislation and case law can be accessed at https://eur-lex.europa.eu; Dutch legislation can be accessed (in Dutch) at https://wetten.overheid.nl; and Dutch case law can be accessed (in Dutch) at: https://www.rechtspraak.nl).

3 It should be noted, however, that there is no public data available on the actual use of litigation funding in the Netherlands.

4 W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at pp 18 and 22; R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 75; and R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 97.

5 Editorial, "Beleggen in procedures sterk in opkomst" (17 November 2010), available at www.advocatie.nl.

stage.[6] According to Rein Philips, managing director and co-founder of Redbreast Associates N.V. (a litigation funder), litigation finance in the Netherlands has not even reached half of its full potential. Liquidators (*curatoren)* and supervisory judges (*rechters-commissarissen*) have only recently begun to see the benefits of litigation funding. Large companies do not yet seem convinced of the benefits of litigation funding. A possible explanation for their reluctance may be that they can attract cheap funding through more usual channels.[7]

The doctrines of maintenance and champerty (used to) stand in the way of TPLF in many common-law jurisdictions. The doctrine of maintenance refers to the situation where a person that has no interest in the lawsuit whatsoever provides assistance to, or encourages, a litigant to pursue a certain action, whereas the doctrine of champerty is a form of maintenance in which a third party that supports a litigant gets a share of the proceeds of the lawsuit in return. These doctrines have not found their way into Dutch law.[8] A first quick scan of Dutch law regarding TPLF funding has not revealed any absolute obstacles to litigation funding in the Netherlands.

In the Netherlands, litigation funding is primarily offered by professional parties with a solid background in legal practice.[9] There are four major Dutch market players, namely Liesker Procesfinanciering, Capaz, Redbreast Litigation Finance and Omni Bridgeway.[10] Founded in 2011, Liesker Procesfinanciering focuses on claims with a value of over EUR 150,000.[11] Capaz sets the bar a little higher by only funding claims with a value of at least EUR 200,000.[12] Redbreast Litigation Finance, which has been a market participant since 2015, focusses on commercial litigation practice, bankruptcy and occasional mass tort claims. The company finances claims with a value of at least EUR 5 million.[13] Omni Bridgeway, one of the largest litigation funders worldwide, is also active in the Dutch market. In addition to the aforementioned large market players, the Netherlands has a number of smaller market players that focus on mass claims for consumers. Some examples are Adriaan de Gier, Pieter Lijesen and ConsumentenClaim.[14]

Litigation funding is used extensively outside of an insolvency context. Van Boom and Luiten distinguish three markets where litigation funding plays or can play a role: (i) commercial parties involved in complex international litigation, (ii) mass tort claims, and

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6 B Zevenbergen, "Rechtszaak als verdienmodel" (5 June 2018), available at www.advocatenblad.nl.

7 R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 98.

8 *Idem*, p 99.

9 *Idem*, p 103.

10 *Idem*, p 98; and B Zevenbergen, "Rechtszaak als verdienmodel", (5 June 2018) available here.

11 R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 98.

12 "Procesfinanciering", www.capazbv.nl.

13 R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020); and "Criteria", www.redbreast.nl.

14 R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 98.

(iii) individuals and small business owners.[15] Predominantly, commercial parties involved in international proceedings are sufficiently wealthy to bear the costs of proceedings themselves, but they use litigation funding as a tool to spread risk.[16] Unlike large companies, individuals and small business owners more often than not lack sufficient liquidity, which means that access to justice is lacking for them. Personal injury cases may be considered in this regard. Litigation funding can provide access to justice to these parties.[17] Mass tort cases are not infrequently cases of long duration and therefore involve high costs. Mass tort claims may be litigated in the Netherlands by a specific entity set up for that purpose on the basis of article 3:305a of the DCC, which brings (class action) claims on behalf of claimants who have suffered damage as a result of a particular event or product (referred to as a collective claim entity (CCE)).[18] In general, such entities will not have sufficient resources themselves, and individually aggrieved parties will not be able to make sufficiently large contributions to fund the claim.[19] In general terms, mass tort claims may be litigated in the Netherlands in an opt-out or an opt-in structure. In an opt-in structure, the litigating entity represents only aggrieved parties who have explicitly agreed to join the action.[20] In an opt-out structure, the litigating entity is established to represent all aggrieved parties, regardless of whether they have explicitly opted in. A settlement reached in such cases may be sanctioned by the Court of Appeal in Amsterdam, making it binding on all parties unless they choose to opt out of the settlement. Bauw believes that due to the broad interpretation of the competence of the Court of Appeal in Amsterdam to take up requests for binding declarations of collective settlements, the Netherlands has become a litigation hub for the settlement of mass claims with an international aspect. In doing so, the Netherlands has attracted the attention of global financers.[21]

2.2 Regulatory framework

Dutch law does not appear to place any restrictions on litigation funding or the degree of control that a funder can have in funded proceedings.[22] This may be explained by the fact that litigation funding is still relatively rare. An extensive debate about the legitimacy and

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15 W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 189.

16 *Ibid*.

17 *Ibid*.

18 R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 99.

19 W C T Weterings, "Procesfinanciering door derden bij collectieve schadevergoedingsclaims: op zoek naar een balans", *AV&S* Vol 3 (2020/14) at p 81; and W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 189.

20 R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 99; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 24.

21 T M C Arons *et al*, *Collectief schadeverhaal (O&R No 105)* (Deventer: Wolters Kluwer, 2018) at 7.2.

22 R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 99; R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at pp 75-76 and 78; T M C Arons *et al*, *Collectief schadeverhaal (O&R No 105)* (Deventer: Wolters Kluwer, 2018) at 7.1 and 7.5 which specifically discusses the context of class actions; *Kamerstukken II* 2011/12, 33126, No 6 at p 6; and B Zevenbergen, "Rechtszaak als verdienmodel" (5 June 2018) available at www.advocatenblad.nl.

desirability of litigation funding has therefore not yet taken place in the Netherlands.[23] Contrary to, for example, the United Kingdom, there is also no self-regulation in the Netherlands, either in the form of an association of litigation funders or a code of conduct.[24] CCE's are subject to the 2019 Claims Code (*Claimcode 2019*), which focuses primarily on the quality of such entities, but also provides rules on external funding.[25] The code operates on the "comply or explain" principle. Thus, it is possible for a CCE to deviate from the code by explaining the deviation. As examples of justifiable reasons for deviation, the code lists a small number of participants or members in the entity, the small size of the average claim per individual, and / or the requested contribution from the participants or members.[26] Examples of obligations imposed on CCE's by the code include the obligation to examine the funder's capitalisation, agree that control over the litigation and settlement strategy rests solely with the CCE, and that the CCE discloses on its website that outside funding was used.[27]

The funding agreement is governed by general rules of contract law, without any specific provisions concerning such funding agreements being in place.

Dutch law does not provide for supervision of litigation funders. An exception can be found in article 3:305a paragraph 2(c) of the DCC, which requires (for the admissibility of a CCE) that it has sufficient resources to bear the costs of a proceeding and that control of the legal action lies sufficiently with the CCE (*voldoende mate*).[28] This provision empowers the court to review any litigation funding agreement in order to assess the CCE's admissibility. [29]

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23 R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 76.

24 A van der Krans, "Third party litigation funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at pp 39-40; W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 21; and W C T Weterings, "Procesfinanciering door derden bij collectieve schadevergoedingsclaims: op zoek naar een balans", *AV&S* Vol 3 (2020/14) at p 83.

25 W C T Weterings, "Procesfinanciering door derden bij collectieve schadevergoedingsclaims: op zoek naar een balans", *AV&S* Vol 3 (2020/14) at p 83; W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 25; and A H van Delden *et al* (ed) *Claimcode 2019* (Den Haag: Boom Juridisch, 2019) at pp 10-12.

26 A H van Delden *et al* (ed) *Claimcode 2019* (Den Haag: Boom Juridisch, 2019) at p 7; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 25.

27 A H van Delden *et al* (ed) *Claimcode 2019* (Den Haag: Boom Juridisch, 2019) at pp 11-12; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 25.

28 With regard to the requirement that control over the claim must lie sufficiently with the CCE, the Dutch government noted that the funder should not be able to exert a determining influence on the CCE's course of action during the proceedings (*proceshouding*). The government considers it undesirable that someone other than the CCE determines how the claim is handled. This means that the CCE (in consultation with its following) and not the funder, ultimately decides whether to agree to a settlement or choose to appeal. See *Kamerstukken II* 2017/18, 34608, No 9 at p 2; *Kamerstukken II* 2017/18, 34608, No 10; and T M C Arons *et al*, *Collectief schadeverhaal (O&R No 105)* (Deventer: Wolters Kluwer, 2018) at 3.2.

29 T M C Arons *et al*, *Collectief schadeverhaal (O&R No 105)* (Deventer: Wolters Kluwer, 2018) at 7.5; *Kamerstukken II* 2017/18, 34608, No 10; W C T Weterings, "Procesfinanciering door derden bij collectieve schadevergoedingsclaims: op zoek naar een balans", *AV&S* Vol 3 (2020/14) at p 83; *Kamerstukken II* 2016/17, 34608, No 3 at pp 11-12; and R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at pp 100 and 102.

Schonewille argues that, because of the interests involved in litigation funding, it seems inevitable that regulation will be put into place in the future to protect the quality and integrity of litigation funding. This will, for example, prevent market participants, who are not reliable or solvent, from becoming active.[30] The legislator seems to be aware of this and cites as a risk of litigation funding that the plaintiff's interests become secondary to those of a funder.[31] Other risks that the legislator is aware of include aggressiveness of the funder in the media resulting in reputational damage for the liable party and coercive settlements, ambulance chasing as a result of accepting assignments on a no cure no pay or a contingency fee basis, and a multiplicity of funders in the market making it impossible for the aggrieved parties to see the forest for the trees.[32] Bauw believes that no rules can be expected in the short term, because it is unclear yet to what extent litigation funding will actually manifest itself in the Netherlands.[33] Considering the fact that the legislator recognises the risks involved in litigation funding, it seems likely that regulation will follow in the future. However, no initiatives to this effect seem to have been set up at present.

With regard to CCE's, Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the Directive) sets a number of rules on litigation funding that in certain respects differ from article 3:305a of the DCC as it currently stands.[34] The Directive must be implemented by 25 December 2022, but the implementation is not on schedule.[35] Article 10 of the Directive stipulates that member states should ensure that conflicts of interest are avoided, and that TPLF does not distract from the protection of the collective interests of the consumers. Member states should do so in particular by ensuring that settlement decisions are not influenced by third parties in a way that is unfavourable to consumers and that the claim is not brought against a defendant who is a competitor or dependent of the funder. Member states must also ensure that courts or administrative authorities have an insight into the funding structure. To this end, CCE's should provide a financial statement with sources of funding. In order to enforce article 10 paragraphs 1 and 2 of the Directive, it should be possible to take appropriate measures, such as requiring CCE's to refuse or modify the funding and, if necessary, to reject a CCE's right to bring proceedings.[36]

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30 W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 25.
31 *Kamerstukken II* 2013/14, 31753, No 65 at p 3.
32 *Kamerstukken II* 2011/12, 33126, No 6 at p 6.
33 T M C Arons *et al*, *Collectief schadeverhaal (O&R No 105)* (Deventer: Wolters Kluwer, 2018) at 7.1 and 7.5.
34 "Wetgeving in consultatie", *NJB* 2021/1447 at pp 1624-1625.
35 *Kamerstukken II* 2020/21, 21109, No 250 (attachment) at p 9.
36 Directive (EU) 2020/1828.

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

As the name suggests, the funder's main job is to provide the litigant with funding that covers the costs of litigation, such as attorney fees, expert fees, court fees, and possibly an adverse cost order.[37] The litigation funder therefore assumes the risk of not obtaining any compensation.[38] The question of whether the financier also takes over the management of the "project" seems to depend on what type of agreement is made. Redbreast distinguishes between a (i) "services agreement" in which a claim is not only funded, but in which (as kind of a contractor) the project management is also taken over, and (ii) "plain funding agreement" in which only funding is provided.[39]

3.2 Regulatory obligations

Because litigation funding is not yet subject to regulation in the Netherlands, at present there are no regulated obligations such as a licensing requirement for litigation funders. The only exception seems to be the requirement of "sufficient resources", stated in article 3:305a paragraph 2(c) of the DCC. If insufficient funds are available, the CCE is inadmissible.[40] In that regard, one could speak of regulation in the sense that the entity must have adequate capital to conduct the proceedings.

Issues in regard to perceived conflicts of interest merit regulatory attention. The lawyer, the funder as well as the litigant have an economic interest in the proceedings. The litigant benefits from obtaining a fair outcome, for which he needs funding and an attorney. The funder is out to maximise profits, and the attorney also has a commercial interest.[41] This may give rise to a conflict of interest between these parties.[42]

The extent to which conflicts of interest can arise between litigants and their funders depends on the distribution of control rights, such as determining litigation strategy. As the funder's influence increases, so does the likelihood of a conflict.[43] Also, the funder has an interest in ensuring that it will receive the highest possible percentage of the proceeds,

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37 W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 189; R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 75; and A van der Krans, "Third party litigation funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at p 30.

38 W C T Weterings, "Procesfinanciering door derden bij collectieve schadevergoedingsclaims: op zoek naar een balans", *AV&S* Vol 3 (2020/14) at p 81.

39 R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 101.

40 T M C Arons *et al*, *Collectief schadeverhaal (O&R No 105)* (Deventer: Wolters Kluwer, 2018) at 5.

41 W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 196.

42 J J Dammingh and L M van den Berg, "Procesfinanciering door derden: een oplossing of een probleem? Verslag van de najaarsvergadering 2016 van de Nederlandse Vereniging voor Procesrecht", *TCR* 2017/2 at p 78; and *Kamerstukken II* 2013/14, 31753, No 65 at p 3.

43 W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at pp 196-197.

while this is directly contrary to the interests of the litigant.[44] Van Boom and Luiten believe that prohibiting a funder from exercising influence – as laid out in the Code of Conduct for Litigation Funders in the United Kingdom[45] – goes too far. According to them, effective dispute settlement rules provide sufficient relief to both parties.[46]

The relationship between the attorney and the funder is also not a simple one. Before making an investment, the funder will want to assess the risks involved. To do this, it needs information that is protected by attorney-client privilege. The attorney's rules of conduct allow him to disclose information with the consent of his client if the proper performance of his duties require it.[47] The attorney's independence may also be compromised as he is financially dependent on the funder. Given the fact that the attorney is a repeat player, he will be reluctant to jeopardise a partnership with the funder. It may therefore be tempting for the attorney to put the interests of the funder ahead of those of the litigant.[48] However, it can be argued that the conflict of interest is manageable. In a joint venture, an attorney usually also represents two cooperating commercial parties. In principle, the parties' interests coincide, but the potential for a conflict of interest is present.[49] In that case, the attorney is required to withdraw. To date, there appears to have been few disciplinary complaints involving litigation funding.[50]

In insolvency, the liquidator may also have a conflicting interest with respect to the bankrupt debtor if the liquidator engages his own law firm to conduct proceedings. This is the case because the liquidator instructs himself or the firm, of which he may also be a shareholder, on behalf of the estate.[51] The question, therefore, is whether the liquidator is looking after his or her own interests, or that of the joint creditors – as is the duty of a liquidator.[52] It can be argued that the liquidator serves the interests of the joint creditors by using a litigation funder. The funder will only want to invest if it expects the proceedings to have a real chance of success. The benevolence of litigation funders is therefore a relevant signal that litigation is a sensible option for the estate. It can however be objected

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44 T M C Arons *et al*, *Collectief schadeverhaal (O&R No 105)* (Deventer: Wolters Kluwer, 2018) at 7.4.

45 W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at pp 22-23.

46 W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 197.

47 *Ibid*.

48 A van der Krans, "Third party litigation funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at pp 37-38; Similarly, see *Kamerstukken* 2013/13, 31753, No 65 at p 3.

49 A van der Krans, "Third party litigation funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at p 38; R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 75; and Code of Conduct 2018 (*Gedragsregels advocatuur 2018*), Rule 15.

50 B Zevenbergen, "Rechtszaak als verdienmodel" (5 June 2018), available at www.advocatenblad.nl; and also see Disciplinary Appeals Tribunal Den Bosch 13 June 2016, ECLI:NL:TAHVD:2016:128 for a case where an attorney was reprimanded for failing to make sufficient effort to clarify ambiguities about the agreement between his client and a litigation funder.

51 R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 82.

52 S C J J Kortmann *et al*, *De curator, een octopus (O&R No 6)* (Deventer: Tjeenk Willink, 1996) at 10.4; and N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.3.2 where societal interests are also discussed.

that funders are willingly taking a litigation risk in the hope of making a profit. Also, the use of a litigation funder comes at the expense of the estate.[53]

3.3 Funding premium

Litigation funding agreements are concluded in a market where supply and demand is the rule. This market is generally not considered as mature in the Netherlands, but it is experiencing a rapid growth.[54] The funder's compensation is generally expressed as a percentage of the recovered proceeds. The amount of this percentage depends on the estimated time and costs involved with the proceedings, the expected likelihood of winning the proceedings, and the work done by the funder itself. It is usually agreed that the funder will first be reimbursed for the advanced costs, and then a percentage will be deducted from the remainder, which accrues to the funder. Sometimes, especially with foreign funders, a minimum return is agreed upon that is paid to the funder in any case. There are also funders that charge a percentage on the realised return, without deducting the advanced costs.[55]

Dutch law does not impose any caps on premiums calculated in litigation funding. Extremely high premiums might be challenged by the litigant via an appeal to abuse of circumstances, error, standards of reasonableness and fairness, or article 3:40[56] of the DCC.[57] The introduction of a maximum fee may offer protection to the litigant – especially in an immature market. However, there are also disadvantages. Setting a reasonable maximum is difficult because every case is different. Also, with a low cap rate, funders will have more stringent funding requirements, resulting in fewer cases being considered. It may also be questioned to what extent protection in the form of maximum rates serves a legitimate purpose, since litigants may seek bids from different funders and in doing so are able to negotiate a reasonable rate.[58] The Dutch government recognises the possibility of introducing a maximum percentage but has not acted on it to date.[59]

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53 R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 83.

54 W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 195; A van der Krans, "Third party litigation funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at p 36; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 22.

55 See W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at pp 21-22 for a clear calculation example.

56 DCC, art 3:40 determines that legal acts that violate public morality, public order or a statutory provision of mandatory law are voidable or null and void (see J Hijma, C C van Dam, W A M van Schendel and W L Valk, *Rechtshandeling & Overeenkomst SBR 3* (Deventer: Wolters Kluwer 2022) at 145).

57 A van der Krans, "Third party litigation funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at p 36; and W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 195.

58 A van der Krans, "Third party litigation funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at pp 36-37.

59 *Kamerstukken II* 2012/13, 33126, No 6 at pp 7-8. An exemplary percentage of 15% is mentioned. This percentage is significantly lower than the current prevailing percentages.

3.4 Procedural aspects

3.4.1 Control of proceedings and involvement in settlement proceedings

Given the fact that litigation funding is not regulated, the level of control exercised by the litigation funder is determined by the funding agreement. Therefore, the degree of control is the result of negotiations between the litigant and the funder.[60] In Dutch practice, many funders are actively involved in the administration of the claim.[61] In the authors' view, an allocation of control to the funder can be problematic during insolvency. If the funder is given predominant control over the litigation strategy, it becomes more difficult for the liquidator to focus on the interests of the joint creditors. After all, the liquidator no longer has full authority to make strategic choices that serve that interest.

In the case of a class action suit on the basis of article 3:305a, paragraph 2(c) of the DCC stipulates that control of the claim must lay sufficiently with the CCE. The Dutch government has stated that it should be the CCE in consultation with those represented by it that decides whether to agree to a settlement or to appeal, not the funder.[62] The 2019 Claims Code also prevents a shift of control. In Principle III, the 2019 Claims Code stipulates that control of the litigation and settlement strategy shall rest exclusively with the CCE.[63]

The liquidator may, in this capacity, enter into settlement agreements. The liquidator's interest in a settlement is usually the interest of the estate and creditors for the best possible outcome. What the best possible outcome of the settlement is depends on the relevant circumstances of the case. Before entering into a settlement agreement, the liquidator must obtain the approval of the supervisory judge.[64] If a committee of creditors (*schuldeiserscommissie*) has been established, the liquidator must ask the committee for advice. If the permission of the supervisory judge is lacking or if the liquidator does not ask the creditors' committee for advice, the liquidator's action is not invalid. The consequence is that the liquidator is liable towards the bankrupt debtor and the joint creditors.[65] In assessing the request for approval, the supervisory judge should be guided in the first place by the interests of the estate. The liquidator has the right to lodge an appeal against the decision of the supervisory judge,[66] and the counterparty to the contract does not have the power to appeal.[67]

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60 R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 83; and R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at pp 101-102.

61 W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 23.

62 *Kamerstukken II* 2017/18, 34608, No 10.

63 A H van Delden *et al* (ed) *Claimcode 2019* (Den Haag: Boom Juridisch, 2019) at pp 10-11; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 25.

64 DBA, art 104.

65 *Idem*, art 72, para 1.

66 *Idem*, art 67.

67 G G Boeve, "De vaststellingsovereenkomst in faillissement", *TvI* Vol 4 (2019/24) at p 182.

3.4.2 Right to abandon proceedings

The conditions under which the funder can get out of the funding agreement are also regulated in the agreement itself. Often the funder has the option to terminate the agreement after a material adverse development in the proceedings. In the event of termination, the funder usually retains the right to repayment of its contributions as well as payment of its premium if the claim is still successfully recovered from the other party.[68] According to Principle III of the 2019 Claims Code, CCE's are obliged to agree with the funder that the latter cannot, with the exception of special circumstances, terminate the agreement until a final judgement has been rendered in the first instance.[69]

3.4.3 Liability for adverse cost orders and security for costs

The guiding principle under Dutch rules of civil procedure is that the unsuccessful party is ordered to pay the costs of the proceedings. Courts must always issue an order for costs (*proceskostenveroordeling*) even if litigants have not requested it.[70] If both parties are partially in the wrong, then it is possible to compensate all or part of the costs.[71] A party litigating by means of assigned counsel (*toevoeging*) may also be ordered to pay for the costs of proceedings.[72] The amount of the cost order is determined by the judge in the judgement.[73] Under Dutch law, the losing party is not ordered to pay the full amount of its counterparty's costs, but only has to bear a contribution to the costs.[74] An obligation to pay full compensation may only arise if a party abuses procedural law or if the case involves intellectual property rights.[75] From the wording of article 237 paragraph 1 of the DCCP it can be concluded that only litigants can be ordered to pay the costs. As long as the litigation funder is not a party to the proceedings, the court cannot order the funder to pay the costs. Of course, the funding agreement may stipulate that the costs will ultimately be borne by the funder.[76]

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68 W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 22; and Court of Amsterdam 1 August 2011, ECLI:NL:RBAMS:2011:BR3857 for a case in which the funder attempted to get out of a funding arrangement, but the litigant forced further funding in preliminary relief proceedings (*kort geding*).

69 A H van Delden *et al* (ed) *Claimcode 2019* (Den Haag: Boom Juridisch, 2019) at p 11; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 25.

70 DCCP, art 237, para 1; and C J M Klaassen, G J Meijer and H J Snijders, *Nederlands burgerlijk procesrecht* (Deventer: Wolters Kluwer, 2017) at 117.

71 C J M Klaassen, G J Meijer and H J Snijders, *Nederlands burgerlijk procesrecht* (Deventer: Wolters Kluwer, 2017) at 118.

72 *Idem*, at 123.

73 DCCP, art 237.

74 C J M Klaassen, G J Meijer and H J Snijders, *Nederlands burgerlijk procesrecht* (Deventer: Wolters Kluwer, 2017) at 121; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 18.

75 DCCP, art 1019a in conjunction with article 1019h; and C J M Klaassen, G J Meijer and H J Snijders, *Nederlands burgerlijk procesrecht* (Deventer: Wolters Kluwer, 2017) at 121.

76 R Philips, "Litigation funding in faillissement", *TvI* Vol 11 (2016) at p 84; W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 188; and A van der Krans, "Third party litigation

In principle, Dutch law does not require a plaintiff to provide security for costs. Those who do not have a place of residence or habitual abode in the Netherlands, and bring an action before the Dutch court, join an action, or intervene in the proceedings may, on the basis of article 224 of the DCCP, be compelled to provide security for possible legal costs at the request of the defendant. If the funder is not a party to the litigation, such an obligation to provide security for costs cannot arise. It should be noted that several EU regulations and international treaties binding on the Netherlands[77] exclude the application of article 224 of the DCCP.[78] "After The Event" (ATE) insurance policies are available in the Netherlands. Given the limited potential costs of an adverse cost order and a ban on contingency fees, they are used only sparingly.[79]

4. Litigation funding and insolvency

Dutch law provides for a number of different types of insolvency proceedings. For the purposes of this study the discussion has been limited to bankruptcy proceedings (*faillissement*) which are aimed at the liquidation of the debtor's assets, entail the divestment of the debtor and the appointment of a liquidator who is charged with administering and disposing of the debtor's estate for the benefit of the general body of creditors.

Not much information appears to be available regarding the types of proceedings that are typically funded in insolvency. This may be clarified by interviews with, for example, liquidators and litigation funders. As to the types of proceedings that are funded it is likely that this will at least include actions based on the liability of directors and officers, and transactions avoidance.

4.1 Mechanisms to fund insolvency proceedings

The liquidator has various sources from which proceedings can be financed. Actions taken by the liquidator are funded from the proceeds of the debtor's assets. It is likely that litigation funding will primarily be used in insolvency proceedings where the proceeds of the debtor's assets are insufficient to cover the costs of actions that, otherwise, have a real chance of success. In such cases the most obvious sources of funding are: the (law) firm of the liquidator, creditors (such as banks or the tax authorities), the Dutch state by means of

funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at p 30.

77 Hague Convention on Civil Procedure 1954, Convention on International Access to Justice 1980, EC-regulation (such as article 56 EEX-Vo II).

78 C J M Klaassen, G J Meijer and H J Snijders, *Nederlands burgerlijk procesrecht* (Deventer: Wolters Kluwer, 2017) at 188.

79 B Zhang, *Third party funding for dispute resolution. A comparative study of England, Hong Kong, Singapore, the Netherlands and Mainland China (diss. Groningen)* (University of Groningen, 2019) at pp 160-161.

the Guarantee scheme 2012[80] (*Garantstellingsregeling curatoren 2012*), the sale of a claim (to the extent possible) and TPLF.[81]

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

The DBA does not contain a general obligation for the liquidator to give interested parties unlimited access to the administration of the estate. However, one cannot speak of a ban on information either. Article 8 of the Best Practice Guidelines drafted by INSOLAD[82] stipulates that the liquidator should strive for a transparent administration of the bankruptcy and offer as much openness as possible to the creditors of the insolvent party.[83] It should be noted that said rules are only intended to give direction to the liquidator and are not of a mandatory nature – the rules are nothing more than an indication of what a liquidator should do.[84]

However, the creditors, the committee of creditors and the bankrupt debtor do not stand completely empty-handed. Pursuant to article 69 of the DBA, they can request the supervisory judge to order the liquidator to provide information on the manner in which the estate is being administered.[85] Such an order, according to the Supreme Court, can be made insofar as it concerns information that the creditors need in order to form a proper picture of the liquidator's management, but cannot serve to promote a personal interest of an interested party. In determining whether or not to order the liquidator to share information concerning the terms of the funding agreement, the supervisory judge must weigh and balance the interests of the estate in not providing the information against the interests of the creditors in disclosing the information requested.[86]

If the funding arrangement entails the sale and assignment of the funded claim, the liquidator needs the consent of the supervisory judge, not the creditors.[87]

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80 Under this scheme, the liquidator can request the Minister of Justice for an advance payment of costs in the event that the estate has insufficient funds to examine or bring a legal action based on director's liability (under DCC, articles 2:138, 2:248 (see subpara 10) or 2:9) or transactions avoidance (see also B Wessels, *Insolventierecht: Gevolgen van faillietverklaring (2) (Wessels Insolventierecht No. III)* (Deventer: Wolters Kluwer, 2019) at 3353 and 3354).

81 R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 78.

82 INSOLAD is a "subdivision" of The Netherlands Bar Association and has over 700 members, prospective members and fellows. The members of INSOLAD are experienced attorneys who are active in the field of insolvency law, for example as liquidator. However, not all liquidators are members of INSOLAD (being a member of INSOLAD is not a statutory requirement for appointment, and courts apply diverging policies in this respect).

83 N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.3.10.1.

84 Court of Appeal Arnhem 11 September 2007, ECLI:NL:GHARN:2007:BB8620 at legal ground 4.2.

85 N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.3.10.2.

86 *Ibid*; and Supreme Court 21 January 2005, ECLI:NL:HR:2005:AS3534, *NJ* 2005/249, with case note by P van Schilfgaarde at legal grounds 3.6 and 3.7 (*Jomed I*).

87 DBA, art 101 in conjunction with art 176; and N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.3.5.

It is possible to establish a committee of creditors. The main task of the committee is to provide the liquidator with advice.[88] The establishment of such a committee is not mandatory and is relatively rare in practice. Such committees are only established in larger and more complex bankruptcies. In order to properly carry out its duties, the committee needs information, and the committee obtains this information on the grounds of article 76 of the DBA, which obliges the liquidator to, among other things, provide the committee with all the information that it requests.[89] The liquidator is not bound by the advice of the committee.[90] The committee must focus on the interests of the joint creditors, and the members of the committee may not let their individual interests as creditor prevail.[91] It is imaginable that those who are apprehensive about the liquidator entering into an unfavourable funding agreement may attempt to review the agreement or issue a recommendation whether or not the agreement should be entered into via the route of the committee of creditors. It should be noted that the committee only issues a recommendation – it does not have a right to consent.

In some cases, the liquidator is obliged to seek the advice of the committee of creditors.[92] This is the case if the liquidator wants to bring a legal action, unless it concerns verification disputes. The liquidator must also seek advice about the general manner of liquidation and the monetisation of the estate, and the time and amount of the distributions.[93] If the liquidator has requested advice but the committee does not issue it, the liquidator may act without advice, provided that he has called the committee to a meeting with consideration of a reasonable period of time.[94]

4.2.2 Relevance of litigation funding arrangement providing benefit to creditors

In exercising the powers conferred on him, the liquidator must act in the interests of the general body of creditors.[95] From this it follows, in the authors' view, that a litigation funding arrangement must lead to at least some benefit for the creditors.

4.2.3 Other measures to protect interests of creditors

The liquidator requires the approval of the supervisory judge before, for example, commencing legal proceedings. In such cases, part of the judicial scrutiny may be a review of the funding arrangement entered into by the liquidator.[96] As stated above, article 69 of

88 DBA, arts 74 and 75.
89 N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.4.1.
90 DBA, art 79.
91 N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.4.2.
92 DBA, art 78.
93 B Wessels, *Insolventierecht: Bestuur en beheer na faillietverklaring (Wessels Insolventierecht No. IV)* (Deventer: Wolters Kluwer, 2020) at 4284 and 4285.
94 *Idem*, at 4286.
95 N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.3.2; and S C J J Kortmann *et al*, *De curator, een octopus (O&R No 6)* (Deventer: Tjeenk Willink, 1996) at 10.4.
96 DBA, art 68, para 3.

the DBA may provide creditors with an avenue to challenge the actions taken or contemplated by the liquidator before the supervisory judge.

Creditor interests could also be protected in terms of obligations owed by liquidators.

5. Insolvency practitioners and litigation funding

5.1 Insolvency practitioner obligations

The core task of the liquidator is included in article 68 paragraph 1 of the DBA. The liquidator is charged with the administration and liquidation of the insolvent estate. In broad terms, this means that the liquidator manages and sells the assets, and then distributes the proceeds to the creditors in accordance with the statutory order of priority of their claims. The liquidator exercises this duty for the benefit of the joint creditors, under certain conditions and by taking into account important social interests. The liquidator must ensure that each creditor receives as much as possible of what is due.[97]

If the liquidator fails in his duties, is culpably deficient or acts carelessly, it can lead to liability to the estate, the bankrupt debtor or third parties, such as the creditors. The liquidator can be liable in two ways: (i) in his capacity as liquidator (*qualitate qua*), and (ii) in person (*pro se*). Any damages to be paid as a result of liability *qualitate qua* are borne by the estate. In the case of liability *pro se*, the liquidator must personally pay the damages.[98]

In determining whether a liability *qualitate qua* can be established, the question is whether the liquidator exceeded legal standards in the performance of his duties. Examples are a failure to fulfill obligations or a tortious act.[99] In the authors' view, it is imaginable that the liquidator may be liable if he does not comply with his duty to serve the interest of the creditors. Consider the situation in which the liquidator enters into a funding agreement, unfavourable to the estate, with a funder because the funder promises to use the liquidator's law firm as attorney in the proceedings.

For liability *pro se*, the Supreme Court introduced a special standard of care that must be observed by the liquidator (the Maclou standard). A liquidator should act as may reasonably be required of a liquidator with sufficient insight and experience who performs his duties with accuracy and commitment.[100] It must be kept in mind that, in exercising his duties, the liquidator has a wide discretion. The liquidator must act in accordance with the interest of the estate, but in principle, it is left to the liquidator's discretion in what way and by what means that interest can best be served. A distinction is made between the situation

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97 N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.3.2.
98 *Idem*, para 13.3.4.
99 *Ibid*.
100 *Ibid*; and Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047, *NJ* 1996/727, with case note by W M Kleijn (*Maclou/Curatoren Van Schuppen*) at legal ground 3.6.

in which the liquidator is bound by rules[101] and the situation where this is not the case. It is obvious that in the first instance the liquidator must follow the rules. If the liquidator is not bound by rules, he is allowed a wide degree of discretion. The requirement for personal liability is that the liquidator can be personally blamed for his actions. The liquidator must have acted while he realised or reasonably should have realised the impropriety of his actions.[102] Whether in the context of TPLF the threshold of personal reproach could be passed seems to particularly depend on the contents of the funding agreement.

5.2 Factors to consider when contemplating litigation funding

There are a number of circumstances that the liquidator should take into account when entering into a funding agreement. One may think of the interests of the joint creditors. The liquidator has to take into account that the aim of the funder is to make as much profit as possible, and that said profit will be made at the expense of the estate. The liquidator must therefore ask himself whether it is opportune to conclude the agreement. The liquidator may also consider other means of funding than a litigation funder, such as his own law firm or the estate. Furthermore, the liquidator must ensure that the estate incurs as few costs as possible (ideally none) if the proceedings are lost. The liquidator can ensure this by stipulating that an adverse cost order will be at the funder's risk. Finally, it is possible to ask for proposals from several funders and to negotiate the premium that the funder charges, in order to reduce the costs as much as possible and to raise as much money as possible for the estate.[103]

5.3 What are litigation funders looking for?

Not surprisingly, litigation funders are out to make as large a profit as possible. The profit motive of the funder is at odds with the objective and task of the liquidator. The liquidator must focus primarily on the interests of the general body of creditors. That interest consists of them receiving the largest possible distribution on their claims. However, the more money goes to the funder after a funded proceeding is won, the less money is available for distribution to the creditors. The aforementioned situation raises the question of

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[101] For example, the rule that creditors must be paid *pro rata parte*, except where statute attaches priority to a claim (DCC, art 3:277). Another example is the rule that the liquidator must provide a pledgee, at the latter's request, with all the information about the pledged claims that are at his disposal and that the pledgee needs in order to give notice of his right of pledge, so that the pledgee can collect the claim himself during insolvency (DCC, art 3:246, para 1). See R Mulder, "De persoonlijke aansprakelijkheid van de curator: oppassen geblazen, steeds meer 'regels'! Een overzicht van de stand van zaken", *TvI* Vol 5 (2019) at pp 32-33; and Supreme Court 30 October 2009, ECLI:NL:HR:2009:BJ0861, *NJ* 2010/96, with case note by F M J Verstijlen at legal ground 4.2.1 (*Hamm q.q./ABN AMRO*).

[102] N B Pannevis, *Polak Insolventierecht* (Deventer: Wolters Kluwer, 2022) at para 13.3.4.3; and Supreme Court 16 December 2011, ECLI:NL:HR:2011:BU4204, *NJ* 2012/515, with case note by F M J Verstijlen at legal grounds 3.4.2 and 3.4.3 (*Prakke q.q./Gips*).

[103] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 21; T M C Arons *et al*, *Collectief schadeverhaal (O&R No 105)* (Deventer: Wolters Kluwer, 2018) at 7.4; and A van der Krans, "Third party litigation funding. De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen", *O&F* 2018/26 at p 36-37.

whether the liquidator is bound by certain rules with respect to entering into a funding agreement, and what the consequences are if these rules are not followed. Liquidator obligations as discussed above will play an important role in this respect.

6. Litigation funding agreement

The funding agreement between the litigant and the funder leads to a shift of the financial risk of investing in a proceeding from the litigant to the funder. From the funder's point of view the agreement is an investment, the results of which are uncertain.[104] The funder invests in the realisation of a claim in exchange for a share of the proceeds.[105] The legal characterisation of the funding agreement, relevant to assess the applicable provisions of (statutory) law to the agreement, is determined by its concrete design, what parties have mutually stated, and how they were supposed to understand said statements.[106] In legal literature, various possible characterisations are discussed, such as a sale agreement,[107] a credit contract[108] and a mandate agreement.[109] Characterisation of the funding agreement as a partnership agreement is also not excluded from the possible options.[110] Van Boom and Luiten believe that a funding agreement should primarily be viewed as a "stripped-down" service provision agreement or a *sui generis* agreement. "Stripped-down" because the funder will move the claimant's right to give directions to itself and exclude the right to terminate the agreement at any time.[111] Schonewille believes that it should not be concluded too easily that the funding agreement is a *sui generis* agreement, but that in respect of each individual funding agreement it must be determined whether a funding agreement may be characterised as one of the types of agreements that has a particular regulation in the DCC (such as a sale agreement or a credit agreement) and whether there is a partnership agreement.[112]

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[104] W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 190.

[105] R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 83.

[106] W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 190; and R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 84.

[107] W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 190; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 23.

[108] W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 191.

[109] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 23.

[110] W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at pp 191-192; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 23.

[111] W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 193. It should be noted that later in the article it is stated that the authors consider "…the qualification of an unnamed contract, the contract of service provision or the purchase of a property right …" to be the most obvious qualification. For a similar position, see J H Lemstra in J J Dammingh and L M van den Berg, "Procesfinanciering door derden: een oplossing of een probleem? Verslag van de najaarsvergadering 2016 van de Nederlandse Vereniging voor Procesrecht", *TCR* 2017/2 at p 81.

[112] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 23. W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 199 seems to make this nuance with the words "…depending on the design in the concrete case …", albeit less explicitly.

6.1 Typical structure of agreement

In a funding agreement, the litigant and the funder include representations and warranties regarding facts relevant to entering into the agreement. In this way, transparency can be provided on relevant facts and misunderstandings can be avoided. For the litigant, the representations and warranties may consist of facts concerning the proceedings. The funder will guarantee that it has sufficient financial resources to finance the proceedings and that it has no interest on the part of the other litigant.[113] It is not just the funder who takes on obligations. For the litigant, the agreement also includes obligations, such as the obligation to refrain from, or to properly carry out, certain conduct (one might think of the obligation to retain ownership of certain patents during proceedings).[114]

The funding provided by the funder is an essential part of the agreement. Agreements are made regarding the amount, conditions, and manner in which the funds are to be provided.[115] The compensation received by the funder is closely linked to its obligation to provide funds and is logically regulated in the agreement as well. The funder's premium generally consists of 5% to 40%, but usually exceeds 25% of the claim after deducting advanced expenses.[116] However, there are also funders who charge a percentage on the realised revenue, without deducting the financed costs first.[117] Parties may generally also include clauses in the agreement regarding which party will assume adverse cost orders and the effects of possible counterclaims (because the counterclaim might be set-off against the plaintiff's claim and the funder is paid a certain percentage of that claim).[118]

Furthermore, a plan might be made for the procedure with objectives and expected costs and revenues, including review and assessment moments, at which times it will be evaluated whether the procedure proceeds as planned.[119] To avoid conflicts related to strategy, the agreement generally regulates which party has control over important

[113] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at pp 20-21; and R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 84.
[114] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 21.
[115] R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 76; R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 101; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 20.
[116] R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 101; W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at pp 21-22; and R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 75.
[117] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 22.
[118] R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 102; and R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 84.
[119] R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at pp 83-84.

decisions such as the choice of attorneys, entering into a settlement or filing appeals.[120] With regard to the provision of information by the litigant to the funder, the latter will generally stipulate that all information relating to the dispute be provided to it and that it should be kept fully informed of the progress of the proceedings and any settlement discussions. Since the funder will have access to confidential information, the agreement generally also contains a confidentiality clause.[121] It is also agreed which party the attorney is acting for and who is instructing him.[122]

Lastly, the funding agreement generally includes clauses pursuant to which, in certain situations, a party (usually the funder) can terminate the agreement. Examples include material adverse developments regarding the proceedings, non-compliance with the agreement, or the situation where new facts come to light that affect the chances of winning the proceedings. It can also be agreed under what conditions the funder can transfer its legal position to a third party (such as another funder). Some funders offer the litigant the possibility of buying off its obligations to the funder in the event of a successful termination of the agreement. Often the buy-out payment will consist of repayment of the funded costs plus interest.[123]

The litigant may (if agreed upon in the funding agreement) derive protection from contractual termination clauses. However, one may question whether and to what extent the litigant, if it is the economically weaker party, will succeed in including such a power in the funding agreement. If the litigant is unable to contractually secure its position sufficiently, the litigant mainly depends on protective provisions of general contract law.[124] If the funder uses standard terms and conditions, the litigant can attempt to derive protection from article 6:233 of the DCC.[125] A successful appeal to article 6:233 of the DCC renders a clause in the standard terms and conditions voidable if it is unreasonably burdensome for the counterparty, or if the user's counterparty has had no reasonable opportunity to be informed of the content of the terms and conditions. As a last resort, Schonewille mentions the standards of reasonableness and fairness which may, as a general principle of Dutch contract law, lead to the inapplicability of provisions that were contractually agreed upon or may lead to rights or obligations being vested in a party that

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[120] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 23; R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 84; and R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 102.

[121] R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at pp 101-102; R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 84.

[122] R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 84.

[123] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 22; R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at p 102; and R Philips, "Litigation funding in faillissement", *TvI* Vol 2 (2016/11) at p 84.

[124] W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at p 23.

[125] *Idem*, p 24.

were not contractually agreed upon.[126] Van Boom advocates applying a duty of foresight in the form of a pre-contractual duty of care on the part of the funder. In his view, the funder should actively ensure that the litigant knows the implications of the funding agreement at the time that the contract is concluded.[127]

6.2 Protection of confidential information in relation to funding agreement

On the basis of article 11a paragraph 1 of the Act on Advocates (*Advocatenwet*), an attorney at law is bound to secrecy with regard to everything that such attorney learns by virtue of his professional practice. Linked to this secrecy obligation is an attorney-client privilege, namely the right to refuse to testify.[128] It should be noted that the right to privilege applies only with respect to available knowledge entrusted to the attorney in his professional capacity.[129] Correspondence between a litigant and his attorney is therefore protected by the attorney's duty of confidentiality and privilege. Should the attorney simultaneously assist the funder, correspondence between the attorney and the funder is also privileged.

Dutch procedural law furthermore does not provide for a discovery process in which a claimant or a funder could be forced to disclose the funding agreement or other information exchanged, except perhaps in very exceptional circumstances. As already mentioned, article 3:305a of the DCC contains an exception for CCEs. The court can review the agreement to verify whether the CCE has sufficient financial resources and whether the control of the legal action lies sufficiently with the CCE. It is unclear whether the counterparty is allowed to review the funding agreement in such a case. It is conceivable however, that parts of the funding agreement will become known to the counterparty if the court decides to review the agreement.[130]

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[126] *Ibid*.

[127] W H van Boom, "Quota pars litis'-financieringsovereenkomst; betrokkenheid advocaat", *TvP* 2012/2 at p 74; and W M Schonewille, "Over litigation funding: relevante praktische en juridische aspecten", *TOP* 2019/325 at pp 23-24.

[128] DCCP, art 165, para 2, sub b.

[129] C J M Klaassen, G J Meijer and H J Snijders, *Nederlands burgerlijk procesrecht* (Deventer: Wolters Kluwer, 2017) at 223; and W H van Boom and J L Luiten, "Procesfinanciering door derden", *RM Themis* 2015/5 at p 197.

[130] R Philips, "Nederland", in S Latham *et al* (ed), *The Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd, London, 2020) at pp 102-103.

NEW ZEALAND

Lynne Taylor

1. Jurisdictional context

Aotearoa New Zealand has a parliamentary system, with one legislative chamber, namely the House of Representatives.

For the most part, Aotearoa New Zealand's insolvency law regime is statute based. Personal insolvency (the insolvency of natural persons) is regulated by the Insolvency Act 2006 (NZ). The Official Assignee is the public official responsible for the administration of this statute. The Official Assignee also administers the estates of individuals who are subject to the most frequently used personal insolvency procedures in the Insolvency Act 2006 (NZ) – bankruptcy, and the no-asset procedure.

Corporate insolvency is largely regulated by the Companies Act 1993 (NZ).[1] The Registrar of Companies is the public official responsible for the administration of this statute. The administration of corporate insolvencies (liquidations, receiverships, administrations and deed administrations) is mostly undertaken by private insolvency practitioners, although the Official Assignee may be appointed as a liquidator of last resort by the court in low or no-asset liquidations. Liquidation is the most frequently occurring insolvency procedure by a large margin.[2]

The Insolvency Practitioners Regulation Act 2019 (NZ) introduced a co-regulatory scheme for insolvency practitioners where the Registrar of Companies accredits bodies to issue licences to insolvency practitioners. The New Zealand Institute of Chartered Accountants (NZICA) is presently the only accredited body. Applicants for an insolvency practitioner's licence must meet prescribed minimum standards in terms of qualifications and experience, as well as a fit and proper person standard.

Aotearoa New Zealand follows a common law system in which the doctrine of precedent applies. Judicial decisions (case law) are an important source of law in terms of interpreting the provisions of the Insolvency Act 2006 (NZ), the Companies Act 1993 (NZ), and the Insolvency Practitioners Regulation Act 2019 (NZ). Some areas of insolvency law remain entirely regulated by case law such as, for example, insolvency practitioners' fiduciary duties. Aotearoa New Zealand's appellate courts are the Supreme Court (Aotearoa New Zealand's highest court) and Court of Appeal, and judgments of these courts carry particular weight.

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1 Large and complex corporate insolvencies may be administered under the Corporations (Investigation and Management) Act 1989 (NZ).

2 *Madsen-Ries v Cooper* [2020] NZSC 100 at para 39. See New Zealand Companies Office, "Latest company statistics" available here.

2. General overview of litigation funding in New Zealand

2.1 Historical development, market overview and prevalence

The torts of maintenance and champerty have not been abolished by statute in Aotearoa New Zealand. The New Zealand Law Commission recommended their preservation in its 2001 report, entitled "Subsidising Litigation".[3] In *Waterhouse v Contractors Bonding Ltd*[4] the Supreme Court assumed the continued existence of the torts of maintenance and champerty. However, recent examples of actions to recover damages in maintenance and champerty do not exist. The torts retain some potential relevance when a party applies for a stay of third-party funded proceedings based on an abuse of process. A recognised category of abuse of process is the impermissible assignment of a cause of action, such as the assignment of a bare cause of action or other personal action where no recognised exceptions apply. Exceptions include the insolvency exception and where the assignee has an interest (such as a common commercial interest) in the subject matter of the action. The insolvency exception refers to a liquidator's power to assign a cause of action or the fruits thereof in the exercise of the liquidator's statutory power to sell company property.[5] Whether the effect of a funding agreement constitutes an impermissible assignment is assessed through a consideration of the whole of the terms of the agreement, including the funder's level of legal control and remuneration.[6]

In *Waterhouse v Contractors Bonding Ltd* the Supreme Court recognised that the prohibition on assignment of a bare cause in tort or other personal action has its origins in maintenance and champerty, but added that the rule now appears to have an independent existence of its own.[7] Reforming maintenance and champerty was identified as an issue by the New Zealand Law Commission in its 2020 Issues Paper, entitled "Class Actions and Litigation Funding".[8] The New Zealand Law Commission's final report was published in June 2022.[9]

Despite the fact that the torts of maintenance and champerty have not been abolished, commercial litigation funding has been a regular feature in reported cases and legal commentary in Aotearoa New Zealand from the early 2000s. The New Zealand Law Commission in its 2001 Report, entitled "Subsidising Litigation" noted "at least two Australian based firms operating in New Zealand" who were prepared to fund insolvency proceedings.[10] The validity of commercial litigation funding agreements in an insolvency

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3 New Zealand Law Commission, "Subsidising Litigation" (NZLC R 72) at para 11.
4 *Waterhouse v Contractors Bonding Ltd* [2017] NZSC 89 at para 26.
5 Companies Act 1993 (NZ), sch 6, cl (g).
6 *Waterhouse v Contractors Bonding Ltd* [2017] NZSC 89 at para 61.
7 *Idem*, para 57.
8 New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC IP 45), chapter 18.
9 New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC R 147).
10 *Idem*, "Subsidising Litigation" (NZLC R 72) at para 33.

context was the subject of a series of cases over 2000–2010.[11] The validity of commercial funding agreements in the context of representative actions was addressed by the Court of Appeal in *Saunders v Houghton*,[12] and more generally by the Supreme Court in *Waterhouse v Contractors Bonding Ltd*[13] and *PricewaterhouseCoopers v Walker*.[14]

Prior to the *Waterhouse v Contractors Bonding Ltd* decision, third-party litigation funding (TPLF) agreements in an insolvency context were dealt with by considering whether such agreements fell within the "insolvency exception" to the prohibition on assignment of a bare cause of action (that is, a liquidator's power to assign a cause of action or the fruits thereof in exercise of a liquidator's statutory power to sell company property). After *Waterhouse v Contractors Bonding Ltd,* TPLF agreements in an insolvency context have been considered under the "cautious approval" given to such arrangements by the Supreme Court. For instance, in *PricewaterhouseCoopers v Walker* the majority identified the essential issue before it as whether the arrangements between a funder and company amounted to an assignment of a bare cause of action and, if so, whether the assignment was permissible as an assignment by a liquidator of company property (or as an assignment to a party that had an antecedent commercial relationship with the company).[15] The majority thus assumed the existence of the "insolvency exception". However, Elias CJ, delivering a minority judgment, flagged her "reservations about the position that a liquidator's statutory power to sell property operates as an unqualified exception which permits assignment of a personal cause of action not otherwise allowed by the general law (such as where the cause of action is ancillary to the enforcement of an interest in property)".[16] Also in the mix is the impact of section 260A of the Companies Act 1993 (NZ), which permits a liquidator to assign a cause of action conferred on a liquidator by that Act with the permission of the High Court. The legislative history to this provision indicates that it permits what would be an otherwise impermissible assignment of a cause of action personal to the liquidator, but some judgments suggest it covers all assignments by a liquidator.

There are at least 11 litigation funders operating in Aotearoa New Zealand, with the majority being overseas owned and based in Australia or the United Kingdom. There is a lack of concrete evidence as to the prevalence of litigation funding in Aotearoa New Zealand. The New Zealand Law Commission identified 40 cases where the plaintiff received litigation funding in its 2020 Issues Paper, entitled "Class Actions and Litigation Funding".[17] This number was derived from a review of case law, media reports and information on funders' websites, but is likely to be an understatement. The Supreme Court indicated in *Waterhouse v Contractors Bonding Ltd* that a funded party must disclose

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11 See *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC); *AMP Capital Investments No 4 Ltd v IBS Group Ltd (in liq)* [2009] NZCCLR 19 (HC); and *Alf No 9 Pty Ltd v Ellis* [2010] NZCA 529.
12 *Saunders v Houghton* [2009] NZCA 610.
13 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89.
14 *PricewaterhouseCoopers v Walker* [2017] NZSC 151.
15 *Ibid*.
16 *Idem*, para 107.
17 New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC IP 45) at para 30.

that fact and the funder's identity to the other party or parties when the litigation commences. However, the Supreme Court also indicated that it is not the role of the courts to act as general regulators of funding agreements.[18] The disclosure of a funding agreement may not necessarily result in it becoming an issue in the proceedings or being referenced in any judgment given in relation to the proceedings. Further to the last point, reported judgments do not reflect all claims filed and later settled, or claims resolved without the commencement of proceedings. Some but not all funders report examples of claims that they have funded on their websites. For those that do, it is not clear whether the examples / statistics given relate only to Aotearoa New Zealand claims. For example, one funder operating in Australia and Aotearoa New Zealand reports that it has funded just under 200 claims and has won or settled 94% of these.[19]

TPLF is also used in contexts other than insolvency. Of the 40 cases identified by the New Zealand Law Commission where a funding agreement was in issue or referenced in a judgment, 11 were identified as insolvency cases. Ten of the other cases were representative claims, although several of these involve claims on behalf of investors and / or shareholders in failed companies. A further 15 cases involved insurance proceedings, with others relating to negligence and breach of fiduciary duty, a demand for repayment of a loan, a relationship property claim, and a land claim.[20]

2.2 Regulatory framework

There is no specific legislation applicable to commercial litigation funders and therefore no regulatory bodies having oversight of litigation funders. Litigation funding is presently regulated by the rules by which the courts regulate proceedings (stay of proceedings, strike out applications, security for costs, and non-party costs orders,[21] the torts of maintenance and champerty, and general legislation (such as the Fair Trading Act 1986 (NZ)). The Law Commission has recently concluded that court oversight of litigation funding is the "most practical and proportionate response" in the Aotearoa New Zealand context.[22]

The judiciary may fulfil a regulatory role to some extent. In this regard It is relevant to note that the Aotearoa New Zealand High Court has jurisdiction to stay proceedings for abuse of process under rule 15.1(3) of the High Court Rules 2016 (NZ) and its inherent jurisdiction.[23] In *Waterhouse v Contractors Bonding Ltd* the Supreme Court recognised that a TPLF agreement may constitute an abuse of process if it effectively amounts to an impermissible assignment of a cause of action (such as the assignment of a bare action in

[18] *Ibid*, para 28.
[19] See https://litigationlending.com.au/.
[20] See New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC IP 45) at paras 14.23-14.33.
[21] *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89 at para 29.
[22] New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC R 147) at para 14.65.
[23] *Idem*, para 30.

tort or other personal action where a recognised exception does not apply).[24] Relevant to this issue are the terms of the TPLF agreement as a whole, including the funder's level of control and remuneration, and the role of the lawyers acting. The Supreme Court also recognised that the terms of a TPLF agreement may be relevant to an application for a stay of proceedings on traditional grounds (such as fictitious or sham proceedings, proceedings where the process of the court is used for an ulterior or improper purpose, proceedings which are groundless, and proceedings likely to cause improper vexation or oppression).

There is no specific regulation of TPLF and conflicts of interest. Conflicts of interest between the funder and plaintiff (for example, if there is a dispute as to whether the claim should settle) are likely to be covered by the funding agreement.[25] Conflicts of interest between the lawyer acting on the claim and the plaintiff client are governed by the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2006 (NZ), and lawyers' general fiduciary duties and duty of care that are owed to their clients. The New Zealand Law Commission has recently recommended that the New Zealand Law Society consider an amendment to the rules of conduct and client care for lawyers prohibiting a lawyer or law firm acting in funded proceedings from having a financial or other interest in the funder.[26]

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

The role of the litigation funder is generally confined to providing financial support for legal proceedings.

3.2 Regulatory obligations

Litigation funders are currently not subject to any regulatory obligations and this is unlikely to change in relation to TPLF agreements entered into in an insolvency context. The New Zealand Law Commission has recently concluded that a regulatory response in the form of court oversight of TPLF agreements in class funded actions is warranted but that other funded plaintiffs (including liquidators) were likely to be "commercially sophisticated" and not in need of an additional oversight or regulatory response.[27]

3.3 Funding premium

There are no specified caps on premiums. However, the Supreme Court has noted without providing an example, that the size of the premium is relevant to the issue of whether a

[24] *Idem*, para 61.
[25] *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at para 26.
[26] New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC R 147) at para 16.31.
[27] *Idem* at paras 14.35, 14.36.

funding agreement is in substance an impermissible assignment of a cause of action and so an abuse of process justifying a stay of proceedings.[28] A very large premium may be evidence that litigation is to be conducted primarily for the benefit of the funder. In an insolvency context, the size of the premium will also be relevant in an assessment of the liquidator / insolvency practitioner's compliance with their general duties as such.

3.4. Procedural aspects

3.4.1 Control of proceedings and involvement in settlement proceedings

There is no specific regulation of this point, but the funder's level of control is relevant to the issue of whether a funding agreement is in substance an impermissible assignment of a cause of action and so an abuse of process justifying a stay of proceedings.[29] In *Waterhouse v Contractors Bonding Ltd* the Supreme Court recognised that "some measure of control is inevitable".[30] In *PricewaterhouseCoopers v Walker* a TPLF agreement was conditional on the assignment of the insolvent company's first ranking general security agreement (GSA) to the funder.[31] The assignment duly occurred. The GSA extended to rights in action. In the event of default, the secured creditor had the power to "bring, defend, submit to arbitration, abandon or settle any claim or proceeding, or make any arrangement or compromise, in relation to the Secured Property". The Supreme Court accepted that it was arguable that the combination of rights given to the funder under the funding agreement and the assignment constituted an assignment of a bare cause of action as it gave the funder "(a) control in a legal sense over the liquidator's claim against PwC; and (b) an entitlement to all of substantially all the proceeds of a successful claim".[32] However, the Supreme Court did not give a formal ruling because of the funder's undertakings that it would not rely on its rights under the GSA and would make an agreed minimum distribution of proceedings to the liquidator.

The New Zealand Law Commission has identified a possible adverse tax consequence for overseas funders:[33]

> "To avoid double taxation on litigation funding activities in Aotearoa New Zealand and in their home jurisdiction, an overseas-based funder may seek a product ruling from the Commissioner of Inland Revenue. Harbour Litigation Funding has sought three product rulings under the Tax Administration Act 1994 which confirm that its funding commissions will not be subject to taxation in Aotearoa New Zealand. A condition of these product rulings is that Harbour will not exercise control over the litigation it is funding".

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28 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89 at para 61.
29 *Idem*, para 61; and *Cain v Mettrick* [2020] NZHC 2125 at para 62.
30 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89 at para 46.
31 *PricewaterhouseCoopers v Walker* [2017] NZSC 151.
32 *Idem*, para 82.
33 New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC IP 45) at para 19.21.

There is no specific regulation in relation to funder involvement in settlement proceedings, but the degree of control a funder retains over settlement may mean that the funding arrangement is an impermissible assignment of a cause of action and so justifies a stay of proceeding.[34]

3.4.2 Right to abandon proceedings

There is no specific regulation in this regard, but the funder's level of control of these matters is relevant to the issue of whether a funding agreement is in substance an impermissible assignment of a cause of action, and so an abuse of process justifying a stay of proceedings. For example, in *Cain v Mettrick* a clause in a liquidation funding agreement pursuant to which the funder could force the funded party to continue proceedings that it would not otherwise pursue, was held to amount to an impermissible assignment of a bare cause of action for profit.[35] Associate Judge Paulsen concluded that "the litigation would be conducted substantially by and for the benefit of … [the funder]. … The … [funded party's] interests become subservient to the those of … [the funder]".[36]

3.4.3 Liability for adverse cost orders and security for costs

Adverse cost orders are possible in Aotearoa New Zealand – in other words, the court may order an unsuccessful party to pay the costs of a successful party. A litigation funder could be caught by an adverse cost order, with the Supreme Court noting in *Waterhouse v Contractors Bonding Ltd* that "costs orders can be made against funders, without needing to make out an abuse of process".[37]

The TPLF can also be required to provide security for costs. The High Court's jurisdiction under rule 5.45 of the High Court Rules 2016 (NZ) is limited to orders against the plaintiff or plaintiffs in a proceeding, but the High Court may make a security of costs order against a TPLF under its inherent jurisdiction in respect of representative and non-representative proceedings. The New Zealand Law Commission has recommended the codification of this practice to make the law more accessible.[38] Note the comments made in *Walker v Forbes*:[39]

> "The existence of a litigation funder in the present case is an important factor that influences the exercise of the discretion for several reasons. The first of these is that the plaintiffs will not be precluded from continuing with their claims if a significant order for security is made. Furthermore, SPF

[34] See *Cain v Mettrick* [2020] NZHC 2215.
[35] *Idem*, para 62.
[36] *Ibid*.
[37] *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89 at para 52. Also see *Bligh v Earthquake Commission* [2019] NZHC 2236.
[38] New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC R 147] at para 16.61.
[39] *Walker v Forbes* [2017] NZHC 1212 at para 33. See also New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC IP 45) at paras 15.42-15.49.

> stands to receive most, if not all, of the proceeds of any successful claim. It has no interest in the litigation beyond the profit it hopes to derive from what it clearly regards as a commercial venture. Commercial ventures generally require an investor to take risks and to incur expenditure as the price to be paid for the chance of success. SPF should therefore be required, as a matter of policy, to contribute significantly to the defendants' costs if the claims are unsuccessful".

After-the-event (ATE) insurance is available in Aotearoa New Zealand and has been used by litigation funders. ATE insurance was accepted as a potential means of satisfying a security for costs order in *Houghton v Saunders*.[40] Judge Whata was less convinced in *White v James-Hardie New Zealand*, commenting that "I am also not persuaded that I should engage in an inquiry as to whether ATE insurance provides risk mitigation, because whatever its terms, it cannot offer the same security as payment into Court".[41] An ATE insurance premium is not recoverable on a costs order, as allowing recovery would not be in the interests of justice.[42] The New Zealand Law Commission has recommended that consideration be given to a further High Court Rule creating a presumption that security for costs in all funded proceedings be in a form that is enforceable in Aotearoa New Zealand, noting that this would prevent the giving of security in the form of a deed of indemnity provided by an after-the-event insurer where that insurance is underwritten overseas for a funder or liquidator.[43]

4. Litigation funding and insolvency

In Aotearoa New Zealand reported cases provide the main evidence of use of funding agreements in an insolvency context. In 2020 the New Zealand Law Commission identified 11 corporate insolvency cases where litigation funding agreements have been in issue or are referenced in a judgment. Claims against directors for breach of duty are the most common.[44] Funded actions have also been taken against auditors[45] and secured creditors.[46] The volume of case law relating to all proceedings taken by liquidators to swell the pool of assets available to creditors largely comprises director recovery actions and insolvent transaction actions, but there appear to be no references to litigation funding agreements in relation to the latter in searchable case law databases. There are also no reported cases involving an application under section 260A of the Companies Act 1993 (NZ) which requires a liquidator to seek the approval of the High Court for the assignment

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40 *Houghton v Saunders* [2019] NZHC 2007 at para 51.

41 *White v James-Hardie New Zealand* [2019] NZHC 188 at para 15.

42 *Houghton v Saunders* [2019] NZCA 285 at para 23.

43 New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC R 147) at para 15.57.

44 See, eg, *Cain v Mettrick* [2020] NZHC 2125; *Re Gellert Developments Ltd (in liq)* (2001) 9 NZCLC 262,714 (HC); *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC); *Yan v Mainzeal Property & Construction Ltd (in liq)* [2021] NZCA 99; and *Kings Wharf Coldstore Ltd (in rec & liq) v Wilson* (2005) 2 NZCCLR 1042.

45 *PricewaterhouseCoopers v Walker* [2017] NZSC 151.

46 *Alf No 9 Pty Ltd v Ellis* [2010] NZCA 629. In this case the Court of Appeal accepted that a liquidator had assigned a company's cause of action against its debenture holder to a third-party litigation funder pursuant to the liquidator's power of sale of company assets.

of a right to sue conferred on the liquidator by that Act. Insolvent transaction claims are liquidator claims falling within the ambit of section 260A. There is no recent evidence of the Official Assignee bringing commercially funded proceedings to benefit creditors either as the administrator of the estates of bankrupt persons or as liquidator.

4.1 Mechanisms to fund insolvency proceedings

Insolvency practitioners and the Official Assignee have other means available to fund insolvency proceedings, aside from an entry into a litigation funding agreement.

One of these is entry into a funding agreement with a creditor.[47] Individual creditors in a liquidation or bankruptcy who provide funding to protect or realise an asset for the benefit of creditors are entitled to a preferential right to repayment of their unsecured debt plus the sum of their costs out of the amount received by the liquidator or Official Assignee in the realisation of the asset.[48]

It is also possible to enter into a conditional fee arrangement with a lawyer,[49] or to enter into an agreement to borrow the necessary funds to conduct the litigation at a commercial rate of interest using the company's assets as security. This is less likely but falls within a liquidator's statutory powers.[50] A further possibility is to fund the proceedings themselves.[51]

Liquidators may also apply for funding from the liquidation surplus account for payment of the costs of proceedings in the liquidation, legal or other expert advice, or the costs of expert witnesses.[52] Funded proceedings must have a public interest element.[53] The liquidation surplus account is comprised of funds that cannot be distributed in a liquidation such as, for example, where recipient creditors cannot be located, or where a recipient creditor is a company that has been struck off the register of companies.

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

Creditors in a liquidation have no general right to receive information about the terms of a funding agreement. Creditors have a right to apply to the High Court under section 256 of the Companies Act 1993 (NZ) for an order permitting them to inspect documents of the liquidation, which would presumably include a funding agreement. Liquidators are required to provide regular reports to creditors under section 255. Although it is usual for

47 See, eg, *Kings Wharf Coldstore Ltd in rec & liq)* (2005) NZCCLR 1042 (HC).
48 Companies Act 1993 (NZ), sch 7, cl 1(e); and Insolvency Act 2006 (NZ), s 274(1)(c).
49 Lawyers and Conveyancers Act 2006 (NZ), ss 333-336.
50 Companies Act 1993 (NZ), sch 6, cl (k).
51 See, eg, *The Fish Man Ltd (in liq) v Hadfield* [2017] NZCA 589 at para 94.
52 Companies Act 1993 (NZ), s 314.
53 See https://www.insolvency.govt.nz/business-debt/liquidation-surplus-account/.

liquidators to report on litigation commenced in the company or liquidator's name, and whether the litigation is funded by a third party, it would be unusual for liquidators to disclose the terms of a funding agreement to creditors.

Creditor approval of funding agreements is not required. The scheme of liquidation in the Companies Act 1993 (NZ) is a streamlined and simplified procedure that not only deals with voluntary and involuntary liquidations, but permits liquidators to operate without mandatory supervision of creditors and / or the court.[54] Creditors' meetings are infrequent. If a meeting of creditors did pass a resolution relating to a funding agreement, the liquidator is only required to have regard to the view expressed in the resolution.[55]

Creditors can further challenge a funding agreement via the enforcement mechanisms in sections 284, 286 and 301 of the Companies Act 1993 (NZ) (see 4.2.3 below). As indicated in previous paragraphs, creditors have no default right of access to the terms of a funding agreement or to approve the liquidator's entry into a funding agreement.

4.2.2 Relevance of litigation funding arrangement providing benefit to creditors

The issue of whether a benefit or return to creditors is a requirement is yet to be considered by the Aotearoa New Zealand courts. In a non-insolvency context involving an application to stay proceedings on the basis of abuse of process, the Supreme Court stated in *Waterhouse v Contractors Bonding Ltd* that it is not the role of the courts to assess the fairness of any bargain between a funder and a plaintiff.[56] This, however, would not necessarily preclude action against the liquidator in the context of the liquidation. In *PricewaterhouseCoopers v Walker* an argument was advanced in the Court of Appeal that a liquidator had acted in abuse of his powers by entering into a funding agreement that conferred a disproportionate benefit on the funder (who was also a secured creditor) and where unsecured creditors would receive nothing. The argument failed on the facts.[57]

4.2.3 Other measures to protect interests of creditors

Aside from a requirement for court approval of the assignment of a liquidator's cause of action under section 260A of the Companies Act 1993 (NZ), there is no mandatory court oversight of liquidators. A liquidator may seek a direction of the High Court under section 284. Creditors have standing to commence a variety of enforcement mechanisms under the Companies Act 1993 (NZ), but rarely do so because they are often likely to receive only a small individual benefit for what may be a considerable outlay in terms of time, money, and energy. In any event, creditors would have to be aware of the terms and circumstances of a funding agreement as a precursor to taking enforcement action against a liquidator. Creditors have no default right of access to this information. With the leave of the High

54 *Re Gellert Developments Ltd (in liq)* (2001) 9 NZCLC 262,714 (HC) at para 26.
55 Companies Act 1993 (NZ), s 258(1).
56 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89 at para 48.
57 *PricewaterhouseCoopers v Walker* [2016] NZCA 338 at para 37.

Court, creditors may seek an order reversing a liquidator's decision under section 284(1). Leave will be granted if the creditor establishes fraud, or that the liquidator's decision was not exercised *bona fide*, or that the liquidator has acted in a way that no reasonable liquidator would have acted.[58] Creditors may seek an order enforcing a liquidator's duties under section 286 but must establish that a liquidator has acted contrary to an enactment, rule of law or court order. A creditor may apply under the general misfeasance provision, section 301, for an investigation into whether a liquidator has breached a duty owed to the company or has misapplied company property. The reality is that judicial scrutiny of a funding agreement is more likely to be initiated by the other party to the litigation than by the creditors of a company liquidation and by way of an application to stay the funded proceedings as an abuse of process.

5. Insolvency practitioners and litigation funding

5.1 Insolvency practitioner obligations

Insolvency practitioners are subject to their usual range of duties (statutory and common law) when contemplating entry into a TFLF agreement. As noted above, a liquidator's primary statutory duty is to take charge of, realise and distribute the company's assets in a reasonable and efficient manner.[59] A liquidator is also an agent of the company and must act in accordance with an agent's general fiduciary duties, and duties of care and skill.[60]

5.2 Factors to consider when contemplating litigation funding

Compliance with the above duties is likely to require liquidators to have regard to factors such as the merits of the claim and the likelihood of recovery, and the terms of the funding agreement (including price, funder control, and costs). A liquidator must also have regard to whether the funding agreement constitutes an impermissible assignment of a bare cause of action and, if so, whether entry into the agreement is permissible as a recognised exception to this rule. Examples of recognised exceptions include an assignment to a party that has an antecedent commercial relationship with the company, or an assignment by a liquidator in the exercise of the liquidator's power of sale.[61] A liquidator must seek the leave of the High Court to assign a cause of action conferred on the liquidator by the Companies Act 1996 (NZ) (for example, an action to avoid a transaction constituting a voidable (insolvent) transaction).[62]

5.3 What are litigation funders looking for?

The New Zealand Law Commission has identified a list of the key factors that funders examine during their initial screening of a potential claim, namely the merits of the case,

58 *Re Gellert Developments ltd (in liq)* (2001) 9 NZCLC 262,714 (HC) at para 26.
59 Companies Act 1993 (NZ), s 253(a).
60 *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] 3 NZLR 602 (CA) at para 22.
61 *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at para 77.
62 Companies Act 1993 (NZ), ss 260A and 292.

estimated quantum of the case, enforceability against the defendant, and the plaintiff's legal representatives.[63]

6. Litigation funding agreement

6.1 Typical structure of agreement

There is no specific regulation of the typical structure of a funding agreement. The available evidence is from the limited numbers of funding agreements scrutinised by the courts, which address, *inter alia*, the funder's obligations with respect to funding, the funder's entitlement, how lawyers are appointed, settlement, termination, cooling off, and dispute resolution.[64]

The inclusion of standard consumer protection measures is not the subject of specific regulation and so is a matter for determination by the parties to the agreement. However, general consumer and contract protection mechanisms apply – for example, Fair Trading Act 2006 (NZ) (misleading and deceptive conduct, and unconscionable conduct) and Credit Contracts and Consumer Finance Act 2003 (NZ) (if the funding agreement constitutes a credit contract, an issue yet to be considered by the courts). A funder that falls within the ambit of the definition of a "creditor" under a "credit contract" will be providing a "financial service" and will be subject to the regulatory regime applicable to financial service providers in the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (NZ). The courts have yet to consider whether a funding agreement is a "financial service". If a funding agreement constitutes a financial product or service, the regulatory regime in the Financial Markets Conduct Act 2013 (NZ) applies.

6.2 Protection of confidential information in relation to funding agreement

Disclosure in relation to funding agreements was addressed by the Supreme Court in *Waterhouse v Contractors Bonding Ltd.*[65] The Supreme Court made the following statements in relation to initial disclosure "where proceedings are funded by a third-party unrelated litigation funder who has no prior interest in the proceedings and whose remuneration is tied to the success of the proceedings and/or who has the ability to exercise some form of control over the conduct of the proceeding":[66]

- the existence of a funding agreement and the funder's identity should be disclosed to the other party or parties when the litigation is commenced. "[A]s a matter of principle, … the courts (and the other party or parties) are entitled to know the identity of the 'real parties' to the litigation";[67]

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63 New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC IP 45) at para 14.19.
64 *Idem*, para 14.22.
65 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89.
66 *Ibid.*
67 *Idem*, para 67.

- whether the funder is subject to the jurisdiction of the Aotearoa New Zealand courts is also part of initial disclosure requirements;[68]

- the financial means of the funder do not have to be disclosed, as this issue can be met by an application for security for costs. "In any event, it is not the function, nor within the competence of the courts to provide any general regulation of litigation funders, including of their financial standing";[69] and

- as a general rule, the terms on which funding can be withdrawn or other litigation sensitive material does not have to be disclosed.[70] However, the Supreme Court left open "the possibility that disclosure of the terms of withdrawal may be appropriate if the terms in some way give legal control over the proceedings to the funder (for example, the ability to withdraw funding if the funded party refuses to obey instructions given)". The Supreme Court also left open "the question of whether the terms of possible withdrawal may be relevant to an application for security for costs".

The Supreme Court added that a funding agreement and its terms should be disclosed (and a court may order this) when an application is made to which the terms of the agreement could be relevant – such as applications for stay on the basis of abuse of process, for third-party costs orders, and for security for costs.[71] However, a court may make an order "subject to redactions relating to confidentiality, and litigation sensitive and privileged matters".

The New Zealand Law Commission has recommended that consideration be given to the development of a High Court Rule requiring a funded plaintiff to disclose the litigation funding agreement to the Court and the unfunded party (with appropriate redactions of privileged material or material that confers a tactical advantage) when the claim is filed. The rationale for the Law Commission's recommendation is that a disclosure requirement is simpler and more efficient than requiring an unfunded party to apply for disclosure, supports access to justice for defendants, and increases the accessibility of the law.[72]

Non-privileged communications are furthermore discoverable.[73]

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[68] *Idem*, para 69.
[69] *Idem*, para 70.
[70] *Idem*, para 71.
[71] *Idem*, para 73.
[72] New Zealand Law Commission, "Class Actions and Litigation Funding" (NZLC R 147) at paras 14.72, 14.73.
[73] See High Court Rules 2016 (NZ), pt 8.

SINGAPORE*

Aurelio Gurrea-Martinez

1. Jurisdictional context

Singapore is a republic with a parliamentary system of Government based on the Westminster Model.[1] The country's sources of law are derived from the Constitution, legislation, subsidiary legislation (for example rules and regulations) and judge-made law.[2]

The Insolvency, Restructuring and Dissolution Act 2018 (IRDA), which has been in force since 30 June 2020, is an omnibus legislation that consolidates Singapore's personal and corporate insolvency and debt restructuring laws into a single piece of legislation.

Since Singapore follows a common law legal system, case law remains an important source of law. Therefore, the judgments of the General Division of the High Court (which is the court that handles insolvency cases) and the Court of Appeal (which is the highest court in Singapore) carry significant weight.

The Ministry of Law regulates the insolvency profession in Singapore. Additionally, the Insolvency Office, a division of the Ministry of Law, oversees the licensing and regulation of all insolvency practitioners in Singapore under the IRDA to ensure the fair and responsible administration of insolvency and debt restructuring matters in Singapore.

2. General overview of litigation funding in Singapore

2.1 Historical development, market overview and prevalence

Maintenance is defined as "officious intermeddling in litigation"[3] and champerty is a particular form of maintenance where "one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action".[4]

Prior to 2017, there were two aspects of the doctrines of maintenance and champerty, namely (i) the common law tort, and (ii) under contract law, agreements affected by maintenance or champerty were void as being contrary to public policy.

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1 https://www.mlaw.gov.sg/about-us/our-legal-system/.

2 *Ibid*.

3 *The Law Society of Singapore v Kurubalan S/O Manickam Rengaraju* [2013] 4 SLR 91 at para 40.

4 *Ibid*.

Due to the doctrines of maintenance and champerty, third parties were prohibited from funding an unconnected party's litigation in Singapore. However, amendments to the Civil Law Act in 2017 clarified that the common law tort of maintenance and champerty was abolished in Singapore.[5]

Despite the existing doctrines of maintenance and champerty, courts had nevertheless upheld third-party funding agreements as early as 2015. For instance, in *Re Vanguard Energy Pte Ltd*,[6] the court upheld a litigation funding agreement between the company and several shareholders for the funding of various causes of action held by the distressed company.

With regard to the aspects in terms of common law mentioned above, section 5A of the Civil Law Act clarified that "no person is, under the law of Singapore, liable in tort for any conduct on account of its being maintenance or champerty as known to the common law".[7] However, with regard to the aspects in terms of contract law, it should be noted that contracts affected by champerty and maintenance may still be unenforceable by virtue of being contrary to public policy or otherwise illegal unless they fall under permitted categories as stated in the Civil Law Act.[8] As such, the law of champerty may remain relevant to funding agreement insofar as analysing whether the content of the agreement offends public policy or is illegal in its nature.

In any event, the sale of a bare right of action by a liquidator does not involve maintenance and champerty. As the power of sale of property of the insolvent is conferred by statute for this purpose, the transaction is immune from any rule of law otherwise applicable that would make the sale unlawful and open to challenge.[9] As such, the amendments in 2017 have had little effect on the liquidator's ability to sell causes of action to third-party litigation funders.

In an insolvency context, the general purpose of litigation funding is to increase or preserve the value of the company's assets for distribution to creditors. As such, the most typical claims funded include suits to recover loans, outstanding value or damages for breaches of contract.[10] Other types of proceedings funded could include investigations into the affairs of the company and any substantive actions following such investigations.[11]

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5 See the Civil Law (Amendment) Act 2017 (No 2 of 2017).

6 *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597.

7 Civil Law Act (Chapter 43, Rev Ed 2020).

8 *Idem*, s 5B.

9 *Re Movitor Pty Ltd (In Liquidation)* (1996) 64 FCR 380 at 391; cited with approval locally in *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at para 28.

10 For an example, see generally *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597.

11 See unreported case of *Trikomsel* (HC/OS 989/2018). For a brief summary of *Trikomsel*, see Clyde & Co, "Third-Party Funding in the Context of Insolvency: Principles on When the Court Will Sanction Third Party Funding" available here.

Additionally, under the IRDA, the liquidator and judicial manager may assign the proceeds of the following actions to a litigation funder:[12]

(a) transactions at an undervalue;[13]

(b) transactions made pursuant to an unfair preference;[14]

(c) extortionate credit transactions;[15]

(d) fraudulent trading;[16] and

(e) wrongful trading.[17]

There is a lack of concrete evidence as to the prevalence of litigation funding in Singapore. Traditionally, litigation funding has been relatively rare, especially in the insolvency context as creditors are usually unwilling to throw good money after bad, or may simply not have the financial wherewithal or risk appetite to fund an action that could take years to complete.[18] As a result of the new regulatory framework for litigation funding, as well as the development of the restructuring ecosystem, the use of litigation funding in Singapore has increased in the past years.[19] The presence of litigation funders in Singapore can also be observed from the list of third-party funders supporting the Singapore Institute of Arbitrators (SIArb) Third Party Funding.[20] Therefore, the market for third-party funding seems to be growing in Singapore. Moreover, international funders have a regular and growing presence in Singapore, with several funders opening permanent offices.[21]

2.2 Regulatory framework

As of 2021, the Civil Law (Third-Party Funding) (Amendment) Regulations 2021 allow for third-party funding for the following classes of proceedings:

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12 IRDA, s 144(1)(g) in respect of the liquidator, and s 99(4) read with para (g) of the First Schedule in respect of the judicial manager.

13 *Idem*, s 224.

14 *Idem*, s 225.

15 *Idem*, s 228.

16 *Idem*, s 238.

17 *Idem*, s 239.

18 Clyde & Co, "Third-Party Funding in the Context of Insolvency: Principles on When the Court Will Sanction Third Party Funding" available at https://www.clydeco.com/en/insights/2020/07/third-party-funding-in-the-context-of-insolvency-p.

19 Commenting a recent case, see K C Vijayan, "Developer's liquidator to get funding raised by creditors for probe" available here.

20 See the list of third-party funders who support the SIArb Third Party Funding Guidelines, available here.

21 Lexology, "In review: third party litigation funding in Singapore" available at https://www.lexology.com/library/detail.aspx?g=a60b3a1c-8add-4170-a7f4-22ee06830a17.

(a) arbitration proceedings (including court proceedings connected with arbitration proceedings, application for stay of proceedings, applications for the enforcement of an arbitration agreement, and proceedings in connection with the enforcement of an award);

(b) mediation proceedings connected with arbitration proceedings; and

(c) proceedings (including mediation proceedings) commenced in the Singapore International Commercial Court (SICC).[22]

The Civil Law (Third-Party Funding) Regulations 2017[23] and its amendment through the Civil Law (Third-Party Funding) (Amendment) Regulations 2021[24] are the main legislation applicable to commercial litigation funders. There is no specific regulatory body overseeing litigation funders.

Following the enactment of the IRDA, the liquidator and judicial manager may assign the proceeds of the following actions to a litigation funder:[25]

(a) transactions at an undervalue;[26]

(b) transactions made pursuant to an unfair preference;[27]

(c) extortionate credit transactions;[28]

(d) fraudulent trading;[29] and

(e) wrongful trading.[30]

There is no indication of any future law reform.

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22 Civil Law (Third-Party Funding) (Amendment) Regulations 2021, reg 2. The SICC handles insolvency-related cases. For example, see *Arris Solutions, INC. & 2 Ors v Asian Broadcasting Network (M) SDN. BHD.* [2017] SGHC(I) 01. The Courts Reform Act 2021 clarified the SICC's jurisdiction over international commercial cross-border insolvency matters.

23 Civil Law (Third-Party Funding) Regulations 2017.

24 Civil Law (Third-Party Funding) (Amendment) Regulations 2021.

25 IRDA, s 144(1)(g) respect of the liquidator, and s 99(4) read with para (g) of the First Schedule in respect of the judicial manager.

26 *Idem*, s 224.

27 *Idem*, s 225.

28 *Idem*, s 228.

29 *Idem*, s 239.

30 *Ibid*.

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

Generally, the main role of the third-party litigation funder is to provide litigation funding to the insolvency practitioner to pursue claims on behalf of the distressed company.

Any other obligation or assistance is commercially decided between the litigation funder and the insolvency practitioner. Where the litigation funder is merely funding the action (as opposed to being assigned the cause of action itself), the litigation funder will unlikely provide any significant assistance with the procedural aspects of the litigation.

3.2 Regulatory obligations

Where the litigation funding relates to the list of prescribed dispute resolution proceedings under regulation 3 of the Civil Law (Third-Party Funding) Regulations 2017, which includes proceedings relating to arbitration proceedings or proceedings commenced in the SICC, the litigation funder must satisfy and continue to satisfy the following requirements, namely that the litigation funder:

(a) carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the litigation funder is not a party; and

(b) has a paid-up share capital of not less than S$ 5 million or the equivalent amount in foreign currency or not less than S$ 5 million or the equivalent amount in foreign currency in managed assets.[31]

Where the litigation funder fails to comply with the above requirements, the rights of the litigation funder under the funding agreement are not enforceable.[32]

In respect of litigation funding in the insolvency context, there does not appear to be any specific regulation, regulatory licence to operate, nor any specific capital or book-keeping obligations for the litigation funder to abide by.

3.3 Funding premium

The premium is commercially decided between the insolvency practitioner and the third-party litigation funder. There is no statutorily expressed cap on the premium.

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[31] Civil Law (Third-Party Funding) Regulations 2017, regs 3 and 4.

[32] Civil Law Act, s 5B(4). Litigation funding based on a contractual agreement applies only to prescribed dispute resolution proceedings (which are found in the Civil Law (Third-Party Funding) Regulations 2017 and the Civil Law Act, s 5B(1)).

3.4 Procedural aspects

3.4.1 Control of proceedings and involvement in settlement proceedings

The ability of the third-party litigation funder to take control of proceedings has traditionally depended on the degree of control conferred by the funding agreement. In some cases, this control has even included obtaining the litigation funder's consent for settlement or discontinuance of the proceedings.[33]

However, the degree of control eventually assigned to litigation funders is subject to certain limitations. In *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd*,[34] the court commented that where the third-party litigation funders are assigned the rights to the claim, the liquidators are entitled to relinquish control over the proceedings.[35] However, should the court be of the view that the liquidators did not act *bona fide* or in good faith in assigning the claims to the litigation funders, the court may interfere with the liquidators' commercial decision to assign the claim (although it would be slow to do so unless bad faith has been established).[36]

More recently, the Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 have clarified that insolvency practitioners "must retain control and oversight over the conduct of the relevant action in relation to which a Funding Agreement was entered into".[37] Moreover, "the relevant insolvency practitioner must not take instructions from the funder on the conduct of the relevant action".[38]

3.4.2 Right to abandon proceedings

The ability of the litigation funders to abandon proceedings or terminate funding would depend on the degree of control conferred by the funding agreement, although funders should generally not have a discretionary right to terminate the agreement.[39] Depending on the terms of the funding agreement, abandoning proceedings or terminating funding without prior consultation or agreement by the liquidators may be considered as a breach of the funding agreement.[40]

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33 See, eg, the terms of the assignment agreement in *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at para 7(f) which provide that: "(f) The Liquidators will have full control of legal proceedings except that the Assignees' agreement is required on the choice of solicitors and on any settlement or discontinuance of any Claim".

34 *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd* [2018] 5 SLR 1337.

35 *Idem*, para 53.

36 *Idem,* para 37.

37 Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020, reg 5(5).

38 *Idem*, reg 5(6).

39 The Law Society of Singapore, "Third-party Funding" (Guidance Note 10.1.1) at para 43.

40 A funder who terminates the funding agreement should remain liable to pay all costs, such as adverse costs that have accrued up to the date of termination and any costs that will accrue as a result of and subsequent

3.4.3 Liability for adverse cost orders and security for costs

The SIArb Guidelines for Third Party Funders establishes that the litigation funding agreement shall state, among other aspects, the extent of the funder's financial liability, including the payment of adverse costs, costs insurance and the provision of security for costs.[41]

4. Litigation funding and insolvency

4.1 Mechanisms to fund insolvency proceedings

There are two mechanisms that can fund insolvency proceedings. Firstly, the liquidator may assign the proceeds of the litigation to the funder in exchange for litigation funding. An example can be found in the assignment agreement in *Re Vanguard Energy Pte Ltd*, where the funders agreed to provide upfront funding for a percentage of the solicitor-and-client costs, security for costs, party-to-party costs and other legal costs.[42] In exchange for funding, the funders will receive any amount funded to them and all rights, title and interest over the part of the recovery equal to the funds provided by the funders will be sold to the funders by way of assignment.

Secondly, the liquidator may sell the causes of action of the distressed company to the funder for a sum of money and, in the event of recovery, a further sum representing a percentage of the recovery. For an example, in *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd*, the funders paid the company an initial sum for the assigned causes of action and agreed to pay 40% of the firm US$ 10 million recovered, and 50% of any further sums recovered.[43]

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

There is no express right given to creditors to be able to obtain information about the terms of the funding agreement. Creditors' approval of the funding agreement is not a requirement, although creditors can oppose the funding agreement by applying to the court.

4.2.2 Relevance of litigation funding arrangement providing benefit to creditors

While some benefit to the creditors is expected, there is no hard and fast rule on the appropriate level of returns: all relevant factors must be considered holistically. If the

to the termination. See The Law Society of Singapore, "Third-party Funding" (Guidance Note 10.1.1) at para 44 in this regard.

41 Singapore Institute of Arbitrators, "SIArb Guidelines for Third Party Funders" at para 3.

42 *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at para 7.

43 *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd* [2018] 5 SLR 1337 at para 5.

funding agreement causes the third-party litigation funders to make a grossly excessive profit at the distressed company's expense, it could suggest that the funding agreement was not a *bona fide* agreement or that it was not entered into in good faith.

4.2.3 Other measures to protect interests of creditors

The duty of a liquidator is to maximise returns to the company's creditors and in this way creditors' interests are protected. Additionally, creditors may apply to the court to oppose the funding agreement if they are of the opinion that their interests are not being protected. Creditors may also apply for the removal of the liquidator, if the actions of the liquidator in relation to entering into the funding agreement showed sufficient cause for the removal of the liquidator.

More recently, the Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 have included additional protections. Firstly, the new framework establishes that "the Court may, on application by a member or creditor of the company, order the relevant insolvency practitioner to disclose the existence of a Funding Agreement and its terms and conditions, subject to such conditions as the Court thinks fit".[44] Secondly, it confers additional powers to the creditors by allowing them "to make an application to the Court for an order for relief on the ground that a Funding Agreement was entered into in breach of these Regulations".[45] Where the court is satisfied that the breach of these Regulations has resulted in prejudice to the company or the members or creditors of the company, the court may make an order declaring that the funding agreement is void, or any other order for giving relief as the court thinks just.[46]

5. Insolvency practitioners and litigation funding

Following the enactment of the IRDA, the liquidator and judicial manager may assign the proceeds of the following actions to a litigation funder: (i) transactions at an undervalue, (ii) transactions made pursuant to an unfair preference, (iii) extortionate credit transactions, (iv) fraudulent trading, and (v) wrongful trading.

5.1 Insolvency practitioner obligations

Insolvency practitioners should maximise returns to the creditors. To achieve this purpose, the insolvency practitioner has the power to bring or defend any action or legal proceeding in the name and on behalf of the company, as well as to adjust prior transactions and proceed against formal directors for fraudulent or wrongful trading.

A liquidator also occupies a fiduciary position in relation to the company. The liquidator must act honestly and exercise his power for a *bona fide* purpose. Liquidators should not

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[44] Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020, reg 6(1).
[45] *Idem*, reg 6(2)
[46] *Idem*, reg 6(3).

allow their private interests to come into conflict with their duties and, in discharging them, they must act with complete impartiality as between the various persons interested in the property and liabilities of the company.

With regard to litigation funding agreements, the insolvency practitioner must act in a *bona fide* manner when entering into such agreements. In ascertaining whether the insolvency practitioner has acted *bona fide*, the courts have enumerated a number of non-exhaustive and non-determinative factors to be taken into account:

- the nature and complexity of the matter and the risks involved in pursuing the claims;
- the prospects of success of the proposed action;
- the amount of costs likely to be incurred in the conduct of the action and the extent to which the funder is to contribute to the costs;
- the extent to which the funder will contribute towards the opponent's costs in the event that the action is not successful or towards any order for security for costs;
- the circumstances surrounding the making of the contract, including the ability of the funder to meet its obligations;
- the level of the funder's premium;
- the extent to which the liquidators have canvassed other funding options and consulted with the creditors of the company;
- the interests of the creditors and the effect that the funding agreement may have on the company's creditors;
- possible oppression to another party in the proceedings; and
- the extent to which the liquidators maintain control over the proceedings.

More recently, the Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 have imposed additional duties and obligations. They include the requirement to give written notice containing all material information when soliciting an offer for litigation funding,[47] and the obligation not to seek approval of a funding agreement if the insolvency practitioner is aware of an actual or potential conflict of interest.[48]

[47] *Idem*, reg 4(3).
[48] *Idem*, reg 4(7). For other duties and obligations, see also reg 5.

5.2 Factors to consider when contemplating litigation funding

Insolvency practitioners contemplating litigation funding will consider the non-exhaustive and non-determinative factors mentioned in section 5.1, and particularly the merits of the likelihood of success, the terms of the funding agreement, and the interests of the creditors.

5.3 What are litigation funders looking for?

When deciding whether and, if so, how a funder will provide litigation funding, it has been argued that funders focus on various criteria, including:

- the merits of the claim – funders are especially comfortable with a claim if the claimant and counsel are able to identify both the strengths and the weakness of the claim;

- the identity of the claimant and motivations for seeking funding – funders are also evaluating the claimant, as well as whether the claimant is emotionally involved in the dispute which will help the funder assess if the parties are likely to act rationally when considering a settlement order;

- the claimant's legal representation – the funder will review the firm's engagement agreement with the claimant to understand the economics of the arrangement and evaluate if the interests of the claimant and its law firm are appropriately aligned;

- the litigation budget – funders will review the proposed budget to understand the types of expenses forecasted to be incurred and the expected timing of these outlays. Unless the funder has included a commitment extension for the facility, it will rely on either the claimant or the law firm to take responsibility for any budget overruns;

- expected damages – funders will weigh the size of the potential award against the investment risks and cost of the opportunity; and

- respondents and recovery – the funder will also evaluate the respondents, including an analysis of whether the respondent is insolvent or judgement-proof.[49]

Another potential factor probably affecting the funder's decision is the ease to prove a claim. In other words, funders are expected to be more inclined to fund claims that are easier to prove, such as claims primarily based on documentary evidence.

[49] Woodsford Litigation Funding, "A Practical Guide to Litigation Funding".

6. Litigation funding agreement

6.1 Typical structure of agreement

According to the SIArb Guidelines for Third Party Funders, published by the SIArb, the litigation funding agreement: [50]

- should be in writing;
- should specify the amount of funding to be provided;
- should indicate the agreed investment return to the litigation funder;
- should be drafted in as clear and concise a manner as possible so as to be properly understood by the litigation funder;
- shall specify that the litigation funder authorises the subsequent disclosure of its identity, its address and the existence of the funding to the other parties, legal practitioners and court or arbitral tribunal in the funded proceedings;
- shall adequately address all relevant matters (such as financial obligations, confidentiality, conflict of interest, control of proceedings, withdrawal of funding and disclosure of litigation funding);
- shall include a fair, transparent and independent dispute resolution mechanism for resolving any disputes that may arise between the litigation funder and the insolvency practitioner; and
- shall state the extent of the funder's financial liability (including the payment of adverse costs, costs insurance and the provision of security for costs).

6.2 Protection of confidential information in relation to funding agreement

Standard consumer protection measures may include the following:

- confidentiality clause;[51]
- limitation to further assignment of the benefits and / or obligations under the funding agreement;[52]

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50 Singapore Institute of Arbitrators, "SIArb Guidelines for Third Party Funders" at para 3.
51 *Idem,* para 5.
52 *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd* [2018] 5 SLR 1337 at para 6.

- rights of the distressed company / liquidator to participate in settlement agreements;[53]
- right to termination of funding agreement clause;[54]
- right to repurchase the causes of action if the funder fails to commence proceedings;[55]
- right to amend the funding agreement limited by approval from creditors;[56] and
- provision of updates to distressed company / liquidator.[57]

[53] Singapore Institute of Arbitrators, "SIArb Guidelines for Third Party Funders" at para 7.1.1.
[54] *Idem,* para 7.1.2.
[55] *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd* [2018] 5 SLR 1337 at para 58(e).
[56] *Idem,* para 58(g).
[57] *Idem,* para 58(f).

SOUTH AFRICA

André Boraine
Jani van Wyk

1. Jurisdictional context

South Africa has a mixed legal system, and its primary sources are legislation, case law and the common law. It consists of Roman-Dutch law, which is referred to as its "common law" (or the "fall back law") that functions in the absence of statutory law, or where legislation has a *lacuna*. Elements of English law are found within the South African law – especially in the fields of commercial law, like company and insolvency law and procedure and its system of precedents set by higher courts. Indigenous customary laws also form part of the broader South African law. Since the advent of the new political order in South Africa, the Constitution of 1996 with its Bill of Rights became the highest law of the land, and all other forms of law must be consistent with, or be developed to conform to, constitutional imperatives.[1]

The South African regulatory framework provides for legal practitioners who may practice as attorneys or advocates, the latter who are specialist litigators.[2] (This system resembles the English system of solicitors and barristers.) All legal practitioners are now regulated by the relatively new Legal Practice Act 28 of 2014. In practice, especially in the high courts of South Africa, litigants would work through an attorney who will, in the majority of instances, involve an advocate to assist with the provision of legal opinions, the drafting of pleadings and the representation of the party in the court matter (or arbitration) should the matter not be settled at an earlier stage.

Broadly speaking there are two main types of civil proceedings, namely application by motion procedure where the matter can be heard on the papers since there are as a rule no factual disputes and where oral evidence is as a rule not allowed, or the action procedure where the matter is initiated by summons and may ultimately lead to a trial where oral evidence is required in order for the court to determine the factual and legal disputes.[3]

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1 An interim Constitution of 1993 was initially adopted and subsequently replaced with the current Constitution of 1996. See in general D Kleyn *et al*, *Beginner's Guide for Law Students* (5th ed, Juta, 2018) at chs 2, 3.

2 See in general C T Theophilopoulos *et al*, *Fundamental Principles of Civil Procedure* (4th ed, LexisNexis, 2020) at pp 28-30 and 33.

3 *Idem*, p 37.

2. General overview of litigation funding in South Africa

2.1 Historical overview, market overview and prevalence

The legal rules and principles for contingency fee agreements entered into between a litigant and its legal representative, and litigation funding provided by third parties ("pure funders"), have been sources of confusion, debate and contention – especially when it comes to the legality of these practices.

Third-party litigation funding (TPLF) agreements[4] were initially, in some instances, viewed as being lawful if such agreements were entered into in good faith and if it did not militate against public policy.[5] Burger[6] points out that such agreements would be contrary to public policy when they were of a "speculative nature", or concluded for a "wrongful purpose". In effect, he argues that the development of litigation funding provided by third parties was hampered in South African law because of the uncertainties that surround these concepts and due to the fact that jurisprudence in this regard was dominated by the Roman-Dutch law principles of *pactum de quota litis* and the English law doctrines of maintenance and champerty.[7] However, the basic right of access to justice as enshrined in section 34 of the Constitution and the introduction of the Contingency Fees Act 66 of 1997 (the Contingency Fees Act) served as catalysts for further developments by the courts in this regard.

South African law, however, in general frowned upon such agreements, and their application were not clear prior to the judgment in *PricewaterhouseCoopers Inc v National Potato Co-operative Ltd*[8] (now known as the Potato case, and also referred to as such in this paper), that re-evaluated the underlying principles of third-party funding in South African law since courts may, in terms of section 173 of the Constitution, develop the common law. In this judgement the court, with reference to earlier judgments, mentioned that:

> "[a] number of cases decided in South Africa in the last years of the 19th and the early part of the 20th Century show that the courts took an uncompromising view of agreements which I shall call champertous (ie any

4 Such agreement is defined as "an agreement that provides for a non-party to finance a legal action on behalf of a litigation in return for a share of the proceeds of the action". See P Burger, "Let the litigation funder beware" available here; and see M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at pp 1, 4 *et seq,* where the author also mentions that litigation funding can be considered within the broad spectrum of litigation funding agreements that includes contingency fees.

5 P Burger, "Let the litigation funder beware" available here; and see M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at p 25; and S Kuper, "The worldwide rise of litigation funding began after the Global Financial Crises of 2008" available here.

6 P Burger, "Let the litigation funder beware" available here.

7 See S Kuper, "The history of litigation funding" available here.

8 2004 (6) SA 66 (SCA).

> agreement whereby an outsider provided finance to enable a party to litigate in return for a share of the proceeds of the action if that party was successful or any agreement whereby a party was said to 'traffic', gamble or speculate in litigation), and refused to entertain litigation following on such agreements or to enforce them".[9]

However, the courts acknowledged one exception, namely where a person, "in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void".[10]

As mentioned, uncertainty as to the application of the Roman-Dutch law principle of *pacta de quota litis,* as well as the English law infused concepts of champerty and maintenance stifled the development of South African law in this regard.[11] Nevertheless, as explained above and although held to be illegal *prima facie* pre-2004, litigation funding agreements could be lawful if such agreements were concluded in good faith and if they did not militate against public policy.[12]

Where the legality of such agreements became questionable was when they were of a "speculative nature", or entered into for a "wrongful purpose"[13] – then such agreements would seemingly militate against public policy.[14] These terms were vague and would

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9 *Idem,* para 26 with reference to *Green v De Villiers, Dr Leyds, N.O., and The Rand Exploring Syndicate* [1895] 2 OR 289 at pp 293-294; *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company* [1894] 2 OR 336 at pp 339-341; *Schweizer's Claimholders' Rights Syndicate, Limited v The Rand Exploring Syndicate, Limited* [1896] 2 OR 140 at pp 144-145; *C.V.J.J. Platteau v S.P. Grobler* [1897] 4 OR 389 at pp 394-396; and *Campbell v Welverdiend Diamonds Ltd* 1930 TPD 287 at pp 292-294.

10 *Idem,* para 21 and judgments cited.

11 *Idem*, paras 21 to 30 in general; and M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at pp 4-5. See also L Lawrence, *Regulating third party funding in arbitrations held within South Africa* (LLM mini-dissertation, UWC, 2018) at pp 60 *et seq*.

12 See for instance the following judgements: In *Hollard v Zietsman* [1885] 6 NLR the court considered the principle of *pactum de quota litis*, as well as the English principles of champerty and maintenance, but held that it is not necessarily illegal to bear part of another's costs of litigation. In the Potato case, litigation funding agreements granting the funder a share in the proceeds would not *per se* be *contra bonos mores* – see *Hugo & Möller N.O v Transvaal Loan, Finance and Mortgage Co* [1894] 1 OR where the court held that a fair agreement to provide litigation funding in exchange for a share in the proceeds was not per se *contra bonos mores*. The Court in *Patz v Salzburg* 1907 TS 526 at p 527 noted that, in Roman-Dutch and English law, it was against public policy to traffic or gamble in lawsuits, but found it not to be unlawful to assist a litigant with legal funding in good faith, and thereby deriving some benefit from the litigation. A *bona fide* agreement to assist a litigant in the exercise of his or her rights in exchange for fair compensation from the proceeds found support in *Campbell v Welverdiend Diamonds Ltd* 1930 TPD 287 at p 28.

13 See P Burger, "Let the litigation funder beware" available here; M J Khoza "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at pp 4-8; and L Lawrence, *Regulating third party funding in arbitrations held within South Africa* (LLM mini-dissertation, UWC, 2018) at pp 60 *et seq* regarding the historical development of this issue in South African law.

14 Further to this aspect, see the discussion by M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at pp 4-5.

therefore put many such agreements at risk of being declared unlawful by a court.[15] However, the introduction of the Contingency Fees Act and the new constitutional dispensation necessitated a re-evaluation of these principles and policy considerations that led to a new approach by the courts in this regard.[16]

Following the developments mentioned above, the Supreme Court of Appeal gave a landmark judgment regarding the legality of third-party agreements in the 2004 Potato case.[17] The Supreme Court of Appeal[18] considered, amongst others, public policy in view of the basic right of access to justice provided for in section 34 of the Constitution, the legalising of contingency fees by the introduction of the Contingency Fees Act, and developments regarding champerty in England. In essence, the Supreme Court of Appeal held that a TPLF agreement is not contrary to public policy or void, and clearly stated that "[t]he law of maintenance and champerty developed out of a need to protect the system of civil justice; and as the civil justice system has developed its own inner strength the need for the rules for maintenance and champerty has diminished – if not entirely disappeared".[19] The new status of third-party litigation agreements following this finding is summarised in the judgment as follows:

> (1) an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void;
> (2) the illegality of such an agreement or an attorney's contingency fee agreement would not be a defence in the action;
> (3) litigation pursuant to such an agreement may constitute an abuse of the process which in appropriate circumstances a court may prevent notwithstanding a litigant's right of access to the courts enshrined in s 34 of the Constitution.[20]

The basic right of access to justice as provided for in section 34 of the Constitution thus called for a re-evaluation of public policy considerations to the extent that these relate to the contractual requirement of legality.[21] The reception of valid contingency fee agreements into South African law by way of legislation, followed by this last mentioned judgment a few years later, and developments regarding champerty and so forth in

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15 P Burger, "Let the litigation funder beware" available here.

16 It is interesting to note that the court in *Headleigh Private Hospital (Pty)Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others* 2001 (4) SA 360 (W) considered an agreement to share the proceeds of a lawsuit to be acceptable and legal when one party cannot fund the litigation completely.

17 2004 (6) SA 66 (SCA).

18 *Idem,* paras 23-43 regarding the re-evaluation of public policy in view of the common law position, developments in England, and the introduction of the Contingency Fees Act, and s 34 of the Constitution.

19 The *Potato* case, para 32.

20 *Idem,* para 52.

21 *Idem,* paras 23 and 24.

English law, are said to have opened, in principle at least, some space for the recognition of litigation funding in South African law.[22]

To conclude, in South Africa, TPLF agreements have mainly been acknowledged through the development of the common law by the courts. Such agreements are based on principles of contract and are no longer viewed to be against public policy *per se*. However, since it is based on principles of contract, the courts may consider the fairness of particular contractual clauses should a court be asked to consider the terms of such an agreement.

Although growing in recognition, litigation funding seems to still be quite low key and only a few local funding entities have been established – these entities are seemingly funded by private equity holders, but there is some interest shown by foreign entities as well.[23] Foreign funding entities have also featured in local case law.[24] At present there appear to be about 10 known TPLF entities / companies in South Africa, namely: The South African Litigation Funding Company (apparently the first such entity in South Africa),[25] Astrea,[26] Christopher Bean International Recoveries,[27] Christopher Consulting,[28] Jericho Litigation Fund,[29] New Heights Finance,[30] RM Capital,[31] Sterling Rand,[32] Wild dog[33] and Taurus Capital.[34] It is not clear how many of these are currently active in the market. Taurus Capital is described as "the pioneer of this asset-class locally",[35] having raised the country's first dedicated litigation fund of ZAR 80 million to pursue litigation investments on a pooled basis.[36]

Generally, it seems that many TPLF entities will only consider sizeable monetary claims. In one of the sources consulted, it is stated that one particular funding entity will not entertain

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22 P Burger, "Let the litigation funder beware" available here; and M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at pp 2-3 and 6-7.

23 See A Vikovich, "African litigation funding market a hot potato" available here.

24 See for instance *PricewaterhouseCoopers Inc v IMF (Australia) Ltd and Another* 2013 (6) SA 216 (GNP) *and De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ).

25 https://www.salfco.com/home; M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at p 8; and R Hendley *et al*, "Litigation funding in Africa" available here.

26 http://www.astrea.co.za/; and see the article entitled "What is litigation funding?" available here.

27 http://www.debtcollectionafrica.com/international-litigation-funding-exchange-(ILFE).html.

28 https://christopherconsulting.co.za/litigation-funding/.

29 http://jerichofund.co.za/; see E Smadja, "Litigation funding: Pioneering an alternative asset class in South Africa" available here; and see also A Vikovich, "African litigation funding market a hot potato" available here.

30 https://nhfinance.co.za/.

31 http://rmcapital.co.za/litigation.html.

32 http://www.sterling-rand.com/.

33 https://wilddog.mu/.

34 https://tauruscapital.co.za.

35 E Smadja, "Litigation funding: Pioneering an alternative asset class in South Africa" available here; and see also A Vikovich, "African litigation funding market a hot potato" available here.

36 That means spreading the risk with a portfolio of claims approach.

claims of less than ZAR 3 million in value,[37] and Taurus Capital in general considers claims of ZAR 20 million. Apart from personal injury and medical negligence claims, it seems that funders are involved in funding commercial litigation that may include matters such as breach of contract litigation, claims arising from liquidation or business rescue proceedings, claims against international trading partners and debtors, claims against bans / insurers and finance providers, class action suits, and so on.[38] Some of these funders, however, indicated that they are not geared for insolvency litigation funding as such. Taurus Capital indicated that they do consider insolvency litigation funding and provided information regarding their approach to TPLF in such litigation. The website of Jericho Litigation Fund indicates insolvency litigation as one of the areas that they fund.

2.2 Regulatory framework

The development of pure TPLF is relatively new in South African law and there exists no (direct) regulatory framework or dedicated regulatory body.[39] Where a litigation funder is operating as a (local) company, the bodies established under the Companies Act 71 of 2008, such as the Companies Tribunal and the Companies and Intellectual Property Commission (CIPC), would regulate these and other companies generally. There are no indications of law reform in this area at the moment, although there have been calls for such reform.[40] The South African Law Reform Commission is reviewing the current rules pertaining to legal costs with the view of proposing measures to make legal services more accessible, but TPLF as such is seemingly not considered as part of this review. It is submitted that if a steady pattern of abuse or unfair outcomes stemming from unscrupulous funders emerges, or if, under the guise of access to justice some serious lobbying may ensue, a regulatory framework may be considered.

In the absence of dedicated statutory regulation, TPLF is governed by agreement – hence contractual principles apply. The South African contract law principles have also been influenced by notions of fairness and public policy, and these concepts are viewed through a constitutional lens inclusive of the basic rights enshrined in the Constitution's Bill of Rights. Although this development regarding TPLF agreements opened up new possibilities, courts may, and will also continue to, scrutinise the terms of agreements where called upon to do so – in the case of a TPLF agreement, for instance where some provisions may be unacceptably favourable to the litigation funder,[41] or where litigation is instituted pursuant to such an agreement.

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37 K Ramothso, "Litigation fund, now available in South Africa" (2016), available here.

38 See www.jerichofund.co.za as referred to by K Ramothso, "Litigation fund, now available in South Africa" (2016), available here.

39 See M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at p 3. See also L Lawrence, *Regulating third party funding in arbitrations held within South Africa* (LLM mini-dissertation, UWC, 2018) at pp 60 *et seq*.

40 M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at p 13.

41 Regarding the role of equity in contract, fairness and public policy regarding contractual terms, see in general *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *AB and Another v Pridwin Preparatory School and Others*

Chappel[42] furthermore points out that, in the absence of statutory regulation, the courts act as watchdogs to some extent when it comes to the development of TPLF rules. For instance, in *PricewaterhouseCoopers Inc v IMF (Australia) Ltd and Another*,[43] a later judgement following the 2004 Potato case, the court *a quo* assisted the defendant in proceedings, which proceedings against it were funded by a non-party funder. The court joined the recalcitrant (foreign) funder as a co-party in order to enable the defendant to seek a cost order against the funder should the plaintiff's claim be unsuccessful, stating:

> "In my view there is no reason why such relief should not be available. It is already possible to obtain direct orders for costs *de bonis propriis* against non-parties such as legal representatives and public officials. To enable the applicants to join the first respondent would be a logical progression from the situation that was created when the Supreme Court of Appeal in *Price Waterhouse Coopers Inc and Others v National Potato CoOperative Ltd* 2004 (6) SA 66 (SCA) (2004 (9) BCLR 930) held that champertous agreements were not unlawful. To allow litigants like the applicants to hold funders directly liable for costs could also be considered to be one of the measures that the courts could adopt to counter any possible abuses arising from the recognition of the validity of champertous contracts".[44]

In addition, the court remarked in passing[45] "that in English law a person who funds a litigant could be held liable for costs and remarked that that was not the position in our law". The court proceeded to remark that "there was no lack of a remedy ('leemte') because the courts could, by ordering the litigant to provide security, indirectly force the funder to provide the wherewithal," but that the court was not asked to do so in this case. This is a pertinent example how the courts will develop the common law – in this case to ensure that the application of the third-party funding construct is fair. However, Burger[46] laments that in developing the common law in this regard the court neglected to make it clear what the considerations should be to allow a defendant to join a TPLF funder to the suit, and also that no criteria were set to consider when an adverse cost order would be allowed.

This 2013 judgment of the court *a quo* went on appeal to the Supreme Court of Appeal but the matter of joinder of, and adverse cost orders against, third-party funders was upheld in *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another*[47] where the Supreme Court of Appeal endorsed the approach of the court *a quo* regarding the joinder of the TPLF funder with the view of granting a cost order against the

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2019 (1) SA 327 (SCA); and *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust* (CCT109/19) [2020] ZACC at p 13.

42 Stated view of T Chappel in A Vikovich, "African litigation funding market a hot potato" available here.

43 2013 (6) SA 216 (GNP).

44 *Idem*, p 222E-G.

45 *Idem, p 222B-C.*

46 See the discussion of this case in P Burger, "Let the litigation funder beware" available here.

47 (451/12) [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) (4 March 2015) at para 162.

foreign funding entity. The litigation had been funded by an Australian litigation funder, which stood to be the primary, and possibly the only, beneficiary of the action.[48] The funder was joined as a party to the suit on application of the defendants with the view of seeking a cost order against it should the claim not succeed. The litigation was funded on the basis that, if the litigation succeeded, the funder would be fully reimbursed for its costs and paid a management fee for its services in respect of the conduct of the litigation. In addition, it would receive a proportion, exceeding 55%, of the gross proceeds of the litigation. Potentially, depending upon the gross amount recovered, it could be the sole beneficiary of a judgment in favour of the plaintiff.[49] In this case, the Supreme Court of Appeal mentioned that this scenario was not aligned with the notion of access to justice and noted that:[50]

> "[I]t is wholly unclear who, other than IMF [*the foreign funder*], stands to gain from the litigation that has taken up so much court time over so protracted a period. It is debatable whether that is a desirable state of affairs. It is one thing to enable an impecunious litigant to obtain legal relief to which that litigant is entitled. It is another matter altogether to have a situation where an outsider to a dispute, motivated solely by considerations of profit, may be the sole beneficiary of a judgment. That is something that may have to engage this court on another occasion. Litigation exists for the proper settlement of disputes in society in the interests of the parties to those disputes. It comes at a social cost. It is undesirable that outsiders driven purely by commercial motives should be able to take over these disputes for their own benefit. When that occurs, it is difficult to see how the constitutional guarantee of access to courts is engaged. It may perhaps be necessary at some future date to consider the precise ambit of our earlier decision in this regard and to what extent it permits a departure from the previous law in relation to champerty."

Other judgments of provincial divisions of the High Court that follow the same vein are also of interest to note. In *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town, and Another, and Four Related Applications*,[51] the High Court granted a cost order against a litigation funder who had already been joined to the proceedings. The plaintiff ceded his interest in the claim, relating to an interest in property, to the funder who was effectively in control of the litigation and would share in the outcome of a successful claim by obtaining co-ownership in the property forming the subject of the litigation. In order to exercise its discretion in relation to costs, the High Court distinguished between so-called "pure funders" and those who "invest" in the outcome of the litigation, substantially controls the process, or stands to benefit from the outcome. The High Court then termed a "pure funder" as someone who does not stand to benefit from the litigation (that is, does

48 *Idem*, paras 9-12.
49 In this respect the court remarked at p 222H: "To obtain it by joining the first respondent is most apposite. After all, the first respondent is a co-owner of the claim".
50 *Idem,* para 10.
51 2014 (1) SA 141 (WCC).

not have a personal interest in the outcome of the litigation),[52] is not funding the case as a matter of business, and does not control the process. The High Court's line of thought was that as TPLF evolved with the view that where the funding does not promote the underpinnings of access to justice etcetera, and the funding was more of an investment than promoting these ideals, a court may be more inclined to grant an adverse cost order against the funder.[53] However, the High Court observed that cost orders would not be granted against commercial funders who do not seek to control the course of the litigation and lack personal interest in the litigation.[54]

Burger[55] questions the approach of the High Court in this judgment and finds it difficult to understand its reasoning since "there does not appear to be any moral difference between an individual funding a single action for financial gain, and a corporation funding multiple actions for financial gain. In both instances, the funder is making a calculated investment with the hope of a return". It must nevertheless be noted that the case had special circumstances: the High Court found that there was fraudulent conduct on the side of the funder in conducting the proceedings, and that the funder would in essence be the only party to have benefitted from a positive outcome.

In *Scholtz and Another v Merryweather and Others*[56] the court also used the distinction between "pure litigation" funders and other types of litigation funders. The court held that cost orders may also be awarded against these other types of litigation funders.

This distinction was also followed by another provincial division of the High Court in *Gold Fields Ltd v Motley Rice LLC*[57] where the funder was considered to be a "pure funder" and was merely facilitating access to justice without "gaining access to justice for his own purposes".

The courts will also develop rules to protect the defendant who is not so funded, for example, where the funding entity was joined as a party to the suit with the view of giving a cost order against it if the litigation was not successful. Funders who are not deemed to be "pure funders" (those who get involved with the litigation itself) are mainly at risk to be joined. Although it is laudable that courts follow this approach (that is, to prevent abuse and to protect the interest of defendants), it makes the application of certain arrangements in this regard uncertain, hence some commentators argue for a statutory regulatory

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52 The funder should have no direct interest in the substantive aspects of the claim – the funder's interests should be limited to the funding and return.

53 M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at p 7; and P Burger, "Let the litigation funder beware" available here.

54 *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town, and Another, and Four Related Applications* 2014 (1) SA 141 (WCC) at para 83.

55 P Burger, "Let the litigation funder beware" available here.

56 2014 (6) SA 90 (WCC) at para 110.

57 2015 (4) SA 299 (GJ) at p 324 and see discussion by M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at p 8.

framework.[58] TPLF funders have to be cautious and ensure that they obtain good advice when drafting the terms of the third-party agreement so as to attempt to evade certain pitfalls, such as cost orders, for instance, and should the funder be seen as an "investing" funder. Even so, the uncertainty necessitates that adverse cost orders are viewed as an additional risk to factor in should the outcome of the funded litigation be unsuccessful.

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

The role, rights and obligations are set out in a TPLF agreement between the TPLF entity and the litigant instituting the claim. The litigation funder will, of course, provide funding for the legal proceedings. In addition, the TPLF entity will gather certain information from the applicant / litigant.

It is important to note that, as stated by Taurus Capital, they do not give instructions, but do give some input. The reason for this is that this funding entity is clearly mindful of the fact that it should guard against taking control of the litigation in view of the position taken by the courts on "pure funders" and other funders.

3.2 Regulatory obligations

In the absence of dedicated regulation in respect of litigation funders, there are no licencing or prudential (capital adequacy) regulations that apply to these bodies. Similarly, there is no formal statutory requirement to keep records, although most litigation funders will do so in practice. Where the litigation funder is a company, it will be subject to submit certain standard documentation to the CIPC as prescribed by the Companies Act 71 of 2008, and for tax purposes under the Tax Administration Act 28 of 2011. Funders should however be aware of the possible tax implications of their contractual arrangements *re* income derived / profit derived from such funding, and foreign funders should acquaint themselves with exchange control measures as well. There are no other regulatory obligations except for case law considerations as referred to above.

There are no formal direct rules applicable to TPLF in relation to conflicts of interest, but in practice a TPLF entity will try to avoid a conflict of interest (there may be a greater risk in this regard in case of class action litigation[59]). In general, it should be noted that a conflict of interest may adversely impact upon the requirements laid out in legal precedent in this regard, such as being contrary to public policy, of a "speculative nature", or concluded for a "wrongful purpose".

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[58] M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at pp 13 *et seq*.

[59] *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ).

Within the context of TPLF arbitrations, Lawrence remarks that it will be difficult to avoid a conflict of interest in arbitration if the involvement of a TPLF funder has not been disclosed.[60]

The relationship between the TPLF funder, the litigant, and its legal representative is also important and funders and legal representatives must attempt to avoid possible conflicts of interest. Lawrence for instance advises that the legal representative of the litigant should not be involved in the negotiations regarding the terms of the TPLF agreement "to avoid aggravating competing interests".[61] Potential conflicts may also arise where the funder prefers to select the legal representative.

Even though there are no specific regulation to address concerns in relation to conflicts of interest, a matter concerning a TPLF funder and a legal representative was considered in a judgment of the Supreme Court of Appeal relating to the pre-trial certification process of a class action.[62] On the facts the Supreme Court of Appeal expressed concern that the funder exercised unwarranted influence over the decision-making of the legal representative who would initially also share in the "proceeds" of a successful litigation.[63] The Supreme Court of Appeal accepted that this problem could be overcome since the legal representative abandoned his share in the proceeds.[64] Furthermore, the independence of the legal representative could be dealt with in the court order concerning the certification, and also by the appointment of a supervisory attorney to ensure that the legal representative in the class action acts independently at all times, and in the best interests of the members of the class for whom the litigation is brought.[65]

3.3 Funding premium

There are several ways to structure the premium or commission rate, but most common is for the funder to be repaid its investment and then receive 25%-50% of the remainder of the judgement or awarded amount, depending on the complexity of the matter for instance.[66] This percentage should logically-wise have some rationale to it and the factors of a particular case, such as the complexity of the litigation, its possible duration, etcetera should be considered in calculating this percentage.

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60 L Lawrence, *Regulating third party funding in arbitrations held within South Africa* (LLM mini-dissertation, UWC, 2018) at p 22.

61 *Idem,* p 25.

62 *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ).

63 *Idem,* para 70.

64 *Idem,* para 66.

65 *Idem,* paras 71 and 72.

66 Information provided by Simon Kuper, director of Taurus Capital, during an interview (hereinafter referred to as S Kuper Interview). It is submitted that the prescribed percentages in respect of the Contingency Fees Act may serve as some guideline (see the remarks in *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ) at para 88 regarding references to the Contingency Fees Act).

A report on TPLF in Africa has identified three dominant cost structures, namely:[67]

- variable – where costs are recovered fully and the litigation funder is entitled to a percentage of the remaining awarded amount;

- fixed – where the total cost is recovered over and above a fixed amount or a multiple of the invested amount; and

- hybrid – where the cost structure adopts a mix of both variable and fixed cost structures, which has been found to be the most common structure adopted.

This report[68] also mentions that litigation funders:

> "[O]n average take 30-50% of the proceeds, depending on the inherent risk and costs with some funders even happy to accept payment in terms of equity. In some instances, however, a higher or lower percentage of the proceeds is expected. Typically, the cost of the funding, as with any investment, increases relative to the risk of the case or cases as well as the stage of litigation (as litigation proceeds, the outcome is easier to predict)."

In *De Bruyn v Steinhoff Holdings N.V.*[69] the court insisted on the funding arrangements being provided to the court since these were deemed to be one of the factors for consideration at the certification stage of the proceedings. As to the benefit of the funder, the TPLF agreement stipulated that the funder "will seek 25% of the class wide recovery, subject to the court determining the acceptability of this funding fee percentage". In deciding whether to certify the initiation of the class action, the court mentioned that:

> "a cap of 25% is consistent with the provisions of the CFA [*Contingency Fees Act, although this was rather TPLF than a mere contingency fee arrangement – own remark*]. It was not suggested that it is not a figure that provides a reasonable ceiling to the success fee that might become payable to the funders. The proposed class action is complex and it is likely to be costly and endure for some time. However, neither the funding agreements, nor prayer 6 of the draft order, seek 25% as a cap, but rather as a determined reward for success".[70]

In this particular instance – being a certification hearing for a class action – the court insisted on having access to the agreement in order to review its terms and expressed its views on

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67 R Handley *et al*, "Litigation funding in Africa" available here.
68 *Ibid*.
69 *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ) at para 88.
70 *Idem,* para 88. It is submitted that although not applicable to TPLF, the prescription of the Contingency Fees Act may be viewed as an indicator of what public policy deems to be an appropriate fee / return in case of TPLF as well.

the 25% benefit: it did not serve as a cap but as a determined reward for success, and this was a matter that should have been left to the trial court for review.[71]

It is to be noted that, unlike the Contingency Fees Act that applies to contingency fees agreements between the litigant and its legal representative and that sets limits as to the financial benefits to be derived from the litigation, there is no such limits in case of TPLF – mainly because it is not specifically regulated by legislation.[72] The Supreme Court of Appeal in *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another*[73] considered a funding agreement that provided for more than 55% as an additional benefit to be derived from a successful order in favour of the plaintiff.[74] Thus, and in an attempt to prevent the funder from potentially being joined as a party to the proceedings, a practical approach with some litigation funders is to limit the benefit due in terms of the agreement to not more than 50%.[75] Some local funders nevertheless limit their fees to a maximum of 50% since it is viewed to be fair.[76]

Should such a matter serve before a court, it is submitted that limitations laid down in the Contingency Fees Act may serve as guidelines as was mentioned above within the context of class actions and where the court considered the benefits that a TPLF funder would possibly derive from a particular matter. It must nevertheless be stressed that the Contingency Fees Act is not applicable to pure third-party funding agreements and courts will generally not deal with this aspect unless its consideration is essential to the matter to be decided.

3.4 Procedural aspects

3.4.1 Control of proceedings and involvement in settlement proceedings

The extent to which a litigation funder may exercise control over legal proceedings may have a bearing on the question as to the validity of the agreement, or may influence a court to grant a cost order in applicable cases where a TPLF funder does take over the litigation or get too involved in the litigation itself.[77] In brief, a litigation funder would be advised not to take control of the litigation.

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71 *Idem*, p 86.
72 M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at p 10.
73 (451/12) [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) (4 March 2015) at para 162.
74 *Ibid*.
75 S Kuper Interview.
76 *Ibid*.
77 See the discussion of case law following the seminal decision in the *Potato* case in 2004 above.

In the certification hearing of the class action in *De Bruyn v Steinhoff Holdings N.V.*[78] the court, in considering measures to mitigate the potential influence of the funder on the process, mentioned that:[79]

> "[i]t is unavoidable that third party funders, by reason of their position can seek to influence matters outside their remit…That risk is not best dealt with by banishing third party funding. That would have the perverse result of limiting access to the courts in cases that might be deserving. Rather, the risk is mitigated by requiring the class lawyers do their duty to their clients...".

The court accepted that the appointment of a supervising attorney to address this risk would deter the funders from exercising undue influence.[80]

Apart from the contractual terms and court oversight, there are no explicit regulatory measures regarding the extent to which a litigation funder could dictate settlement proceedings.

3.4.2 Right to abandon proceedings

Since a TPLF agreement is based on principles of contract, the contract may contain a cancelation clause that may stipulate that the funder may abandon the proceedings. A material breach of the terms of the TPLF agreement by the litigant could lead to the funder exercising its contractual remedies to cancel the agreement and cease to provide any further funding. The agreement should however contain a cancellation or termination clause regulating such an eventuality as well. There should in general be good reason to terminate the TPLF agreement since it may leave the litigant in a vulnerable position. The lack of a reasonable prospect to succeed may also form the basis of a cancelation or termination clause. It may happen that the initial assessment may indicate such a prospect but as the case develops the situation may change. It thus seems that an assessment of reasonable prospect of success may remain relevant throughout the litigation and a funder may protect itself by way of a termination clause for such an eventuality.

The exit of the funder at a sensitive stage of the litigation may, of course, be highly prejudicial to the funded litigant and, before entering into a TPLF agreement, the litigant should be properly advised in this regard as well. This matter was raised in the class action certification case, *De Bruyn v Steinhoff Holdings N.V.*,[81] where the court was very concerned about the terms of termination that almost allowed the funder to cancel unilaterally, and the negative effect that it might have on the litigating class. In the case, the specific term provided that:[82]

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78 *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ).
79 *Idem,* para 106.
80 *Ibid*.
81 *Idem*, para 77.
82 *Idem,* para 91.

> "subject to consultation with the class members, the litigation funders reserve the right to cancel the funding agreements where they are of the view that the matter lacks reasonable prospects of success. The litigation funders will remain liable for expenses and adverse costs orders incurred until the date of cancellation".

Options on how to address this and to reflect it in the certification order was considered and it seems that the court would be satisfied with some independent input provided in determining the prospect of success.[83]

3.4.3 Liability for adverse cost orders and security for costs

Parties are liable to remunerate, and pay the expenses of, their own legal representatives.[84] The South African system provides for different types of cost scales,[85] namely: party and party costs, attorney and client costs, and attorney and own client costs. In brief, the party and party costs must be calculated in terms of the prescribed tariffs (found in the court rules) but the other two types may include some additional costs agreed upon by the practitioner and client. The tariff is viewed as being outdated, however, and even a successful party will be hard-pressed to recover their legal costs in full.

A principle of prime importance is that, where a party has been substantially successful in bringing or defending a claim, such party is entitled to have a cost order made in its favour against the unsuccessful party.[86] The "costs-follow-the-event" principle means that costs follow the outcome of a case. This means that it is customary for the court hearing the matter to grant a cost order in favour of the successful party who may then claim its legal costs from the unsuccessful party.

Although the court hearing a matter has a wide discretion regarding the granting of a cost order and its content, this discretion will be exercised within the ambit of well-established principles.[87] Such a cost order obliges the unsuccessful party to pay a substantial portion of the costs of the successful party – usually, the court orders payment in line with the scale of party-and-party costs as per the prescribed tariff but the court may specifically order

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83 *Idem,* paras 95-97.

84 See A C Cilliers *et al*, *Herbstein & Van Winsen: The Civil Practice of the High Courts & the Supreme Court of Appeal of South Africa* (5th ed, Juta & Co, 2017) Vol. II at ch 36; D E van Loggerenberg and E Bertelsmann (contributor), *Erasmus Superior Court Practice* (2nd ed, Juta, 2015) at D5 *ff*; and D E van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* (10th ed, Juta & Co, 2012) Vol. II at pp 33.1 *ff*.

85 C T Theophilopoulos *et al*, *Fundamental Principles of Civil Procedure* (4th ed, LexisNexis, 2020) at pp 501 and 502.

86 See *Skotnes v SA Library* 1997 (2) SA 770 (SCA) where it was stated that the substance of the judgment and not merely its form must be considered in this regard. In *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC), the Constitutional Court confirmed these principles but indicated that the cost-follows-the-event principle does not apply in the Constitutional Court.

87 See *Naylor v Jansen* 2007 (1) SA 16 (SCA) regarding the court's discretion.

payment of a higher scale. If the court order requires payment of party and party costs, and the successful litigant had a fee agreement in respect of a higher scale, such as attorney and own client costs, the successful party remains liable to its practitioner for the difference between the cost contribution by the unsuccessful party and the full amount due in terms of the individual fee agreement.

It goes without saying that the unsuccessful party also has to pay its own legal representative.

A court must not allow the abuse of its process, and in such instances, punitive costs may be awarded against a party (or a personal cost order against a legal practitioner – the so-called costs *de bonis propriis*) to serve as a mark of disapproval of litigious conduct.[88]

A litigation funder may be held liable for an adverse cost order, especially where the court joins a litigation funder to the proceedings directly if disclosed and joined to proceedings, or indirectly if the funder has provided an indemnity to the litigant.

The possibility exists that a court may develop the common law to require security for costs from funders under specific circumstances, especially in those instances where they stand to be joined in the suit.[89] The TPLF agreement may also address the liability of the litigation funder *vis-a-vis* the litigant should security for costs be required.

Measures to indicate to what extent adverse cost orders made in favour of the defendants will be covered by the TPLF agreement may favourably affect the decision to certify that a class action may proceed.[90] In the *De Bruyn v Steinhoff Holdings N.V.* matter, there was TPLF and insurance cover to secure the payment of adverse cost orders, and in this context the court mentioned that the funding "strikes a fair balance between protecting the interests of defendants, the funders and the class members".[91]

After the Event (ATE) insurance is not widely used in South Africa yet, but is being explored by some entities. A funding agreement may provide that an adverse costs award will be covered by ATE insurance.[92]

It may be noted that in *De Bruyn v Steinhoff Holdings N.V.*,[93] the TPLF was to be provided by foreign funding entities and the agreement made provision for insurance cover to secure the payment of adverse cost orders in favour of the defendants.

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88 C T Theophilopoulos *et al*, *Fundamental Principles of Civil Procedure* (4th ed, LexisNexis, 2020) at p 502.
89 See *PricewaterhouseCoopers Inc v IMF (Australia) Ltd and Another* 2013 (6) SA 216 (GNP) at p 222 B-G.
90 *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ) at para 102.
91 *Idem,* para 104.
92 R Scott *et al*, "The Advent of Litigation Funding and What Does It Involve?" (2018), available here.
93 *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ) at para 104.

4. Litigation funding and insolvency

In South African insolvency law, post-commencement litigation may follow on the sequestration of the estate of a debtor defined in the Insolvency Act 24 of 1936, or liquidation (winding-up) of an insolvent company when the liquidation is effected in terms of Chapter 14 of the Companies Act 61 of 1973,[94] or where a company is under business rescue in terms of Chapter 6 of the Companies Act 71 of 2008. It seems that only a few TPLF entities operating in South Africa are lately open to fund certain litigation or litigation-related procedures arising from an insolvent estate (or from business rescue). These would typically include, for example, insolvency enquiries, monetary claims by or against the insolvent estate, contractual disputes, litigation relating to the tracing and attachment of assets (sometimes cross-border based assets or transactions), litigation to set voidable dispositions aside, and voiding transactions for fraud / collusive dealings or failure to comply with section 34 of the Insolvency Act 29 of 1936.[95]

It seems that the TPLF entities are only interested in funding larger, once-off monetary claims.[96] However, they can also partake in so-called portfolio funding where an insolvency practitioner (IP) for instance has a number of "good" claims that could be funded as such.[97]

4.1 Mechanisms to fund insolvency proceedings

The general principle is that litigation costs will be a statutory preferent (priority) claim paid as part of the costs of the administration of the estate,[98] however, there may not always be sufficient funds available for litigation notwithstanding that the estate may have a good claim(s) that may ultimately benefit the creditors if successfully pursued.

Sometimes the creditors will fund certain matters (for instance litigation regarding voidable dispositions).[99] Where the IP refuses to litigate potential voidable dispositions, (some) creditors may also continue with the litigation in the name of the IP.[100] In doing so, they risk a cost order being issued against themselves should they lose the case – hence the IP must be indemnified in respect of any adverse legal costs in such instances.[101] Should the litigation succeed, the creditors who pursued the matter will enjoy a preference

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94 The Companies Act 61 of 1973 was replaced by the Companies Act 71 of 2008, except for ch 14 of the Companies Act 61 of 1973 that deals mainly with the liquidation of insolvent companies.

95 S Kuper Interview.

96 Litigation funder, Taurus Capital, considers claims of ZAR15 million, but it also depends on where the litigant is in the proceedings. For example, Taurus Capital could not fund ZAR15 million from inception but could consider funding it if it was just funding the appeal to the Supreme Court of Appeal. Taurus Capital uses a rule of thumb that the costs in proportion to the claim amount must be at least 1/10th – ie, if the costs are ZAR100 then the claim must be at least ZAR1000. Word also has it that foreign funders are not interested to fund claims of less than ZAR50 million.

97 *Ibid*.

98 Insolvency Act 24 of 1936, s 97.

99 Companies Act 61 of 1973, s 340 read with the Insolvency Act 24 of 1936, ss 26-34.

100 Insolvency Act 24 of 1936, s 32(1)(b).

101 *Ibid*.

on the proceeds of the property returned to the estate (limited to the amounts of their respective claims and costs).[102] Legal representatives of the insolvent estate may of course also litigate on a contingency fee basis as explained above in which case the Contingency Fees Act will apply.

As mentioned, a contingency fee type arrangement may also potentially be used to access financial support for litigation in insolvency. The South African common law viewed contingency fees, or success fees (conditional fees in English Law),[103] as being illegal *prima facie*. However, the Contingency Fees Act, promulgated on 23 April 1999, was introduced to regulate the use of contingency fee agreements between a litigant and its legal representative.[104] The Contingency Fees Act provides for two types of contingency fee agreements, namely: (i) the ordinary "no-win no-fee" agreement, in terms of which a legal representative charges the normal fees subject to a successful conclusion of the matter, or (ii) where the legal representative is entitled to a "success fee". Section 2(2) of the Contingency Fees Act limits the "success fee" to not more than 100% of the normal fees or, in the case of claims sounding in money, it is limited to 25% of the total amount awarded by the court, or double the amount of the attorney and own client fee, whichever is the lesser. It is important to note that common-law contingency fee agreements that fall outside the ambit of the Contingency Fees Act, are still in principle invalid[105] and a punitive cost order may be granted in such an instance.[106]

Another option is for a TPLF funder to step in and fund the litigation – in principle, there is no prohibition against this practice in the South African insolvency framework. Typically, the funder will require approval in the form of a resolution from the creditors to litigate, as

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[102] Insolvency Act 24 of 1936, s 104(3).

[103] M J Khoza, "Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective", *Potchefstroom Electronic Law Journal* (2018) at p 2 fn 5, referring to English Courts and Legal Services Act 1990, s 58.

[104] See *De La Guerre v Ronald Bobroff and Partners Inc and Others* [2013] JOL 30002 (GNP) at para 13 where the court relied on a *dictum* made in the Supreme Court of Appeal judgment of *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA). Also see *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund Intervening)* 2013 (2) SA 583 (GSJ) at paras 11, 18, 26-27 and 34; and [2013] 2 All SA 96 (GNP) at paras 7-8. The Constitutional Court approved this approach in *Ronald Bobroff and Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) at para 5.

[105] See *De La Guerre v Ronald Bobroff and Partners Inc and Others* [2013] JOL 30002 (GNP) at paras 14 and 15. Further on appeal, see *Ronald Bobroff and Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) at para 5, where the Constitutional Court accepted this view. (See also the Potato case at para 41, although this judgment dealt first and foremostly with a third-party funding situation, ie a champerty agreement as further discussed below; and *Mostert and Others v Nash and Another* 2018 (5) SA 409 (SCA) at paras 48-52 for the distinction between a contingency fee agreement where the attorney acting on behalf of his client enters into such an agreement, and an agreement where an attorney acting in another capacity funds litigation and secures him or herself a financial benefit.)

[106] *De La Guerre v Ronald Bobroff and Partners Inc and Others* [2013] JOL 30002 (GNP) at para 17.

required in terms of statute.[107] The IP, armed with such approval, will in practice finalise the terms of the TPLF with the funding entity.

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

Creditors of an insolvent company must approve litigation embarked upon by the IP[108] and the TPLF will relate to such litigation, hence a resolution will be sought. Creditors may argue that they need all the information and may insist on information about the litigation funding agreement before agreeing or giving a mandate to pursue litigation. However, in practice, the detailed terms of the agreement are apparently left to the IP to negotiate with the litigation funder. Taurus Capital as standard practice also requires creditors to vote on the matter concerning litigation funding, and the IP should in any event obtain a resolution as such.[109]

4.2.2 Relevance of litigation funding arrangement providing benefit to creditors

Commercially and legally, funded litigation should provide a benefit to creditors, since the IP is expected to act in the best interest of the creditors as a group. There would be no point in the litigation if there is no benefit for the creditors. The IP should not enter into such an agreement if there is no such benefit. In the absence of statutory prescriptions in this regard, the cost effectiveness must be determined by taking all factors into account – such as the likelihood of success with the litigation, and the full costs of the litigation. All aspects must be considered before embarking on entering into the TPLF agreement. It is also important to note that courts frown upon agreements that aim only to enrich the funder and not the person who is directly affected by the litigation (in the context of insolvency law, it would be the estate which is administered for the benefit of the creditors of that estate).

4.2.3 Other measures to protect interests of creditors

It is submitted that the validity of a TPLF agreement or related questions concerning the agreement can become the subject of judicial scrutiny. This may offer protection to the interests of creditors, where this is a concern. For example, a TPLF agreement could arguably be set aside if the creditors did not approve the IP entering into such an agreement and if creditors' consent was not obtained beforehand, or if the TPLF agreement is prejudicial to the creditors. In particular, in the case of *De Bruyn v Steinhoff*

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[107] Companies Act 61 of 1973, s 386(3) read with s 386(4)(a) allows a liquidator of an insolvent company to bring or defend an action with the authority granted by creditors, and in the case where a court issued the liquidation order on authority of the creditors as well as the members or contributories.

[108] *Ibid*.

[109] During the S Kuper Interview, it was pointed out that in business rescue, the transaction could be deemed a disposal of an asset or post-commencement financing, but the funder prefers creditors to act with "eyes wide open".

Holdings N.V.,[110] the court considered various terms of the agreement, especially those that had to be reflected in the certification court order.

5. Insolvency practitioners and litigation funding

5.1 Insolvency practitioner obligations

The IP must act in accordance with the statutory framework and his mandate from the creditors – this includes to act in the best interests of the creditors. In principle, the IP must obtain the approval of the creditors before engaging in litigation. If the case is lost, the expenses will become an expense of the costs of sequestration / liquidation and if the IP is not properly mandated, the IP may be held personally liable (it seems that TPLF funders go through rigorous procedures to ensure that all the mandates are in place in such instances).

5.2 Factors to consider when contemplating litigation funding

Factors to consider when contemplating litigation funding include:[111]

> "The legal costs and potential rewards also need to be estimated with a high level of accuracy. This process of due diligence can be a highly complex and rigorous process drawing on professional experts, e-discovery, asset traces, highly specialised legal professionals (in-house or external), legal costs consultants and the like. Everything must be considered from the facts of the case, the court jurisdiction, the rule of law, jurisprudence, and so on. Even if claims have merit, funders will still need to ensure that the case fits in with their firm's overall portfolio in terms of diversity, exposure, and risk".

Litigation funders would consider these factors as mentioned above. It was pointed out during an interview[112] that the possibility of the defendant abusing proceedings to "manufacture" lengthy costs, delays, and additional proceedings, will also play a role. This risk is usually higher in a business rescue and / or liquidation matter. It was stated that "[d]efendants can get clever when they sense a plaintiff is not in a good funding position".

The risk of being joined as a party to the suit with the further risk of an adverse cost order against it will also be considered by the funder. In fact, a prudent funder will try to avoid this.

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[110] *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ), and discussed at various instances in this chapter.

[111] R Handley *et al*, "Litigation funding in Africa" available here.

[112] S Kuper Interview.

5.3 What are litigation funders looking for?

According to Taurus Capital,[113] the three primary criteria for funding are:

- for the claim to be meritorious, in other words prospects (preferably a narrow legal point based on documentation);
- against a solvent defendant with deep pockets; and
- against a solvent defendant who could satisfy a judgement / award for a large enough claim amount and funder's share to justify the funder's risk and cost.

The secondary considerations such as the nature and capability of the claimant, the legal team, forum, the estimated duration of proceedings, the estimated budget, identity of judges / arbitrators, and the attitude of the defendant will also play a part in respect of the risk criteria scorecard.

6. Litigation funding agreement

6.1 Typical structure of agreement

In brief, such a litigation funding agreement will cover the following aspects:[114]

- the action or motion proceedings that are to be funded through TPLF;
- the funder undertakes to pay the expenses incurred in the litigation and to indemnify the claimant against adverse costs orders. The indemnification of adverse costs is not automatic and must be agreed upon – thus the litigation funder may provide litigation funding without an adverse costs indemnity;
- the amount committed to fund the litigation (not so prevalent in South Africa yet but it may also provide for adverse cost-insurance up to a certain amount);
- the amounts to be paid to the funder, and other benefits the TPLF funder are to receive, should the litigation be successful;
- the conditions under which the funder may cease to fund the litigation, the effect of such withdrawal of the funding, and the arrangements in place up to the point of withdrawal;

[113] *Ibid*.

[114] See *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ) at para 84 where the court refers to the standard terms.

- the agreement may contain a clause relating to settlement where the litigation funder agrees to a "trigger amount" upfront, which is the amount which if offered by the defendant in settlement of the matter must be accepted by the claimant, unless otherwise agreed between the claimant and the litigation funder; and

- other clauses such as a dispute resolution mechanism for disputes around the TPLF agreement, the position *re* the discovery of documents by the plaintiff *vis-à-vis* the funder, and the terms for settlement of the litigation may also be included.

There are no such statutory "consumer protection" measures applicable to such an agreement. Such measures may be inserted in the agreement and their fairness may be considered by a court if litigation ensues between the funder and the funded client. As discussed, a South African court can scrutinise contractual terms, including whether they meet constitutional imperatives of fairness, and conform to public policy as enshrined in the basic constitutional rights referred to earlier.

6.2 Protection of confidential information in relation to funding agreement

It must be noted that, in the absence of specific legal rules in this regard, this question needs to be considered within the confines of the general rules pertaining to the legal professional privilege between a litigant and its legal representative for instance.

Discovery of the TPLF agreement and related communications should remain confidential to the extent that these do not have a bearing on the merits of the claim, to the extent that the TPLF funder is not a party to the *lis*, and to the extent that there is no legal obligation to disclose same by means of discovery. However, depending on how the case unfolds (for instance if the court (on request of the defendant) decides to join the TPLF funder), discovery may become relevant for purposes of considering joinder and the granting of an adverse cost order.

Although confidentiality as such is not (as a rule) a valid ground for objecting to the production of a document, a court has some discretion to limit a party's right to inspect such documents.[115] It seems that funders would also prefer to preserve any legal privilege or confidentiality regarding the status of the documents provided to the funder by its client, the litigant, that may exist, as well as confidential communications between them.

In view of a dearth of authority, on various questions that may arise as to privilege and related matters such as discovery and confidentiality of legal documents prior to and during litigation in South African law relating to TPLF, Taurus Capital sought the advice of a senior counsel to provide a legal opinion on some of these questions. The legal opinion was largely based on general principles concerning legal professional privilege,

[115] *Crown Cork and Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W).

confidentiality and comparative law investigations.[116] Amongst others, the positions in Australia, the United Kingdom, New Zealand and the United States of America were considered.

It was pointed out that a broad concern was the status of documents provided by a prospective litigant (client) or litigant to a litigation funder, during the consideration of the granting of funding, as well as such exchanges and communications between them after the conclusion of the funding agreement – some of which that may relate directly to the litigation.

The main advice sought relates to the question whether or not documents over which a prospective litigant (client) or litigant of the litigation funder has privilege, will retain that status once it has been provided by the client to the funder.[117] The opinion also addresses questions concerning the status of communications between the funder and such client or a prospective client, as well as documents produced by the funder when assessing the prospects of success of the clients claim, and the status of the TPLF agreement as such.

The opinion was given under pertinent headings that are mentioned below and a brief summary of the advice in each instance is provided:

6.3.1 Privilege concerning communications between a litigant and its funder[118]

This aspect was approached within the confines of the general principles of South African legal privilege and applicable rules in comparative systems and, as mentioned, in the absence of direct authority in South African law, it was also approached with reference to principles relating to confidential communications between the funder and the litigant.

It was pointed out that the funding agreement and communications between litigant and funder are not usually relevant to the facts that occurred prior to such agreement and on which the underlying litigation turns.[119] It may however become relevant where the opposing party argues that that the litigation amounts to an abuse of process, and thus seeks to join the funder as a party with the view of obtaining a cost order against the funder where it is for instance argued that the funder in fact controls the process and has become the real party to the process; or where the security of costs is sought from the litigation funder; and it will also be relevant in the consideration of the certification process of class actions.[120]

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[116] L Harris, SC and D Watson, "Legal Opinion" on file. We are indebted to both Taurus Capital and Advocate Harris for kindly agreeing that reference may be made to the opinion.
[117] *Idem,* paras 1-4.
[118] *Idem,* paras 8-38.
[119] *Idem,* para 39.
[120] *Idem,* para 40. It should be noted that these issues stem mainly from the consideration of these issues in South African case law as discussed above.

6.3.2 *Documents over which a litigant may claim privilege will retain their privilege*[121]

Regarding this matter it is pointed out that litigants are likely to provide their funders or prospective funders with copies of documents relevant to the underlying dispute as well as the legal advice from their legal representatives regarding the dispute. The advice is that such documents remain privileged if they are inherently privileged documents – even when provided to the litigation funder or prospective litigation funder, on condition that they are provided to the funder or prospective funder on a confidential basis.[122] To this effect the advice is that the funder should enter into a confidentiality agreement with the litigant or the prospective litigant concerning the documents that are privileged in the hands of the litigant in order to minimise the risk regarding a possible waiver of privilege argument.[123]

6.3.3 *Litigation funding agreements are not privileged but may contain privileged terms that may be redacted*

In this regard the opinion concludes that South African law will not hold the litigation funding agreement to be privileged as such.[124] On this basis it is then submitted that a South African court will hold that when a funding agreement is directly relevant to the underlying dispute it will be disclosable, like in the case of class-action certification process as mentioned before, as well as in matters where abuse of process is argued etcetera.[125] The authors[126] of the opinion state that:

> "[a] blanket recognition of privilege of litigation funding agreements would prevent courts from performing the supervisory function required by each of these categories of proceedings, and accordingly the courts are unlikely to hold as a blanket rule that such agreements are privileged under the litigation privilege".

However, it is pointed out that South African courts would (possibly) allow portions of the litigation funding agreements to be redacted if these would tend to reveal otherwise privileged material.[127]
In summary the opinion states that:[128]

> "5 We have been unable to find any South African decisions on this issue. However, having done a survey of a number of comparative jurisdictions,

[121] *Idem,* paras 42 and 43.
[122] *Idem,* para 47.
[123] *Idem,* paras 48 and 49.
[124] *Idem,* para 52.
[125] *Idem,* para 53.
[126] *Ibid*.
[127] *Idem,* paras 51 and 54.
[128] *Idem,* para 5.

> in our view South African courts, when confronted with the issue, will apply the following principles:
> 5.1 Documents that are privileged in the hands of a prospective client or client of a litigation funder will remain privileged even once they are provided to the funder;
> 5.2 In order to prevent the inference being drawn that there has been an express or implied waiver of the prospective client or client's privilege, the prospective client or client must conclude a non-disclosure or confidentiality agreement with the litigation funder;
> 5.3 Communications between the litigant and the funder, and documents produced by the funder will be privileged when they tend to disclose privileged material;
> 5.4 Litigation funding agreements are not privileged but courts will allow the redaction of terms that tend to disclose privileged material."

As discussed in the certification process of class actions, it may be necessary to disclose some detail as to the funding and related matters since this is an aspect that the court needs to consider at this stage of the proceeding.[129] In the *De Bruyn v Steinhoff Holdings N.V.* judgment referred to above, all the information concerning the TPLF agreement was initially not provided and the legal representative explained that she resisted disclosure since she thought she could rely on confidentiality and privilege. This argument was later withdrawn and the court in fact ordered disclosure of certain documents relevant to the funding arrangements.[130] It is submitted that there are a number of considerations applicable to class actions that may not apply to the ordinary type of litigation, and the same approach as to disclosure adopted here will not necessarily apply to ordinary types of litigation. It must further also be noted that class action litigation is also not regulated by statute *per se* and the courts have mainly been responsible for the development of the rules and procedures. In South Africa, we may see the same trend in respect of TPLF.

When such information becomes relevant (for instance where a court has to decide if the funder must be joined as a party to the litigation), it may affect the other party.[131] Otherwise, it is arguably not relevant where the litigant obtains funding to pursue litigation – sources of funding (where a litigant obtains monies to pay the legal team) are as a rule not relevant to litigious matters.[132]

6.3.4 Are non-privileged communications discoverable?

The advice on this point is that the litigation funding agreement, and the bulk of communications between the litigant and the funder will (usually) not be relevant to the underlying litigation (save in the case of class action certification process for instance),

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[129] *De Bruyn v Steinhoff Holdings N.V. unreported case no*: 29290/2018 (GJ) at paras 60-64.
[130] *Ibid.*
[131] See L Harris, SC and D Watson, "Legal Opinion" at para 39.
[132] *Idem,* para 40.

and will thus not be discoverable as such, or be disclosable. However, it may become relevant where the opposing party in fact argues abuse of process, joinder, etcetera as referred to in the previous paragraph.[133]

As advised by senior counsel, Taurus Capital attempts to protects itself by means of a clause to this effect in the TPLF agreement. Like in the case of other privileged documents, this question may become relevant when the joinder of the TPLF funder is for instance to be considered and for purposes of an adverse cost order.

In general, it is interesting to note that the Arbitration Foundation of South Africa's (AFSA) rules in case of arbitration matters involving TPLF now requires discovery of the existence of a TPLF agreement.[134] It is said that there is room for abuse with such funding and hence it is necessary for a party to an arbitration to be aware of the existence and, where appropriate, the contents of a TPLF arrangement. Disclosure of TPLF arrangements is not required but will occur if the funded party voluntarily discloses these details, or where the tribunal requires it.

Article 27 of AFSA International's Rules (effective from 1 June 2021) requires that a funded party to an arbitration subject to the AFSA rules "shall notify all other parties to the arbitration, the Arbitral Tribunal and the AFSA Secretariat of (a) the existence of the Third-Party Funding Agreement; and (b) the identity of the Third-Party Funder (as defined in Article 27)".[135]

[133] *Idem,* para 41.
[134] E Warmington and C Gopal, "Disclosure of third-party funding arrangements" available here.
[135] *Ibid*.

UNITED STATES*

Paul B Lewis

1. Jurisdictional context

The United States employs a system of federalism in balancing powers between the federal government and the 50 states. The federal government's power is "enumerated", meaning that the United States Constitution lists the powers of the federal government, and the federal government can only exercise those powers expressly granted to it. These powers include those exclusively given to the federal government, such as dealing with foreign relations, the military, trade across national and state borders, and the monetary system; and those that exist concurrently with powers of the states, such as regulating elections, taxing, borrowing money, and establishing a system of courts. In addition, the federal government is given implied powers necessary for it to execute its enumerated powers. By contrast, the powers of the states are delineated in the 10th Amendment of the United States Constitution, which states that "powers not delegated to the United States … nor prohibited by [the Constitution] to the States, are reserved to the States … or to the people". [1]

The United States Constitution gives Congress the right to establish "uniform laws on the subject of Bankruptcy".[2] Both business insolvency and individual bankruptcy are referred to as "bankruptcy" in the United States. For most of American history, there was no codified bankruptcy law. Rather, Congress repeatedly passed temporary measures to deal with particular economic crisis. The first comprehensive law was the Bankruptcy Act of 1898,[3] which was superseded by the current law, the United States Bankruptcy Code (Bankruptcy Code), enacted in 1978[4] and subsequently amended.

As the Bankruptcy Code is federal law, it is essentially uniform and applicable in all 50 states. The Bankruptcy Code addresses individual bankruptcy in Chapters 7 and 13, municipal bankruptcy in Chapter 9, and corporate reorganization in Chapter 11. Among the critical features of Chapter 11 is that the norm is that no trustee is appointed – rather the debtor has the rights of a trustee as debtor-in-possession. The debtor-in-possession can operate not only without the constraints of a trustee, but so long as it is acting in the ordinary course of business, it can largely function without the constrains of its creditors as well during the term of the Chapter 11 reorganization.[5] In addition, the debtor-in-possession is given the exclusive right to propose a plan of reorganization for the first 120

* With thanks to Madeline Paradkar and Caitlyn Bunker for their excellent research assistance.

1 See United States Constitution, 10th Amendment.

2 United States Constitution, art I, cl 8.

3 Act of July 1, 1898, ch 541, 30 Stat. 544, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549

4 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

5 See 11 United States Code (USC), 363.

days following the filing of a bankruptcy petition.[6] If neither the debtor's plan nor any other plan can be successfully confirmed, it is likely that the firm's assets will be liquidated.[7]

2. General overview of litigation funding in the United States of America

2.1 Historical development, market overview and prevalence

The doctrines of maintenance and champerty, stemming from English common law, have never been incorporated into United States federal law, but a number of states have recognized them under the common law. However, their use is not significant and appears to be declining in importance. Numerous states refuse to recognize the existence of maintenance and champerty at all, based on the fact that the doctrines were never incorporated into their respective state laws. These states, including those which (while recognizing the doctrines), have carved out an exception for litigation funding, include Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Ohio and Texas. Other states have expressly abolished the doctrines. Even in states that have recognized maintenance and champerty, courts have consistently given these such narrow readings that they have rarely interfered with third-party litigation funding. The United States Court of Appeals for the Ninth Circuit has also stated that the "consistent trend across the country is toward limiting, not expanding," the common law prohibition of champerty.[8] Still, the inconsistent approaches to maintenance and champerty suggest that funders and insolvency practitioners should not dismiss their potential relevance.

The situation in New York is particularly interesting. In 2016 the New York Court of Appeals affirmed the relevance of the doctrine of champerty in New York.[9] Section 489 of the champerty statute in New York, the Judiciary Law, restricts individuals and companies from purchasing or taking an assignment of notes or other securities "with the intent and for the purpose of bringing an action or proceeding thereon".[10] However, the Judiciary Law contains a broad exception in instances where the purchaser has a binding *bona fide* obligation to pay at least US$ 500,000.[11] This is satisfied by actual payment of at least

6 11 USC, s 1121(b).

7 *Idem*, s 1112 (providing for conversion of a case from Chapter 11 to one under Chapter 7 of the Bankruptcy Code).

8 See *Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145 at p 1156 (9th Cir 2011).

9 *Justinian Capital SPC v. WestLB AG*, 65 N.E.3d 160 (N.Y. 2016).

10 *Ibid*.

11 S Ben-Ishai and E Uza, "A Canadian Lens on Third Party Litigation Funding in the American Bankruptcy Context", *Chi.-Kent L. Rev.* Vol 93 (2018) at p 633. New York Judiciary Law, s 489 (2) states: "Except as set forth in subdivision three of this section, the provisions of subdivision one of this section shall not apply to any assignment, purchase or transfer hereafter made of one or more bonds, promissory notes, bills of exchange, book debts, or other things in action, or any claims or demands, if such assignment, purchase or transfer included bonds, promissory notes, bills of exchange and/or book debts, issued by or enforceable against the same obligor (whether or not also issued by or enforceable against any other obligors), having an aggregate purchase price of at least five hundred thousand dollars, in which event the exemption provided by this subdivision shall apply as well to all other items, including other things in action, claims and demands, included in such assignment, purchase or transfer (but only if such other items

US$ 500,000 or the transfer of financial value worth at least US$ 500,000 in exchange for the notes or securities. It is noteworthy that the court emphasized a lack of concern with parties structuring their agreements to meet the safe harbor's requirements, so long as the US$ 500,000 threshold was met. To justify its reasoning, the court noted that there is a strong indication that the legislature did not intend either that actual payment be made or that face value alone would suffice to obtain protection of the safe harbor. Rather, the safe harbor was enacted to facilitate the ease of transactions by exempting large-scale commercial transactions in the debt-trading markets from champerty concerns.

Third-party litigation funding in general commercial litigation is well established in the United States. It has been used in a wide range of litigation, including antitrust claims, breach of contract claims, business tort claims, patent claims, copyright claims, trademark infringement claims, and trade secret misappropriation claims. By contrast, the use of third-party funding in the insolvency context in the United States is relatively new and is in an evolving state. Prior to the employment of litigation funding in the insolvency context, two primary options existed for a financially distressed entity to be able to litigate. The first was through a class action lawsuit, where lawyers would likely be paid a significant part of the recovery. And the second, typically involving smaller cases, was where the lawyer agreed to take the case on a contingency basis. One clear benefit of third-party litigation funding from the insolvency practitioner's perspective is that it removes the financial risk from the lawyer in question.

While the American courts that have examined the validity of third-party litigation funding in the insolvency context have largely upheld its use, there has been significant disagreement as to what grounds justify its use. Courts that have considered the issue have done so with reference to numerous parts of the Bankruptcy Code. These parts include sections 327 and 328 which deal with the appointment and compensation of professional persons; section 363 which addresses using, selling, and leasing property of the estate; section 364 which deals with post-petition financing of the debtor; and Federal Rule of Bankruptcy Procedure 9019, which addresses compromise and arbitration, and have employed the theory that such post-petition funding is necessary as relevant litigation could not continue without the third-party funding. Presumably this last contention is justified by section 105 of the Bankruptcy Code, which gives broad equitable discretion to bankruptcy judges to achieve the goals of bankruptcy and insolvency law. Other courts have expressly rejected the idea that parts of the Bankruptcy Code (such as section 364) justify the use of third-party funding while finding non-statutory justifications to uphold its use.

While it appears that litigation funding in insolvency first emerged in Australia, the last decade has seen a recognition in the United States of the benefits of its use as a way of funding actions to benefit creditors against parties who have harmed the corporate entity, such as officers and directors who have mismanaged or committed fraud, advisors that

are issued by or enforceable against the same obligor, or relate to or arise in connection with such bonds, promissory notes, bills of exchange and/or book debts or the issuance thereof)".

may have aided malfeasance, or equity holders who may have improperly diverted assets from the company. Estimates are that as much as US$ 10 billion in combined assets under management are currently dedicated to commercial finance litigation transactions in the United States.[12]

There are dozens of major litigation funders in the United States. Among the largest are Burford Capital, Curiam Capital, GLS Capital, Lake Whillans, Longford Capital Management, Omni Bridgeway, Parabellum Capital, Tenor Capital Management, Therium Capital Management, Validity Finance and Woodsford Litigation Funding. Litigation funders have different structures, ranging from large, publicly-traded entities to private funds to smaller entities that raise capital on an individual investment basis.

2.2 Regulatory framework

There is no dedicated federal regulation applicable to commercial litigation funders in the United States. There are, however, other areas of law which may impact third-party funding practices. Perhaps most notable are the rules of professional conduct, in particular the American Bar Association's Model Rules of Professional Conduct.[13] Most relevant among the rules of ethics are those that relate to the professional independence of a lawyer when litigating a case funded by a third party. Rule 5.4(a) of the Model Rules of Professional Conduct, which every state has adopted in some form, provides that, with limited exceptions, "[a] lawyer or law firm shall not share legal fees with a nonlawyer". The comments to rule 5.4 provide additional context, and indicate that the rule's provisions "express traditional limitations on sharing fees" which "are to protect the lawyer's professional independence of judgement", as well as place "limitations on permitting a third party to direct or regulate the lawyer's professional judgement in rendering legal services to another". However, courts that have considered the issue have generally found that a lawyer's use of commercial litigation funding does not violate rule 5.4.[14]

Aside from maintenance and champerty, and the issues embedded in the Bankruptcy Code and the Model Rules of Professional Conduct, the absence of meaningful regulation in the United States is striking, despite increasing statements of concern. Perhaps the most cited case in the United States in relation to litigation funding and its potential abuses has been *In re Magnesium Corp. of America*,[15] widely known as MagCorp, where, following nearly a decade of litigation resulting in a US$ 213 million judgment for the benefit of the debtor's creditors, the trustee lacked sufficient funds to defend an appeal. The issue involved the potential monetization of a partial interest in a sizeable estate judgment via a section 363 sale. The Bankruptcy Court for the Southern District of New York approved a US$ 26.2 million sale, or a portion of the case proceeds, to a litigation funder, despite the

[12] A Childers, "Uptick In Third-Party Litigation Financing Concerning Insurers", LAW360 (9 February 2022), available here.
[13] American Bar Association's Model Rules of Professional Conduct, available here.
[14] J L Storey, "The Ethics of Third-Party Litigation Funding", The Bar Association of San Francisco (21 June 2021), available here.
[15] Case No 01-14312-mkv (Dokt. No.745 (Bankr., S.D.N.Y.).

objection of some noteholders that the transaction was both unnecessary and excessively expensive. The trustee had argued in favor of the financing based on the idea that the sale would hedge the estate's downside exposure, that it would provide necessary liquidity for the appeal, and that it would ultimately allow the trustee to recover on behalf of the creditors. In upholding the sale, the court relied on sections 105(a) and 363 of the Bankruptcy Code. The fact that the funders in this case obtained such a significant financial return following a relatively short investment period has been well-noted in subsequent literature, and it is this type of arrangement that has given rise to increased requests for regulation of the industry.

The proposals for regulation have largely focused on issues of disclosure. Among the calls for change have been suggestions both for federal regulation and for amendments to the Federal Rules of Civil Procedure which would make disclosure of third-party funding contracts mandatory.[16] At the moment, however, Wisconsin is the sole state which requires litigation funding disclosure – without a request being made in discovery – to "provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise".[17] In addition, courts have begun entering the debate. Most notably, the United States District Court in New Jersey enacted Local Civil Rule 7.1.1 in 2021 which requires disclosure of "any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis".[18] It appears likely, however, that additional disclosure rules will eventually be enacted as the market for third-party funding in insolvency continues to grow.[19]

3. Role, rights and obligations of litigation funder

3.1 Role of litigation funder

The normal role of the commercial litigation funder is to provide non-recourse cash advances to parties in need of financing in exchange for a share of the judgment or settlement. The exact role played by the litigation funder beyond providing the financing remains subject to debate, particularly in regard to control and confidentiality issues. Examples of the issues surrounding control and confidentiality are questions of the degree to which a litigation funder may assist with aspects such as project management of the

[16] T J Salerno and J A Kroop, "Third-Party Litigation Funding: Where Do We Go Now?", *Am. Bankr. Inst. J.*, Vol 18 (2018) at p 57 (discussing third-party litigation funding regulations).

[17] See Wisconsin statute 804.01(2)(bg) ("*Third party agreements.* Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.")

[18] Order Amending Local Civil Rule 7.1.1 (21 June 2021), available here.

[19] T J Salerno and J A Kroop, "Third-Party Litigation Funding: Where Do We Go Now?", *Am. Bankr. Inst. J.*, Vol 18 (2018) at p 57 (discussing third-party litigation funding regulations).

litigation or pre-claim investigations. As are explored more fully below, concerns for the insolvency practitioner and the estate are readily apparent, but certain considerations for the litigation funder themselves may be less obvious. In the realm of insolvency, if a third-party litigation financing arrangement exists before an insolvency case commences, and if the third-party funder, due to their close relationship with the debtor, has access to confidential information and exerts a level of control over the financed litigation, unanticipated complications may arise for the funder. For example, such a scenario could render the funder a non-statutory insider as someone in control of the debtor-plaintiff – a characterization that in turn could potentially subject the funder's claim to equitable subordination or to a re-characterization as equity, each of which might ultimately lead to the risk of subordination or disallowance.[20]

3.2 Regulatory obligations

As noted above, there is a lack of comprehensive regulation of litigation funders in the United States.[21] While generally not an issue, there are some states where the doctrines of maintenance and champerty are still strictly enforced, rendering the issue of further regulation effectively unnecessary.[22] Currently, there is a minimal level of court consideration and scrutiny of litigation funders in the United States.[23] As also noted above, there is a sense that regulators and courts will pay more attention to a potential regulatory framework in the future in order to insure that the third-party litigation funding industry develops in a way that not only benefits litigation funders but also protects litigants.[24] Issues that have arisen include whether there should be a universal capital adequacy requirement for litigation funders in the United States and whether there should be a cap on the fees or percentage that a litigation funder could charge.[25]

There are also no current regulatory obligations on litigation funders to keep records.[26] Proposed federal legislation and suggested changes to the Federal Rules of Civil Procedure have focused on the need to make adequate disclosure of third-party funding contracts mandatory.[27] For example, one commentator has suggested that the Securities and Exchange Commission could regulate litigation funders in the United States by requiring them to register as investment advisors.[28]

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20 See, eg, R S Fraley, "Equitable subordination: being an insider can put you on the outside track" available here; and see also T J Salerno, "Third-Party Litigation Funding (TPLF) and Issues It Creates In Bankruptcy", *Distressed Asset Central*, available here.

21 S Ben-Ishai and E Uza, "A Canadian Lens on Third Party Litigation Funding in the American Bankruptcy Context", *Chi.-Kent L. Rev.* Vol 93 (2018) at p 633.

22 *Idem,* p 645.

23 *Ibid.*

24 *Ibid*.

25 *Idem,* p 646.

26 *Ibid.*

27 T J Salerno and J A Kroop, "Third-Party Litigation Funding: Where Do We Go Now?", *Am. Bankr. Inst. J.,* Vol 18 (2018) at p 57 (discussing third-party litigation funding regulations).

28 S Ben-Ishai and E Uza, "A Canadian Lens on Third Party Litigation Funding in the American Bankruptcy Context", *Chi.-Kent L. Rev.* Vol 93 (2018) at p 646.

Although nondisclosure agreements are common when a litigation funder performs a due diligence in deciding whether to provide financing, once the contract for the litigation funder to fund the litigation is executed, the funder is likely to gain extensive access to information and will also enjoy a level of control beyond what would be expected of a "non-insider".[29] However, it is important to note that ultimate control must remain with the insolvency practitioner and his client, as required by the rules governing potential conflict of interest. Rule 1.7 of the Model Rules of Professional Conduct, governing conflicts of interests, states in relevant part: "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[30]

3.3 Funding premium

The premium calculated / commission rates are determined on a case-by-case basis depending on the litigant and third-party litigation funding. There is no universal premium calculated or commission rate in the United States. Caps on third-party litigation funding premiums have not been regulated or determined in the United States.

3.4 Procedural aspects

3.4.1 Control of proceedings and involvement in settlement proceedings

As noted, funders typically disclaim any right to control litigation or settlement for ethical and regulatory reasons. Insolvency practitioners and trustees, of course, owe fiduciary obligations to their stakeholders, so the decision-making process cannot be in the hands of a third party. However, litigation funders do of course monitor the litigation process. Accordingly, it is common that litigation funders contractually require to be kept apprised of all major developments in the case, including settlement discussions, as well as receive relevant non-privileged information and work product.

It is important to note that in the insolvency context litigation funders should not be able to demand settlement approval in their funding agreements. Bankruptcy professionals have fiduciary duties to stakeholders and decision-making should not be given to third

[29] T J Salerno and J A Kroop, "Third-Party Litigation Funding: Where Do We Go Now?", *Am. Bankr. Inst. J.*, Vol 18 (2018) at p 57 (discussing third-party litigation funding regulations). See also T J Salerno, "Third-Party Litigation Funding (TPLF) and Issues It Creates In Bankruptcy", *Distressed Asset Central*, available here.

[30] See Model Rules of Professional Conduct, rule 1.7, available here. Other Model Rules of Professional Conduct may be implicated as well, such as rule 2.1 (requiring a lawyer to exercise independent judgment and render candid advice), rule 5.4(c) (prohibiting third party direction of lawyer), rule 1.8(a) (regulating the entry into business relationships between lawyers and clients), and rule 1.8(e) (prohibiting financial assistance other than contingency fee arrangements).

parties.[31] The third-party funder typically wants control and discretion, and while this may occur in limited fashion, allowing excessive control will likely be a dereliction of fiduciary duty. In any event, bankruptcy settlement terms will need approval of the bankruptcy court after notice and a hearing are provided for all the constituencies in the case.[32]

3.4.2 Right to abandon proceedings

Litigation funders generally reserve the right to terminate funding. Justifications for such termination often include the occurrence or non-occurrence of certain materially adverse events, including new legislation, fraud, or bad faith.

3.4.3 Liability for adverse cost orders and security for costs

Generally, unless a contract or statute requires otherwise, the prevailing party cannot recover costs in the United States. It is therefore unlikely that litigation funders will be held liable for adverse cost orders, and a requirement that a litigation funder provides security for costs is also unusual.

4. Litigation funding and insolvency

Bankruptcy trustees may obtain funding to pursue claims on behalf of bankruptcy estates. Since the use of third-party funding in the insolvency context in the United States is relatively new, the bulk of third-party litigation funding in the United States has been focused in the areas of patent infringement and price fixing / antitrust, rather than insolvency proceedings. In the context of insolvency, claims have arisen in different fashions. It is possible that the bankruptcy estate may already have a claim against a third-party upon filing for bankruptcy. Post-bankruptcy petition, the most common uses are for claims brought against third parties for preferences, for fraudulent conveyances, and for claims against officers, directors and advisors based on their pre-bankruptcy petition actions. Other uses are by creditors' committees and by pre-petition secured or unsecured creditors. The latter is particularly the case when creditors are bringing actions against other classes of creditors or equity holders, especially when the creditor or creditors' committee is not entitled to reimbursement from the estate due to restrictions in the debtor-in-possession financing or cash collateral orders.

Another common use of third-party funding is for litigation trusts, which, while allowing for immediate plan confirmation, still provide for the prospect of ongoing litigation that may take substantial time to conclude. In addition, it has become increasingly common for bankruptcy estates to raise funds through a court approved auction process, resulting in the monetization of third-party claims.

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[31] E O Slater, "Expert Q&A on Bankruptcy Litigation Financing", *Practical Law Bankruptcy & Restructuring* (February 2019), available here.

[32] T J Salerno and J A Kroop, "Third-Party Litigation Funding: Where Do We Go Now?", *Am. Bankr. Inst. J.*, Vol 18 (2018) at p 57 (discussing third-party litigation funding regulations).

As alluded to above, it is worth noting that in the insolvency context in the United States there is a distinction between the funding of pre-petition secured or unsecured creditors, and the post-bankruptcy petition funding of the debtor-in-possession, a trustee, or a post-confirmation creditors' trust. The latter is likely to involve more detailed legal issues, not least of which relate to requirements of the Bankruptcy Code. As already noted, the financing of an estate during the pendency of a bankruptcy proceeding will likely require court approval pursuant to section 364 of the Bankruptcy Code;[33] a sale of a claim or a litigation asset will require court approval under section 363 of the Bankruptcy Code;[34] and financing a professional during the pendency of the bankruptcy will be subject to disclosure requirements under the Federal Rule of Bankruptcy Procedure 2014[35] and 2016.[36]

4.1 Mechanisms to fund insolvency proceedings

The basic structure is for a non-party to the litigation to make a cash investment in hopes that they receive a portion of the successful award, settlement or judgment. Alternatively, the trustee in bankruptcy may sell an interest in the litigation, pursuant to section 363(b) of the Bankruptcy Code, which permits a trustee to sell the assets of the debtor corporation, including outside of the ordinary course so long as the trustee has court approval to do so. One potential benefit of the mechanism is that the presence of a litigation funder may help reduce overall legal expenses, as the litigation funder may require the insolvency practitioner to work on a budget, or otherwise maintain supervisory rights that would lead to efficient use of assets.[37] One issue which has arisen is whether a creditor itself can fund the litigation proceeding. This question appears to as yet not have been addressed by courts in the United States.

4.2 Creditor protection and litigation funding

4.2.1 Creditor access to and approval of funding agreement

Generally, creditor approval for litigation funding agreements will not be required, but it may be relevant in cases where creditors can raise objections under the terms of the Bankruptcy Code. This is likely to be particularly true when there are challenges to the use, sale or lease of assets under section 363, or to the obtaining of credit under section 364.

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33 Bankruptcy Code, s 364 addresses "Obtaining Credit".

34 *Idem*, s 363 governs "Use, sale, or lease of property".

35 Federal Rule of Bankruptcy Procedure 2014 governs "Employment of Professional Persons".

36 Federal Rule of Bankruptcy Procedure 2016 governs "Compensation for Services Rendered and reimbursement of Expenses".

37 S Ben-Ishai and E Uza, "A Canadian Lens on Third Party Litigation Funding in the American Bankruptcy Context", *Chi.-Kent L. Rev.* Vol 93 (2018) at p 633.

4.2.2 Relevance of litigation funding arrangement providing benefit to creditors

It is not an express requirement that creditors should benefit from a litigation funding arrangement, but it may be necessary for the debtor to justify certain actions to a court as being in the best interest of creditors as well as its own best interest (again, section 363 and 364 of the Bankruptcy Code).

4.2.3 Other measures to protect interests of creditors

Depending on exactly what is involved, it is very likely that court review will be required. For example, a sale of a claim or litigation asset under section 363 of the Bankruptcy Code is going to require judicial consent, as will the advancement of post-petition financing under section 364. The involvement of judicial consent in the "sale" of a claim to a litigation funder could therefore offer some protection to the interests of creditors.

5. Insolvency practitioners and litigation funding

5.1 Insolvency practitioner obligations

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion Number 2020-204 specifically addressed ethical obligations that are relevant in instances when an attorney is representing a client whose case is being funded by a third party. This opinion identified six critical issues for the legal practitioner: (i) the lawyer must understand how the funding agreement will impact any potential litigation, including having the ability to negotiate the contract for the litigation funding, (ii) the lawyer must communicate with the client regarding the relative risks and benefits of the third-party funding, including "whether litigation funding would assist in accomplishing the client's goals", (iii) the attorney must protect confidential information, with particular regard to the issue of the impact of sharing information with the third-party funder on the attorney-client privilege still not fully resolved, (iv) the lawyer must get the written informed consent of the client, including that the attorney can provide appropriate representation under the circumstances, (v) the lawyer must explain to the client the risk that the interest of the litigation funder may depart from the interest of the client, and (vi) related to the previous issue, the lawyer's duty is to the client and not to the third-party funder, and the presence of the third-party funder must not compromise the legal advice proffered to the client.[38]

5.2 Factors to consider when contemplating litigation funding

From the perspective of the litigation funder, key issues are likely to include: (i) the amount of money potentially at stake, and the related question of the funder's ability to obtain multiple times their initial investment, (ii) the quality of the potential case to be funded, (iii)

[38] See State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No 2020-204, available here.

the extent to which the outcome of the case will be predictable, with cases that are more developed generally leading to greater predictability, and (iv) identifying cases where the defendant can and will pay an adverse judgment.

From the perspective of the lawyer and the client, the issue is far more direct. Will the benefits of agreeing to the funding arrangement exceed the costs? In particular, will the third-party funding allow the client to achieve a result that would otherwise not be available for lack of funding?

As previously discussed, litigation finance arrangements in bankruptcy may require court approval under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Parties must evaluate the need for approval based on the facts and circumstances in which a stakeholder is seeking capital. The general guidelines for seeking court approval include: (i) in financing an estate during the pendency of a bankruptcy case, a debtor-in-possession, trustee, or creditors' committee generally needs to obtain court approval for financing under section 364 of the Bankruptcy Code, (ii) financing a professional during the pendency of a bankruptcy case is potentially subject to disclosure requirements under Federal Rules of Bankruptcy Procedure 2014 and 2016, (iii) post-plan confirmation financing requires court approval subject to the terms of the plan or litigation trust agreement and is also dependent on when funding is being sought or by which party, and (iv) sale of claims or litigation assets requires court approval under section 363 of the Bankruptcy Code.[39]

In cases where court approval is necessary, a party seeking third-party capital should disclose the funding agreement, demonstrate that the funding terms were subject to the market in that multiple bids were sought, and provide to the court an explanation as to why the funding is in the best interest of stakeholders.[40]

5.3 What are litigation funders looking for?

Return on investment requirements are structured in different ways. They may be structured as a multiple of capital invested or committed, a percentage of the gross or net recovery, an interest rate or internal rate of return, or some combination of these. There are no specific criteria that is employed to determine whether the litigation funder would be willing to fund the insolvency proceeding. Rather, the criteria are looked at on a case-by-case basis. As noted above, common considerations include include: (i) the amount of money potentially at stake, and the ability to obtain multiple times their investment, (ii) the quality of the potential case to be funded, (iii) the extent to which the outcome of the case will be predictable, with cases that are more developed generally leading to greater predictability, and (iv) identifying cases where the defendant can and will pay an adverse judgment.

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[39] E O Slater, "Expert Q&A on Bankruptcy Litigation Financing", *Practical Law Bankruptcy & Restructuring* (February 2019), available here.

[40] *Ibid*.

6. Litigation funding agreements

6.1 Typical structure of agreement

Third-party funding transactions in the United States are frequently structured as financing a claim, rather than as purchasing a claim outright. The agreements take multiple forms, depending on the particular situation. As a broad matter, funding is collateralized in one of three ways. The first is a scenario of single matter funding, where collateral for the third-party funding is limited to a single case. The second addresses portfolios, which are collateralized by multiple cases in order to spread risk. The third are lines of credit, which provide flexibility as to which cases will be funded through the line of credit. Transactions are best structured when the goals of the relevant parties – the claimant, the insolvency practioner, and the litigation funder – are aligned. Among the benefits of such an approach is the deterrent factor in terms of the taking of unnecessary risk.

As for payout, there are few absolutes. Generally, the funder will demand to receive the amount of its invested capital at the earliest possible point. Beyond that, structures tend to vary. Common approaches include allocating proceeds based on percentages and defined multiples, up to the point of a specified multiple of the capital initially invested.[41] In all cases the structure should seek to maximize benefits to all interested parties.

6.2 Protection of confidential information in relation to funding agreement

The issue of protection of confidential information in relation to the funding agreement issue has been raised regularly in discovery disputes. Relevant questions include whether privilege has been waived via disclosure to a funder and whether there should be transparency in relation to who is an interested party (and who is in control) of the litigation. Courts in the United States have generally shielded funding-related documents from disclosure on the basis of privilege, holding that case-related communications with a funder are entitled to work-product privilege. Many courts have also found held documents related to litigation funding are irrelevant as a matter of law and therefore not subject to disclosure.

However, there are some issues for concern. Firstly, as noted above, when a funding agreement becomes subject to judicial scrutiny under the express terms of the Bankruptcy Code, disclosing the terms of the agreement is likely to prove necessary. In addition, non-privileged communications may be discoverable. Litigation funders should routinely engage in non-disclosure agreements to attempt to protect the work-product privilege.[42] However, there is likely a reasonable expectation of confidentiality, even in the absence of a non-disclosure agreement.[43] Also, as noted above, Wisconsin remains the sole state with

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41 A A Stulce and J D Parente, "Demystifying the Litigation Funding Process", *Bloomberg Law* (16 June 2021), available here.

42 S Ben-Ishai and E Uza, "A Canadian Lens on Third Party Litigation Funding in the American Bankruptcy Context", *Chi.-Kent L. Rev.* Vol 93 (2018) at p 633.

43 *Ibid.*

affirmative disclosure requirements which exist even in the absence of a discovery request. Whether this remains the case remains to be seen.

PART B

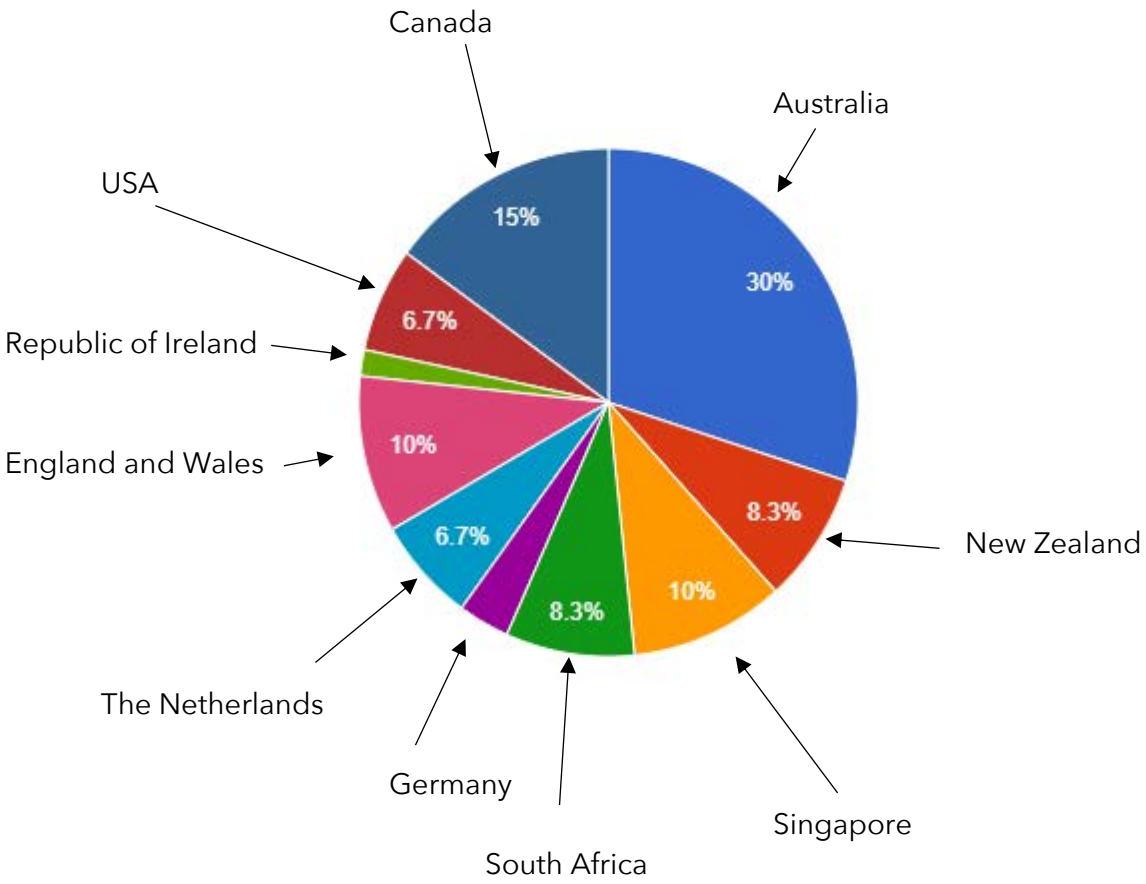
ANALYSIS OF SURVEY DATA

INSOLVENCY PRACTITIONER SURVEY*

Insolvency practitioners across all 10 jurisdictions were invited to participate in a survey to obtain an understanding of their perception of, and experience with, the use of commercial litigation funding in insolvency proceedings.

A total of 60 responses were received and there were responses from all jurisdictions.

1. Survey participation by jurisdiction



Counts / frequency: Australia (18 participants, 30.0%), New Zealand (5 participants, 8.3%), Singapore (6 participants, 10.0%), South Africa (5 participants, 8.3%), Germany (2 participants, 3.3%), The Netherlands (4 participants, 6.7%), England (6 participants, 10.0%), Republic of Ireland (1 participant, 1.7%), USA (4 participants, 6.7%), and Canada (9 participants, 15.0%).

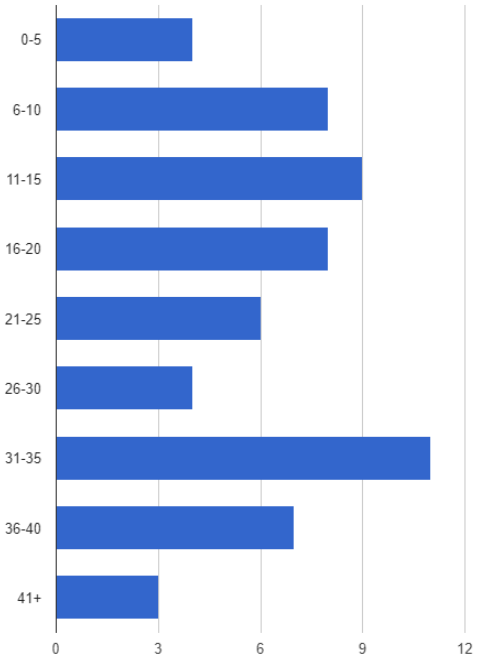
* In the survey results, where graphs are used to show specific results, not all the information on the y-axis is always visible; however, please note that the incomplete information on the y-axis is complete under the "counts / frequency" indicated just below the graph each time.

Comment – Survey participation by jurisdiction

Responses to the insolvency practitioner survey on insolvent litigation funding were received from all jurisdictions relevant to the project. Australia had the highest response rate to the survey (30%). This is perhaps not surprising in light of the well-developed practice around use of commercial litigation funders to fund insolvency proceedings, as well as the amount of regulatory attention recently given to litigation funding in this jurisdiction. Survey responses may therefore well carry an Australian bias. The lowest response rate (1.7%, being 1 participant) came from the Republic of Ireland. Once again, perhaps not surprising, seeing that the notion of use of commercial litigation funding in insolvency is in its infancy in this jurisdiction.

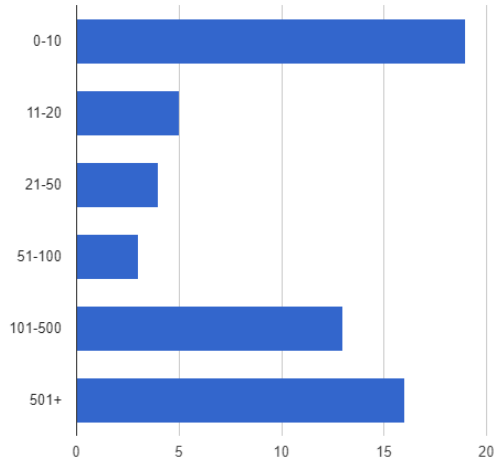
2. Survey participant profile

2.1 Years of experience in insolvency industry



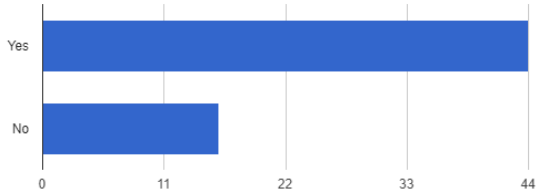
Counts / frequency: 0-5 years (4 participants, 6.7%), 6-10 years (8 participants, 13.3%), 11-15 years (9 participants, 15.0%), 16-20 years (8 participants, 13.3%), 21-25 years (6 participants, 10.0%), 26-30 years (4 participants, 6.7%), 31-35 years (11 participants, 18.3%), 36-40 years (7 participants, 11.7%), and 41+ years (3 participants, 5.0%).

2.2 Number of staff employed by firm



Counts / frequency: 0-10 staff members (19 firms, 31.7%), 11-20 staff members (5 firms, 8.3%), 21-50 staff members (4 firms, 6.7%), 51-100 staff members (3 firms, 5.0%), 101-500 staff members (13 firms, 21.7%), and 501+ staff members (16 firms, 26.7%)

2.3 Level of seniority – principal / partner / director or owner of firm



Counts / frequency: Yes (44 participants, 73.3%), and No (16 participants, 26.7%)

Comment – Survey participant profile

Survey participants are typically senior, experienced insolvency practitioners, as illustrated by the fact that approximately half of the insolvency practitioners surveyed has more than 20 years' experience in the industry, and typically has role as principal, partner, director or owner in the firm. The size of the firms where the insolvency practitioners practise varies, with approximately half of the firms (at the higher end of the scale) employing more than 100 staff, and (at the smaller end) approximately 30% employing 10 staff or less.

3. Extent to which litigation funder has been used in insolvency proceedings

Out of the 60 insolvency practitioner survey participants, 28 (47%) have previously used a litigation funder in insolvency, and 32 (53%) have not done so. Interestingly, 19 out of the 28 survey participants who have previously used a litigation funder in insolvency proceedings (just over two-thirds) are from Australia (14) and England (5), indicating that

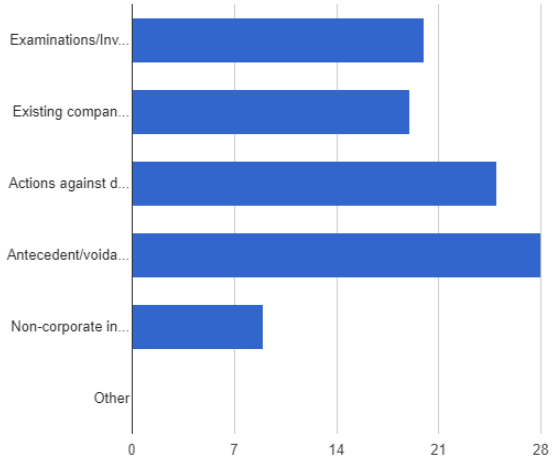
the use of litigation funding in these jurisdictions might perhaps be more common than in the other jurisdictions. Once again, this is not surprising in light of the fact that litigation funding is more familiar in these jurisdictions compared to some others.

Of the survey participants who indicated that they have previously used a litigation funder, 71% have done so in 20% or less of the matters that they were involved in, and 14% of respondents used litigation funders in more than 40% of the proceedings that they were involved in.

Therefore, even though nearly half of the survey participants have used a commercial litigation funder, it appears that this is not the funding option that will be used in the majority of instances where legal proceedings are pursued. This may be due to the availability of other funding options in the jurisdiction, or willingness of creditors to fund proceedings.

3.1 Use of, and experience with, litigation funding for those survey participants who have used litigation funders

3.1.1 Type of proceedings in which litigation funders were used



Counts / frequency:

- Examinations / Investigations (20, 71.4%);
- Existing company actions, for example corporate recovery of debt / torts (19, 67.9%);
- Actions against directors (breaches of directors' duties) (25, 89.3%);
- Antecedent / voidable transactions (28, 100.0%);

- Non-corporate insolvency proceedings (personal insolvency proceedings) (9, 32.1%); and

- Other (0, 0.0%).

Comment – Type of proceedings in which litigation funders were used

Insolvency practitioner respondents indicated that litigation funding is most commonly used in antecedent transactions (100%), and typically also in actions against directors (89%) and proceedings during the investigation / examination stage (71%). Interestingly, nearly a third of respondents indicated that they also used litigation funders in personal insolvency proceedings. These were all based in Australia, or England and Wales, where use of commercial litigation funding in insolvency proceedings is more common compared to some of the other jurisdictions. It is likely that proceedings involving examinations or investigations, which was only selected by 22% of respondents, is less costly and so there is less need for the insolvency practitioner to look for external funding.

3.1.2 Relevance of collectability and claim value

Not surprisingly, all survey respondents indicated that commercial litigation funders pay significant attention to collectability (likelihood of success on the merits and likelihood that defendant will be able to satisfy the judgment) when deciding to fund proceedings, or not.

In response to a question as to whether experience showed that commercial litigation funders would only be willing to fund proceedings where the value of the potential claim exceeds a certain amount, the expectation was that all respondents would answer "YES". However, a surprising 11% of respondents answered "NO", indicating that experience varies as to the emphasis that commercial litigation funders would place on the amount of the claim.

For those respondents that answered "YES" to this question (89%), experience once again varies regarding the "minimum threshold" that would be required to engage a commercial litigation funder.

Responses from Australia generally seem to indicate that a claim threshold of AUD 500,000 to AUD 1 million is required in order to engage a litigation funder, with some respondents indicating that some funders would only be willing to become involved for claims of at least AUD 20 million. The differentiation here could be ascribed to the fact that many Australian respondents noted that the claim threshold varies from funder to funder, and that the complexity of the matter, as well as chances of a successful outcome, will have an impact on the claim threshold. According to the experience of one respondent, for example, funders would be willing to become involved in matters where the claim value is low as AUD 400,000, if it is a simple matter, with success and recovery almost certain to be achieved within a 12-month period. Another Australian respondent noted the impact of

competition in the litigation funding market, with the claim threshold decreasing as more funders enter the market, thus making litigation funding more widely available.

The claim thresholds in the United States of America and Singapore appear to be at the high end of the scale, with respondents from the United States mentioning claim values of at least US$ 10 million, and in Singapore, US$ 25 million. The reason for the high claim threshold in the United States is ascribed to the high cost of litigation in this jurisdiction. Potentially, the absence of adverse cost orders in this jurisdiction (as discussed in the jurisdictional overview of the United States above) could also have an impact on the minimum claim threshold, as a successful party will typically remain responsible for their own legal costs and not have the benefit the principle that the cost should follow the event.

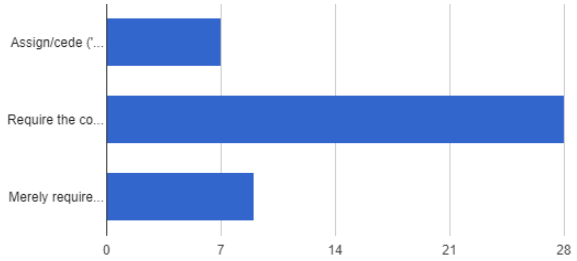
Responses from England and Wales mentioned a general claim threshold of around GBP 2 million, although one respondent from this jurisdiction mentioned that their most recent experience with a litigation funder involved a claim of GBP 400,000.

Respondents generally mentioned two factors in regard to the relevance of claim value: firstly, the investment required by a commercial litigation funder to conduct a due diligence would make pursuing smaller claims uneconomical, and secondly, the cost of litigation.

It appears that wider availability of litigation funding and consequent increase of competition in the market, as well as availability of adverse cost orders, could potentially contribute to a lower claim threshold in some jurisdictions, compared to others.

3.1.3 Basis on which litigation funder is involved

Survey participants were asked on which basis they typically involve litigation funders – in other words, whether they prefer to assign ("sell") the bare cause of action to the litigation funder, to receive financial assistance from the litigation funder in exchange for the funder receiving a portion of the proceeds recovered in a successful outcome, or to only fund the risk of an adverse cost order. Survey participants responded as follows:



Counts / frequency:

- Assign / cede ("sell") the bare cause of action (claim) to the funder (7 participants, 25.0%);

- Require the commercial litigation funder to fund the proceedings in exchange for a portion of the proceeds recovered in a successful outcome (28 participants, 100.0%) and

- Merely require the commercial litigation funder to fund the risk of a potential adverse cost order (9 participants, 32.1%).

Comment – Basis on which litigation funder is involved

Survey respondents indicated a clear preference for funding of proceedings in exchange for the funder sharing in the proceeds of a successful outcome and often identified this as the "usual model". Comments by survey participants regarding why a particular construct is used or preferred, provided interesting insights. Preference for involving a litigation funder to fund proceedings in exchange for the funder sharing in the proceeds of a successful outcome was explained as follows:

- "It has the least impact on the financial position of the estate and avoids risking creditor money (if there is any) for something which might not work."

- "Offers received to acquire the claims are generally far lower than the value of the claims. Funding of proceedings usually provides the most upside to creditors."

- "The time (length) and cost of litigation is invariably way in excess of the best estimates of legal advisers to an insolvency practitioner and so the level of funding required is indeterminate at the outset of the legal action. Thus LF finance is essential to reduce the risk of not being able to get to and through a trial of the matter."

- "There may be some discount of the lawyer costs eg funding of 50% to keep skin in the game for the lawyers."

- "Provides funding for the case in circumstances where funding is not available whilst maintaining control of outcome."

- "It enables claim to proceed fully funded and results in a higher return for creditors than bare assignment."

- "It helps to preserve some upside for the stakeholders and also to encourage the funder to consider more favourably for smaller upfront funding."

- "Litigation is inherently uncertain and the costs, risks and returns are often difficult to predict, making sale of an action generally unattractive."

- "This lets the liquidator, trustee etc. control the litigation, and comply with their statutory and other duties for the benefit of creditors."

- "This is the normal model. Usually the IP's team are at an advanced stage of investigations / claim development, with their legal teams, and it makes sense for them to continue to run the claim. The Funder is not involved or making decisions.
- "The funder requires it, not the IP, but it's in recognition of the financial / legal risk they take."

- "Little financial risk and chance of good results."

Comments by participants who used the option of assigning ("selling") the bare cause of action indicated that this option was used as:

- "This is the only viable option for claims under £2m."

- "Choice of client and appetite for price, sometimes client retains residual right to future monies."

- "There will be more certainty to the IP in terms of the course of action."

- "The cause might be open ended regard to costs and extent of investigation. Office holders should not risk estate assets unnecessarily to the detriment of the position of creditors. Alternatively, action might involve pursuing directors and others who have been cooperative with the office holder. This could create a conflict of interest."

- "In some situations that's easier for the trustee or liquidator, because they don't have to be actively involved and aren't at risk of adverse costs orders. In other cases the appointee wants to stay in control."

- "In situations where there is a need for upfront consideration in the insolvent estate."

- "Quick solution."

Survey participants who indicated that litigation funders are typically used merely to defray the risk of adverse cost orders provided the following reasons:

- "Depending on the circumstances, an estate, with creditor support can bear the costs associated with pursuing litigation that will add value to the estate, however it is prudent to mitigate the risk of adverse costs being awarded – particularly in

circumstances where a claim has reached a point at which such risk becomes higher (eg: after mediation, or where an initial settlement offers has been made)."

- "It depends. The IP and the lawyers may be prepared to carry the risks of conducting proceedings on the basis that they be paid out of settlement proceeds but generally will not be willing to take on the risk of adverse costs."

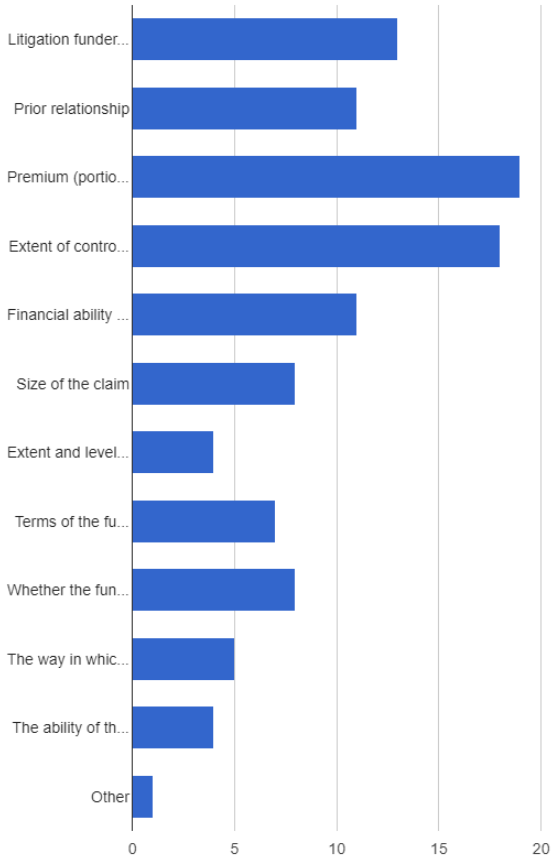
- "As mentioned above an insolvency office holder should not risk estate assets where an adverse costs order is possible."

- "In some cases this is the main concern that the liquidator or trustee has about the litigation."

- "Used in cases where out-of-pocket expenses are not significant and solicitor/barrister and insolvency practitioner prepared to "spec" their time."

- "Unfunded matters undertaken for the benefit of creditors expose personal appointees to personal costs orders - should be statutory indemnity."

3.1.4 Relevant factors when selecting a litigation funder



Counts / frequency:

- Litigation funder reputation (13 participants, 46.4%);
- Prior relationship (11 participants, 39.3%);
- Premium (portion of proceeds) charged by the funder (19 participants, 67.9%);
- Extent of control that litigation funder would wish to exercise over proceedings (including aspects such as choice of lawyers / counsel) and / or settlement (18 participants, 64.3%);
- Financial ability of the litigation funder (11 participants, 39.3%);
- Size of the claim (8 participants, 28.6%);
- Extent and level of detail of funder due diligence in respect of the analysis of the claim (4 participants, 14.3%);
- Terms of the funding agreement and the ability to negotiate in respect of those (7 participants, 25.0%);
- Whether the funding agreement covers the insolvency practitioner's and solicitor's costs (8 participants, 28.6%);
- The way in which the funding agreement is structured (5 participants, 17.9%);
- The ability of the litigation funder to unilaterally terminate the agreement (4 participants, 14.3%); and
- Other (1 participant, 3.6%).

Comment – Relevant factors when selecting litigation funders

When asked to select the three most relevant factors when selecting a litigation funder, survey respondents appear to favour the premium charged by the funder (68%), extent of control that the litigation funder would wish to exercise over the proceedings (64%), and the reputation of the litigation funder (46%). Apart from these three factors, a prior relationship with the particular funder (39%), as well as the financial ability of the funder (39%) were also considered as relevant in many cases.

However, one participant did indicate that all of the factors listed in the question are considered when selecting a litigation funder, and that it would be "negligent of an insolvency practitioner not to consider all of the above factors when deciding to enter into a litigation funding agreement". Many of the survey respondents emphasised insolvency

practitioner obligations and ensuring the best outcome for creditors as drivers in their selection of a particular litigation funder. In this regard, the size of the premium, importance of retaining control of proceedings, as well as funder reputation were mentioned. The importance of trust between the insolvency practitioner and litigation funder was furthermore mentioned in a number of comments, explaining the emphasis on "funder reputation" and "prior relationship" as important factors.

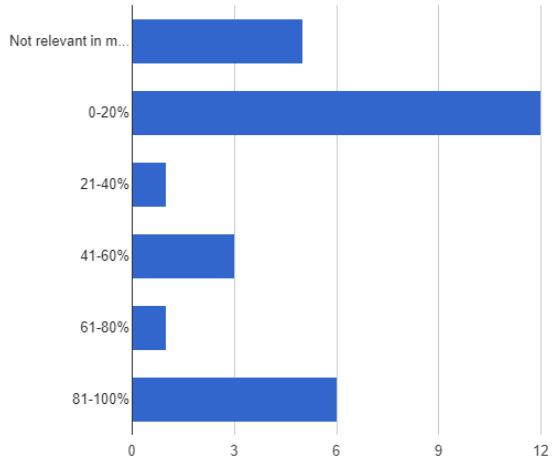
3.1.5 Creditor involvement

Even though creditor involvement (for example, by way of approving the litigation funding agreement) may not necessarily be a legal requirement, most of the survey respondents (89%) indicated that they do involve creditors in the process. In addition to recognising that creditor approval for entering into a funding agreement may be a legal requirement in some cases, many insolvency practitioners mentioned the importance of keeping creditors informed regarding liquidation strategy, the practice to invite creditors to fund the litigation in advance of approaching litigation funders, or at least indicated that creditors will be informed if a litigation funder is being used. Thus, it appears that a practice has developed across all jurisdictions forming part of this study to keep creditors involved and informed in respect of the use of litigation funding, even in the absence of legal requirements to do so.

3.1.6 Use of dispute resolution clauses in litigation funding agreement

It is heartening to observe that, when asked whether they have had to resort to the dispute resolution clauses in the litigation funding agreement, 93% of survey participants indicated that they had not needed to do so. One of the respondents who did have to resort to the dispute resolution clauses indicated that the dispute revolved around the funder withdrawing, and that the matter ended with having to use another litigation funder.

3.1.7 Requirement that litigation funder provide security for costs

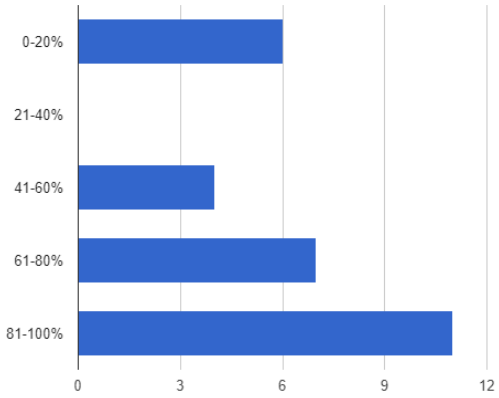


Counts / frequency: Not relevant in my jurisdiction (5 participants, 17.9%), 0-20% (12 participants, 42.9%), 21-40% (1 participant, 3.6%), 41-60% (3 participants, 10.7%), 61-80% (1 participant, 3.6%), and 81-100% (6 participants, 21.4%).

Comment – Requirement that litigation funder provide security for costs

Survey responses clearly indicate that litigation funders are not required to provide security for costs as a matter of course; in fact, the most selected option to this question indicated that litigation funders were required to provide security for costs in 0-20% of cases. Interestingly, responses were not concentrated according to jurisdiction, with many jurisdictions where this question would be relevant, having responses across brackets. This creates the impression that a requirement that a litigation funder provide security for costs will be imposed on a case-by-case basis.

3.1.8 Successful outcomes in proceedings where litigation funder was involved



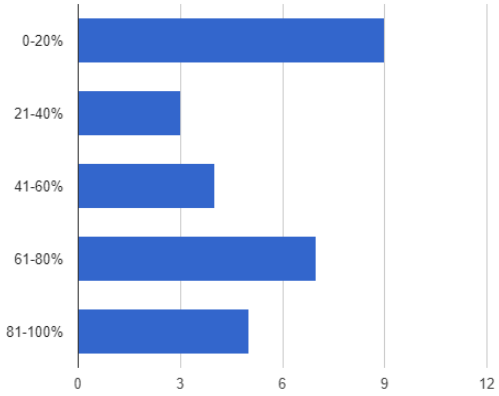
Counts / frequency: 0-20% (6 participants, 21.4%), 21-40% (0 participants, 0.0%), 41-60% (4 participants, 14.3%), 61-80% (7 participants, 25.0%), and 81-100% (11 participants, 39.3%).

Comment – Successful outcomes in proceedings where litigation funder was involved

In response to the question: "In how many of the insolvency proceedings where you used a commercial litigation funder was there a successful outcome (whether it be a favourable judgment at trial, or out of court settlement?", the most selected option was 81-100% of cases (39% of participants), with the second-most selected option being 61-80% (25% of participants), and close to that the third-most selected option being in 0-20% of cases (21% of participants). Anecdotally, litigation funders are likely to "cherry pick" when asked to fund litigation and would, for obvious reasons, not be interested in becoming involved in proceedings where the chances of success are low. This has led to a perception that cases involving a litigation funder are likely to be resolved in favour of the funded litigant. This may well be true in cases where litigation funders are used in a context other than insolvency, for example class actions. However, responses to this question appear to

demonstrate that litigation funders are not always successful in predicting the outcome of an insolvency matter, with the success rate of cases involving a litigation funder being as low as 0-20% according to approximately a fifth of the participants who answered this question.

3.1.9 Benefit to creditors in proceedings where litigation funder was involved



Counts / frequency: 0-20% (9 participants, 32.1%), 21-40% (3 participants, 10.7%), 41-60% (4 participants, 14.3%), 61-80% (7 participants, 25.0%), and 81-100% (5 participants, 17.9%).

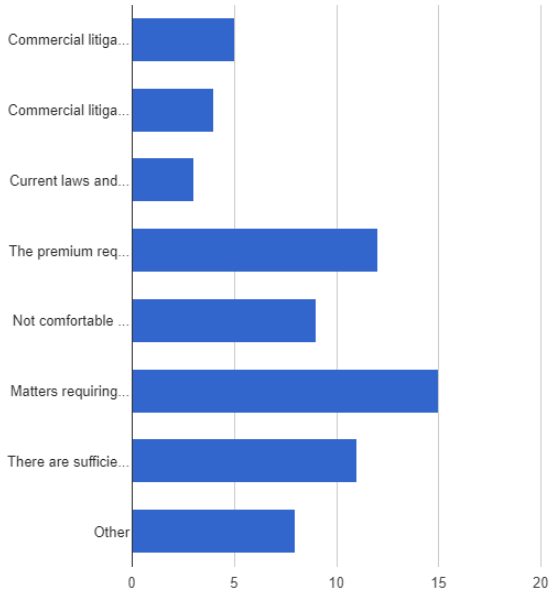
Comment – Benefit to creditors in proceedings where litigation funder was involved

Interestingly, even though nearly 40% of respondents indicated a success rate of 81-100% in proceedings involving a litigation funder (see above discussion), according to only 18% of survey participants did unsecured creditors benefit in 80-100% of proceedings involving a litigation funder. In fact, nearly a third of respondents (32%) suggested that there was a benefit to unsecured creditors in only 0-20% of instances involving a litigation funder. Thus, even though there may have been a successful outcome in many instances where a litigation funder was involved, this will not necessarily devolve to unsecured creditors.

3.2 Survey participants who have not used litigation funders

Survey participants who have not previously used a litigation funder were asked whether they have considered / applied for / investigated this funding option in insolvency. Half of these respondents indicated that they have investigated this funding option, which raises the question as to why the option of commercial litigation funding was not used, as well as a question about alternative funding methods.

3.2.1 Reasons for not using commercial litigation funder in insolvency proceedings



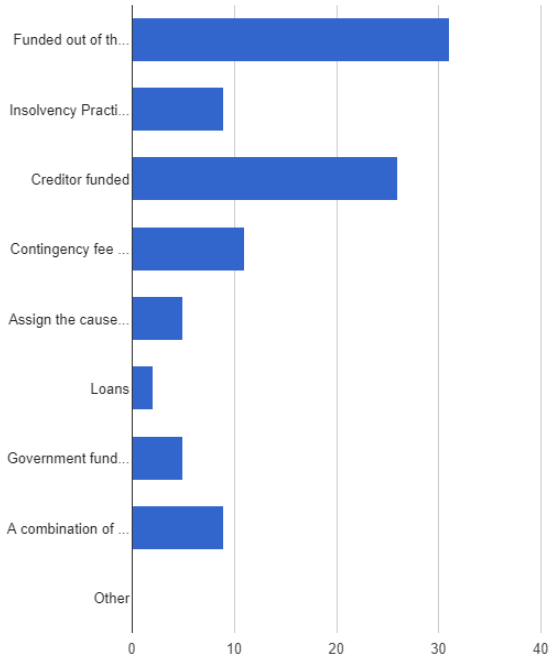
Counts / frequency:

- Commercial litigation funding is not readily available in my jurisdiction (5 participants, 15.6%);
- Commercial litigation funding options available in my jurisdiction are not suitable for my practice (4 participants, 12.5%);
- Current laws and regulations do not allow for use of commercial litigation funders (3 participants, 9.4%);
- The premium required by commercial litigation funders (that is, the portion of the proceeds charged by the commercial litigation funders) is prohibitive (12 participants, 37.5%);
- Not comfortable with the extent of the control that commercial litigation funders would wish to have over proceedings and / or settlement (9 participants, 28.1%);
- Matters requiring funding are too small for litigation funders to consider (litigation funder threshold for funding is too high) (15 participants, 46.9%);
- There are sufficient alternative funding options available (11 participants, 34.4%); and
- Other (8 participants, 25.0%).

Comment – Reasons for not using commercial litigation funder in insolvency

The most common reasons why survey participants did not use commercial litigation funders in insolvency proceedings appear to be the fact that the litigation funder claim threshold was too high for the relevant matter (47%), that the litigation premium was too high (38%), and the availability of alternative funding options (34%).

3.2.2 Alternative funding methods used



Counts / frequency:

- Funded out of the proceeds of the insolvent debtor's estate / assets (31 participants, 96.9%);
- Insolvency Practitioner funded (9 participants, 28.1%);
- Creditor funded (26 participants, 81.3%);
- Contingency fee arrangement with a legal practitioner / lawyer (11 participants, 34.4%);
- Assign the cause of action to interested parties (5 participants, 15.6%);
- Loans (2 participants, 6.3%);
- Government funded (5 participants, 15.6%);

- A combination of some / all of the above (9 participants, 28.1%); and
- Other (0 participants, 0.0%).

Comment – Alternative funding methods when not using litigation funder

The most common funding alternatives to commercial litigation funding by far appear to be funding out of the estate (97%) and / or funding by creditors (81%). Another reasonably popular source of funds is the lawyer, and in jurisdictions with contingency fees for legal practitioners, speculative funding occurs (34%).

3.2.3 Perception of litigation funding

Survey respondents who indicated that they have not previously used a litigation funder were asked if they are generally in favour of using the services of a litigation funder, and whether they believe that, in future, commercial litigation funders can and should play a role in funding litigation in insolvency proceedings. 90% of participants who answered this question, answered in the affirmative. Participants in favour of the use of commercial litigation funders in insolvency proceedings provided the following feedback to explain their support:

- "There are many instances where a liquidator is hamstrung by the creditors refusing to embark on the costly recovery process. In my view the creditors would in these instances gladly authorise the liquidator to enter into a litigation funding agreement."
- "In my experience litigation funding has grown out of and in response to the needs of the insolvency profession and is an essential resource for an insolvency practitioner."
- "Commercial funding in insolvency matters can provide practitioners with the ability to more comfortably pursue investigations and claims when this would not otherwise be possible."
- "Commercial funding can often be the only viable option for funding the pursuit of claims."
- "Entry into the funding agreement strongly motivates the respondent to reach a settlement."
- "They can preserve valuable assets for the estate and provide a market check on what the prospects of success are."
- "I am in favour especially for larger cases where one takes the view that there is an element of fraud and a particular creditor or group of creditors do not want to assume the burden of litigation because of the uncertainty of winning. In addition, given the

nature of certain insolvencies, it may be helpful if there are class actions and these would probably be considered if there was commercial litigation funders to utilise."

- "If the rate is suitable, it would be a good way of transferring the risk of litigation to the litigation funder, in exchange for smaller recovery."

- "The use of funders adds an option to enable recoveries and should be encouraged."

- "With the increase in fraudulent activity and lack of assets remaining in most matters, this is a necessary option (despite its limitations)."

- "Typically matters get dropped because the insolvency company cannot afford the cost of litigation. This gives incentive for a settlement to be reached and a benefit for creditors."

- "There may be situations in which the assets of a company have been siphoned off or depleted by errant officers or employees of the company. In such situations, it would be sensible to obtain commercial litigation funding in order to pursue recovery actions against the wrongdoers. Creditors…tend to be risk-averse and may not be willing to provide funding for such recovery actions as it is often viewed as "throwing good money after bad"."

- "In the instances where the insolvent estate does not have sufficient funds to cover costs/expenses, this measure of funding would lighten the burden on us as respective insolvency practitioners, to advance funds out of our own pocket for insolvency administration purposes."

- "The costs of litigation and insolvency proceedings are high. I do not see any reason to limit the options available to stakeholders."

- "Well, I could imagine them helping IP's pursue cases that otherwise would not be pursued."

- "A healthy and vibrant commercial litigation funding environment gives the legal framework greater "bite" as it ensures that legitimate claims can be brought against wrongdoers, and not stymied due to a lack of funding."

- "Insolvency is all about maximising recovery, and litigation funding should be an option for liquidators to consider. That is to say, when we should rule out litigation funding, it should be on whether the cost makes commercial sense, and not whether it is prohibited."

- "If the estate does not have enough money, they can provide it, in order to make sure that all necessary actions are taken."

However, survey participants were not unqualified in their support for the use of litigation funding in insolvency, and some noted that it is a "very costly funding source".

Other concerns regarding the use of litigation funding in insolvency were expressed as follows, with a number of these focussing on the cost involved (litigation funding premium) and loss of control:

- "However, from my limited experience with them, the major issues I have had with funders is (1) finding one prepared to look at funding claims as little as $200,000 and (2) finding a funder prepared to stay in the claim until the end. The second point is from my experience of the funder bailing out at the first offer. I fear that may become a regularity - the funder knows that the defendant will make a settlement offer once it is known the IP has a funder involved; the defendant knows that the funder will take the first "low ball" offer and cash in without risk. I guess it is a reputational thing for the funders and hope I will be proved wrong but my experiences with them have not been great. I will not deal with certain funders and simply discard any advertising material from them. Having said all that, I know there are funders with good reputations that will stay in the action. I just haven't experienced that."

- "The risk of loss of privilege with a litigation funder seems to be abating, but is not completely settled. The potential for conflict over fiduciary duties to the estate in the event of divergent views of value and strategy also seems to be a risk."

- "I would like the fee structure to be more transparent. Also, I do not like the influence of the litigation funders on the proceedings itself."

- "It seems to be not in high regard with supervisory judges or insolvency courts. Main concern is costs and control."

- "I think the requested percentage of the proceeds is prohibitive."

- "Not comfortable with the extent of the control that commercial litigation funders would wish to have over proceedings and/or settlement."

- "I have concerns that they could exert too much influence over how a liquidations is conducted."

LITIGATION FUNDER SURVEY*

A short litigation funder survey was conducted, primarily for the purpose to determine whether insolvency practitioner perceptions align with litigation funder expectations.

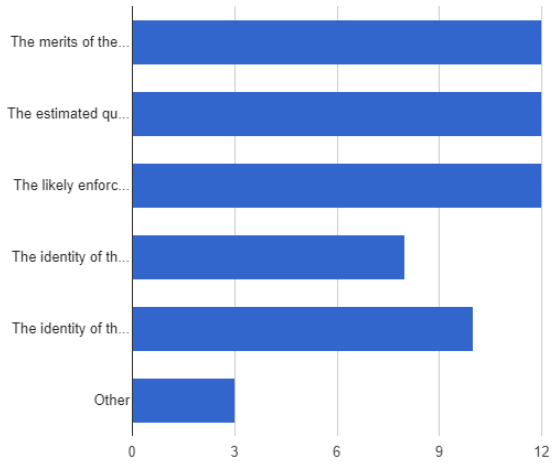
Thirteen litigation funders across the ten jurisdictions participated in the survey.

1. Assessment and rate of approval of funding requests

Litigation funders were asked a range of questions to obtain information regarding their approach when making a decision as to whether an application for funding should be approved.

These questions focused on the criteria that will apply when assessing a funding application, relevance of the amount of the claim, and the rate at which funding requests are approved / rejected where the funder was provided with a detailed outline of a potential claim and supporting documentation.

1.1 Criteria informing funding decision



Counts / frequency:

- The merits of the case (likelihood of success) (12 participants, 100.0%);
- The estimated quantum of the case (12 participants, 100.0%);

* In the survey results, where graphs are used to show specific results, not all the information on the y-axis is always visible; however, please note that the incomplete information on the y-axis is complete under the "counts / frequency" indicated just below the graph each time.

- The likely enforceability of any judgment or settlement against the proposed defendant, and likelihood that the defendant will be able to pay (12 participants, 100.0%);

- The identity of the insolvency practitioner(s) (8 participants, 66.7%);

- The identity of the insolvency practitioners' legal representatives (10 participants, 83.3%); and

- Other (3 participants, 25.0%).

Comment – Criteria informing funding decision

Not surprisingly, the most important factors were considered to be the merits of the case, the estimated value of the case, and the likely enforceability of any judgment / settlement and the likelihood that the defendant will be able to pay (100% in all instances). Interestingly, the choice of legal counsel was considered to be a more relevant factor (83.3%) than the identity of the insolvency practitioner (66.7%).

Commercial litigation funders also commented in regard to factors that will influence a funding decision, providing useful insights into the approach that will apply when assessing the merits of a funding application. They noted the following:

– "In addition to the factors set out above, we would consider the amount of funding required / requested; the litigation budget and litigation strategy; how engaged the claimant is in the matter (as demonstrated, for example, by how prompt and forthright they are concerning due diligence questions); the status of proceedings and any relevant procedural history; among other factors. Our approach to analysis will consider a matter holistically, in addition to these itemized criteria."

– "Viable case economics (1:10 legal costs to quantum ratio)."

1.2 Relevance of amount of the claim

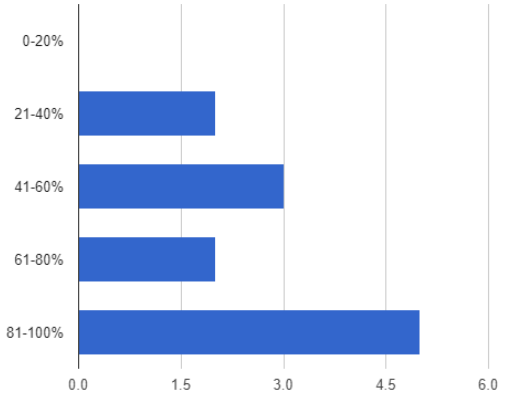
Two respondents (17%) indicated that the potential claim would not need to exceed a certain amount to be funded. This response aligns with that of insolvency practitioners when asked a similar question, seeming to indicate that not all litigation funders will base a decision to accept / reject a request for funding purely on claim value.

Comments by litigation funders provide further insights, indicating that "[r]ather than a dollar threshold, the relationship between the quantum of the claim and the amount of investment required" would be more relevant and that this "must generally be in the range of 10:1 or greater". The estimated litigation costs would therefore inform the relevance of

the amount of the claim, with one litigation funder noting that "[u]sually claims $5 million or less are not economically viable as it is difficult to run a claim with a legal costs budget of $500,000 or less".

Litigation funders who indicated a minimum claim value, suggested amounts of more than US$ 3 million, US$ 5 million, US$ 10 million, and ZAR40 million (South Africa) respectively. Responses to this question appear to align with the experience of insolvency practitioners in regard to the relevance of the claim amount and indicate once again the obvious significance of the relative cost to conduct litigation in a particular jurisdiction.

1.3 Rejection rate for funding requests where insolvency practitioner provided detailed outline of a potential claim along with supporting documentation



Counts / frequency: 0-20% (0 participants, 0.0%), 21-40% (2 participants, 16.7%), 41-60% (3 participants, 25.0%), 61-80% (2 participants, 16.7%), and 81-100% (5 participants, 41.7%)

Comment – Rejection rate for funding requests

It appears that well-prepared requests for funding are often rejected and more than 40% of the litigation funder respondents indicated that requests for funding, supported by a detailed outline of the claim and supporting documentation, will be rejected in 81-100% of the cases.

It is assumed that funding requests will be rejected for not complying with the criteria identified above. The high number of rejections would suggest that more awareness among insolvency practitioners is needed about the litigation funders' approach when assessing the merits of a funding request. This could potentially save time and effort both in preparing and assessing unsuccessful funding requests. This conclusion is supported by a comment from one of the survey participants: "The reputation of funders as being cherry pickers who turn down most cases is accurate – but the reasons need to be better understood and published".

2. Basis of funding

In response to the question whether proceedings are funded on the basis of the bare cause of action being "sold" to the funder, or on the basis of providing financial support for litigation in exchange for a portion of a successful outcome, the majority of litigation funders expressed a preference for the latter option (67%), while the remainder indicated that they would fund proceedings on both bases (33%).

The reasons advanced for preferring more "typical" litigation funding, rather than "buying" the bare cause of action include the following:

- "Courts in my jurisdiction are more likely to understand and approve a more "straightforward" litigation funding agreement ("LFA")."
- "The Insolvency Practitioner usually has the most information relating to the claim itself and therefore it is best to have them as a party to the claim."
- "[I]f the Insolvency Practitioner is prepared to invest its time into the claim, it is a good sign that they have confidence in the claim."
- "Due to the inherent difficulty of valuing litigation investments, a sale and cession of a claim transaction may lead to a pricing dispute with creditors either before or after the claim has resolved."
- "This transaction ('selling' cause of action) may also disincentivise creditors and the insolvency practitioner from providing assistance or evidence in the subsequent litigation post transition."
- "A [typical] litigation funding transaction ensures a far better alignment and that the true value of the claim properly benefits all parties."

On the other hand, the "selling" of the bare cause of action could be advantageous, depending on "the quantum of the claim [as] it may be in the best interests of the creditors for the officeholder to sell the claim for a nominal sum upfront, with a share of any potential proceeds. This typically takes place on smaller claims."

3. Dispute resolution

Litigation funders were asked whether they ever had to resort to the dispute resolution clauses in the funding agreement, as between funder and insolvency practitioner. Three respondents (25%) indicated that they made use of the dispute resolution clauses. Comments below from litigation funders provide some insights into the type of disputes that could arise and serve to demonstrate the importance of carefully crafted funding agreements:

- "The Insolvency Practitioner wanted to accept the defendant's offer to resolve the matter on a walk away basis when we received some evidence that wasn't supportive of our claim. The funder wanted to make a counter-offer (*sic*) to settle the claim for a sum that would enable it to recover some of its funding. Counsel advised that accepting the defendant's offer involved less risk so the matter was settled on that basis and the funder lost its funding and any entitlement to commission."

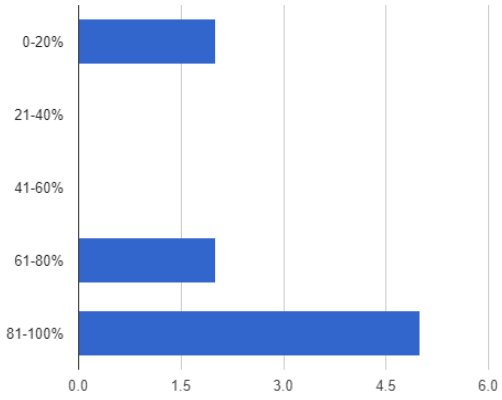
- "Most were resolved amicably between the parties and on a commercial basis after raising reliance on the dispute resolution mechanism in the funding agreement."

- "In a failed case a dispute arose as to how the payout from an ATE policy, which covered own side disbursements, would be used. Ongoing!"

4. Outcome of funded proceedings

4.1 Success rate

When asked in how many of the insolvency proceedings that they funded there was a successful outcome (whether it be a favourable judgment at trial, or out of court settlement), litigation funders responded as follows:



Counts/frequency: 0-20% (2 participants, 22.2%), 21-40% (0 participants, 0.0%), 41-60% (0 participants, 0.0%), 61-80% (2 participants, 22.2%), and 81-100% (5 participants, 55.6%).

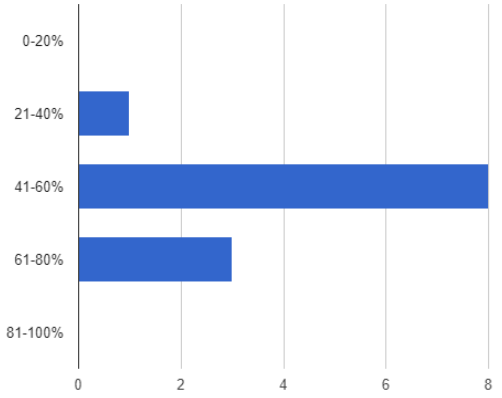
Comment – Success rate in funded insolvency proceedings

Funders appear to have had mixed success with funded proceedings, with more than half indicating that a successful outcome was achieved in 81-100% of funded insolvency proceedings, while nearly a quarter had success in only 0-20% of funded insolvency proceedings (22% of participants). Once again, this appears to align more or less with the experience of insolvency practitioners when asked the same question. The response to this question offers additional evidence to dispel the notion that funded insolvency

matters will be decided in favour of the funded party in the vast majority of instances. This clearly indicates the risk that litigation funders are exposed to when funding insolvency proceedings, as they may well end up in a position where they have to carry the cost burden, without any return on investment in respect of the particular matter that was funded.

4.2 Proceeds that would normally go back into the insolvency administration

Litigation funders were furthermore asked to provide information to estimate how much of the proceeds of a successful outcome would normally go back into the insolvency administration. The responses indicated the following:



Counts/frequency: 0-20% (0 participants, 0.0%), 21-40% (1 participant, 8.3%), 41-60% (8 participants, 66.7%), 61-80% (3 participants, 25.0%), and 81-100% (0 participants, 0.0%).

Comment – Proceeds that would normally go back into the insolvency administration

It appears from the jurisdictional overviews above[1] that there is little, if any, regulation in regard to the funding "premium" that may be levied. Concerns have been expressed that the "premium" charged by litigation funders may be excessive in some cases and that this may potentially result in unsecured creditors not benefiting from funded proceedings in any way, even where these are successful. However, based on the information provided by litigation funders it appears that a significant portion of the fruits of a successful action would flow back into the insolvency administration. In fact, 92% of respondents indicated that between 40%-80% of the proceeds would normally go back into the insolvency administration. One litigation funder indicated support for regulation that would ensure that "the plaintiff received 50% of any Claim Proceeds on the basis that the Court had a discretion to adjust this in appropriate circumstances".

[1] Part A of this report.

5. Regulation of litigation funding industry

Litigation funders were asked to provide their perspective on the adequacy of existing regulation in respect of the litigation funding industry. Not surprisingly, the vast majority indicated that existing regulation is adequate and appropriate. Multiple survey participants based their response on the extent to which courts fulfil an oversight function in respect of insolvent litigation funding arrangements:

- "Insolvency courts have demonstrated themselves to be capable of assessing issues relating to the use of litigation funding within insolvencies. They are equipped with a useful framework, in the form of the insolvency/restructuring laws, to effectively oversee the use of litigation funding in the context of insolvencies."

- "[C]ourts generally have a broad supervisory role over insolvency proceedings and the same applies to LFAs."

- "Court oversight keeps industry/arrangements in check."

Creditor approval for litigation funding agreements being required in some jurisdictions has also been identified as a reason as to why additional regulation is not required, the assumption being that creditors are capable of protecting their own interests:

- "Typically various sophisticated shareholders participate in LFA negotiations; in fact, creditors of the funded insolvent entity have to bless the LFA."

- "Creditors will also have the casting vote in any litigation funding transaction as much of the proceeds will be for their benefit."

Reliance on experience of insolvency practitioners, as well as the extensive regulatory framework that applies to insolvency, are also seen as reasons as to why additional regulation would be superfluous:

- "The Insolvency Practitioners have been using litigation funding since the late 1990's and are cognisant of the risks and benefits of litigation funding."

- "The Insolvency Practitioners are aware of what terms of a funding agreement to accept or reject when negotiating the agreement."

- "The Insolvency Practitioners generally have a good relationship with the funder so any issues are able to be resolved by way of discussion and compromise by both parties."

- "The creditors of the insolvent company have in-built protections given that the insolvency practitioner has an obligation to act in the best interests of the creditors."

However, in the same breath, other comments highlighted reasons why regulatory intervention could be useful in some respects:

- "[V]oluntary or further regulation would enhance the reputation of the sector, provided that was at a sensible costs. The proposed adoption in the UK of standard terms is a good idea which should be adopted."

- "There is some ambiguity in Australia as to whether claims that are brought in the name of both the liquidator and the insolvent company must be run as a Managed Investment Scheme."

- "It would be nice to streamline the process for external administrators canvassing options for and then entering into litigation funding agreements."

6. General comments regarding insolvent litigation funding

Litigation funders generally expressed very positive views about funding insolvency matters. In fact, one litigation funder indicated that there is a preference for funding claims arising from insolvency because:

- "Transactions are easy to structure and there is always an enthusiasm from creditors to proceed because it comes at no cost to their already reduced claims coming out of the insolvent estate."

- "It is the best example of a litigation funding transaction assisting litigants who but for the resources provided by the litigation funder, would not have been able to proceed with their claims."

- "We also enjoy working with insolvency practitioners and their legal practitioners because they are results driven - you have to be in insolvency litigation."

Litigation funders identify litigation funding as a useful "tool in the insolvency toolbox", but one with which "insolvency practitioners (and their legal representatives)…ought to become more familiar with".

PART C

EXAMPLES OF LITIGATION FUNDING DOCUMENTS

Examples of Litigation Funding Documents

1. Australia

The example of a litigiation funding document used in Australia, has been kindly provided by CASL Funder Pty Ltd, Sydney, Australia. This document has been reproduced here with permission from CASL Funder Pty Ltd.

2. South Africa*

The example of a litigation funding document in South Africa has been kindly provided by the TPLF Company (Proprietary) Limited, Johannesburg, South Africa. This document has been reproduced here with permission from the TPLF Company (Proprietary) Limited.

* Please note that, while the example provided by the South African litigation funder refers to its use in business rescue, it is largely generic. The document could also be used for litigation in liquidation, with minor adjustments that would be required to align it with the relevant legislation. However, no material term would change.

COMMERCIAL CLAIM FUNDING AGREEMENT

COMMERCIAL CLAIM FUNDING AGREEMENT		
DATED		
BETWEEN:		
CASL Funder Pty Limited ACN 645 229 643		**("CASL")**
ADDRESS	Level 13, 115 Pitt Street, Sydney, New South Wales	
[INSERT CLAIMANT NAME]		**("Claimant")**
ADDRESS	*[INSERT CLAIMANT ADDRESS]*	
[INSERT REPRESENTATIVE NAME]		**("Representative")**
ADDRESS		

EXECUTED by the parties as an Agreement:

SIGNED for and on behalf of **CASL Funder Pty Limited ACN 645 229 643 by its directors in accordance with s.127 of the Corporations Act 2001**	)	
	)	Director
	)	Print Name:
	)	
	)	
	)	Director / Secretary
	)	Print Name:
SIGNED for and on behalf of **[*CLAIMANT*]** ***[Should note signing in accordance with section 127]***	)	
	)	
	)	Director
	)	Print Name:
	)	
	)	
	)	Director / Secretary
	)	Print Name:
SIGNED for and on behalf of ***[Representative]*** ***[Should have three alternative execution blocks:*** ***1. Sole practitioner*** ***2. Company/ILP – s 127*** ***3. Partnership – 2 partners]***	)	
	)	
	)	Director
	)	Print Name:
	)	
	)	
	)	Director / Secretary
	)	Print Name:

BACKGROUND

(i) CASL has received a proposal from the Claimant to fund the Claims.

(ii) CASL has agreed to provide funding for the Investigative Work and the Proceeding subject to the terms and conditions in this Agreement.

(iii) The Representative is retained by the Claimant to represent and advise the Claimants with respect to the Claims and the prosecution of the Proceeding on terms that include the terms set out in the Costs Agreement.

1 DEFINITIONS AND INTERPRETATION

1.1 DEFINITIONS

The following definitions apply to this agreement:

"Agreement" means this agreement.

"Additional Sum" means the sum payable to CASL pursuant to clause 5.1.2.

"**Adverse Costs Insurance**" means a contract of insurance that provides:

(a) cover for the costs incurred by the Respondent in the Proceeding that may be the subject of an Order for Costs; and/or

(b) security for costs in any form required for costs of the Respondent in the Proceeding.

"**Adverse Costs Insurance Premium**" means any sum paid or payable by CASL to purchase or procure Adverse Costs Insurance.

"Adverse Costs Insurance Provider" means any person considering providing, or provides, Adverse Costs Insurance to CASL or the Claimant, in respect of the Claims, whether before or after the date of this Agreement.

"**Business Day**" means a day on which banks (as defined in the *Banking Act 1959 (Cth)*) are open for general banking business in New South Wales, excluding Saturdays and Sundays.

"Claims" means all claims the Claimant has or may have against some or all of the Respondents arising out of, or connected with, the facts, matters, circumstances and/or allegations set out in **Item (a) of Schedule 1**.

"Co-Funder" means any person considering entering into, or who enters into, an agreement with CASL to provide co-funding to the Claimant, or a similar arrangement, in respect of the Claims, whether before or after the date of this Agreement.

"Conditions Precedent" means the matters that must be satisfied before any funding is provided as set out in **Item (k) of Schedule 1**.

"Confidential Information" means:

(a) the contents and subject matter of this Agreement;

(b) any forensic report and or legal opinions obtained by or on behalf of the Claimant under this Agreement (or any summaries of them);

(c) any information relevant to the Claims whether of a technical, commercial or any other nature;

(d) any information coming to a Party by virtue of being a Party

(e) information developed by a Party relevant to the Claims prior to or during the term of this Agreement including all information, data, documentation, functions, features, agreements with third parties, marketing information, customer or contact lists, trading data and financial information;

irrespective of whether it is provided to a Party before, on or after the date of this Agreement, except for information in the public domain other than as a result of a breach of this Agreement.

"Conflict Disclosure" means the matters raised in **Item (l) of Schedule 1**.

"**Corporations Act**" means the *Corporations Act 2001 (Cth)* in force as at the Date of this Agreement.

"Costs Agreement" means the terms and conditions set out in **Schedule 2**.

"**Date of this Agreement**" means the date of commencement of this Agreement pursuant to clause 9.1.

"Disbursements" means any costs, expenses and/or fees that are not professional fees of the Representative, reasonably incurred by the Representative on behalf of the Claimant with the prior written consent of CASL for the prosecution of the Claims, in the period from the Date of this Agreement up to the date of termination or conclusion of this Agreement. Such costs include but are not limited to fees and expenses for independent experts, private investigators, counsel, copying, printing and the fees charged by the Court.

"Enforcement Costs" means Legal Costs and Disbursements reasonably incurred by the Claimant for the Enforcement Work in the period from the Date of this Agreement up to the date of termination or conclusion of this Agreement.

"Enforcement Work" means work undertaken to recover any Resolution Amount from any Respondent.

"GST" means the same as in the *A New Tax System (Goods and Services Tax) Act 1999*.

"Investigative Work" means work undertaken to investigate the merits of the Claims prior to the commencement of the Proceedings being the work set out in **Item (c) of Schedule 1**.

"Legal Costs" means reasonable legal professional fees incurred by the Claimant in accordance with the terms of the Costs Agreement for the prosecution of the Claims in the period from the Date of this Agreement up to the date of termination or conclusion of this Agreement.

"Order for Costs" means any costs order made in the period from the Date of this Agreement up to the date of termination or conclusion of this Agreement, in favour of the Respondent against the Claimant in the Proceeding.

"Overarching Objective" means the just resolution of the Claims as quickly, inexpensively and efficiently as possible with the aim of maximising the present value of money received via the Settlement or adjudication of the Claims, net of costs, whilst having due regard to all risks including, in particular, the risk of the Claims being unsuccessful.

"Parties" means CASL and the Claimant (and Party means either one of them).

"Privilege" means, unless the context otherwise requires, legal professional privilege and includes any joint privilege or common interest privilege.

"Proceeding" means any and all legal proceedings or alternative dispute resolution process issued by or taken (including any process or proceedings in contemplation of such legal proceedings) concerning the Claims by the Claimant that is not Investigative Work.

"**Progress Report**" means a written report to be provided to CASL addressing each of the matters set out in **Schedule 3** concerning all material aspects of the conduct of the Proceeding and/or the Claims.

"Reimbursable Amount" means, collectively, all funds paid by CASL pursuant to Clause 3 of this Agreement together with any Adverse Costs Insurance Premium, indemnity or security for costs provided by CASL to the Claimant pursuant to Clause 7 and any administrative fees incurred by CASL in connection with the provision of security under Clause 7.2.

"**Remaining Costs**" means any Legal Costs and Disbursements in excess of the respective capped amounts referred to in Clauses 3.1, 3.2, 3.3 and **Schedule 1** of this Agreement.

"Representative" means the firm of solicitors identified in **Item (d) of Schedule 1**, or any other solicitors appointed in their place as agreed between CASL and the Claimant.

"**Resolution**" means when all or any part of the Resolution Amount is received by or on behalf of the Claimant. Where the Resolution Amount is received in parts, including where there is more than one Proceeding, a "Resolution" occurs each time a part is received.

"Resolution Amount" means any amount of money and/or any asset of value for which the Claims and/or the Proceeding are Settled, in part or in whole, with

any Respondent, or for which judgment is given for any of the Claims in favour of the Claimant in any Proceeding. It includes any interest (including any interest earned on money whilst held in the Trust Account) and any costs recovered by the Claimant pursuant to any costs order or by agreement.

"Respondent" means the persons or entities named in **Item (b) of Schedule 1** and, any other person against whom claims arising out of the same factual circumstances as the Claims, are made by the Representative on behalf of the Claimant.

"**Settlement**" means any settlement, compromise, discontinuance, withdrawal, abandonment, dismissal or waiver of all or part of the Claims and/or the Proceeding.

"**Settle and Settled**" has a corresponding meaning to Settlement.

"Trust Account" means a trust account kept by the Representative.

1.2 INTERPRETATION

In this Agreement:

1.2.1 the expression "person" includes an individual, a body politic, a corporation and a statutory or other authority or association (incorporated or unincorporated);

1.2.2 a reference to any Party includes that Party's executors, administrators, successors, substitutes and assigns;

1.2.3 words or expressions denoting individuals include any legal entity, and any words or expressions denoting acts done or roles undertaken include those done or undertaken by an authorised representative of a legal entity;

1.2.4 words or expressions denoting the singular include the plural and vice versa;

1.2.5 words or expressions denoting a gender include any gender;

1.2.6 headings and bold type are for convenience only and do not affect the interpretation of this Agreement;

1.2.7 where the day on which or by which any act, matter or thing is to be done under this document is not a business day, that act, matter or thing must be done on the following Business Day;

1.2.8 a provision of this Agreement will not be construed to the disadvantage of a Party merely because that Party was responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement; and

1.2.9 month means a calendar month.

2 COOLING-OFF PERIOD

2.1 CASL has informed the Claimant of its rights to, and recommends that it does consider, obtaining independent advice before entering into this Agreement, and the Claimant has been provided with adequate opportunity to obtain that independent advice.

2.2 The Claimant may withdraw from this Agreement by doing so in writing within 5 Business Days after this Agreement is signed by the Claimant, but before any amount of funding has been paid to the Claimant for the Investigative Work or the Proceeding (**Cooling-Off Period**).

3 FUNDING

3.1 Subject to satisfaction of the Conditions Precedent, CASL hereby agrees to pay for the Investigative Work up to the capped amounts set out in **Item (e) of Schedule 1**.

3.2 On satisfaction of the Conditions Precedent, and conclusion of the Investigative Work, CASL, may at its sole discretion, elect whether to:

3.2.1 provide funding for the Proceeding up to the capped amounts set out in **Item (f) of Schedule 1**; or

3.2.2 terminate pursuant to clause 9.2 of this Agreement.

3.3 On conclusion of the Proceeding, CASL, may at its sole discretion, elect to:

3.3.1 provide funding for the Enforcement Work up to the capped amounts set out in **Item (g) of Schedule 1**; or

3.3.2 terminate pursuant to clause 9.2 of this Agreement.

4 CLAIMS FOR PAYMENTS

4.1 A claim for payment is to be made by the Claimant and Representative once per calendar month, unless otherwise agreed in writing by CASL, as soon as possible after the last day of each calendar month.

4.2 Subject to clauses 4.3 and 4.4, all monies payable by CASL pursuant to this Agreement will be paid within 14 days of a claim for payment being made by the Claimant and Representative to CASL in writing.

4.3 All claims for payment must, as a minimum requirement, include the following information and detail:

4.3.1 the amount of the payment claim;

4.3.2 the number of the payment claim;

4.3.3 details of the work carried out;

4.3.4 the date the work was carried out;

4.3.5 the professional who carried out the work;

4.3.6 the time spent by that professional in carrying out the work;

4.3.7 the rate per hour charged by that professional for carrying out the work;

4.3.8 copies of invoices for any Disbursements;

4.3.9 a summary of the actual costs incurred vs the budgeted or expected costs for the work; and

4.3.10 where the actual costs are different to the budgeted or expected costs, an explanation for why the costs differ.

4.4 Notwithstanding clause 4.3, CASL may, from time to time, at its sole discretion, require further information and detail relating to the claim for payment. If such detail is available and not provided, CASL may at its sole discretion withhold payment until such information and detail is provided.

4.5 If there is any dispute about the amount or form of the claim for payment, the dispute will be dealt with in accordance with clause 15 of this Agreement. For the avoidance of doubt, CASL agrees to make payment, in accordance with clause 4.2, of any amounts in the claim for payment that are not in dispute.

5 REIMBURSABLE AMOUNT AND ADDITIONAL SUM

5.1 As consideration for the promises made by CASL under this Agreement, CASL is entitled as an assignee, to be paid by the Claimant as an assignor, upon Resolution, in accordance with clauses 5.2 and 5.3, the following amounts from any Resolution Amount:

5.1.1 an amount equal to the Reimbursable Amount; and

5.1.2 the Additional Sum provided for and calculated in accordance with **Item (h) of Schedule 1,** or if the Additional Sum is increased by agreement between the Parties, then that increased Additional Sum.

5.2 The Claimant hereby irrevocably instructs the Representative to:

5.2.1 upon Resolution, receive any Resolution Amount and immediately pay such amount into the Trust Account;

5.2.2 maintain records allowing for the separate identification of each Resolution Amount; and

5.2.3 upon cleared funds becoming available, immediately pay out of the Trust Account to CASL, the amounts due to CASL pursuant to Clause 5.1 of this Agreement in accordance with clause 5.5 below.

5.3 The Representative will hold that part of the Resolution Amount assigned to CASL under Clause 5.1 on trust for CASL.

5.4 The Claimant agrees that CASL holds a security interest in the Resolution Amount as contemplated under the Personal Property Security Act 2009 (Cth). The Claimant consents to CASL registering its security interest on the Personal Property Securities Register and agrees to provide all assistance reasonably required by CASL to facilitate registration.

5.5 The Parties agree that the Representative is irrevocably instructed to make the following payments upon Resolution from any Resolution Amount in the strict order of priority set out below:

5.5.1 as a first priority, pay to CASL all amounts assigned to CASL by virtue of clause 5.1 of this Agreement;

5.5.2 as a second priority, pay to the Representative the Remaining Costs, if any; and

5.5.3 as a third priority, pay to the Claimant all remaining amounts as directed by the Claimant.

6 APPEAL OF THE PROCEEDINGS

6.1 If an appeal is lodged in respect of a final judgment in the Proceeding by any Respondent:

6.1.1 the Claimant must forthwith give CASL written notice;

6.1.2 CASL may elect, in its absolute and unfettered discretion to provide further funding to defend the appeal. This election must be communicated in writing by CASL to the Claimant; and

6.1.3 unless and until CASL makes an election pursuant to clause 6.1.2, or otherwise consents in writing, the Claimant must not approach another litigation funder to fund the appeal.

6.2 If there is a final judgment in the Proceeding which is not wholly in favour of the Claimant, then:

6.2.1 CASL may elect in its absolute and unfettered discretion to provide further funding to appeal. This election must be communicated in writing by CASL to the Claimant; and

6.2.2 unless and until CASL makes an election pursuant to clause 6.2.1 or otherwise consents in writing, the Claimant must not approach another litigation funder to fund the appeal.

6.3 If CASL elects to provide any funding pursuant to clause 6.1.2 or clause 6.2.1 above, then from the date of CASL's written notice, an additional amount as set out in **Item (i) of Schedule 1** will be added to the Additional Sum otherwise payable in accordance with clause 5.1.2.

6.4 For clarity, unless CASL elects otherwise pursuant to clause 6.1.2 or clause 6.2.1 above, CASL is under no obligation to provide any funding in connection with any appeal of the Proceeding.

7 CASL INDEMNITY

7.1 CASL hereby indemnifies the Claimant from and against any Order for Costs up to the maximum set out in **Item (j) of Schedule 1**.

7.2 At the request of the Claimant, and upon an order of the Court being made that security for the Respondent's costs be provided, CASL will provide security for costs in the form as agreed by CASL, or otherwise as ordered by the Court, up to the maximum amount as set out in **Item (j) of Schedule 1**.

8 REPRESENTATIVE AND CONDUCT OF PROCEEDING

8.1 The Claimant must enter into a retainer with the Representative in the same terms as the Costs Agreement in respect to the Claims the subject of this Agreement.

8.2 In consideration of CASL entering into this Agreement, the Representative will act consistently with the terms of this Agreement and comply with all of their obligations including providing CASL with:

8.2.1 The names of the individual lawyers and experts who will undertake legal work in connection with the Claims and their hourly and daily rates;

8.2.2 The hourly and daily rates of barristers retained or proposed to be retained; and

8.2.3 the Representatives' estimate of Legal Costs and Disbursements to the conclusion of the Proceeding, including any material change in any earlier estimates.

The Representative will provide not less than 5 Business Days' notice to CASL of any proposed changes to those individual lawyers and experts who will undertake legal work in connection with the Claims and Proceeding.

8.3 The Claimant and Representative will keep CASL fully and promptly informed of all matters concerning the Claims and the Proceeding, including any mediation and settlement discussions.

8.4 To the extent that there are any inconsistencies or ambiguities between the terms of this Agreement (including the Schedules to this Agreement) and any retainer entered into by the Claimant with the Representative, the terms of this Agreement prevail.

8.5 The Parties agree that the Representative's professional and fiduciary duties owed to the Claimants take precedent over any duties or obligations the Representative may owe to CASL (if any).

8.6 Subject to clause 8.8, CASL will give day-to-day instructions to the Representative on all matters concerning the Claims and their prosecution. The Claimant, however, may override any instruction given by CASL by giving instructions directly to the Representative.

8.7 Notwithstanding the provisions of clause 8.9, CASL may from time-to-time request certain information and the Representative and/or Claimant must provide the information requested by CASL within a reasonable time period.

8.8 The Claimant agrees that it will not resolve, settle, compromise, in part or in whole, the Claims and/or the Proceeding without prior consultation with, and written consent from, CASL.

8.9 The Claimant and Representative agree that they will disclose to CASL immediately upon such information coming to the Claimant's knowledge, all information received from time to time which may have a material impact on the Investigative Work, Proceeding, Enforcement Work, or the continuation of funding under this Agreement. The Claimant and Representative acknowledge that any breach of this clause may entitle CASL to terminate this Agreement.

8.10 Notwithstanding any terms to the contrary in this Agreement (including the Schedules to this Agreement), the Claimant and the Representative agree and acknowledge that:

8.10.1 the Representative is aware of and agrees to the terms of this Agreement;

8.10.2 if the capped limits of the funding under this Agreement (as may be increased pursuant to this Agreement) are reached or the Representative reasonably anticipates that Remaining Costs will be incurred:

8.10.2.1 the Claimant will continue to instruct the Representative to act on their behalf until the conclusion of the Proceeding or the final resolution of the Claims;

8.10.2.2 the Representative will continue to act on behalf of the Claimant until the conclusion of the Proceeding or the final resolution of the Claims; and

8.10.2.3 the Remaining Costs will only be payable by the Claimant to the Representative upon Resolution, and in accordance with the priorities set out in clause 5.5; and

8.10.3 the Representative will send to CASL a Progress Report on the status and progress of the Investigative Work, the Proceeding and

Enforcement Work, as applicable from time to time, every month and at such other time as requested by CASL, within 2 Business Days of such request.

8.11 CASL may at its discretion, by written notice to the Claimant and the Representative, suspend its obligations under clauses 3 and 4, if CASL has not received a Progress Report from the Representative in accordance with clause 8.10.3, until the receipt of all outstanding reports.

8.12 If CASL suspends its obligations as set out in clause 8.9, the Claimant and the Representative will continue to prosecute the Claims and the Proceeding, and otherwise continue to undertake any Investigative Work and Enforcement Work, without delay, in good faith and with all due care, skill and diligence.

8.13 The Representative will charge Legal Costs by reference to the time reasonably and properly spent, subject to the Representative's right to increase the then applicable hourly rates by no more than five percent (5%) during any 12 month period commencing from each anniversary of the date of this Agreement. Detailed time records must be kept by the Representative.

8.14 No Legal Costs will be charged by the Representative for any fee earners, other than those notified to CASL without the prior consent of CASL. CASL will not be liable to pay the fees of any barristers or experts other than those notified to CASL from time to time or those briefed with CASL's consent. CASL will not unreasonably refuse to provide their reasonable consent.

8.15 The Representative is entitled to be reimbursed by CASL for Disbursements that are reasonably incurred by the Representative in accordance with this Agreement.

8.16 The Representative must inform CASL if they consider any proposed legal or expert service may exceed any component of Legal Costs or Disbursements prior to rendering the service or retaining external services and will work with CASL to amend any work plans to attempt to ensure the overall costs and disbursements remain as budgeted, in so far as is reasonably possible having due regard to the legal work required to achieve a successful resolution of the Claims.

9 COMMENCEMENT AND TERMINATION

9.1 This Agreement commences and becomes operative on the execution of this Agreement by the Parties and the Representative and satisfaction of the Conditions Precedent.

9.2 Where there has been a negative change to the assessment of the merits of the Claims and/or the Claims are no longer commercially viable to pursue and/or there has been professional misconduct or negligence by the Representative or the Claimant terminates the Representative's Cost Agreement for any reason,

CASL may terminate this Agreement by providing 28 days written notice to the Claimant.

9.3 If a Party commits a material breach of this Agreement and such breach is:

9.3.1 incapable of remedy; or

9.3.2 capable of remedy but the Party has failed to remedy the breach within 28 days of receiving a notice from another Party requiring it to do so,

then any other Party may immediately terminate this Agreement by giving notice to the other Parties.

9.4 In the event this Agreement is terminated pursuant to clause 9.2 or 9.3, CASL will remain obligated to pay any:

9.4.1 Legal Costs;

9.4.2 Disbursements;

9.4.3 any Order for Costs

in accordance with the terms of this Agreement, incurred in the period from the Date of this Agreement to the date of termination of this Agreement.

9.5 Upon the termination of this Agreement, the Parties are to use their best endeavours to have any security for costs provided by CASL pursuant to clause 7.2 withdrawn and returned to CASL, including but not limited to replacing the security for costs by one provided by a person or entity other than CASL.

9.6 For avoidance of doubt, if this Agreement is terminated for any reason other than for a material breach by the Claimant, upon Resolution (which may occur after termination), the Claimant shall pay to CASL an amount equal to the Reimbursable Amount from the Resolution Amount in priority to any other person (including the Claimant and the Representative).

9.7 If this Agreement is terminated by CASL pursuant to clause 9.3, upon Resolution (which may occur after termination), the Claimant shall pay to CASL an amount equal to the Reimbursable Amount and Additional Sum from the Resolution Amount in priority to any other person (including the Claimant and the Representative).

9.8 The Claimant's obligation to pay to CASL the Reimbursable Amount pursuant to Clause 5.1.1 survives termination.

10 REPRESENTATIONS AND WARRANTIES BY CLAIMANT

10.1 The Claimant warrants that all statements made by them, and all documents created by them in connection with the Claims as provided to CASL up to the Date of this Agreement are true and correct. The Claimant acknowledges that CASL has relied upon the correctness of those statements, documents and representations in entering into this Agreement and will continue to do so in

performing its obligations under this Agreement. Should any such statements, documents and/or representations to be found to be untrue or incorrect by CASL, then CASL may terminate this Agreement by providing three (3) Business Days' notice in writing to the Claimant.

10.2 The Claimant warrants that:

10.2.1 there is no charge or other encumbrance on the Resolution Amount and that no other third party litigation funding agreement relating to the Claims has been entered into by the Claimant as at the date of this Agreement; and

10.2.2 The Claimant will not cause or permit any charge, lien or other encumbrance to arise over or otherwise attached to the Resolution Amount and will not enter into any other third-party litigation funding agreement relating to the Claims, after the date of this Agreement, except with the prior written consent of CASL.

10.3 During the term of this Agreement the Claimant warrants that it will:

10.3.1 co-operate in good faith with CASL, and comply with any reasonable request CASL makes, in order to achieve the Overarching Objective and, in particular, will provide to CASL all information that CASL reasonably requires;

10.3.2 follow all reasonable legal advice given by the Representative in relation to the Claim; and

10.3.3 not have communication with the Respondent in respect of the Claim other than through the Representative or upon their reasonable advice.

11 CONFIDENTIALITY

11.1 A Party must not use or disclose the Confidential Information and must maintain any Privilege attaching to the Confidential Information, except as expressly permitted below:

11.1.1 in the proper performance of this Agreement;

11.1.2 to its legal or financial advisers;

11.1.3 to its officers, employees and advisers (including legal or financial);

11.1.4 CASL is permitted to disclose the Confidential Information (but excluding any personal information) to any Co-Funders, Adverse Costs Insurance Providers and any Co-Funders' or Adverse Costs Insurance Providers' Related Body Corporates, officers, employees and advisors provided that the applicable recipient of such disclosure has agreed with CASL to keep the information confidential and/or the subject of Privilege;

11.1.5 as required by law; or

11.1.6 with the consent of the other party.

11.2 Both Parties will ensure they have and will maintain secure operating procedures to comply with their obligations in this clause 11.

11.3 The obligations in this clause 11 survive termination of this Agreement.

12 NOTICES

12.1 Any notice or other communication of any nature which must be given, served or made under or in connection with this Agreement:

12.1.1 must be in writing in order to be valid;

12.1.2 is sufficient if executed by the party giving, serving or making the same or on its behalf by any attorney, director, secretary, other duly authorised officer or solicitor of such party;

12.1.3 will be deemed to have been duly given, served or made in relation to a person if it is sent by email, or if delivered or posted by prepaid registered post to the address, or sent by telex or facsimile to the number of that person set out herein (or at such other address or number as is notified in writing by that person to the other Parties from time to time); and

12.1.4 will be deemed to be given, served, made or received:

12.1.4.1 (in the case of prepaid registered post) on the third day after the date of posting;

12.1.4.2 (in the case of facsimile) on receipt of a transmission report confirming successful transmission;

12.1.4.3 (in the case of delivery by hand) on delivery; and

12.1.4.4 (in the case of email) on the date and time at which it enters the addressee's information system (as shown in a confirmation of delivery report from the sender's information system, which indicates that the email was sent to the email address of the addressee notified for the purposes of this clause), but if the delivery or receipt is on a day which is not a business day or is after 5.00pm (addressee's time), it is deemed to have been received at 9.00am on the next business day.

13 GST

13.1 Expressions used in this clause have the same meaning given to those expressions in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

13.2 Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

13.3 Subject to sub-clause 13.4, if GST is imposed on any Taxable Supply made under or in connection with this Agreement (a "GST amount"), the recipient must pay to the supplier the GST amount in addition to and (unless otherwise agreed) at the same time, without deduction or set-off, as payment for the Taxable Supply is required to be made under this Agreement.

13.4 Unless otherwise agreed in writing, the recipient of a Taxable Supply shall have no obligation to make any payment in respect of that Taxable Supply until the supplier has provided the recipient with a valid Tax Invoice for that Taxable Supply.

13.5 Unless otherwise agreed in writing between CASL and the Claimant, the Resolution Amount is not to be reduced by any GST liability that the Claimant may have with respect to any supplies in connection with the conclusion or conduct of the Proceedings.

14 INPUT TAX CREDITS

14.1 In this clause 14 the following definitions apply:

14.1.1 **ATO** means the Australian Taxation Office;

14.1.2 **BAS** means a business activity statement;

14.1.3 **Creditable** Acquisitions has the same meaning given to the term "creditable acquisitions" in the GST Act;

14.1.4 **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and

14.1.5 **Input Tax Credit** has the same meaning as the expression "input tax credit" as in the GST Act;

14.2 The Claimant must not claim any Input Tax Credit for the GST paid or payable by CASL under this Agreement with respect to any Legal Costs, Disbursements and Adverse Costs Insurance Premium, unless such a claim is made by the Claimant for and on behalf of CASL for the benefit of CASL pursuant to clause 14.3.

14.3 If the Claimant is entitled to any Input Tax Credit the GST paid or payable by CASL under this Agreement with respect to any Legal Costs, Disbursements and Adverse Costs Premium and the Claimant receives the benefit of such Input Tax Credit, then the Claimant must:

14.3.1 when legally entitled to do so, lodge with the ATO a BAS for each tax period during the course of this Agreement and must do so within the prescribed timeframes;

14.3.2 include in its BAS for the relevant tax period the amount of Input Tax Credit that it is entitled to claim in respect of its Creditable Acquisitions that were paid for as part of the Legal Costs and/or Disbursements; and

14.3.3 repay to CASL the amount of the Input Tax Credit referred to in clause 14.3.2, within 7 days upon receipt of the refund from the ATO; and/or in the event that the ATO credits the amount of any such Input Tax Credit to which the Claimant is entitled against any other tax liability of the Claimant, then within 7 days of notification by the ATO that such a credit has been made.

14.4 For the avoidance of doubt, the Claimant acknowledges that CASL is beneficially entitled to the Input Tax Credits referred to in this clause 14 and undertakes to provide CASL with the benefit of all the Input Tax Credits received.

15 DISPUTE RESOLUTION

15.1 In the event of any dispute between CASL, the Claimant and/or the Representative in relation Settlement of the, the Parties and Representative agree that:

15.1.1 this clause is enlivened by the sending of a notice by either party to the other stipulating that it is a notice seeking to enliven this clause;

15.1.2 they will use their best endeavours to resolve the dispute within 5 Business Days from receipt of the notice under clause 15.1.1;

15.1.3 failing resolution, the dispute will be referred to the most senior counsel retained by the Representative in the Proceeding or, if no counsel has been retained, one appointed by the Representative with the written agreement of CASL and the Claimant or, failing agreement, an independent counsel nominated by the President of the New South Wales Bar Association for a determination;

15.1.4 in making their determination, counsel may request detailed submissions from each party as to the particulars or details of the matters in dispute;

15.1.5 the determination of counsel under this clause is final and binding; and

15.1.6 In relation to a dispute about the Settlement of the Claims, CASL will pay the costs of complying with this clause as part of the funding provided pursuant to this Agreement.

15.2 Except in relation to Settlement of the Claims, in the event of any dispute between CASL, the Claimant and/or the Representative in relation to any matter arising from this Agreement, in particular, as to the conduct or progress of the Claims and/or the Proceeding, the Parties and Representative agree that the dispute must:

15.2.1 first be promptly discussed at a meeting of the parties to resolve the dispute

in good faith;

15.2.2 second, if it cannot be resolved, be the subject of mediation administered by Australian Disputes Centre ("**ADC**"); and

15.2.3. finally, if it cannot be resolved by mediation, be the subject of a binding arbitration conducted by ADC; and

15.2.4 each of the Claimant and CASL is liable for their own costs of complying with this clause and, they are each liable for 50% of the cost of the ADC costs for the purpose of this clause. For avoidance of doubt, the Claimant's share for the ADC costs under this clause is not funded or payable by CASL.

16 GOVERNING LAW

16.1 This Agreement will be governed by and construed in accordance with the laws of New South Wales and the Parties and Representative, by agreeing to enter into this Agreement, will be deemed to have submitted to the non-exclusive jurisdiction of that State.

17 ASSIGNMENT

17.1 Neither Party may assign, delegate, charge or otherwise transfer or encumber any of its rights or obligations under this Agreement without the prior written consent of the other Party.

17.2 The consent referred to in clause 17.1 must not be unreasonably withheld.

17.3 Notwithstanding clauses 17.1 and 17.2, CASL may assign and transfer all its rights and obligations under this Agreement to any person to which it transfers all or part of its business, provided that the assignee undertakes in writing to be bound by the obligations of CASL under this Agreement.

18 CONFLICTS MANAGEMENT POLICY

18.1 The Parties acknowledge that the nature of the relationships between the parties involved in funded litigation has the potential to lead to a divergence of, and conflicts between, the interests of the Claimant, CASL and the Representatives because:

18.1.1 CASL has an interest in minimising costs and maximising its return;

18.1.2 The Representative has an interest in receiving fees and costs; and

18.1.3 The Claimant has an interest in minimising costs and the remuneration paid to CASL and, in doing so, maximising any return

These conflicts can be actual or potential, and present or future.

18.2 The Claimant and Representative acknowledge the Conflict Disclosure provided prior to execution of this Agreement.

18.3 In order to address any actual or perceived conflicts, CASL will comply with its conflicts management policy which is maintained by CASL and may be amended by CASL from time to time. A copy of the current conflicts management policy can be accessed on the CASL website at www.casl.com.au.

18.4 Where the Representative considers that they may be in a position of conflict they may:

18.4.1 Take instructions from or give advice to the Claimant, whose instructions will override those of, and may be contrary to the interests of, CASL; and

18.4.2 Not give advice or act on CASL's instructions where that advice or those instructions may be contrary to the Claimant's interests.

19 AMENDMENT OF THIS AGREEMENT

19.1 This Agreement may only be amended as follows:

19.1.1 by notice in writing by CASL to the Claimant, and the Claimant does not notify CASL in writing within 14 days that the amendment is rejected; or

19.1.2 otherwise by written agreement of both Parties.

SCHEDULE 1

The details of each item which constitute its definition for the purpose of this Agreement is set out in the corresponding column entitled "Particulars" in this table as follows:

Item	Item Name	Particulars
(a)	**"Claims"** (Clause 1.1)	*[INSERT DESCRIPTION OF CLAIM]*
(b)	**"Respondent"** (Clause 1.1)	*[INSERT NAME OF RESPONDENT(S)]*
(c)	**"Investigative Work"** (Clause 1.1)	*[INSERT PARTICULAR ITEMS INCLUDED AS PART OF INVESTIGATIVE WORK]* *An example is as follows:* *Obtaining preliminary advice as to the prospects of success of the Claims, drafting letter of demand, reviewing any responses to letter of demand and engaging in any pre-litigation settlement discussions with the Respondent.*
(d)	**"Representative"** (Clause 1.1)	*[INSERT NAME OF THE SOLICITOR INTENDED TO BE ON THE RECORD AND NAME OF FIRM OF SOLICITORS]*
(e)	**Funding for Investigative Work** (Clause 3.1)	1. Legal Costs to a capped amount of $*INSERT* (inclusive of GST); and 2. Disbursements to a capped amount of $*INSERT* (inclusive of GST).
(f)	**Funding for the Proceeding** (Clause 3.2)	1. Legal Costs to a capped amount of $*INSERT* (inclusive of GST); and 2. Disbursements to a capped amount of $*INSERT* (inclusive of GST).
(g)	**Funding for Enforcement Work**	1. Legal Costs to a capped amount of $*INSERT* (inclusive of GST); and

	(Clause 3.3)	2. Disbursements to a capped amount of $*INSERT* (inclusive of GST).
(h)	**Additional Sum** (Clause 5.1.2)	"Additional Sum" means the higher of either Option 1 or Option 2 **Option 1** 1. For any Resolution Amount received by or on behalf of the Claimant within six (6 months) of the Date of this Agreement, an amount equal to *INSERT*% of the Resolution Amount; 2. For any Resolution Amount received by or on behalf of the Claimant between six (6) and twelve (12) months of the Date of this Agreement, an amount equal to *INSERT*% of the Resolution Amount; and 3. For any Resolution Amount received by or on behalf of the Claimant after twelve (12) months of the Date of this Agreement, an amount equal to *INSERT*% of any Resolution Amount. **OR** **Option 2** 1. For any Resolution Amount received by or on behalf of the Claimant within six (6 months) of the Date of this Agreement, an amount equal to *INSERT NUMBER* times the Reimbursable Amount; 2. For any Resolution Amount received by or on behalf of the Claimant between six (6) and twelve (12) months of the Date of this Agreement, an amount equal to *INSERT NUMBER* times the Reimbursable Amount; and 3. For any Resolution Amount received by or on behalf of the Claimant after twelve (12) months of the Date of this Agreement, an amount equal to *INSERT NUMBER* times the Reimbursable Amount.
(i)	**Increase in Additional Sum for appeals** (Clause 6.3)	*For Option 1 in Item (h) of Schedule, an additional INSERT PERCENTAGE.* *For Option 2 in Item (h) of Schedule, an additional INSERT MULTIPLE or DOLLAR AMOUNT.*
(j)	**Indemnity for Order for Costs and security for costs**	*[INSERT AMOUNT]*

	(Clauses 7.1 and 7.2)	
(k)	**Conditions Precedent**	*[INSERT DESCRIPTION OF CONDITIONS PRECEDENT]*
(l)	**Conflict Disclosure**	1. *Pre-existing or potential future relationship between CASL the Representative*. The Representative and CASL have previously entered into a similar relationship for the purpose of pursuing another action. The Representative [has/has not] previously provided legal services to CASL. In the future the Representative may seek funding from CASL to pay for their legal services and CASL may seek the Representative to provide legal services to their clients. The Representative is retained by the Claimant and not by CASL. Your lawyers professional and fiduciary duties to you take precedence over any duties or obligations they may owe to CASL. 2. *Procedural aspects of the claim.* The Parties may disagree about the best strategy for pursuing the claim to achieve the Overarching Objective. In the event there is a disagreement in relation to any procedural aspects of the claim, clause 15 of the Agreement provides for a dispute mechanism. 3. *Proposed settlement of the claim*. The Parties may potentially disagree about whether or not to accept a settlement offer, or whether to make a particular settlement offer. In the event there is a disagreement in relation to the settlement, clause 15 of the Agreement provides for a dispute mechanism. 4. *Termination of the Agreement*. CASL may not want to continue funding a claim despite the Claimant wishing it to continue funding or vice versa. The Agreement addresses this potential conflict in clause 9 by specifying the rights which CASL and the Claimant have to terminate the Agreement and the consequences. Clause 15 of the Agreement provides a dispute resolution mechanism. 5. *Resolution of Conflicts*. Clause 15 of the Agreement provides a dispute resolution mechanism by which conflicts of interests can be resolved if they are not able to be resolved informally.

SCHEDULE 2 – REPRESENTATIVE'S COSTS AGREEMENT WITH THE CLAIMANT

[INSERT]

SCHEDULE 3 – PROGRESS REPORT

Name of Case	
Date of Report	
Name of lawyer making report	
Please list the key events which have occurred since the date of the last report	
Please indicate any key features of the case which have changed since the last report	
Please list the steps you expect to take in the next month	
Please provide your assessment of the prospects of success of the case, the prospects of settling and the prospects of enforcement as applicable. If any prospects have changed in the last month, please provided detailed reasoning	
Do you see any changes to the estimates of costs provided by you and reflected in Schedule 1 of the Agreement? Please note the capped limits of funding under Clause 3 and your obligations under Clause 8.10 and Clause 8.10 of the Agreement	
What is your current estimated date for the final trial of this matter?	

If this has changed since the last report, please explain why.	
What proposals do you have to explore settlement in the next month, if any?	

FUNDING AGREEMENT

entered into between

TPLF COMPANY (PROPRIETARY) LIMITED

(Registration Number 2020/12345/08)

("TPLF Company")

and

[_____] PROPRIETARY LIMITED

(IN BUSINESS RESCUE)

(Registration Number **[_____]**)

("Plaintiff")

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WHEREBY IT IS AGREED AS FOLLOWS:

1. PARTIES

1.1. The Parties to this Agreement are –

1.1.1. TPLF Company Capital General Partner(Proprietary) Limited;

1.1.2. **[_____]** (in Business Rescue).

1.2. The Parties agree as set out below.

2. INTERPRETATION AND PRELIMINARY

The headings of the clauses in this Agreement are for the purposes of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify the terms of this Agreement nor any clause hereof. Unless a contrary intention clearly appears:

2.1. Words importing:

2.1.1. any one gender includes the other two genders;

2.1.2. the singular includes the plural and *vice versa*; and

2.1.3. natural persons include created entities (corporate or unincorporate) and The State and *vice versa.*

2.2. The following terms shall have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings namely:

2.2.1. "**Action**" means the action, motion or arbitration proceedings (or a combination thereof) and shall include any appeals and/or reviews, instituted or to be instituted (whether or not transferred to another court or jurisdiction or referred to arbitration or any alternate dispute resolution process), as described in the Litigation Schedule, in relation to or in connection with the Claims;

2.2.2. "**Agreement**" means this written document together with all written appendices, annexes, exhibits or amendments attached to it from time to time;

2.2.3. "**Availability Period**" means a period from the Signature Date up until the Action having become settled or finally determined;

2.2.4. "**Claims**" means the claims, disputes and matters which the Plaintiff has against the Defendant, as described in the Litigation Schedule;

2.2.5. "**Conclusion Date**" means the date when both - (i) the Action becomes settled or finally determined (after all appeals or reviews have been exhausted); and (ii) the payment to TPLF Company of the Recompense and all other amounts due to TPLF Company in terms of this Agreement have been made or it has been finally determined that no Recovery will be payable;

2.2.6. "**Consulting Expert**" means a person who has been retained by the Plaintiff to give advice on factual, technical or legal matters, but who has not been designated as a witness in the Action;

2.2.7. "**CPA**" means the Consumer Protection Act, 68 of 2008;

2.2.8. "**Defendant**" means the defendant or respondent in the Action, as described in the Litigation Schedule and "**Defendants**" shall have a corresponding meaning;

2.2.9. "**Disclosure Schedule**" means the disclosure schedule attached hereto as **Annexure A**;

2.2.10. "**Event of Default**" means any event or circumstance specified as such in clause 19 and elsewhere in this Agreement;

2.2.11. "**Expert Witness**" will mean a person who has been retained by the Plaintiff to provide expert testimony in connection with the Action, as listed in the Litigation Schedule (or any other expert that may be mandated by the Plaintiff in terms of this Agreement, should that situation arise);

2.2.12. "**Facility**" means:

2.2.12.1. the Funding Amount; plus

2.2.12.2. any additional amount to be made available by TPLF Company pursuant to the provisions of clause 5.2 below in order to bring the prosecution of the Action to finality;

2.2.13. "**Funding Amount**" means the predetermined funding amount to be made available by TPLF Company under this Agreement, as set out in the Litigation Schedule;

2.2.14. "**Indemnified Amount**" means the amount of the Plaintiff' maximum aggregate indemnification for all adverse costs orders or awards arising out of the Action, as set out in the Litigation Schedule;

2.2.15. "**Insolvency Act**" means the Insolvency Act, 24 of 1936;

2.2.16. "**Legal Costs**" means the fees, costs and disbursements of the Representatives reasonably incurred in the prosecution of and furtherance of the Action;

2.2.17. "**Legal Practice Act**" means the Legal Practice Act, 28 of 2014;

2.2.18. "**Legal Representatives**" means advocates, attorneys and firms of attorneys for the Plaintiff, as listed in the Litigation Schedule (or any other attorney or counsel that may be mandated by the Plaintiff in terms of this Agreement, should that situation arise) and "**Legal Representative**" shall mean any one of them as the context may indicate;

2.2.19. "**Letter of Authority**" means a written and signed acknowledgement, in the form of **Annexure B** hereto, addressed by the Parties to the Legal Representative confirming that it is aware of the terms of this Agreement and in particular:

2.2.19.1. the provisions of clause 7 as concerns the sharing of Litigation Information;

2.2.19.2. the irrevocable agreement of the Plaintiff for the payment and retention of the Recovery into the Trust Account of the Legal Representative as a stakeholder for the benefit of the Parties and as agent for neither; and

2.2.19.3. the obligation to deduct and pay to TPLF Company from such Trust Account deposit any amount due and payable to TPLF Company in terms of clause 6,

and that the Legal Representative accepts and agrees thereto;

2.2.20. "**Litigation Information**" means all information, whether written, oral, or in electronic form, of or concerning the Action, including but is not limited to information and communications that are privileged or protected - (i) by the attorney-client privilege or any other privilege; (ii) by the work product doctrine; or (iii) as confidential financial, business or technical information;

2.2.21. "**Litigation Schedule**" means the schedule attached hereto as **Annexure C**;

2.2.22. "**Management Reports**" means the reports to be prepared and presented by the Plaintiff in accordance with clause 16 below;

2.2.23. "**Material Adverse Effect**" means, any fact or circumstance or happening or any event which has or is reasonably likely to have a material adverse effect on:

2.2.23.1. the business, operations, property, condition (financial or otherwise) or solvency of the Plaintiff; and/or

2.2.23.2. the ability of the Plaintiff to perform any of its obligations under this Agreement;

2.2.24. "**NCA**" means the National Credit Act, 34 of 2005;

2.2.25. "**Parties**" means TPLF Company and the Plaintiff and includes a reference to either one of them, as the context may require;

2.2.26. "**Plaintiff**" means **[_____]** (in Business Rescue):

2.2.26.1. being a limited liability private company duly incorporated in accordance with the company laws of the RSA, with registration number **[_____]**;

2.2.26.2. having been placed under business rescue in terms of a resolution passed in terms of section 129 of the Companies Act;

2.2.26.3. herein represented by **[_____]** in his capacity as the Business Rescue Practitioner of **[_____]** Proprietary Limited (in Business Rescue), - (i) having been appointed by the Companies and Intellectual Property Commission, which appointment is confirmed by his Certificate of Appointment annexed hereto marked as **Appendix 1**; and (ii) having in writing duly authorised and approved the terms and conditions of the Transaction for and on behalf of **[_____]** (in Business Rescue) as contemplated in section 134 and/or section 135 of the Companies Act, which writing is attached as **Appendix 2;**

2.2.27. "**Plaintiff Members**" means the Plaintiff directors, employees, officers, agents and representatives;

2.2.28. "**Prime Rate**" means the publicly quoted basic rate of interest per annum, compounded monthly in arrear and calculated on a 365 day year (irrespective of whether or not the year is a leap year) from time to time quoted by The Standard Bank of South Africa Limited as being its prime overdraft rate as certified by any manager of such bank, whose appointment and designation need not be proved;

2.2.29. "**Pro-Rata Share**" means the proportionate share of each instalment of the Recovery (if the Recovery is paid in instalments and not as a lump sum) that TPLF Company shall be paid, being the relevant percentage reflected in clause 8 of the Litigation Schedule;

2.2.30. "**Rand**" or "**ZAR**" means South African Rands;

2.2.31. "**Recompense**" means the amount payable by the Plaintiff to TPLF Company as consideration for advancing the Facility to the Plaintiff in accordance with the tariffs, scales, charges and terms of payment set out in this Agreement and the Litigation Schedule;

2.2.32. "**Recovery**" means the value of all gross sums of whatever nature (whether in monies, payment *in specie* or otherwise, received from or paid by or on behalf the Defendant, any party to the Action, or any third party (including, without limitation, an insurer or indemnifier) or pursuant to any execution proceedings and whether consequent upon any order, award or settlement of compromise of the Action;

2.2.33. "**Recovery Balance**" means the Recovery less the amount of the Utilisation Aggregate;

2.2.34. "**Referee**" shall have the meaning ascribed to that term in clause 11.5 below;

2.2.35. "**Representatives**" means the Expert Witness and the Legal Representatives and "**Representative**" has a corresponding meaning;

2.2.36. "**Signature Date**" means the date of the last signature of this Agreement;

2.2.37. "**TPLF Company**" means TPLF Company Capital General Partner (Proprietary) Limited, registration number 2020/462413/07, a company registered and incorporated with limited liability under the laws of the Republic of South Africa;

2.2.38. "**Top-Tier Firms**" means those top-tier firms of attorneys listed in the Litigation Schedule;

2.2.39. "**Trigger Amount**" means the amount/s at which the Plaintiff has agreed to accept as the minimum amount (in certain circumstances) in respect of settlement or compromise of the Action, as set out in the Litigation Schedule;

2.2.40. "**Trust Account**" means the separate trust banking account at a banking institution in the Republic of South Africa, opened and kept by the Legal Representative in accordance with the provisions of Section 86 of the Legal Practice Act;

2.2.41. "**Utilisation**" means the utilisation of the Facility in terms of clause 5;

2.2.42. "**Utilisation Aggregate**" means the aggregate of all Utilisation Amounts, constituting that portion of the Facility paid in terms of clause 5 below *[for the avoidance of doubt and by way of example, where there are a total of 3*

Utilisations during the Availability Period bearing Utilisation Amounts of R 1 million, R 1.5 million and R 3 million, then the Utilisation Aggregate is equal to R 5.5 million];

2.2.43. "**Utilisation Amount**" means, in respect of a Utilisation, the amount specified in the Utilisation Request in question;

2.2.44. "**Utilisation Date**" means the date of Utilisation of any part of the Facility, being 2 (two) business days following receipt by TPLF Company of a Utilisation Request contemplated in clause 5.6;

2.2.45. "**Utilisation Request**" means, in respect of a Utilisation, the notice substantially in the form set out in clause 5.6 and "**Utilisation Requests**" has a corresponding meaning;

2.2.46. "**VAT Act**" means the Value-Added Tax Act, 89 of 1991, as amended;

2.2.47. "**VAT**" means Value-Added Tax levied in terms of the VAT Act;

2.2.48. "**Warranties**" means the Warranties given by the Plaintiff in the Schedule of Warranties attached to this Agreement marked as **Annexure D** and elsewhere in this Agreement.

2.3. Any reference in this Agreement to:

2.3.1. "**Ordinary Course of Business**" means, with reference to the relevant entity in respect of any transaction involving such entity, in the ordinary course of such entity's business, as conducted by such entity in accordance with past practice and undertaken by such entity in good faith and not for the purposes of evading or avoiding any covenant, restriction or undertaking in this Agreement;

2.3.2. "**Industry Best Practice**" means in relation to the relevant entity, the manner in which the relevant entity is to conduct its business, applying the standards, practises, methods and procedures conforming to applicable regulatory provisions, and exercising that degree of skill, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person seeking to comply with its contractual obligations under

and engaged in the same or in a similar type of undertaking and under the same or similar circumstances and conditions;

2.3.3. "**Material**" and "**Materially**" refer, with respect to a given Party, to a level of significance that would have affected any decision of a reasonable person in such Party's position regarding whether or not to enter into this Agreement, or would affect any decision of a reasonable person in that Party's position regarding whether or not to consummate the transaction contemplated in this Agreement;

2.3.4. "**days**" shall be construed as calendar days unless qualified by the word "business", in which instance a "**business day**" will be any day other than a Saturday, Sunday or public holiday as gazetted by the government of the Republic of South Africa from time to time; and

2.3.5. "**writing**" means legible writing and in English and excludes any form of electronic communication contemplated in the Electronic Communications and Transactions Act, 25 of 2002.

2.4. Where this Agreement requires a Party to use "**Best Endeavours**" in relation to an action or omission, that Party shall do all such things as are reasonably necessary or desirable so as to achieve that action or omission and, to the extent that the action or omission is frustrated, hindered or otherwise difficult to attain, the Parties shall, to the extent that it is commercially reasonable to do so, consult and co-operate with each other in good faith and continue to take action so as to achieve that action or omission, provided that any actions or omissions required to be undertaken shall not be such as to result in a breach of fiduciary duty or contravention of any law.

2.5. Any consent, approval, acceptance and/or agreement required by this Agreement (in particular, without limitation clauses 5, 9 and 15) in relation to the Plaintiff shall be binding on the Plaintiff if it is authorised by any director or member (as the case may be) or the Business Rescue Practitioner of the Plaintiff.

2.6. If any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the Agreement.

2.7. In the event of conflict between this Agreement and between any annexure, the provisions of this Agreement shall prevail, save to the extent that any annexure expressly provides otherwise.

2.8. Where any term is defined within the context of any particular clause in this Agreement, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that that term has not been defined in this interpretation clause.

2.9. Expressions defined in this Agreement shall bear the same meanings in schedules or annexes to this Agreement which do not themselves contain their own definitions.

2.10. The use of any expression in this Agreement covering a process available under South African law shall, if any of the Parties to this Agreement is subject to the law of any other jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such defined jurisdiction.

2.11. Any reference to an enactment is to that enactment as at the Signature Date and as amended or re-enacted from time to time.

2.12. Where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.

2.13. The words “including” and “in particular” are without limitation.

2.14. In its interpretation, the *contra proferentem* rule of construction shall not apply (this Agreement being the product of negotiations between the Parties) nor shall this Agreement be construed in favour of or against any party by reason of the extent to which any Party or its professional advisors participated in the preparation of this Agreement.

2.15. A reference to a document includes an amendment or supplement to, or replacement or novation of that document.

2.16. Recordals shall be binding on the Parties and are not merely for information purposes.

2.17. Save insofar as otherwise expressly provided all amounts stated in this Agreement are expressed inclusive of Vat.

3. RECORDALS

3.1. WHEREAS the Plaintiff has instituted the Action to recover damages and loss which it has suffered or incurred.

3.2. AND WHEREAS the Plaintiff requires external funding to prosecute the Action.

3.3. AND WHEREAS TPLF Company is willing to advance funding to conduct the Action on an exclusive basis in return for a reasonable recompense in the Action.

3.4. AND WHEREAS the Parties agree and acknowledge that participation by TPLF Company in the funding of the Action represents neither an endorsement of, nor an authorisation to control, the prosecution strategy or decisions of the Plaintiff.

3.5. AND WHEREAS the Parties respectively agree and acknowledge that each provision of this Agreement (and each provision of the schedules and annexes hereto) is fair and reasonable in all the circumstances and is part of the overall intention of the Parties in connection with this Agreement.

3.6. AND WHEREAS the Parties wish to record in writing their agreement herein.

3.7. NOW THEREFORE the Parties agree as follows.

4. COMMENCEMENT AND DURATION

4.1. This Agreement shall commence on the Signature Date and, except as otherwise provided in this Agreement, shall continue until the Conclusion Date.

4.2. Termination of this Agreement for any reason whatsoever shall be without prejudice to any accrued rights as at the date of termination and such rights and obligations as within the contemplation of this Agreement are intended to survive such termination.

5. FUNDING

5.1. Subject to the terms of this Agreement, TPLF Company makes available to the Plaintiff funding in an aggregate amount equal to the Funding Amount (subject to any increase in accordance with the provisions of the clause 5.2 below).

5.2. TPLF Company may *mero motu,* in its sole and absolute discretion*,* increase the Funding Amount but is under no obligation to do so.

5.3. The Parties agree that participation by TPLF Company in the funding of the Action represents neither an endorsement of, nor an authorisation to control, the prosecution strategy or decisions of the Plaintiff.

5.4. The Plaintiff shall apply the Facility towards the payment of the Legal Costs in accordance with the provisions of this clause 5.

5.5. The Plaintiff may utilise the Facility by delivery to TPLF Company of a duly completed Utilisation Request. TPLF Company shall not be obliged (but shall be entitled) to advance Funding unless requested to do so by the aforementioned delivery to TPLF Company of a duly completed Utilisation Request.

5.6. The Utilisation Request is irrevocable and will not be regarded as having been duly completed unless:

5.6.1. the currency specified is ZAR;

5.6.2. the amount must be an amount which is less than the then balance of the Facility;

5.6.3. it is not more frequent than once every thirty days;

5.6.4. the proposed Utilisation Date is a Business Day within the Availability Period;

5.6.5. in the case of a Utilisation Request for an increase in the Funding Amount beyond the peremptory maximum increase in clause 5.2, the Agreement having not been terminated in accordance with the termination provisions set out in clause 19 below or elsewhere in terms of this Agreement;

5.6.6. it is accompanied by a tax invoice issued by the Representative concerned certifying the amount due, together with all vouchers and supporting documents and to include timesheets in respect of the services rendered in sufficient detail to enable TPLF Company to ascertain and assess the work done and which shall include (as a minimum) - (i) the date of the work attendance; (ii) details of the professional who carried out the work; and (iii) the time spent by that professional carrying out the work and the agreed hourly or other rate of such professional; and

5.6.7. is substantially in the form set out in **Annexure F**, which is signed and addressed to TPLF Company's domicilium address.

5.7. If the conditions set out in clause 5.6 have been met (but subject to clause 5.8 below), TPLF Company shall make payment on the Utilisation Date by electronic transfer of available funds to the account of the Representatives designated as such in the Litigation Schedule (or to such other person, if any, at such other account, if any, as the Representative in question has designated for the time being by written notice to TPLF Company of the amount specified in each Utilisation Request).

5.8. Should TPLF Company wish to dispute any amount in terms of any tax invoice issued by any Representative ("**Invoice Dispute**"), it shall be entitled to do so, provided TPLF Company gives written notice of the dispute to the Representative concerned within 5 (five) business days after receiving the relevant Utilisation Request. If TPLF Company and the Representative are not able to resolve the Invoice Dispute within 5 (five) Business Days after TPLF Company has raised the Invoice Dispute with the Representative as aforesaid, then TPLF Company shall be entitled to require the Plaintiff to refer the matter for resolution pursuant to any dispute resolution mechanism provided for in their mandate and fee agreement with the Plaintiff in respect of the Action and failing any such resolution mechanism, to any competent authority, governing body, council or organisation that has jurisdiction over the Representative in question. TPLF Company shall be required to make payment to the Representative of that portion of the invoice not disputed by TPLF Company, when due, and the remaining amount which is disputed by TPLF Company and forms the subject of an Invoice Dispute shall not be payable until such time as the Invoice Dispute has been resolved.

5.9. It is recorded that:

5.9.1. the Plaintiff has hitherto and before the Availability Period borne and paid Legal Costs in the prosecution of the Action; and

5.9.2. there are outstanding Legal Costs that are due and payable to the Legal Representatives as at the Signature Date, which are to be paid as part of the first Utilisation Request.

5.10. Without in any way limiting or derogating from any matter referred to elsewhere in this clause 5, TPLF Company shall be entitled to pay into the Trust Account of the Legal Representatives, as a stakeholder for the benefit of the Parties, the whole or any part of the Facility at any time and from time to time. The Legal Representative is authorised to

invest the amount in an interest bearing account with a registered financial institution. This clause 5.9 constitutes the written instruction to the Legal Representative in accordance with Rule 56.1 of the Rules of the Law Society of the Northern Provinces (or its successor in Gauteng). Such investment shall be governed by the provisions of section 86(4) of the Legal Practice Act.

5.11. Nothing in this Agreement shall be construed as implying that TPLF Company assumes any of the Plaintiff' obligations to any of the Representatives otherwise as is expressly provided in this Agreement.

5.12. Unless otherwise expressly agreed between the Parties, funding from the Facility and the Indemnified Amount payable by TPLF Company under this Agreement shall constitute TPLF Company's entire payment liability to the Plaintiff under this Agreement.

6. RECOMPENSE

6.1. As consideration for TPLF Company advancing funding to conduct the Action in accordance with the provisions of this Agreement, the Plaintiff shall pay to TPLF Company the Recompense.

6.2. The Recompense shall become due and payable upon - (i) the Action having become settled or finally determined (either partially or in whole); and (ii) the Recovery being paid to the Plaintiff or the Legal Representative, in terms of clause 6.3 below.

6.3. The Recompense due to TPLF Company in terms of this Agreement shall:

6.3.1. if the Recovery is paid in a lump sum, constitute the first charge against the Recovery; or

6.3.2. if the Recovery is paid in instalments, TPLF Company shall receive – (i) the Utilisation Aggregate portion of the Recompense as a first charge against the Recovery; and (ii) for the balance of the Recompense, TPLF Company Pro-Rata Share from every instalment until the Recompense due to TPLF Company shall be paid in full.

6.4. If there is any dispute between TPLF Company and the Plaintiff with regard to calculation of the Recompense or TPLF Company' Pro-Rata Share of any instalment of the Recovery, such dispute shall be determined by the Independent Expert in terms of clause 26 below.

6.5. The Plaintiff irrevocably undertakes and agrees that the Recovery shall be paid to the Trust Account and retained by the Legal Representative as a stakeholder for the benefit of the Parties and as agent for neither and who shall be irrevocably authorised and instructed to deduct and pay to TPLF Company from such Trust Account deposit any amount due and payable to TPLF Company by the Plaintiff hereunder, for which this Agreement and particularly, this clause 6.5 shall be their authority.

6.6. Where the whole or part of the Recovery is effected or paid otherwise than in monies (such as for example, Shares or payment *in specie*), then in order to ensure compliance with the provisions of this Agreement, the Plaintiff shall be obliged to lodge the share certificates in respect of its Shares (or other instrument where payment is effected in any other legal manner) with the Legal Representative, in trust. The value of Shares or other instrument, for purpose of calculating the Recovery, shall in the absence of agreement between the Parties, be determined by the Independent Expert in terms of clause 26.

6.7. The Recompense to be paid by or on behalf of the Plaintiff to TPLF Company under this Agreement (notwithstanding clause 2.17) falls within the ambit of Section 2 as read with Section 12(a) of the VAT Act and therefore is exempt from VAT.

6.8. The Recompense due and payable to TPLF Company in terms of this Agreement shall not bear interest if TPLF Company receives timeous payment from or on behalf of the Plaintiff in terms of this Agreement.

6.9. All payments to be effected by or on behalf of the Plaintiff to TPLF Company in terms of this Agreement shall be made by way of a direct electronic funds transfer, free of bank exchange or other costs, in accordance with the payment instructions and details set forth in the table below:

Bank	:	
Account Number	:	
Branch Number	:	
Beneficiary	:	
Reference	:	**[_____]**

6.10. TPLF Company shall be entitled to change its bank account, or payment address by giving written notice of such change to the Plaintiff. Any such change will be communicated by registered mail on an official letterhead, signed by a director of TPLF Company and addressed to the Plaintiff' domicilium address. The authenticity of this registered letter shall, after receipt and before the Plaintiff take action on such letter, be verified by the

Plaintiff in writing as soon as possible and without causing any delay in payment of any amount on the due date in terms of this Agreement. Without limiting TPLF Company's rights, any payment, including payments not verified as stipulated herein, shall be at the Plaintiff' risk.

6.11. The Plaintiff shall have no right to defer, withhold or adjust any payment due to TPLF Company arising out of this Agreement, to obtain the deferment of any judgment for any such payment or part thereof, or to obtain deferment of execution of any judgment whether by reason of any set-off or counterclaim of whatsoever nature and howsoever arising.

6.12. Without in any way limiting or derogating from any matter referred to elsewhere in this Agreement, and in particular in clause 6.10, the Plaintiff' obligation to effect payment of the Recompense in accordance with this Agreement shall be absolute and unconditional, irrespective of any contingency whatsoever including, but not limited to any right of set-off, counterclaim, recoupment, defence or other right.

7. LITIGATION INFORMATION

7.1. Each Party acknowledges that it is in each of their separate and common interests that the Litigation Information in the possession of the Plaintiff be shared with TPLF Company, within the context of and in furtherance of the Parties' common goals and efforts in the prosecution of the Action.

7.2. In light of the matters referred to in clause 7.1 above, the Plaintiff undertakes and agrees to share with TPLF Company all Litigation Information which shall include but is not limited to:

7.2.1. written communications;

7.2.2. interview reports, statements and reports of Expert Witnesses, Consulting Experts, consultants, investigators or other witnesses;

7.2.3. notes, memoranda and opinions of the Legal Representatives, including draft briefs, pleadings, notices, motions, memoranda of fact or law and legal and other strategies;

7.2.4. joint meetings between counsel, the Plaintiff' Members and any meetings with prospective witnesses or Consulting Experts or litigation support service providers in connection with the Action in person, by telephone or in any other form, and records or reports of such communications;

7.2.5. the identity and work product of Consulting Experts and/or Expert Witnesses;

7.2.6. confidential business, financial and technical information; and

7.2.7. all other factual and legal analyses and summaries.

7.3. The Plaintiff undertakes and agrees to inform its Legal Representatives of the duty of disclosure of Litigation Information pursuant to this Agreement, that all such disclosures are to be kept confidential in the manner called for in this Agreement and to procure that the Legal Representatives furnish their cooperation in the disclosure of Litigation Information to TPLF Company pursuant to and in accordance with what is contemplated in this Agreement.

7.4. The terms of disclosure of Confidential Information pursuant to the provisions of this clause 7 shall be made in the spirit of mutual co-operation, trust and confidence. The Plaintiff shall use its Best Endeavours to procure that Litigation Information is disclosed to TPLF Company as soon as it comes into the possession or knowledge of the Plaintiff and that such disclosure be full and complete.

7.5. When the Plaintiff shares written Litigation Information with TPLF Company, it will endeavour to mark the copy of the writing that is to be shown or given to TPLF Company with the conspicuous legend: “Confidential and Privileged Communication”.

7.6. The Litigation Information shared by the Plaintiff with TPLF Company will deemed to be confidential and proprietary to the Plaintiff and will be used by TPLF Company solely in connection with the prosecution of the Action and for no other purpose and will not be disclosed to any third party without the prior written consent of the Plaintiff. However, TPLF Company may disclose Litigation Information to its corporate representatives and professional advisors or consultants as TPLF Company may deem appropriate for purposes of this Agreement, provided such persons will be required to sign a confidentiality undertaking incorporating *mutatis mutandis* the terms set out in this clause 7.6.

7.7. To the extent allowed under applicable law, the sharing of Litigation Information with TPLF Company does not constitute a waiver of any applicable confidentiality, privilege, protection or immunity, including but not limited to the attorney-client privilege and/or work product doctrine.

7.8. If any Party is required by court order, discovery obligation or other legal compulsion to produce or reveal any Litigation Information received pursuant to this Agreement, reasonable notice will be given to the originating party before responding to, or complying with such requests or providing discovery. In the event that the Party from whom disclosure is sought has no objection to the disclosure, such Party will nevertheless invoke this Agreement and make reasonable efforts to prevent disclosure until the final resolution of any objection from the originating party.

7.9. TPLF Company will within 20 (twenty) business days after the Conclusion Date return all hard copies of the Litigation Information to the Plaintiff, except that TPLF Company may retain one hard copy for archival purposes and will take all reasonable steps to ensure that such copy is kept secure and confidential in terms of this Agreement.

8. INDEMNITIES BY TPLF COMPANY

8.1. TPLF Company hereby indemnifies the Plaintiff and holds it harmless, up to a maximum of the Indemnified Amount, against all orders or awards as to costs which may be sustained or incurred by the Plaintiff as a direct consequence of the Action. The Plaintiff shall immediately, once a costs order has been entered against it, advise TPLF Company thereof.

8.2. In the event where the Defendant or any third party obtains any order or award as to costs against the Plaintiff or TPLF Company, which exceeds the Indemnification Amount, then the Plaintiff, by entering into this Agreement, indemnifies TPLF Company and shall reimburse TPLF Company, on demand, for all payments, damages and costs (including, but not limited to legal fees on attorney and client scale).

8.3. To the extent permitted by law, TPLF Company's liability in terms of clause 8.1 will be completely discharged if TPLF Company terminates this Agreement in accordance with the termination provisions set out in clause 19 below prior to any order or award as to costs being sustained or incurred by the Plaintiff as a direct consequence of the Action.

9. CONDUCT OF THE LITIGATION

9.1. Unless otherwise agreed between the Parties, the Plaintiff shall conduct all negotiations for settlement of the Action and TPLF Company agrees to grant the Plaintiff exclusive control of any such negotiations for settlement. The Plaintiff shall however, subject to clause 9.2 below, not settle or compromise the Action without the prior written consent of TPLF Company.

9.2. It is recorded that the Plaintiff has irrevocably agreed, with the concurrence of TPLF Company, to settle or compromise the Action at any amount that is equal to or exceeds the Trigger Amount. Unless agreed to in writing by TPLF Company, the Plaintiff undertakes and agrees not to accept any settlement or compromise of the Action in an amount that is less than the Facility.

9.3. The Plaintiff undertakes to and in favour of TPLF Company not to do anything that may in any way circumvent this Agreement, or attempt to do so, including by way of any settlement or compromise of the Action. A breach by the Plaintiff of this clause 9.3 shall constitute an Event of Default in terms of clause 19 below.

9.4. Without in any way limiting or derogating from any matter referred in clauses 9.1 and 9.2 above, the Parties agree that the Action shall not be settled or compromised unless and until there is a written and signed settlement agreement, authorised and approved by TPLF Company in writing, which shall -

9.4.1. specify the settlement amount in money in Rands (which shall not be less than the Facility, unless agreed to in writing by TPLF Company);

9.4.2. specify the terms of payment offered or required (which shall require payment into the Trust Account of the Legal Representative); and

9.4.3. not be subject to any set-off and recoupment.

10. LETTER OF AUTHORITY

The Parties undertake and agree that contemporaneous with the conclusion of this Agreement, they shall sign and execute the Letter of Authority and deliver a copy to the Legal Representative. The Plaintiff shall use its Best Endeavours to procure signature of the Letter of Authority by the Legal Representative. The Parties agree that the Letter of Authority is unconditional and irrevocable. The provisions of this clause 10 shall apply *mutatis mutandis* to any substituted or replacement Legal Representative, should that situation arise.

11. STANDARDS

11.1. Subject to compliance with the provisions of clause 11.3 below, the Plaintiff shall prosecute the Action to finality using its Best Endeavours and in conformance with all

relevant legislation, regulations, rules and other requirements of any court or arbitration (as the case may be).

11.2. The Plaintiff undertakes and agrees to cooperate with the Representatives by promptly granting the Representatives access to the Plaintiff' Members as and when required. The Plaintiff shall cooperate in every reasonable way to facilitate the prosecution or settlement of the Action.

11.3. Subject to clause 11.4 below, the Plaintiff shall –

11.3.1. not engage in, agree to, perform or undertake any Material acts or take any Material steps in the prosecution of the Action unless such acts or steps are approved in writing by TPLF Company; and

11.3.2. not omit to engage in, agree to, perform or undertake any Material acts or take any Material steps in the prosecution of the Action as may be directed in writing by TPLF Company,

and the Plaintiff' functions, roles, responsibilities, powers and authority in the conduct of the Litigation shall be limited accordingly.

11.4. If – (i) the approval of TPLF Company in accordance with the provisions of clause 11.3.1 is withheld; (ii) an issue arises as to a determination by TPLF Company in terms of clause 11.3.2; and/or (iii) there is a dispute if the act or step in question is Material, then a dispute shall be deemed to exist between the Plaintiff, of the first part, and TPLF Company, of the second part (the "**Concerned Parties**"), and such dispute shall be resolved by the Referee in accordance with the provisions of clause 11.5 below.

11.5.

11.5.1. The Referee shall (notwithstanding his nomenclature as referee) act as an expert and not as an arbitrator. There shall be one Referee who shall be a practising commercial senior counsel of at least 10 (ten) years standing.

11.5.2. The appointment of the Referee shall be agreed between the Concerned Parties in writing or, failing agreement by them within 5 (five) days after any Concerned Party has notified the other Concerned Party that a dispute has arisen, the Referee shall, at the request of any Concerned Party, be nominated by the chairman for the time being of AFSA (or his nominee), who, in making his nomination, shall have regard to the nature of the dispute, whereupon the

Concerned Parties shall forthwith appoint such person as the Referee. If that person fails or refuses to make the nomination, either Concerned Party may approach the High Court of South Africa to make such an appointment. To the extent necessary, the Concerned Parties agree that the High Court is expressly empowered to make such appointment.

11.5.3. The Referee shall determine the quantum of his charges, which quantum shall be paid on demand, in the amounts and manner determined by the Referee by the Concerned Parties in equal proportions.

11.5.4. The Referee shall be entitled to determine such methods and processes as he may, in his sole discretion, deem appropriate in the circumstances.

11.5.5. The Referee shall consult with the Concerned Parties (provided that the extent of the Referee's consultation shall be in his sole discretion) prior to rendering a determination.

11.5.6. The Referee shall afford the Concerned Parties the opportunity to make such written, or at its discretion, oral representations as the Concerned Parties wish (which representations shall be copied to the other Concerned Party), subject to such time and other limits as the Referee may prescribe and the Referee shall have regard to any such representations but not be bound by them.

11.5.7. The Referee shall be entitled to make his determination if the written or oral representations have not been made in accordance with the prescribed time limits. The Concerned Parties shall fully co-operate with the Referee and do all such things as may be necessary to assist the Referee with his determination.

11.5.8. Having regard to the sensitivity of any confidential information, the Referee shall be entitled to take advice from any person considered by him to have expert knowledge with reference to the matter in question.

11.5.9. It is the intention that the Referee make his determination in as short a time as is reasonably possible in the circumstances, where possible within 14 (fourteen) days after the Referee's appointment. The Concerned Parties shall use their Best Endeavours to procure the expeditious determination by the Referee.

11.5.10. The Referee's determination including any determination as to the payment of costs, will be final and binding on the Concerned Parties and shall forthwith be carried into effect by the Concerned Parties.

11.5.11. Either Concerned Party is entitled to have the Referee's determination made an order of the court of competent jurisdiction.

11.6. Should the Referee determine any dispute in terms of clause 11.5 in favour of TPLF Company and such determination not forthwith be carried into effect by the Plaintiff, then TPLF Company shall be entitled (but is not obliged) to summarily terminate this Agreement and for the purposes of clause 19 such termination shall be deemed to be for cause.

11.7. If this Agreement is terminated by TPLF Company in terms of the provisions of clause 11.6 above, then and in such event the Plaintiff shall pay to TPLF Company a penalty calculated in accordance with the following formula:

A = B x C
Where
A = Penalty
B = Funding Amount paid to the Plaintiff up to that date
C = [insert figure]

11.8. The aforementioned remedy shall not prejudice any other remedy, which TPLF Company may have under this Agreement or in law. In particular TPLF Company shall, in terms of the provisions of section 2 of the Conventional Penalties Act, 15 of 1962 , at its election, be entitled to claim damages in lieu of the aforementioned penalty.

12. REPRESENTATIVES

12.1. It is recorded that in entering into this Agreement and agreeing to provide financial assistance to conduct the Action, TPLF Company does so having regard to the identity, reputation and good standing of the Representatives, which have been nominated and retained by the Plaintiff.

12.2. It is recognised and acknowledged by the Parties that the Representatives will likely have a material bearing on the outcome of the Action, which furthers the Parties' common goals and efforts in the prosecution of the Action.

12.3. In light of the matters set out in clauses 12.1 and 12.2:

12.3.1. The Plaintiff undertakes and agrees that it will use its Best Endeavours to ensure that the Representatives remain engaged in the Action at all times during the Availability Period.

12.3.2. Should any Representative be unwilling or unable to continue representing the Plaintiff, then the Parties shall endeavour to jointly agree upon a replacement of any such Representative, who -

12.3.2.1. as concerns an Expert Witness, shall be a suitably qualified person who possesses a degree of skill, diligence and experience which is appropriate to the expert testimony to be provided in connection with the Action; and

12.3.2.2. as concerns a Legal Representative, shall be a practising senior counsel with no less than 15 years' experience as a senior counsel or a practising attorney (as the case may be) with not less than 15 years' experience as an attorney in one of the Top-Tier Firms.

12.4. A breach by the Plaintiff of clause 12.3.1 above shall constitute an Event of Default in terms of clause 19. Should the Parties be unable to agree a replacement Representative in terms of clause 12.3.2.2, then such failure shall constitute a Material Adverse Effect and TPLF Company shall be entitled to proceed in terms of clause 24.1.

13. VAT

13.1. It is recorded that the Parties agree that the Recompense payable to TPLF Company in terms of this Agreement falls within the ambit of Section 2 as read with Section 12(a) of the VAT Act and therefore the Recompense is exempt from VAT. For the avoidance of any doubt, the Plaintiff is not obliged to pay to TPLF Company, or to gross up the Recompense by, the amount of any taxes imposed or levied on TPLF Company in connection with the Recompense.

13.2. Where one Party to this Agreement is obliged to indemnify the other Party, such indemnity shall extend to any amount representing VAT to the extent that the other Party has been unable to obtain credit or repayment of such VAT.

13.3. Neither Party shall be required to pay to the other any sum representing interest, penalties, fines or charges which is due to the wilful default, omission or negligence of the Party liable to account for the VAT to the South African Revenue Services.

14. GENERAL WARRANTIES

14.1. Each of the Parties hereby warrants to and in favour of the other that:

14.1.1. it has the legal capacity and has taken all necessary corporate action required to empower and authorise it to enter into this Agreement;

14.1.2. this Agreement constitutes an agreement valid and binding on it and enforceable against it in accordance with its terms;

14.1.3. the execution of this Agreement and the performance of its obligations hereunder does not and shall not:

14.1.3.1. contravene any law or regulation to which that Party is subject;

14.1.3.2. contravene any provision of that Party's constitutional documents; or

14.1.3.3. conflict with, or constitute a breach of any of the provisions of any other agreement, obligation, restriction or undertaking which is binding on it;

14.1.4. to the best of its knowledge and belief, it is not aware of the existence of any fact or circumstance that may impair its ability to comply with all of its obligations in terms of this Agreement;

14.1.5. it is entering into this Agreement as principal (and not as agent or in any other capacity);

14.1.6. the natural person who signs and executes this Agreement on its behalf is validly and duly authorised to do so;

14.1.7. no other Party is acting as a fiduciary for it; and

14.1.8. it is not relying upon any statement or representation by or on behalf of any other Party, except those expressly set forth in this Agreement.

14.2. Each of the representations and warranties given by the Parties in terms of this clause 14 shall:

14.2.1. be a separate warranty and will in no way be limited or restricted by inference from the terms of any other warranty or by any other words in this Agreement;

14.2.2. continue and remain in force notwithstanding the completion of any or all the transactions contemplated in this Agreement; and

14.2.3. *prime facie* be deemed to be material and to be a material representation inducing the other Party to enter into this Agreement.

15. PUBLICITY

15.1. Subject to clause 15.3, the Plaintiff undertakes to keep confidential and not to disclose to any third party, save as may be required in law or permitted in terms of this Agreement, the nature, content or existence of this Agreement.

15.2. No announcements of any nature whatsoever will be made by or on behalf of the Plaintiff relating to this Agreement without the prior written consent of TPLF Company, save for any announcement or other statement required to be made by the Plaintiff in terms of the provisions of any law, in which event the Plaintiff will first consult with the TPLF Company in order to enable the Parties in good faith to attempt to agree the content of such announcement, which (unless agreed) must go no further than is required in terms of such law or rules.

15.3. This clause 15 shall not apply to any disclosure made by the Plaintiff to its professional advisors or consultants, provided that they have agreed to the same confidentiality undertakings.

16. REPORTING

The Parties shall meet in accordance with the timetable set out in **Annexure E** and the Plaintiff or its Representatives shall, at each meeting, present to TPLF Company Management Reports in the format set out in that annexure.

17. SUPPORT

The Parties undertake at all times to do all such things, perform all such actions and take all such steps and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open to them and necessary for or incidental to the putting into effect or maintenance of the terms, conditions and/or import of this Agreement.

18. EXCLUSIVE RIGHTS

18.1. The Plaintiff hereby irrevocably undertakes and warrants to and in favour of TPLF Company that it:

18.1.1. will not during the Availability Period, directly or indirectly enter into negotiations or conclude any agreement with any third party (whether in its own name or for and on behalf of a third party) which is similar to this Agreement or which would in any other way conflict with in the terms of this Agreement;

18.1.2. has not, directly or indirectly, granted any rights similar to the rights contained in this Agreement to any third party at any time before the Signature Date;

18.1.3. will not at any time until the Conclusion Date, directly or indirectly grant to or in favour of any third party any rights similar to the rights contained in this Agreement in relation to the funding of Legal Costs for the Action in respect of the Claims.

18.2. If TPLF Company has provided the Funding Amount to the Plaintiff and is not willing to advance any further funding to the Plaintiff in respect of the Action, the Plaintiff is entitled to itself fund or seek additional funding from third parties, provided that - (i) it does not disclose the material terms of this Agreement to those third parties (although it is entitled to disclose the existence of this Agreement to those third parties); and (ii) the Plaintiff will remain liable to TPLF Company for payment of the Recompense in accordance with the terms of this Agreement.

19. TERMINATION

19.1. This Agreement may be terminated for cause by either Party in the following circumstances:

19.1.1. by either Party with immediate effect from service on the other of written notice if the other Party is in breach of any material obligation under this Agreement and fails to remedy such breach within 10 (ten) business days of the date of receipt of written notice requiring it to do so;

19.1.2. by TPLF Company in the circumstances set out in clause 11.6 above;

19.1.3. by TPLF Company on and at any time after the occurrence of an Event of Default.

19.2. Subject to clause 19.5, if this Agreement is terminated by TPLF Company in terms of the provisions of clause 19.1, such termination shall be at no loss or cost to TPLF Company and the Plaintiff hereby indemnifies TPLF Company against any such losses or costs which TPLF Company may suffer as a result of any such termination for cause.

19.3. Each of the events or circumstances set out in this clause 19 is an Event of Default:

19.3.1. Unless otherwise as disclosed by the Business Rescue Practitioner as part of the Business Rescue proceedings, the value of the assets of the Plaintiff is less than its liabilities (taking into account contingent and prospective liabilities);

19.3.2. the appointment of a liquidator, receiver, administrative receiver, administrator, compulsory manager or judicial manager;

19.3.3. Unless otherwise as disclosed by the Business Rescue Practitioner as part of the Business Rescue proceedings, the Plaintiff suspends or ceases to carry on all or a material part of its business;

19.3.4. any Recompense is not paid when due (otherwise than arising out of a failure of the Legal Representative to comply with the provisions of clause 6.5 above, provided that such failure is not due to any act or omission on the part of the Plaintiff in complying with its obligations in terms of the said clause 6.5); or

19.3.5. any representation or statement made by the Plaintiff in the Disclosure Schedule or any other document delivered by or on behalf of the Plaintiff under or in connection with the Action is or proves to have been incorrect or misleading in any material respect when made.

19.4. Should this Agreement be cancelled at any time as a result of a breach occasioned on the part of the Plaintiff, then the Plaintiff shall repay to TPLF Company that portion of the Facility paid in terms of clause 5 together with interest thereon (calculated with respect to each amount advanced in terms of clause 5 from the date of its advance) at the Prime Rate.

19.5. Should this Agreement - (i) be cancelled by the Plaintiff at any time as a result of a breach occasioned on the part of TPLF Company; or (ii) should TPLF Company terminate this Agreement without cause in terms of clause 24.3, then the Funding Amount provided for in clause 5.1 and the Indemnified Amount shall continue to remain available to the Defendant exclusively for purposes contemplated in this Agreement.

19.6. No remedy conferred by any of the provisions of this Agreement is intended to be exclusive of any other remedy available at law, in equity, by statue or otherwise, and each and every other remedy given hereunder or now or hereafter existing at law, in equity, by statute or otherwise. The election of any Party to pursue one or more such remedy shall not constitute a waiver by such Party of the right to pursue any other available remedy.

19.7. The provisions of this clause 19 are in addition to and without prejudice to the rights of TPLF Company to terminate this Agreement in accordance with the provisions of this Agreement.

20. WARRANTIES

20.1. The Plaintiff hereby unconditionally gives to and in favour of TPLF Company the warranties set out in the Schedule of Warranties, being **Annexure D**.

20.2. Each Warranty will:

20.2.1. be a separate warranty and will in no way be limited or restricted by inference from the terms of any other warranty;

20.2.2. continue and remain in force for the duration of this Agreement; and

20.2.3. be deemed to be material and to be a material representation inducing TPLF Company to enter into this Agreement.

20.3. The Plaintiff warrants to TPLF Company that each of the Warranties is accurate in all material respects. The Warranties are to be read with the disclosures made in the Disclosure Schedule.

20.4. It is agreed that in relation to the Warranties, TPLF Company will be entitled to all remedies available to it at law (including contractual and delictual remedies) arising from a breach of any such warranty.

20.5. A breach by the Plaintiff of any of the Warranties shall constitute an Event of Default on the part of the Plaintiff in terms of clause 19.

21. UNDERTAKINGS BY THE PLAINTIFF

21.1. The Plaintiff undertakes that it shall:

21.1.1. not mortgage, pledge or hypothecate, or in any other way encumber the Action;

21.1.2. not cede or assign all or any of the rights and obligations of the Plaintiff under this Agreement; or

21.1.3. take all reasonable and necessary steps (to the extent that same can only be taken by it) to maintain and protect the interests of TPLF Company in relation to the Action, and not take any action which might reasonably be expected to jeopardise any of such interest.

21.2. A breach by the Plaintiff of any of the undertakings given in this clause 21 shall constitute an Event of Default on the part of the Plaintiff in terms of clause 19.

22. INDEMNITY

The Plaintiff agrees to pay and at all times to indemnify and hold harmless TPLF Company from and against all and any costs, expenses, payments, charges (actual and contingent), losses, demands, liabilities, claims, actions, proceedings, penalties, fines, damages, judgements, orders or other sanctions, including legal costs on a scale as between attorney and own client relating to, or arising directly or indirectly in any manner or for any cause or reason whatsoever out of the Action which arises as a consequence of the occurrence of an Event of Default or a breach by the Plaintiff of its obligations under this Agreement.

23. LIMITATION OF LIABILITY

23.1. Subject to the terms of this Agreement, no Party will be liable for any consequential, indirect, special, punitive or incidental damages, whether foreseeable or unforeseeable, based on claims of the other Party (including, but not limited to, claims for loss of goodwill, profits, use of money, stoppage of other work or impairment of other assets), arising out of breach or failure of express or implied warranty, breach of contract, misrepresentation, negligence, strict liability in delict or otherwise, whether based on this Agreement, any commitment performed or undertaken under or in connection with this Agreement, or otherwise.

23.2. Nothing in this clause 23 excludes or limits the Plaintiff's liability under and in terms of clauses 11.6 to 11.8 and any claims that may be asserted with respect thereto.

24. MATERIAL ADVERSE EFFECT

24.1. In the event that any event or circumstance occurs which has, or is reasonably likely to have, a Material Adverse Effect, then TPLF Company may:

24.1.1. declare that all or part of the Facility paid in terms of clause 5 become due and payable to TPLF Company by the Plaintiff; and/or

24.1.2. terminate this Agreement.

24.2. In the event that it becomes unlawful in any applicable jurisdiction for TPLF Company to perform any of its obligations as contemplated by this Agreement or to fund or maintain its participation in the Action, then TPLF Company may terminate this Agreement.

24.3. Notwithstanding anything to the contrary herein contained, TPLF Company shall be entitled to terminate this Agreement without cause on written notice to the Plaintiff. If this Agreement is terminated by TPLF Company in terms of the provisions of this clause 24.3, such termination shall be at no loss to the Plaintiff.

25. DISPUTE RESOLUTION

25.1. **Separate, divisible agreement**

This clause 25 is a separate, divisible agreement from the rest of this Agreement and shall:

25.1.1. not be or become void, voidable or unenforceable by reason only of any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immorality, absence of consensus, lack of authority or other cause relating in substance to the rest of the Agreement and not to this clause. The Parties intend that all disputes, including the issues set forth above, be and remain subject to arbitration in terms of this clause; and

25.1.2. remain in effect even if the Agreement expires or terminates for any reason whatsoever.

25.2. **Disputes subject to arbitration**

Subject to the provisions of clause 11.5 and save in respect of those provisions of this Agreement which provide for their own remedies which would be incompatible with arbitration, any dispute arising out of or in connection with this Agreement or the subject matter of this Agreement, including without limitation, any dispute concerning:

25.2.1. the existence of the Agreement apart from this clause;

25.2.2. the interpretation, application and effect of any provisions in the Agreement;

25.2.3. the Parties' respective rights or obligations under the Agreement;

25.2.4. the rectification of the Agreement;

25.2.5. any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immorality, absence of consensus, lack of authority or other cause relating to or in any way connected with the Agreement or any part or portion thereof;

25.2.6. the breach, expiry, termination or cancellation of the Agreement or any matter arising out of the breach, expiry, termination or cancellation; and

25.2.7. any claims in delict, compensation for unjust enrichment or any other claim,

whether or not the rest of the Agreement apart from this clause is valid and enforceable, shall be referred to arbitration as set out in clause 25.

25.3. **Arbitration**

All disputes shall be finally determined in accordance with the Commercial Arbitration Rules of the Arbitration Foundation of Southern Africa ("**AFSA**") without recourse to the ordinary courts of law, except as explicitly provided for in clause 25.

25.4. **Appointment of arbitrator**

25.4.1. The Parties to the dispute shall agree on the arbitrator who shall be a senior advocate (with at least 15 years' experience in commercial legal practice) on the panel of arbitrators of AFSA. If agreement is not reached within 10 (ten) business days after any Party calls in writing for such agreement, the arbitrator shall be a senior advocate (with at least 15 years' experience in commercial legal practice) nominated by the Chairman of AFSA for the time being, or his nominee.

25.4.2. The request to nominate an arbitrator shall be in writing outlining the claim and any counterclaim of which the Party concerned is aware and, if desired, suggesting suitable nominees for appointment as arbitrator, and a copy shall be furnished to the other Party who may, within 7 (seven) days, submit written comments on the request to the addressee of the request with a copy to the first Party.

25.5. **Venue and period for completion of arbitration**

The arbitration shall be held in Johannesburg and the Parties shall endeavour to ensure that it is completed within 90 (ninety) days after notice requiring the claim to be referred to arbitration is given.

25.6. **Binding nature of arbitration**

The Parties irrevocably agree that, subject to clause 25.7, any decisions and awards of the arbitrator:

25.6.1. shall be binding on them;

25.6.2. shall be carried into effect; and

25.6.3. may be made an order of any court of competent jurisdiction.

25.7. **Appeal**

The Parties agree that there shall be no appeal against the decision of the arbitrator.

25.8. **Application to court for urgent interim relief**

Nothing contained in this clause 25 shall prohibit a Party from approaching any court of competent jurisdiction for urgent interim relief pending the determination of the dispute by arbitration.

26. EXPERT DETERMINATION

26.1. Save as specifically provided to the contrary elsewhere in this Agreement, if –

26.1.1. any forecast or calculation is required to be made by an independent expert for the purposes of determining an amount payable by one Party to another Party hereunder; or

26.1.2. any dispute arises between the Parties which calls for the appointment of an independent expert for an expert determination as opposed to such dispute being referred for arbitration in terms of clause 25,

then the identity of the independent expert shall be decided by agreement between the Parties, failing agreement between the Parties within 5 (five) business days after any Party calls in writing for such agreement, by the chairman for the time being of AFSA or his nominee (the "**Independent Expert**").

26.2. Each forecast or calculation to be made by the Independent Expert shall be made in accordance with prevailing best industry practice.

26.3. In making a forecast or a calculation or in determining a dispute the following provisions shall apply –

26.3.1. the Independent Expert shall act as an expert and not as an arbitrator, with the view that the matter for determination be dealt with as expeditiously as possible;

26.3.2. each Party shall be entitled to make representations to the Independent Expert in such manner and form as the Independent Expert shall determine in his sole discretion;

26.3.3. if this Agreement is found to be lacking in any material respect in relation to the matter concerned, the Independent Expert shall be entitled to interpret and give effect to what he perceives to be the intention of the Parties and to make the determination accordingly;

26.3.4. the Independent Expert shall be entitled to obtain further advice in relation to the matter concerned; and

the Independent Expert shall furnish written reasons supporting his forecast, calculation determination, order or award.

26.4. The costs of the Independent Expert in making his determination of the dispute in terms of this clause 26.4 shall be borne equally between TPLF Company, for the one part, and the Plaintiff, for the other, unless the Independent Expert determines otherwise.

26.5. A determination, order or award, including any determination as to the payment of costs, made by the Independent Expert shall be carried into effect by the Parties and shall be final and binding upon the Parties and may be made an order of court of competent jurisdiction.

27. DOMICILIUM CITANDI ET EXECUTANDI

27.1. The Parties choose as their domicilia citandi et executandi for all purposes under this Agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature, the following addresses:

27.1.1. Plaintiff -

Physical : **[_____]**
Email : **[_____]**

27.1.2. TPLF Company -

Physical : 32 Impala Road Chislehurston, Johannesburg, 2196
Email : simon@TPLF Companycapital.co.za

27.2. Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing but it shall be competent to give notice by email.

27.3. Any notice or other document given under or in connection with this Agreement Document must be in English.

27.4. Either Party may by notice to the other Party change the physical address chosen as its domicilium citandi et executandi to another physical address where postal delivery occurs in the Republic of South Africa or its email address, provided that the change shall become effective on the 7th (seventh) business day from the deemed receipt of the notice by the other Party.

27.5. Any notice to a Party:

27.5.1. delivered by hand to a responsible person during ordinary business hours at the physical address chosen as its domicilium citandi et executandi shall be deemed to have been received on the day of delivery; or

27.5.2. sent by email to its chosen email address stipulated in clause 27.1, shall be acknowledged immediately on receipt, and shall be deemed received when so acknowledged.

27.6. Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a Party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its domicilium citandi et executandi.

28. RELATIONSHIP OF PARTIES

The relationship of the Parties shall be governed by this Agreement. Nothing in this Agreement shall be deemed to constitute any Party the partner of the other Party, nor constitute any Party the agent or legal representative of the other Party.

29. LEGAL ADVICE

29.1. Each of the Parties acknowledges and agrees that they have entered into this Agreement in their own free will and understanding and have obtained independent legal advice in connection with the effect of, and their obligations under, this Agreement.

29.2. Without in any way limiting or derogating from clause 29.1 above, each of the Parties agrees and acknowledges that:

29.2.1. this Agreement correctly sets forth the terms of the funding transactions agreed to by the Parties;

29.2.2. such Party agrees to this Agreement under its own volition and desire and not as a result of any undue influence, overreaching, oppression, duress or bad faith on the part of any other Party;

29.2.3. it has been represented in the negotiation and in the preparation of this Agreement by professional advisors of its own choice or had the opportunity to meet and confer with, and to review this Agreement with, independent legal advisors of its own choice;

29.2.4. it has read this Agreement carefully and has either had the Agreement explained to it by its legal advisors or has chosen to waive the opportunity to have this Agreement explained by such legal advisors; and

29.2.5. it is fully aware of the contents of this Agreement and of its legal consequences and effects.

30. MISCELLANEOUS MATTERS

30.1. This Agreement constitutes the whole agreement between the Parties and supersedes all prior verbal or written agreements or understandings or representations by or between the Parties regarding the subject matter of this Agreement and the Parties will not be entitled to rely, in any dispute regarding this Agreement, on any terms, conditions or representations not expressly contained in this Agreement.

30.2. No variation of or addition to this Agreement or the cancellation of this Agreement by mutual consent shall be of any force or effect unless reduced to writing and signed by or on behalf of the Parties.

30.3. All provisions and the various clauses of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision or clause of this Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatever, shall, in such jurisdiction only and only to the extent that it is so

unenforceable, be treated as *pro non scripto* and the remaining provisions and clauses of this Agreement shall remain of full force and effect. The Parties declare that it is their intention that this Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof.

30.4. Neither Party shall be entitled to cede, assign, transfer or otherwise dispose of any of its rights or obligations under this Agreement without the prior written consent of the other Party.

30.5. Neither Party to this Agreement has given any warranty or made any representation to the other Party, other than any warranty or representation which may be expressly set out in this Agreement.

30.6. No indulgence, leniency or extension of a right, which either of the Parties may have in terms of this Agreement, and which either Party (the "**grantor**") may grant or show to the other Party, shall in any way prejudice the grantor or preclude the grantor from exercising any of the rights that it has derived from this Agreement, or be construed as a waiver by the grantor of that right.

30.7. No waiver on the part of either Party to this Agreement of any rights arising from a breach of any provision of this Agreement will constitute a waiver of rights in respect of any subsequent breach of the same or any other provision.

30.8. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under the applicable law but, if a provision of the Agreement is prohibited by or invalid under the applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity only, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

30.9. Each of the Parties shall bear its own cost incurred as a result of the negotiation, drafting and finalisation of this Agreement, which shall include but not be limited to all legal fees.

30.10. The Parties agree that any costs order awarded in favour of any one or other of the Parties arising out of the Parties pursuing their rights in terms of this Agreement shall be on an attorney / client basis.

30.11. This Agreement and all matters arising out of its performance, expiration, cancellation or termination for any reason shall be governed by or construed in all respects in accordance with the laws of the Republic of South Africa.

31. COUNTERPARTS

31.1. The undersigned represent and warrant that they hold the designated offices with the respective Parties, that they are duly authorised to execute this Agreement and thereby bind their respective Party and that all required approvals have been obtained.

31.2. This Agreement may be executed in any number of counterparts and by different Parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which when taken together shall constitute one and the same agreement.

SIGNED by the Parties and witnessed on the following dates and at the following places respectively:

DATE	PLACE	WITNESS	SIGNATURE
			For: **TPLF COMPANY CAPITAL GENERAL PARTNER (PROPRIETARY) LIMITED**
		1. _____	
_____	_____		_____
		2. _____	

DATE	PLACE	WITNESS	SIGNATURE
			For: **[__] (PROPRIETARY) LIMITED (IN BUSINESS RESCUE)**
		1. _____	
_____	_____		_____
		2. _____	

CIPC CERTIFICATE OF APPOINTMENT

BUSINESS RESCUE PRACTITIONER APPROVAL

I the undersigned,

[_____]

hereby confirm that the funding agreement to be entered into between **[_____]** (in Business Rescue), registration number **[_____]** ("**[_____]**") and TPLF Company Capital General Partner Proprietary Limited (registration number 2020/462413/07) is for fair value and has been authorised and approved by me in my capacity as the duly appointed Business Rescue Practitioner (BRP) of **[_____]**, in terms of the powers conferred upon us in accordance with the provisions of section 134 and/or section 135 of the Companies Act, No. 71 of 2008.

Signature:	……..
Name:	**[_____]**
Designation:	Business Rescue Practitioner
Date:	11 November 2022
Pace:	Johannesburg

DISCLOSURE SCHEDULE

The Plaintiff make the disclosures set out in this **Annexure A** to TPLF Company in terms of the Agreement to which this annexure is attached and with reference to the Warranties as set out in **Annexure D** to the Agreement.

1. INTRODUCTION

1.1. The words and expressions defined in the Agreement have the same meanings in this Disclosure Schedule and the principles of interpretation applicable to the Agreement also apply to this Disclosure Schedule. The headings in this Disclosure Schedule are for convenience only and have no effect on this Disclosure Schedule's interpretation.

1.2. All information contained in this Disclosure Schedule and any annexures thereto or documents referred to herein (collectively the "**Disclosure Documents**"), form part of this Disclosure Schedule as if they were set out expressly in it. In the event of any inconsistency between the express factual contents of any of the Disclosure Documents and any reference to it or summary of it in this Disclosure Schedule, the provisions of the document forming part of the Disclosure Documents are to be taken as being correct unless otherwise expressly stated in this letter.

2. DISCLOSURES

The Plaintiff disclose the matters set out below.

2.1. All matters already disclosed by virtue of the disclosure of the Plaintiff' statements and discovery documents in the Action to TPLF Company.

ANNEXURE B

DRAFT ACKNOWLEDGMENT TO BE GIVEN BY THE ATTORNEYS ON THEIR LETTERHEAD

We, the undersigned,

[_____]

1. Represented herein by **[_____]** (a director who warrants his authority to sign this document) acknowledge that:

    1.1. We are the authorised legal representatives ("**Attorneys**") of **[_____]**, (the "**Plaintiff**"), who has mandated and appointed us to render professional legal services for purposes of and in relation to claims by the Plaintiff against **[_____]**, relating to or in connection with *inter alia* an agreement between the Plaintiff and **[_____]**, which has resulted in arbitration proceedings administered by **[_____]** before **[_____]** ("the **Matter**"), pursuant to and in accordance with a written and signed mandate ("**Mandate**").

    1.2. We have had sight of a funding agreement concluded, or to be concluded, between TPLF Company Capital General Partner (Proprietary) Limited (Registration Number 2020/462413/07) ("**TPLF Company**") and the Plaintiff ("**Funding Agreement**").

2. Given that the Plaintiff requires external funding to prosecute the Matter and that TPLF Company is willing to advance funding to conduct the Matter in return for a Recompense in the Matter, the Plaintiff:

    2.1. believes that the sharing of confidential and privileged information and documents with TPLF Company will be mutually beneficial, within the context of and in furtherance of the common goals and efforts of TPLF Company and the Plaintiff in the prosecution of the Matter; and

    2.2. agrees that TPLF Company is entitled to receive the Recompense as defined in clause 2.2.31 of the Funding Agreement, as read with clause 6 thereto,

    which recordals we note and accept.

3. We have been irrevocably instructed by the Plaintiff that:

3.1. The proceeds as well as any amount payable pursuant to any order, award, settlement or compromise of the Matter shall be paid to us in Trust, which shall be held by us in trust by as stakeholder for the benefit of the parties, depending upon who becomes entitled thereto, and as agent for neither.

3.2. The amounts so held by us in Trust will be allocated to the Plaintiff's file with description "**[_____]** *Dispute*" (with reference **[_____]**) or any similar name, and which shall hereinafter be referred to as the "**Investment**".

3.3. In controlling the Investment, we act in our capacity as stakeholders, but not as agent for either the Plaintiff or TPLF Company.

3.4. We will not deal with the Investment nor allow any funds to be drawn out of the Investment otherwise than -

3.4.1. in terms of the Funding Agreement; or

3.4.2. in accordance with the written and signed instruction of both the Plaintiff and TPLF Company (whether personally or via their legal representatives); or

3.4.3. in terms of a court order that authorises us to allow the whole or a portion of the funds to be withdrawn and then only in accordance with the terms of a court order and in favour of whichever beneficiary is entitled to the funds so withdrawn.

4. In order to further the common objectives of the Plaintiff and TPLF Company (collectively the "**Parties**"), the Parties have mutually understood and agreed:

4.1. that their mutual interests have been and will be best served by the Plaintiff disclosing to TPLF Company, orally and in writing, documents, factual materials, advice, memoranda, interview reports, and other information related to the Matter, which may include privileged information (collectively the "**Joint Materials**");

4.2. that the Attorney's communications concerning the Matter (to include notes, memoranda and opinions, briefs, pleadings, notices, motions, memoranda of fact or law and legal and other strategies) will constitute Joint Materials shared in

furtherance of a common legal interest and for the purpose of enabling both parties to take legal advice on the merits of the Matter and which joint materials will be subject to joint privilege;

4.3. that insofar as any of these Joint Materials are protected from disclosure to adverse or other parties as a result of the attorney-client privilege, the attorney work-product doctrine, and/or other applicable privileges, immunities or confidentialities such privilege will endure notwithstanding it being shared with TPLF Company;

4.4. that disclosure to TPLF Company will not diminish in any way the privileged and confidential nature of such Joint Materials and that any disclosure of Joint Materials will not constitute a waiver of any available privilege, immunity or claim of confidentiality; and

4.5. that to the extent that the Parties already have already been in communication with each other concerning any Joint Materials, or the Plaintiff having already disclosed any Joint Materials to TPLF Company, such communications, exchanges, and/or disclosures have been made pursuant to the common interest privilege.

5. Regard being had to the Funding Agreement and what is recorded in paragraph 4 above, we confirm our instructions by the Plaintiff to disclose to TPLF Company any Joint Materials which are now or at any time during the continuance of our Mandate in our possession and/or under our control, subject to the provisions of the Agreement.

6. We acknowledge that this document is being executed in favour of the Parties jointly and pursuant to the provisions of the Funding Agreement. We are aware that the terms hereof shall not be capable of being amended, varied, cancelled or withdrawn other than with the joint written and signed agreement of the Plaintiff and TPLF Company.

7. In the event that any of the terms of this document are found to be invalid, unlawful or unenforceable, such terms will be severable from the remaining terms, which will continue to be valid and enforceable.

8. In the event of conflict between this document and the Mandate, the Mandate shall be construed as amended to the extent that the provisions of this document conflict with the provisions of the Mandate.

9. This document shall be construed and enforced pursuant to the laws of South Africa.

For and on behalf of:

[_____] Incorporated

Name: _____

Designation: _____

Date: _____

Acceptance, for and on behalf of:

[_____] (in business rescue)

(he being duly authorised)

Name: _____

Date: _____

Acceptance, for and on behalf of:

TPLF Company Capital General Partner (Proprietary) Limited

(he being duly authorised)

Name: _____

Date: _____

LITIGATION SCHEDULE

1. Introduction

1.1. For the purposes of this Litigation Schedule, unless inconsistent with or otherwise indicated by the context, words and expressions used in this Litigation Schedule shall bear the meanings ascribed to such words and expressions in the Agreement to which this Litigation Schedule is annexed.

1.2. The principles of interpretation applicable to the Agreement also apply to this Litigation Schedule.

1.3. Meanings ascribed to defined words and expressions in paragraph 3 below, shall impose substantive obligations on the Parties.

2. Schedule

No.	Term	Clause	Description
1.	Action	2.2.1	In the arbitration proceedings between **[_____]**, and **[_____]**, before **[____]** administered by **[___]**.
2.	Claims	2.2.4	All claims of any nature whatsoever which the Plaintiff has against the Defendants in respect of any cause of action that arose relating to or in connection with the Plaintiff's agreement with **[_____]**, such claims will include relief against all Defendants, as contemplated in and/or related to the Action or consequent upon the introduction of any amendment (whether or not such amendment introduces a new cause/s of action or further or alternate relief)
3.	Defendants	2.2.8	**[_____]**
4.	Expert Witness	2.2.11	N/A
5.	Funding Amount	2.2.13	**[_____]**

6.	Indemnified Amount	2.2.14	**[_____]**
7.	Legal Representatives	2.2.17	a) Attorneys for the Plaintiff – **[_____]** Counsel for the Plaintiff – **[_____]**
8.	Pro-Rata Share	2.2.29	**[_____]**
9.	Trust Account Details	2.2.40 & 5.10	**[_____]**
10.	Recompense	2.2.31	**[_____]**
11.	Top-Tier Firms	2.2.38	Messrs Werksmans, Bowmans, Edward Nathan Sonnenbergs, TWB.
12.	Trigger Amount	2.2.39	**[_____]**

3. Recompense

3.1. The Recompense payable to TPLF Company shall be the aggregate of – (i) the amount of the Utilisation Aggregate; plus (ii) an amount equivalent to **[____]** of the Recovery Balance.

3.2. For the avoidance of doubt and by way of example:

3.2.1. If the – (i) Utilisation Aggregate is [**R insert amount here**]; (ii) Recovery is [**R insert amount here**]; and (iv) Recovery Balance is accordingly [**R insert amount here**], then the percentage of the Recovery to which TPLF Company becomes entitled is [**insert % here (insert percentage in words)**] of the Recovery Balance, which equates to a Recompense amount of [**R insert amount here**] made up of – (i) the amount of the Utilisation Aggregate of [**R insert amount here**]; plus (ii) [**R insert amount here**] (i.e. [**insert % here**] of [**R insert amount here**);

3.2.2. If the – (i) Utilisation Aggregate is [**R insert amount here**]; (iii) Recovery is [**R insert amount here**], and (iv) Recovery Balance is accordingly [**R insert amount here**], then the percentage of the Recovery to which TPLF Company becomes entitled is [**insert % here (insert percentage in words)**], which equates to a Recompense amount of [**R insert amount here**] made up of – (i) the amount of the Utilisation Aggregate of [**R insert amount here**]; plus [**R insert amount here**] (i.e. [**insert % here**] of [**R insert amount here**]);

4. Increase of Trigger Amount

4.1. In the event that TPLF Company increases the Funding Amount in terms of 5.2 of the Funding Agreement, then the Trigger Amount shall increase to an amount of [R insert amount here (insert amount in words)].

SCHEDULE OF WARRANTIES

1. INTERPRETATION

1.1. For the purposes of this Schedule of Warranties, unless inconsistent with or otherwise indicated by the context, words and expressions used in this Schedule of Warranties shall bear the meanings ascribed to such words and expressions in the Agreement to which this Schedule of Warranties is annexed.

1.2. The Warranties contained in this **Annexure D** are given by the Plaintiff to TPLF Company on the basis set out in clause 20 of the Agreement to which this annexure is attached. The warranties in this **Annexure D** are in addition to any warranties given in the Agreement to which this annexure is attached.

1.3. The following warranties are, unless otherwise stated in respect of any warranty (in which case the specified date or period shall apply) given as at the Signature Date.

1.4. To the extent that the Agreement may have been signed on a date which results in the use of any tense being inappropriate, the Warranties shall be read in the appropriate tense.

2. THE PLAINTIFF BUSINESS

2.1. The Plaintiff is duly incorporated and validly existing under the laws of South Africa and has the power to own its assets and carry on its business as it is being conducted.

2.2. The only business of the Plaintiff is that of a provider of fibre optic infrastructure.

2.3. To the knowledge of the Business Rescue Practitioner, no part of the business of the Plaintiff has been conducted in a manner which is corrupt or has involved the payment of any bribe or improper consideration.

3. FINANCIAL COMMITMENTS

3.1. Unless otherwise as disclosed by the Business Rescue Practitioner as part of the Business Rescue proceedings, the Plaintiff has not exceeded any borrowing limit imposed upon it by its bankers, other lenders, its Memorandum of Incorporation or otherwise, nor has the Plaintiff entered into any commitment or arrangement which might lead it to do so;

3.2. No overdraft or other financial facilities available to the Plaintiff are dependent upon the guarantee of or security provided by any other person (save for the furnishing of any personal guarantees or suretyship/s).

3.3. The Plaintiff has not, nor has agreed to become, bound by any guarantee, indemnity or surety.

3.4. The Plaintiff has not received any grants, allowances, loans or financial aid of any kind from any government department or other board, body, agency or authority which may become liable to be refunded or repaid in whole or in part.

4. SOLVENCY AND LITIGATION

4.1. Unless otherwise as disclosed by the Business Rescue Practitioner as part of the Business Rescue proceedings, The Plaintiff:

4.1.1. has not been and is not at present subject to any applications, proceedings or orders for the deregistration, winding-up, liquidation, whether provisional or final;

4.1.2. is not party to any judicial, quasi-judicial, administrative or arbitration proceedings save only in respect of the Action and no such proceedings are pending or have been threatened against it;

4.1.3. is not in default under or with respect to any agreement, judgment, order, award, writ, interdict, decree or any similar pronouncement of any court or other tribunal or administrative authority having jurisdiction in respect of it; unless otherwise disclose in BR plan. Add the list

4.1.4. is not the subject of any criminal investigation or charge, nor has it committed any crime;

4.1.5. is not engaged in any dispute with any authority having jurisdiction in respect of it or anybody representing or claiming to represent any of its employees nor is it aware of any such dispute which is pending or has been threatened against it;

4.1.6. is not threatened with or party to any proceedings for, nor has it taken any steps towards, its winding-up, provisional or final;

4.1.7. is not a party to, nor is it affected by, any expropriation proceedings or threatened expropriation proceedings.

4.2. The Plaintiff is not aware nor has any reason to suspect any fact or circumstance which might give rise to any proceedings or default referred to or contemplated in this clause 4.

4.3. The Plaintiff warrants that it has full right, power and authority to pursue the Action and that the Plaintiff has not sold, ceded, transferred, assigned or otherwise disposed of its interest in the Action.

4.4. There is no other past or present dispute between the Plaintiff and the Defendant or any other party to the Action which has or could have an impact on the Action or its prosecution.

4.5. In any proceedings taken in South Africa or in any other jurisdiction, the Plaintiff will not be entitled to claim itself or any of its assets immunity from suit, execution, attachment or other legal process in relation to the Action or this Agreement.

5. STATUTORY REQUIREMENTS AND AUTHORISATIONS

The Plaintiff has complied in all respects with all laws, statutes, by-laws, ordinances, regulations, orders and other measures having the force of law to the extent that such law is applicable to the conduct of its business or its assets

6. CONSUMER PROTECTION ACT AND NATIONAL CREDIT ACT

The Plaintiff is a juristic person as contemplated in Section 1 of the CPA and Section 1 of the NCA, whose asset value or annual turnover exceeds the monetary threshold –

6.1. for the purposes of Section 5(2)(b) of the CPA, as stipulated and calculated in the Regulations contained in Government Gazette No. 294 of 1 April 2011; and

6.2. for the purposes of Section 4(a)(i) of the NCA, as stipulated and calculated in the Regulations contained in General Notice 713 in Government Gazette No. 28893 of 1 June 2006.

7. ACCURACY AND ADEQUACY OF INFORMATION AND DISCLOSURE

7.1. The information contained in the Disclosure Schedule is true, complete and accurate in all material respects and is not misleading because of any omission or ambiguity or for any other and where the information is expressed as an opinion, it is truly and honestly held and not given recklessly or without due regard for its accuracy.

7.2. The Plaintiff acknowledges that TPLF Company has relied upon the correctness of those statements, documents and representations contained in the Disclosure Schedule in entering into this Agreement and will continue to do so in dealing with the Plaintiff.

7.3. So far as the Plaintiff is aware, there is no fact or circumstance relating to the Action which, if disclosed to TPLF Company or any of its advisors, might reasonably be expected to influence the decision of TPLF Company to provide the Facility on the terms contained in this Agreement and which has not been so disclosed in the Disclosure Schedule.

7.4. The Plaintiff is not aware of any circumstances which could affect the validity or enforceability of the Action. In particular, the Plaintiff is not aware of any counterclaims which could be offset against the Action or any other rights affecting the Action

REPORTING

1. **AUTHORISED REPRESENTATIVES**

Plaintiff' Authorised Representatives	:	**[_____]** (Business Rescue Practitioner)
TPLF Company Authorised Representatives	:	[**insert names here**]

2. **MEETINGS**

2.1. Type: In person or teleconference.

2.2. Quorum: One or more of the Authorised Representatives from either Party.

2.3. Frequency:

2.3.1. In the period immediately preceding the hearing of the Action: Once every 5 (five) days.

2.3.2. During the hearing of the Action: daily.

2.4. Agenda: Progress in prosecution of the Action.

3. **REPORTS**

3.1. Type: Oral or written.

3.2. Contents: the Agenda in paragraph 2.4 of this Annexure.

3.3. Frequency: As per paragraph 2.3 of this Annexure.

SPECIMEN UTILISATION REQUEST

TPLF Company (Proprietary) Limited
32 Impala Road Chislehurston Johannesburg
2196
Email: xxxx@TPLF Company.co.za

Dear Sirs

RE: FUNDING AGREEMENT CONCLUDED BETWEEN THE PARTIES AS MORE FULLY DEFINED IN CLAUSE 1 THEREOF

1 We refer to the Funding Agreement. This is a Utilisation Request. Terms defined in the Funding Agreement have the same meaning in this Utilisation Request unless given a different meaning in this Utilisation Request.

2 We wish to Utilise the Facility on the following terms:

Proposed Utilisation Date	:	_____ (or, if that is not a business day, the next business day)
Utilisation Amount	:	ZAR _____ (_____ rands)

3 We attach hereto tax invoice/s issued by the Representative/s, cumulatively in the Utilisation Amount, together with all vouchers and supporting documents.

4 You are directed to make payment on the Utilisation Date by electronic transfer of available funds to the account of the Representatives, the details of which we confirm in the table below:

Bank: **[_____]**
Account Number: **[_____]**
Branch Number: Universal
Beneficiary: **[_____]**
Reference: TPLF Company **[_____]**

5 We confirm that each of the terms specified in clause 5.6 of the Funding Agreement have been satisfied.

6 This Utilisation Request is irrevocable.

For and on behalf of the Plaintiff (as that term is defined in clause 2.2.26 of the Funding Agreement)
Duly Authorised

Name: _____

Designation: _____

Date: _____

INSOL International

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