LITIGATION FUNDING

British Virgin Islands

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Litigation Funding

Consulting editors

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Woodsford

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

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REGULATION

Overview

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

Historically there has been a certain degree of uncertainty about whether third-party litigation or arbitration funding is compatible with local public policy, and whether litigation funding agreements are enforceable.

The BVI has a common law system. It is arguably unclear whether the doctrines of champerty and maintenance continue to apply in the jurisdiction, so as to potentially render third-party funding contracts unenforceable.

While criminal liability for champerty and maintenance was abolished in the BVI in 1997 by section 328 of the BVI Criminal Code, to the extent that the doctrines still lurk in the backdrop of the BVI's legal system, they have not been fully abolished by local statute as a civil wrong or a tort as is the case in England and Wales.

Until 29 September 2020, BVI courts had not fully assessed the enforceability of third-party funding arrangements. In the important (but uncontested) decision of Crumpler v Exential Investments Inc , Claim No. BVIHC (COM) 81 of 2020, the BVI Eastern Caribbean Supreme Court (Commercial Division) gave its approval of a third-party funding agreement between two BVI liquidators and a third-party litigation funder.

Litigation funding had previously been sanctioned by the Court on previous occasions, but this was the first time that the position had been confirmed in a written decision. In his judgment, the Honourable Justice Jack noted that the modern English approach permitting third-party litigation funding at common law has been adopted in judgments by courts in Bermuda, Jersey, Australia and Cayman (citing to a whole series of cases in that regard). The Learned Judge concluded that the funding arrangement was not contrary to BVI public policy – in fact, that the contrary was the case. In Justice Jack's view, the liquidators would not have been able to recover assets for the benefit of the creditors without such funding in place, and the funding arrangement was essential to ensure access to justice. This acceptance of third-party funding has not yet been considered at the appellate level. It may take considerable time before the courts come to a final landing on the acceptability of third-party funding.

Prior to the Court's decision in Crumpler , in Hugh Brown & Associates (Pty) Ltd v Kermas Limited , Claim No. BVIHCV (COM) 2011/13 and 14, Mr Justice Bannister was prepared (without deciding the point) to proceed on the assumption that third-party funding was permissible. Subsequently, in Leremeieva v Estera Corporate Services (BVI) Ltd , Claim No. BVIHCM2017/0118, Justice Gerhard Wallbank observed that litigation funding might provide access to justice, which he described as 'laudable'. In the judge's view, the tell-tale signs of a champertous agreement included excessive control over the litigation by the funder, significant returns conditional upon the outcome of the claim and that the funder does not appear to be a professional funder or a regulated financial institution.

Given the scarcity of BVI precedent on the topic, whether third-party financing of litigation is common in the BVI is difficult to judge. An argument can certainly be made that BVI courts will continue to adopt the modern English common law model, by permitting responsible third-party funding to flourish under judge-made rules. As a result, it would not be surprising to see an upsurge in cases that are funded by professional funders or regulated financial institutions.

By the adjective 'responsible' in modifying the noun 'funding' we mean to say funding agreements that (1) do not permit a funder to exercise control over the prosecution of a bare cause of action for an unliquidated sum and (2) that require a funder to fund adverse costs up to the level of its funded costs. Also, by 'responsible' we are referring to adequately capitalised and professional third-party funders. If these guiding principles are not followed, in our opinion, there exists a real risk under BVI law that an offending funding agreement will be found to be unenforceable.

Law stated - 10 November 2021

Restrictions on funding fees

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

There are no established limits on the fees and interest that funders can charge. However, if an application is made for the court's approval of a funding agreement, the amount of fees and interest charged by the funder will likely be a relevant consideration for the court.

Law stated - 10 November 2021

Specific rules for litigation funding

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

There is currently no regulation of third-party litigation funding in the BVI.

Law stated - 10 November 2021

Legal advice

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

Several of the rules contained in the Code of Ethics appended to the Legal Professions Act 2015 (the Code) will be relevant to those legal practitioners in the BVI who advise on funding. For example, a legal practitioner must maintain his or her integrity and independence and act in the best interests of the client. A breach of the Code may constitute professional misconduct. As in other common law jurisdictions, a legal practitioner in the BVI owes his or her client a duty of care, and the failure to meet the requisite standard of care when advising on funding may result in a claim for professional negligence.

Law stated - 10 November 2021

Regulators

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

There are no such public bodies in the BVI, although the BVI court will of course scrutinise any agreement that it is called upon to approve.

Law stated - 10 November 2021

FUNDERS' RIGHTS

Choice of counsel

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

Securing litigation funding can be a complex and long process. Potential funders will need to be convinced that the case is worth funding from a commercial perspective. A variety of factors will be considered by the funder, including

the composition of the client's legal team. If for whatever reason the funder is not satisfied with the legal team, it may of course refuse to fund the litigation.

Law stated - 10 November 2021

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

There is nothing preventing a funder from attending open court hearings. If the proceedings are being held in chambers or in camera, it would be necessary to first obtain permission from the judge. Equally, there is nothing prima facie improper with a funder attending settlement discussions, although it may be appropriate to obtain the opposing party's consent first.

Law stated - 10 November 2021

Veto of settlements

Do funders have veto rights in respect of settlements?

Litigation funding agreements will often require a funder to be kept informed of settlement offers and negotiations, and the degree to which it can contribute to the litigant's decision to settle the matter and what terms should be set out in the agreement. Decisions from the courts of England and Wales are persuasive authority in the BVI. Therefore, the BVI court is likely to intervene when a funder is attempting to procure an improper settlement (Davey v Money [2019] EWHC 997 (Ch)).

Law stated - 10 November 2021

Termination of funding

In what circumstances may a funder terminate funding?

The circumstances under which an agreement may be terminated by the funder or the litigant, or both, will generally be set out in the funding agreement.

Law stated - 10 November 2021

Other permitted activities

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?

The ways and extent to which funders can take an active role in litigation remain untested in the BVI. While the BVI court appears to be taking a modern approach to litigation funding, it is arguable that the public policy against champerty and maintenance remains alive in the BVI, at least to some extent, and a funder must therefore not assume control over the litigation. That said, it is arguable that the BVI court should adopt the modern approach of the English courts and ask itself whether the right of control enjoyed by a funder will likely undermine or corrupt the process of justice (Davey v Money [2019] EWHC 997 (Ch)).

Law stated - 10 November 2021

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

Yes. Section 26 of the Legal Professions Act 2015 (LPA) provides that the Code of Ethics appended to the LPA (the Code) governs the conduct of legal practitioners in the BVI.

Section 6 of Part B (Mandatory Provisions and Specific Provisions) of Schedule 4 (Code of Ethics) of the Act provides the following:

In relation to this, it is relevant to note the BVI court's decision in Abdel-Karim Taher Itum v Forbes Hare (Claim No. BVIHCV 2016/0199) dated 1 December 2020. The central issue was whether there was a binding and enforceable contract between a BVI law firm (the Law Firm) and its client (the Client), and if so on what terms. The Law Firm had issued a partially signed letter of engagement to the Client, who, rather than signing the agreement, issued what he described as a 'counter-offer'.

The counter-offer contained a proposal that if the Law Firm's initial efforts were successful and a funder was identified, an additional sum on top of the capped fee would be settled through the funder.

The Court found that the Client had not agreed to the written letter of engagement and the Law Firm had not agreed to the counter-offer. However, the Court held that the Client had impliedly entered into an agreement to retain the Law Firm and, as a result, the Client was the subject of an implied obligation to remunerate the Law Firm reasonably in exchange for the firm's services – and such fees were not capped.

Relevantly for present purposes, the judge proceeded to deal with the Law Firm's ancillary argument that it would not be reasonable to conclude that the firm would have accepted the terms of a counter-offer that, if accepted, would be unenforceable by reason of it being incompatible with the public policy rule at common law against champerty (on the theory that the Client's counter-offer represented a conditional fee arrangement).

Having examined several older English judgments in support of the proposition that a conditional fee agreement offends the rule against champerty – and is therefore unenforceable – the judge concluded that even if it could be said that the Client contracted with the Law Firm on such terms, the agreement would likely be unenforceable at common law.

In my respectful view the judge's finding on this issue is unlikely to be followed in the future. First, there is a strong argument that this finding was made obiter and that the ratio of the case appeared earlier in the judgment. Second, it appears that the judge did not refer to section 6 (2) of the Code, which authorises the use of contingency fees (albeit only in writing). Third, the judge was not referred to Justice Jack's decision in Russell Crumpler and David Standish as Joint Liquidators of External Investments Inc (In Liquidation) v External Investments Inc , Claim No. BVIHC (COM) 81 of 2020, where the court found that a third-party litigation funding agreement was not incompatible with BVI public policy.

Law stated - 10 November 2021

Other funding options

What other funding options are available to litigants?

Legal aid is not provided for by statue in the BVI for civil litigation matters. Unless a litigant has insurance, if third party funding is not in place, he or she must personally fund the litigation.

Law stated - 10 November 2021

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

The BVI High Court currently has four judges who sit full time, two of whom deal exclusively with matters in the Commercial Division. The time it takes for a commercial claim to be determined at first instance depends on a variety of factors, including how legally or evidentially complex the case is and how busy the Court's list is.

Interlocutory applications can be dealt with on an urgent basis within a couple of days of filing, but only if the court is satisfied that there are cogent grounds for urgency. A trial will, of course, take much longer to be determined, and it would not be unusual for twelve months to elapse between the issuance of a claim and final determination at first instance. This period will increase substantially if issues of proper forum or service arise. A report published by the Eastern Caribbean Supreme Court indicates that in 2018 (ie, pre-pandemic) the average time for a commercial court matter to be disposed of was 241 days.

Law stated - 10 November 2021

Time frame for appeals

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

The Court of Appeal division of the Eastern Caribbean Supreme Court, headquartered in Castries, Saint Lucia, operates as an itinerant court of appeal whereby the Justices of Appeal travel to each of the member states for scheduled sittings. The nine member states: the Territory of Anguilla, Antigua and Barbuda, the Commonwealth of Dominica, Grenada, the Territory of Montserrat, the Federation of Saint Christopher and Nevis, Saint Vincent and the Grenadines, Saint Lucia and the Territory of the British Virgin Islands.

The Court of Appeal usually sits in the BVI twice a year (sometimes three). While most BVI appeals are heard when the court is sitting in the jurisdiction, emergency appeals can be heard in any jurisdiction where the court is sitting at that time. As with decisions at first instance, the time taken for an appeal to be determined will vary greatly and will depend on the circumstances of the case and how busy the Court's diary is. Broadly speaking, it can take around one to two months for an emergency appeal and 12 to 18 months for a non-urgent, complex appeal to be resolved.

Law stated - 10 November 2021

Enforcement

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

There are no statistics detailing the proportion of judgments that require enforcement action in the BVI. The available methods of enforcement of a money judgment are set out under Part 45.2 of the Eastern Caribbean Civil Procedure Rules 2000 and include (1) a charging order; (2) a garnishee order; (3) a Judgment Summons; (4) a seizure and sale order; or (5) the appointment of a receiver.

Before a foreign judgment can be enforced in the BVI it must first be recognised under the Reciprocal Enforcement of Judgments Act 1922 (which applies to judgments given in the High Court of England and Wales, the Court of Northern Ireland, the Court of Session in Scotland and the courts of the Bahamas, Barbados, Belize, Trinidad and Tobago, Guyana, St Lucia, Grenada, Jamaica and New South Wales (Australia)) or a substantive claim must be issued in the BVI based on the outstanding judgment debt.

Law stated - 10 November 2021

COLLECTIVE ACTIONS

Funding of collective actions

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

There are no rules that specifically relate to class or groups actions. However, where there are five or more persons who have the same or similar interest in the proceedings, the court may appoint (1) a body having sufficient interest in the proceedings; or (2) one or more of those persons to represent all or one of the persons with the same or similar interest (pursuant to Part 21 of the Eastern Caribbean Civil Procedure Rules 2000). A representative may be either a claimant or defendant. In principle there is no reason why group litigation could not be funded by a third party, although group litigation in the BVI is relatively rare.

Law stated - 10 November 2021

COSTS AND INSURANCE

Award of costs

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?

Yes. Under Civil Procedure Rule 64.6 the general rule is that where the court decides to make an order about costs, the court must order the unsuccessful party to pay the costs of the successful party. However, the court has a wide discretion and may order the successful party to pay all or part of the unsuccessful party's costs or make no order at all. As for the costs liability of a funder, while the issue remains untested, it is likely that the BVI court will adopt the position in England that an unsuccessful party in litigation cannot be ordered to pay the costs of third-party funding.

Law stated - 10 November 2021

Liability for costs

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

The issue of whether a third-party funder can be made liable for the costs of a funder is yet to considered by the BVI court. However, English precedent is persuasive authority in the BVI, and it is therefore arguable that the court may have the discretion to order a funder to pay adverse costs (see Davey v Money [2019] EWHC 997 (Ch)).

Law stated - 10 November 2021

Security for costs

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?)

By Civil Procedure Rule 24.3, the Court may order the claimant to pay security for costs if it considers that it would be just to do so having regard to all the circumstances of the case, and if any of the following applies:

- some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover;
- the claimant:
  - failed to give his or her address in the claim form;
  - gave an incorrect address in the claim form; or
  - has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation;
- the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;
- the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21 of the Civil Procedure Rules, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;
- the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;
- the claimant is an external company; or
- the claimant is ordinarily resident out of the jurisdiction.

In Dr Martin Didier et al v Royal Caribbean Cruises Ltd , SLUHCVAP 2017/0051, the Court of Appeal (for the Eastern Caribbean Supreme Court) held that the court would not order security for costs solely because the claimant was ordinarily resident outside the jurisdiction. That said, a non-resident claimant without any assets in the jurisdiction will, in all likelihood, be required to put up security for the defendant's costs.

The amount and nature of the security shall be such as the court thinks fit (CPR 24.2 (4)). The court should ensure that the amount ordered to be paid is not oppressive or disproportionate and will consider such factors as the value of the claim and the costs incurred to date. Security may be in various forms, including a payment into court, bond or guarantee.

Law stated - 10 November 2021

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

Under Civil Procedure Rule 24.3 (a), one of the circumstances under which the court may order security for costs is if some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property that the claimant may recover. This would include most if not all third-party funding arrangements.

In Hualon Corporation (M) SDH BHD (in receivership) v Marty Limited , BVIHC (COM) 2014/0090, Justice Farara held that the claimant's refusal to provide the defendant with a copy of the funding agreement was one of the factors weighing in favour of granting security for costs, because it 'raises the serious likelihood that the Claimant is either unable or unwilling to pay or to meet any costs awarded to the Defendant in these proceedings'. However, while there

are no decided cases in the BVI, it is unlikely that the existence of funding alone would warrant an order for security for costs, particularly if the funding is being provided by an established funder.

Law stated - 10 November 2021

Insurance

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

There are no rules prohibiting the use of after-the-event insurance. However, there are no published statistics detailing how common its usage is in the BVI.

Law stated - 10 November 2021

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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?

There is no general obligation on the parties to disclose the existence of a funding agreement, although the refusal to do so may be a factor (among others) that weighs in favour of granting security for costs (Hualon Corporation (M) SDH BHD (in receivership) v Marty Limited , BVIHC (COM) 2014/0090).

Under Civil Procedure Rule 24.3 (a) the court may order security for costs if some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property that the claimant may recover. The equivalent provision in England has been held to include an inherent power for the court to require the disclosure of the identity of the funder (RBS Rights Issue Litigation [2017] EWHC 463 (Ch). It is reasonable to expect that the BVI court would adopt a similar stance.

Law stated - 10 November 2021

Privileged communications

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

There appears to be no written judgment from the BVI court examining whether a third-party funding agreement is likely to attract privilege. The concepts of litigation and legal advice privilege apply in the BVI in the same manner as they do in England, and therefore the BVI court would likely adopt the position on this issue currently taken in England. In the Matter of Edwardian Group Limited [2017] EWHC 2806 (Ch), Morgan J considered the applicable authorities concerning legal advice privilege in this context. He held that if the litigation funding agreement 'gave a clue to the advice given by the solicitor' (Lyell v Kennedy (No. 3) (1884) 27 Ch D 1), or 'betray[ed] the trend of the advice which [the solicitor] is giving the client' (Ventouris v Mountain [1991] 1 WLR 607), then legal advice privilege would apply to the funding agreement.

Law stated - 10 November 2021

DISPUTES AND OTHER ISSUES

Disputes with funders

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

None reported in this jurisdiction.

Law stated - 10 November 2021

Other issues

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

Recently, a report was issued by the BVI's Insolvency Law Reform Committee setting out a number of preliminary recommendations for legislative reform on litigation funding by both third parties and legal professionals. This is an important law reform report. The Committee was established by the Honourable Chief Justice in 2017 and has six members. Currently they include three sitting judges of the Court of Appeal and two senior members of the BVI Bar. The report recommends, in part, the abolition of the common law rules relating to champerty and maintenance insofar as they concern tortious conduct and as a ground for the automatic avoidance of funding agreements on public policy grounds. It is substantially a pro-litigation funding report albeit under a regulated structure.

Law stated - 10 November 2021

UPDATE AND TRENDS

Current developments

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

The proposed Bill to Enact the Dispute Resolution Funding Act 2021 (BVI) was prepared by the authors at the request of the government of the BVI. It is now under consideration by the government for possible enactment. An earlier version of the draft Bill has been commented on extensively by the recent report of the BVI Insolvency Law Reform Committee.

Law stated - 10 November 2021

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Japan	Miura & Partners
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