

THE THIRD PARTY
LITIGATION
FUNDING LAW
REVIEW

Editor
Leslie Perrin

THE LAWREVIEWS

THE THIRD PARTY
LITIGATION
FUNDING LAW
REVIEW

SECOND EDITION

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Editor
Leslie Perrin

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PREFACE

Just as you start to think it might be safe to assume that everyone who needs to understand third party funding of litigation and arbitration really does understand it, you stand, as I did the other day, in one of London's finest clubs chatting socially to a Circuit Judge, who asks what you are doing these days and you reply that you invest capital in the costs of litigation in return for a share of the proceeds contingent on success. He looks you magisterially in the eye and asks, as if you would never have thought of it, 'isn't that unlawful?'

The task of proselytising third party funding, as anyone directly involved in it will tell you, goes on. Right across the global reach of third party funding, every meeting or conference, with lawyers or with potential claimants, can be expected to require a run through of the basics of how it is done. The process is not assisted by the silo mentality of most major law firms, where it is absolutely not possible to make the assumption that, having spoken to one, or even several partners, you have spoken to the firm.

This past year has also meant for most funders, a merry-go-round of encounters with investors, as blue-chip pension funds, family offices, endowments and seemingly all known fund management vehicles have realised that it might be possible to invest in an asset that is not only non-correlated with other asset classes, but also, where concentrations are properly managed, one where the individual assets in a portfolio are not internally correlated. Eye-catching returns are being reported by the listed funders, while rumours of similar performance circulate around the private funders.

Individual managers and underwriters of litigation risk with a track record of success are rarer than the proverbial hens' teeth though. Some observers estimate that in the entire world there are no more than about 35 people with a 10-year investment management record delivering the sort of results that investors are seeking. This has led to an aggressive global hiring spree by funders in an attempt to remedy this shortage, aimed at the cream of senior associates (and occasionally partners) from all types of firm, including the very largest.

As the pipeline to equity narrows at all law firms, but especially at the largest and most profitable, and that pathway comes to depend on ever greater commitments of time to the firm, over all else, many lawyers outside law firm equity have begun to be tempted by the stories they hear of the opportunities to earn an equity stake at a litigation funder where hard work and dedication are, of course, an absolute requirement, but where an 18-hour-day time commitment is not expected.

All this has led to a debate within funders as to what ingredients make up the ideal senior recruit from a law firm. Does it have to be a litigator? Not really. Third party funding can be seen as a corporate finance transaction where competitive advantage for a funder may lie in being able to field top-class transactional input to the way a deal is negotiated from the outset. Does it have to be a lawyer? No. Experienced finance professionals should play a role

in case assessment, not just in the process of understanding the true quantum of a claim but in establishing the return that will be required by the investors in given time and quantum outcomes.

Interesting business pressures are also mounting in consequence of the global nature of third party funding. Although the Association of Litigation Funders of England & Wales (of which I remain the chairman) continues to provide voluntary regulation to the third party funding sector that seems to be respected and understood in the senior ranks of the judiciary and beyond in the Ministry of Justice and in other government circles, it is becoming clear that some form of international trade association is now required, to give a collective global voice (albeit, not as a regulator) to the interests of the third party funding industry. It would not surprise me if such a body were to be launched in the coming months, possibly in the wake of the inquiry currently being run by the Australian Law Reform Commission (ALRC), which might only directly affect the Australian market but will achieve global significance because so many non-Australian funders are active in that market. The ALRC's final report is likely to be highly influential on what happens next, not only in the regulation of third party funding in Australia but also how the entire third party funding industry will organise its approach to marketing and opinion forming in the global market.

This all adds up to a remarkable 12 months since the first edition of the *Third Party Litigation Funding Law Review* was published. Awareness of the industry has spread, not just in the context of the funding of the legal costs of a single case from its inception through to resolution (what might be called Litigation Funding 101) but in the monetisation of judgments and awards. In civil law jurisdictions, monetisation of claims can also be achieved. In the common law countries, by and large, monetisation of a claim would still, even in these enlightened times, offend against maintenance and champerty.

Businesses have learned that there is a way out of the accounting bind that contingent claims against you must (as a matter of principle) be accounted for as a debit in your balance sheet but contingent assets can be ascribed no value until they are turned into cash. This fact of business life, combined with what could be described as 'litigation fatigue' (which requires no explanation!), means that monetisation transactions are very much on the rise.

A modest extension of the market in monetisations takes you squarely into consideration of secondary markets, where funders might sell their interest in an investment to (say) a hedge fund at a price that appeals to both sides of the transaction. The development of monetisations and the development of secondary markets might well be major themes for the year ahead.

Leslie Perrin

Chairman

Calunius Capital LLP and Association of Litigation Funders of England and Wales

November 2018

NETHERLANDS

*Rein Philips*¹

I MARKET OVERVIEW

The Dutch market for third party litigation funding is developing rapidly.² Still a relatively unknown phenomenon a few years ago, today many Dutch lawyers will tell you it is the flavour of the day. That being said, litigation finance in the Netherlands is not nearly as common as it is in Australia or the UK. It is hard to determine potential market size for litigation funding based on publicly available figures but it seems safe to assume that litigation funding in the Netherlands is not yet half way to reaching its full potential.

Based on the available information from other funders, published cases and our own experience, in terms of number of claims, consumers in the context of class actions and small and medium-sized companies (SMEs) lacking the means to litigate a bigger opponent are among the most frequent users of litigation finance in the Netherlands. Securities of companies going through some kind of turmoil of their own doing and complex financial products, such as investment insurance products and interest swaps, have been the focal point of a number of (partially) funded Dutch class actions. Another type of class action for which the Netherlands has proven to be a popular jurisdiction is follow-on damages claims in anti-cartel cases.

Owing to a large presence of international holding companies, the recognition of judgments across the European Union pursuant to Regulation (EU) No .1215/2012 and a relatively effective class action settlement mechanism, the Netherlands has become a favoured jurisdiction for the litigation and settlement of securities class actions. A recent notable event in this arena took place on 13 July 2018, when the Court of Appeal of Amsterdam approved a €1.3 billion settlement between Ageas (formerly known as Fortis) and institutional and retail investor regarding claims stemming from Fortis' 2007 acquisition of ABN AMRO Bank. Even more recently, the Amsterdam Court assumed jurisdiction in the *Petrobras* securities class action. US firms such as Bernstein Litowitz Berger & Grossmann and Grant Eisenhofer have had permanent feet on the ground in the Netherlands since Dutch courts appeared to be willing to approve US-class action settlements for non-US investors in *Converium* (2012).

Dutch insolvency administrators and supervisory judges in insolvencies are only just starting to discover the benefits of litigation finance. Based on the widespread use of litigation

1 Rein Philips is managing director and co-founder of Redbreast Associates NV.

2 There is no public data available on the actual use of litigation funding in the Netherlands, hence this overview is to a large extent on the subjective experience and analysis of relevant published events of the author.

finance in insolvency in countries such as Australia, Germany and the UK, and the obvious benefits that litigation finance offers to insolvent estates lacking the funds to prosecute valid claims, there is potential for further development in this area.

So far, there are no signs that general counsel and CFOs of large Dutch companies are embracing litigation finance as an alternative form of corporate finance. The concept seems to be compelling: a company obtains non-recourse financing against its disputed claim portfolio that would otherwise be sitting dead on its balance sheet while the litigation expenses burden its working capital and profit margins. Depending on how the deal is structured, the financing provided by a litigation funder may be accounted for as income.

However, there are reasons why large corporations might be hesitant to explore this particular type of financing. First, in recent years large corporations have not suffered from a lack of capital supply from more common sources whereas the concept of litigation finance is relatively new and untested. Another reason may be a natural inclination of large corporations to view litigation funders as potential opponents rather than as potential partners. A general counsel of a large company is more likely to hear about third party funding in the context of a funded action directed against his or her company or its peers, than as a helpful finance solution for its own business. In this context it is noteworthy that the American Chamber of Commerce, a powerful US lobby for big corporations, has set up office in the Netherlands to warn against the envisaged widening of the scope of Dutch class action legislation and, in its wake, the perceived threat third party funding poses to businesses that are on the receiving end of such actions.

Notable players

Liesker procesfinanciering, founded in 2011, has successfully introduced litigation finance to the broader public of private individuals and SMEs. Liesker procesfinanciering will finance claims starting from €150,000. In recent years it has successfully financed its growth through crowdfunding. Recently, other litigation finance outfits with a similar focus opened shops, most notably Capaz.

Redbreast Litigation Finance, founded in 2015, finances claims exceeding a value of €5 million and focuses on commercial litigation, bankruptcy claims and, selectively, class actions. Besides providing regular third party litigation finance to its clients, in some cases Redbreast will also take on a role as project manager and book builder.

Omnibridgeway is a firm that built an international reputation for its capability to enforce judgments and awards in difficult areas of the world long before the litigation finance boom. More recently, they have also been active in the funding of anti-cartel class actions and high-value litigation and arbitration.

Finally, a number of individuals, organisations and law firms have built a reputation for organising or conducting funded consumer class actions. To mention just a few here: Adriaan de Gier of De Gier Business Law, Pieter Lijesen and ConsumentenClaim.

II LEGAL AND REGULATORY FRAMEWORK

i Funding of individual claims

Dutch law does not put particular restrictions on litigation funding or the degree of control that a third party litigation funder can assume in the funded lawsuit. Common-law doctrines of maintenance and champerty did not find their way into the Dutch Civil Code (DCC).

As such, a funding agreement will be governed by the general rules of contract, meaning that parties are generally free to shape their funding agreement as they like as long as their agreement does not result in a violation of public policy (including due process).

ii Funding of class actions

For the purpose of this discussion we distinguish two general types of class action:

- a class actions in which a Dutch special purpose foundation or association represents all claimants of a certain class, whether or not the claimants have signed up or are actively involved in any other way; and
- b class actions in which the claim entity only represents claimants with which it has entered into an agreement to that effect.

305a class actions

The first type of Dutch class action is based on Article 3:305a of the DCC. This provision allows a Dutch foundation or association that meets certain requirements, to represent all claimants (active and non-active) that suffered damage as a result of an event or product (a 305a-Organisation). A 305a-Organisation can only file a claim for the determination of liability on behalf of its class members but it cannot bring a claim for compensation. In the event that, either before or after liability has been established by a court, the 305a-Organisation and the defendants reach an agreement regarding damages, a settlement can be approved by the court and declared binding on the entire class, including inactive claimants provided an opt-out period of at least three months (a 305a Settlement). If, after determination of liability, no settlement is reached, individual claimants will have to sue for damage compensation in separate proceedings. 305a-Organisations have been particularly successful in securities class actions with notable examples including *Shell's Oil Reserves*, *Converium*, *FortisAgeas* and recently *Petrobras* (still subject of litigation).

A bill has been passed by the House of Representative and is now awaiting approval by the Senate that will enable 305a-Organisations to also sue for compensation of damages after liability has been determined (the Bill). Together with this new feature, the Bill will to a large extent enact existing non-binding guidelines for 305a-Organisations that were drafted by a commission of experts and representatives of claimants' organisations.

Relevantly, the Bill stipulates that to qualify as a 305a-Organisation the entity must have sufficient financial means to bring the claim and must have a professional board whose members do not have a direct or indirect financial interest in the outcome of the lawsuit. This means that the board members must be compensated independently from the outcome of the lawsuit and, presumably, cannot be representatives of a third party litigation funder financing the suit. This cuts off the possibility for the litigation funder to exercise direct control over its investment when funding claims of a 305a-Organisation (de Claimcode).

A further restriction on control by the litigation funder is implied by the legislator in the explanatory memorandum to the Bill (the Bill itself makes no mention of third party litigation funding). According to the legislator a court has the means to review the funding structure if it is concerned that the third party funder is in a position to adversely affect the interests of the claimants. The legislator provides the notable example of a litigation funder having complete power over the decision to accept a settlement proposal. Although the explanatory memorandum has no force of law, it is an important guideline for the court's interpretation of the law.

The *Fortis/Ageas* settlement showed that the court, when asked to confirm a settlement by a 305a-Organisation, may critically review the compensation received under the settlement by the claimants' organisations and this may even be cause to deny the confirmation. Although, after some amendments, the settlement was eventually confirmed, this affair, together with impracticalities and uncertainties associated with the Claimcode and the Bill (only partially discussed above), have caused some practitioners and funders to question the viability of the use of 305a-Organisations. As always, the proof of the pudding will be in the eating and it will be interesting to see how the market will respond when the Bill is implemented, possibly in the course of 2019.

Regular class actions

The second category of class actions is organised by limited liability companies or foundations that bundle claims strictly on an opt-in basis (i.e., not making use of Article 3:305a DCC). Claimants affected by a particular event, such as a cartel in a specific industry, may assign their claims to a special purpose vehicle incorporated and managed by a litigation funder or provide it with a power of attorney to bring the claim on their behalf. The funder and the claimants are, in principle, free to structure the agreement that forms the basis for such an assignment or granting of a power of attorney as they see fit. In general, the parties agree that the special purpose vehicle will prosecute the claim and, once realised, will transfer the proceeds of the claim to the claimant after deduction of costs and a success fee for the funder consisting of a percentage of the upside. Thus, while lacking the possibility of binding non-active claimants in a settlement, these transactions are not burdened with the formal requirements and uncertainties surrounding the 305a-Organisation, making it the preferred option whenever the class members are relatively easy to identify and not too numerous.

Contingency fees

In the Netherlands, lawyers are prohibited from working for a purely contingent fee. Alternative fee arrangements, including limited upside percentage sharing, are, however, allowed as long as the lawyer also receives a salary sufficient to cover his or her costs independent from the outcome.

III STRUCTURING THE AGREEMENT

This section will focus on the funding agreement regarding an individual claim. There are no generally accepted best practices or industry models for the types of agreements used by Dutch litigation funders. The following is therefore based primarily on the types of agreements the authors use, which may be more or less representative for the industry.

There are two types of agreements: a services agreement if we not only fund but also manage the claim, and a plain funding agreement if we only provide capital to the claimant for the prosecution of the claim. If the deal is structured as a services agreement, the funder acts as general contractor, who contracts the prosecution of the claim, including the management of litigation, on behalf of the client on a 100 per cent contingent fee. In this structure the funder agrees to manage the case and pay for all related costs, including lawyers' and experts' fees at its own risk, in return for a share of the proceeds actually realised. Litigation counsel is engaged by the funder directly and will enter into a client–attorney relationship with both the funder and the claimant based on their joint interest.

In the event of a plain funding agreement, the funder agrees to pay for litigation expenses, usually up to a certain maximum amount, in exchange for a share of the proceeds. In this structure the claimant remains in control of the suit and the instruction of counsel.

In both structures, the nature of the agreement is most closely related to a venture capital or joint venture agreement. In this analogy the claimant is the owner of a promising venture (i.e., the claim) that requires risk capital to realise its value. The litigation funder can be compared to the venture capitalist that provides capital and, sometimes, knowhow and management services to the claimant in return for a minority stake in the enterprise. The final settlement of the claim or the final judgment in respect of the claim is analogous to the hoped-for exit in a venture capital transaction. It follows that most provisions in the funding agreement are typical of any type of investment agreement, most importantly:

- a* The amount of funding to be provided and conditions for payment – the litigation funder will usually provide the funding through the direct payment of invoices for attorneys' fees and other costs incurred in the litigation.
- b* Compensation or return to the funder – the compensation of the funder usually amounts to 20 per cent to 40 per cent of the actually realised proceeds after subtraction of costs. Alternative compensation schemes may include a preferred return out of the proceeds of two or three times the investment or a preferred cumulative interest on the committed capital.
- c* Information sharing – in the Netherlands information exchanged between claimant and funder is not discoverable in the proceedings. In general, the litigation funding agreement will therefore stipulate that the funder is provided with all information regarding the dispute without limitation and is kept fully up to date by litigation counsel on all material progress of the case and any settlement discussions.
- d* Governance and control – the litigation funder will demand some kind of control over important decisions such as the acceptance of a settlement offer, the filing of an appeal or the replacement of litigation counsel. Usually the claimant will not be allowed to take such decisions without the consent of the litigation funder and vice versa. The agreement may provide for the appointment of an independent third party adviser or exit, or both, in the event of deadlock.
- e* Representations – the most important representations of the claimant regard the accuracy and completeness of the information provided in the due diligence process preceding the agreement. Important representations of the funder include the absence of conflicts of interest and the availability of the committed capital.
- f* Exit or termination – the agreement will usually allow the funder to terminate the agreement in the event of breach by the claimant or a material adverse change, such as surfacing of new facts that materially impact the chances of success.
- g* Counterclaims and cost orders – the costs of defence against possible counterclaims and liability for cost orders may or may not be covered by the funding agreement. The Netherlands has a loser-pays rule. However, outside litigation regarding the infringement of intellectual property right where the cost order is based on actual litigation expenses, cost orders are based on fixed tariffs that are usually less than 10 per cent of the actual costs of litigation.

IV DISCLOSURE

Outside third party funding of 305a-Organisations, the disclosure of the funding agreement is not a real concern in the Netherlands. Dutch procedural law 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 between them except perhaps in very exceptional circumstances where the defendant has evidence that the funding agreement itself would constitute a wrongful act against it. Hence the claimant's decision to disclose the fact that he or she is being backed by a litigation funder is a strategic rather than a legal concern.

305a-Organisations are an exception to this general rule, in particular as the Bill is implemented into law. The Bill, stipulates that to qualify as a 305a-Organisation the entity must, among other things, have sufficient financial means to bring the claim and in its organisation the interests of the claimants must be sufficiently safeguarded. We mentioned above that, according to the Dutch legislator, these requirements imply that the court may review the funding structure if it is concerned that the 305a-Organisation does not have sufficient financial means to prosecute the claim or if the court is concerned that the funder is in a position to adversely affect the interests of the claimants. This triggered a debate among practitioners as to whether this also implies that the defendant should be allowed to review the funding agreement or the financial means of the 305a-Organisation. Defendants' attorneys in class actions argue that they should be allowed full insight into the finances and funding arrangements of the 305a-Organisation as it provides them with a potential angle to argue inadmissibility of the claim. Neither the Bill nor the legislator's explanatory memorandum provides any guidance as to the chances of success of this argument so it will be up to the court to resolve this debate. In the context of the class action settlement proceedings in the *Fortis/Achmea* case, the court already demonstrated that it is not shy to use its power to review the agreed distribution scheme, which, at least in part, will directly reflect the funding structure.

V COSTS

Outside of intellectual property infringement litigation, cost orders in the Netherlands are based on fixed tariffs and usually amount to only a fraction of the actual litigation expenses of the parties. Whether or not the third party funder assumes liability for an adverse cost order against the claimant is a matter of agreement and negotiation between the funder and the claimant. It is not common to obtain after-the-event insurance for cost orders in the Netherlands.

VI CONCLUSIONS AND OUTLOOK

Litigation finance is on the rise in the Netherlands. Consumers and SMEs lacking the means to litigate bigger opponents are finding their way to an ever increasing number of providers of third party litigation funding. Securities and complex financial products, such as investment insurance products and interest swaps, have been the focal point of a number of major class actions that were in part funded by third parties. Another type of class action typically funded by third parties for which the Netherlands has proven to be a popular jurisdiction is follow-on damages claims in anti-cartel cases.

The providers of third party funding in the Netherlands are generally professional parties with a solid background in law practice and so far have caused little legal or public

turmoil. The exception to this general rule is class action brought by 305a-Organisations. These organisations have the power to represent all claimants in a certain class independent from their active participation and have been at the centre of some of the more publicised class actions that were brought mainly against financial institutions in the wake of the financial crisis. A new law is expected to be enacted in 2019 that will extend the scope of action of 305a-Organisations to claims for actual damage compensation but simultaneously raise the thresholds for being recognised as a 305a-Organisation. This law and the increase in claims brought by 305a-Organisations have triggered a debate that includes the way that these organisations are funded. Although it is generally recognised that third party litigation funding can play a positive role in bringing just class actions to fruition, restrictions are imposed on the degree of control a third party funder can exercise in these types of cases and the fee it charges for its services can be subject to scrutiny of the courts. In the coming years it will become apparent whether these developments will affect the viability of the use 305a-Organisations as some fear.

ABOUT THE AUTHORS

REIN PHILIPS

Redbreast Associates NV

Rein is managing director and co-founder of Redbreast Associates, an internationally oriented Dutch litigation fund.

Before setting up Redbreast Rein worked as an insolvency and restructuring lawyer at RESOR in which capacity he represented multinational corporations, investors, banks and other stakeholders in formal and informal restructurings, insolvency matters and related disputes.

Rein is a fellow and member of INSOL International and member of INSOL Europe. He regularly publishes and lectures on matters of litigation finance and insolvency law.

REDBREAST ASSOCIATES NV

Anna van Buerenplein 41
2595 DA The Hague
Netherlands
Tel: +31 85 822 6380
rein.philips@redbreast.com
www.redbreast.com



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