Luxembourg

Isabelle Berger Nivalion AG

Laure-Hélène Gaicio-Fievez and Alexeji Nickels Bonn Steichen & Partners

REGULATION

Overview

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

There are currently no specific rules concerning the financing of a dispute by a third party. Furthermore, the admissibility of third-party litigation funding has never been, as such, reviewed by the Luxembourg courts. However, recent practice shows that third-party litigation funding is in fact increasing in Luxembourg.

Restrictions on funding fees

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

Due to the lack of legislative or regulatory provisions in the field of third-party funding, explicit limits on the fees and interest funders can charge do not exist. Indeed, the determination of fees and interest is subject to the parties' freedom of contract.

However, French case law, to which Luxembourg judges often refer in contractual matters, considers that funders run the risk that courts could eventually reduce the contractually agreed funder's fee if the fee is considered excessive or disproportionate in comparison to the services rendered.

Specific rules for litigation funding

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

In Luxembourg, there are currently no specific regulatory or legislative provisions applicable to third-party funding. The general law of contracts therefore governs third-party funding agreements. Furthermore, specific rules of professional conduct governing the attorney-client relationship affect the third-party funding relationship.

Legal advice

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

Attorneys in Luxembourg must carry out their activities in compliance with the very strict ethical rules laid down by both the amended law of 10 August 1991 on the legal profession and the ethical rules provided by the Bar.

In that regard, the prohibition on charging contingency fees, the duty of professional secrecy and the duty of independence are the most relevant in regard to advising clients in the field of third-party funding.

The duty of professional secrecy applies to any type of communication (written or oral) or information exchanged between an attorney and his or her client. It is an absolute rule. Thus, the duty of professional secrecy can be considered as a public freedom participating in the democratic state of law, the violation of which, moreover, constitutes a criminal offence.

However, the amended law of 10 August 1991 on the legal profession allows, under certain conditions, the attorney to disclose information covered by professional secrecy. Furthermore, a client is also free to independently communicate documents or information received from attorneys to third parties, including third-party funders.

The funder's information rights regarding privileged information should, however, be precisely defined in the litigation funding agreement.

Thus, attorneys also have a duty of independence to their clients. This means that an attorney must have all the means and freedom to determine what must be done in order to effectively carry out his or her functions of assistance, advice and defence in the service of the client. This duty applies to any strategic advice throughout a proceeding, including the choice of whether to settle or withdraw an action.

Regulators

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

At present, since third-party litigation funding is not regulated under Luxembourg law, third-party litigation funding generally escapes any type of supervision by public bodies.

However, it cannot be excluded that in future, depending on the structuring of the funding agreement, a specific funding model may be considered as a regulated service falling under the supervision of the Luxembourg financial regulator (CSSF).

Furthermore, since the financing of a dispute by a third party is indirectly subject to compliance with the attorney's ethical or legal obligations, the Bar Council too could be considered as a competent regulator.

FUNDERS' RIGHTS

Choice of counsel

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

In principle, clients are completely free in regard to their choice of counsel. In practice, however, it is accepted that a third-party funder may present a funded party with its choice of counsel if the funded party is not yet represented and seeks advice from the funder in this regard. Also, it is common practice to stipulate in the funding agreement that funding is only granted for a specific attorney accepted by the funder or that, if the litigant intends to replace his or her attorney, funding will only be further granted if the new attorney is approved by the funder.

Since there are no explicit rules on third-party litigation funding, the choice of counsel is therefore subject to the parties' freedom of contract.

As a matter of principle, the litigant's attorney should however be independent from the third-party funder and must be able to act freely of any instructions from the latter.

Participation in proceedings

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

In principle, court hearings are public. As such, every person, including a representative of a funder, has the right to attend a trial.

To the contrary, arbitration hearings and settlement meetings are generally confidential. The participation of funders is in those cases subject to the prior agreement of the other party.

Veto of settlements

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

Since there are no explicit rules on third-party funding, veto rights are subject to the parties' freedom of contract. Thus, it is common practice to include in the funding agreement a funder's veto right relating to a potential settlement. Thereby, the parties often agree in advance on certain minimum and maximum amounts limiting the funder's veto power. Similarly, funding agreements typically provide for an exit mechanism if the claimant and the funder fail to reach an agreement regarding a specific settlement. There has been no decision handed down yet by a Luxembourg court confirming the validity of such a clause.

Termination of funding

9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances in which funding may be terminated. These often include a major change in the creditworthiness of the opponents, a change of circumstances having an impact on the chances of success of the funded case or the insolvency of the litigant.

In addition, the termination of a funding agreement could be triggered in the case of a contractual breach of the funding agreement by the funded party. In that case, the funder would have the option to terminate the funding after due notice and would not be obliged to cover the costs of the ongoing proceedings. Given these circumstances, the funded party might even be obliged to reimburse the funder for its costs and expenses.

Other permitted activities

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

There are no explicit rules as to the role a funder has in an ongoing litigation. The determination of such role is therefore subject to the parties' freedom of contract. Any rights and actions the funder wishes to exercise during the funded proceedings must therefore be determined in the funding agreement. This includes any information or participation rights, access to documents and any right to reject actions a litigant is usually free to take. Outside the scope of the funding agreement, there is however no requirement for a third-party funder to take any active role in the funded proceedings.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

In Luxembourg, attorneys' fees are not subject to any tariff. In principle, attorneys charge their own fees. The rule is provided by article 38 of the amended law of 10 August 1991 on the legal profession, which states that the attorney shall determine his fees and bear his professional expenses. In exercising this option, however, the attorney must show moderation in order to be socially acceptable and avoid abuses. Consequently, various elements must be taken into account, such as the importance of the case, the degree of difficulty, the result obtained and the wealth of the client.

Contingency fees are prohibited in Luxembourg. If, on the other hand, the attorney has achieved the desired result, the attorney is allowed to claim an additional fee. The right of an attorney to claim such a success fee does not have to be provided for by any agreement.

However, the attorney must not exaggerate when determining the success fee, otherwise he or she risks a reduction of it – in the context of a taxation procedure by the Luxembourg Bar or in court – and may even be subject to disciplinary proceedings.

Thus, the success fee must not be disproportionate in relation to the fees claimed and obtained by the attorney for the work performed. Accordingly, the courts have the power to reduce even a success fee that was initially agreed, when it appears to be exaggerated in relation to the service rendered. Also, the success fee must not be unreasonable in relation to the client's expectations. Indeed, the latter should not be surprised, at the end of the process, by a success fee that he or she could not have expected.

Other funding options

12 | What other funding options are available to litigants?

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

Legal protection insurance is widely used in Luxembourg. It is a contract by which the insurer undertakes, within the contractual limits, to pay the costs of an expert, bailiff, attorney, etc – in the event of a dispute or litigation opposing the insured party – to third parties and to assert certain of the insured party's rights. The types of dispute covered are defined in the contract and vary according to the needs of the insured.

Legal aid is a measure of state-funded support that may cover part or the totality of a litigant's costs and fees. This assistance is only provided for people without sufficient funds to ensure them access to legal redress, and includes the right to be assisted by an attorney and any other ministerial officer, such as a notary or bailiff, whose assistance may be necessary. Legal assistance is granted in both judicial and extrajudicial matters, with respect to both litigation and non-contentious matters, and whether the person in question is the plaintiff or the defendant. It applies to any matter brought before a judicial court or administrative court.

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

In our experience, the average duration of proceedings on the merits from the date of the summons to a first-instance judgment is one to two years.

The significant variance in the duration of claims is due to the difference in the proceedings initiated. For example, civil proceedings consist in a written procedure that requires more time, especially in the context of complex cases, whereas oral proceedings are considerably faster.

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

Time frame for appeals

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

No statistics exist indicating the proportion of first-instance judgments that are appealed.

The length of proceedings increases significantly when the parties to the dispute lodge an appeal. On average, it takes more than two years from the act of appeal to the judgment for decisions on the merits of the case.

No publicly available information exists as to the number of set aside proceedings against arbitral awards rendered in Luxembourg.

Enforcement

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

No statistics exist indicating the proportion of judgments that require enforcement proceedings.

Yet, Luxembourg law contains a number of provisions that facilitate the enforcement of judgments in the case of a final and enforceable decision (such as a garnishment). In principle, however, it should be noted that a judgment given by a Luxembourg court is enforceable without a *visa* or *pareatis*, provided that it is final and enforceable and that the rendering judge has not suspended its enforcement.

COLLECTIVE ACTIONS

Funding of collective actions

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

Class actions are currently not part of Luxembourg law. However, class actions in consumer law are on their way to being introduced in Luxembourg.

Related actions may under certain conditions be grouped together for a joint judgment of the court. However, as a matter of principal under current Luxembourg procedural rules, a claimant can only sue for his or her own personal benefit to recover a loss personally suffered. Unlike class actions, the parties to the joinder may not, in other words, seek damages on behalf of others who have not joined the proceedings. Accordingly, funding of such litigation processes by a third-party funder is comparable to the funding of individual claims.

Despite the absence of a legislative text providing for class actions, a few judgments have recognised that certain legal entities might be entitled to bring claims on behalf of their members.

Indeed, in 2007 the Court of Appeal held that unions are entitled to defend the interests of their members through court actions. Furthermore, the District Court of Luxembourg decided in 2005 that a legal entity would have standing to claim damages on behalf of its members on the condition that its Articles of Association authorise the entity to defend, through court proceedings, the interests of some or all of its members.

A few organisations are also expressly authorised by law to lodge claims for damages in criminal proceedings where the collective interests defended by these organisations are at stake (for instance in the areas of animal rights and preservation of the environment).

COSTS AND INSURANCE

Award of costs

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

Under Luxembourg law, any person who mandates an attorney to defend his or her interests in legal proceedings must in principle pay the attorney's fees in full.

Nevertheless, the judge may order the unsuccessful party to pay a procedural indemnity under certain conditions. The judge may only make such an order if the party that wins the case has made a request to that effect, expressly asking for the opposing party to be ordered to pay a procedural indemnity of a specified amount, either in the document initiating the proceedings (petition, summons or writ of summons) in the case of the plaintiff, or in the course of the proceedings in the case of the defendant.

If such a request has been made, it is for the judge to assess whether it is well grounded. Thus, article 240 of the New Code of Civil Procedure provides that the judge may order a party to pay a certain amount 'when it seems unfair to leave the other party to pay part of the sums it has incurred and not included in the expenses'. The sums concerned are mainly lawyers' fees and costs but may cover other costs such as travel to court. Only the successful party can obtain compensation for the proceedings. The judge will also consider whether the successful party has taken prior steps to avoid court proceedings, and may take into account the good or bad faith of the losing party. It is therefore not enough to be entitled to obtain this procedural indemnity, which is left to the judge's discretion. In any event, the procedural indemnity is only symbolical and only covers a part of the lawyer's fees (the procedural indemnity often ranges from 500 to 5,000 euros).

Unlike attorneys' fees and expenses, the costs directly incurred by the plaintiff to initiate the proceedings (such as bailiff's fees and translation costs) can be recovered from the unsuccessful party, provided this party is solvent. No specific request in regard to these fees is needed; the judge must, however, expressly specify who has to bear the costs.

Liability for costs

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

Since third-party funders are not a party to the proceedings, no legal basis exists that could be used by courts to order a third-party funder to pay for adverse costs (or more specifically the procedural indemnity as stated above).

If the funding agreement provides for the funder to cover adverse costs, the funder has a contractual obligation to pay for them. The successful adverse party, however, has no enforceable right against the funder.

Security for costs

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

In Luxembourg, a defendant cannot request the court to order the plaintiff to provide security for costs. However, when the plaintiff resides in a foreign country that is not a member of the European Union, or that has not signed a specific convention with Luxembourg, the defendant may request the court to order the deposit of a certain sum of money (*caution judicatum solvi*) with the *Caisse de Consignation*. The amount

of the deposit is calculated after an assessment of the costs of the proceedings and the potential damages, and usually remains low to ensure that the right to access to justice is preserved.

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

As there is no requirement to inform the courts of the existence of a funding, the courts are usually unaware of such funding. In any event, as the amount of the *caution judicatum solvi* must be determined in compliance with the criteria determined by the law, the existence of a funder should remain without consequence on the court's decision.

As there is no such requirement under the New Code of Civil Procedure for arbitration either, the same would apply. However, if specific arbitration rules apply (eg, IBA, ICC, Luxembourg Chamber of Commerce), it would be necessary to determine if there are specific provisions provided by such rules, and if so, to apply them.

Insurance

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

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

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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

In principle, Luxembourg law does not oblige a party to a domestic litigation to disclose a funding agreement to the opposing party or the court. One could argue that the disclosure of a funding agreement could be ordered by a court if the conditions required for the production of documents are met. This seems very unlikely to happen, as the defendant would need to prove that the funding agreement may have an impact on the decision of the judge on the merits.

As there is no such requirement under the New Code of Civil Procedure for arbitration either, the same would apply. However, if specific arbitration rules apply (eg, IBA, ICC, Luxembourg Chamber of Commerce), it would be necessary to determine if there are specific provisions provided by such rules, and if so, to apply them.

Privileged communications

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

Subject to legal privilege, the attorney may not disclose any information entrusted to them by their client. Any breach of privilege may result in criminal or disciplinary proceedings.

Communications between litigants and their attorneys will therefore not be allowed as evidence by the courts or arbitrators. This does not apply, however, to communications between litigants and their funders. Consequently, the confidentiality of information exchanged between a litigant or his or her attorney and a third-party funder must be provided for in the litigation funding agreement.

Obviously, the fact that a litigant or his or her attorney shares certain information with a third-party funder cannot be considered as a waiver of the attorney-client privilege by the litigant.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

To our knowledge, there are no published decisions regarding disputes between litigants and third-party funders in Luxembourg.

NIVALION
Elevating legal finance

Isabelle Berger
isabelle.berger@nivalion.com

Turmstrasse 28
6312 Steinhausen
Zug
Switzerland
Tel: +41 41 748 43 00
www.nivalion.com

BSP
Right by you in Luxembourg

Laure-Hélène Gaicio-Fievez
lhgaicio@bsp.lu

Alexeji Nickels
anickels@bsp.lu

rue Peternelchen
Immeuble C2
L-2370 Howald
Luxembourg
Tel:+352 260 25 1
www.bsp.lu

Other issues

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

Practitioners should be aware that third-party funding is not regulated in Luxembourg. Consequently, many issues remain unresolved. It is therefore vital that a clear and transparent contract is drawn up between the funded party and the third-party funder to cover all relevant aspects of the funding relationship, including the interactions between the third-party funder and the litigant's attorney.

UPDATE AND TRENDS

Current developments

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

With the growing interest in the enforcement of arbitral awards against sovereign states in Luxembourg, it is clear that third-party funding is developing further in Luxembourg and in the European Union. Indeed, at European level, the first incentives are being taken. For example, in June 2021, the European Parliament's Legal Affairs Committee published a draft report containing recommendations to the Commission on responsible private funding of litigation.

At the start of the covid-19 crisis, a state of emergency was declared for three months in Luxembourg, and during this period the judicial system came to a standstill.

In addition to the 8.8 billion euros of aid implemented to protect the Luxembourg economy from the effects of the health crisis linked to the covid-19 epidemic, other key measures were decided by the government council. In particular, a grand-ducal regulation drawn up by the Ministry of Justice suspended, as a first step, time-bars in judicial matters and adapted certain other procedural modalities.

Since June 2020 and after the adoption of two laws providing a continuous legislative framework dealing with the covid-19 situation after the end of the state of emergency, the Luxembourg judicial system has nevertheless resumed its normal functioning. In order to reduce the number of people in the corridors and courtrooms, different measures were introduced (for instance the summonses for the hearings were issued on an advanced schedule, which means that the parties, their attorneys, witnesses and experts are asked to appear at the exact times indicated on the summons).

Although we consider that covid-19 has not had a significant impact on the cases currently dealt with by written procedure, we note, however, that all the measures taken due to the pandemic did have an impact on oral proceedings – as such oral hearings were not held during the state of emergency. This created a delay in the handling of the oral proceedings.

A positive effect of the crisis is, however, that it clearly contributed to the digitalisation of the Luxembourg judicial system. Indeed, at the start of the covid-19 crisis, the digitalisation of the procedure had not been completed, making exchanges between the judiciary and litigants difficult or even impossible. The players in the judicial world then mobilised strongly to find solutions quickly, thereby accelerating the digitalisation of information vectors for judges. Thus, for example, the joint circular of the Luxembourg District Court and the Luxembourg Bar Association of 12 March 2020 and the joint circulars of the Superior Court of Justice and the Luxembourg Bar Association of 18 March and 2 April 2020 developed the process of electronic communication with judicial institutions. These measures are intended to remain in place for the duration of the exceptional circumstances.

Designed to ensure the health security of the judicial actors and to avoid a complete blockage of the judicial institutions, many hope however that these measures will continue to be implemented after the crisis because they clearly allow for better time management and a reduction in costs.