THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Fourth Edition

Editor
Simon Latham

THE LAWREVIEWS

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FOURTH EDITION

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PREFACE

As a law graduate whose first steps in the legal profession were encumbered by the impact of the previous global financial crisis, I faced a fairly bleak outlook. By happenstance (sheer bloody-mindedness), I found myself at the doors of the London branch of a US plaintiffs' firm, little known on these shores at the time (I still recall the firm's name was spelled incorrectly by the court on most documents in those days). The firm's proactive, and innovative, culture naturally meant it was an early adopter of third party funding (TPF). As such, I had the great fortune to be inducted into the world of TPF from my very first day as a trainee solicitor. I witnessed, first-hand, how TPF catalysed both the firm's growth and its clients' paths to a healthier balance sheet, notwithstanding the burdens that the financial crisis had left in its wake. A spark was lit.

As an investment manager, now immersed within the TPF sector in the face of what has been described as the worst global economic crisis since the Great Depression, I face the challenge of translating my experience into reasons for optimism. Like many of my industry peers, I understand and appreciate the role that TPF plays in providing access to justice for those who could otherwise not afford to pursue their claims. Similarly, in a time when cash is king, TPF has a role to play in enabling corporates to resolve their disputes without depleting resources that could be invested profitably elsewhere within the business. With ever increasing funds under management both by members of the Association of Litigation Funders (ALF) and by the broader TPF fraternity, there are significant resources available for litigants and law firms to utilise. Yet despite the sector's expansion since the previous global financial crisis, TPF still remains a little-known, or little-understood, solution for businesses. Even among lawyers, there are few who are fully aware of the TPF options available to their own businesses, let alone to their clients.

So what exactly is there for law firms and litigants to know about TPF? Well, just as the list of legal remedies available to litigants varies between jurisdictions, so too does the menu of TPF options. The past year alone has seen both shifts in and endorsements of the various regulatory frameworks that underpin the sector across the globe. In Australia, the industry found itself on the receiving end of stringent new regulations, notably without industry consultation. Partly in response to those developments, a number of funders and finance firms have sought to create a global lobbying voice for the TPF sector, by establishing the International Legal Finance Association, chaired by my editorial predecessor, Leslie Perrin. By contrast, there have been notable judicial endorsements of TPF in other jurisdictions over the past 12 months. The English courts, for example, have endorsed not only TPF, but also the ALF itself.

With government support for businesses during the current crisis coming to an end and legal developments such as the forthcoming EU directive on representative actions on the horizon, could 2021 become a milestone year for TPF? I hope this publication provides a useful guide for litigants, lawyers and investors alike as we take on the challenges the new year brings.

Simon Latham
Augusta Ventures
London
November 2020

Chapter 10

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 still not nearly as common as it is in Australia or the United Kingdom. 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 halfway 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 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. On 19 September 2018, the Rotterdam Court assumed jurisdiction in the *Petrobras* securities class action and, on 14 April of 2020, the Amsterdam Court of Appeal, overturning the ruling of the Amsterdam Court, declared the Stichting Victimes Des Dechets Toxiques Cote d'Ivoire admissible in its case against Trafigura in relation to toxic waste dumping by the tanker Probo Koala on the coast of Côte d'Ivoire. US firms such as Bernstein Litowitz Berger & Grossmann and Grant Eisenhofer have had permanent feet on the ground in the

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 based on the author's subjective experience and analysis of relevant published events.

Netherlands since Dutch courts appeared to be willing to approve US class action settlements for non-US investors in *Converium* in 2012. More recently, US claimants law firm Scott+Scott set up shop in the Netherlands.

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 finance in insolvency in countries such as Australia, Germany and the United Kingdom, 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 the chief finance officers 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.

One reason why big corporations thus far do not feel compelled to embrace litigation finance could be that, for the past decade, cheap financing has been available to them from other, more common, sources. Should the recession induced by covid-19 evolve into a credit crisis, the financing situation could change and open corporations up to alternative ways of financing expensive litigation.

Some big corporations however will still have to overcome a natural inclination to view litigation funders as opponents rather than 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 the 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 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 market participants

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. Other litigation finance outfits with a similar focus have opened shop in the past few years, 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.

Omni Bridgeway 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, it has also been active in the funding of anti-cartel class actions and high-value litigation and arbitration. At the end of 2019 Omni Bridgeway, merged with IMF Bentham, thereby becoming one of the larger participants in the world of litigation finance.

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), therefore 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 (opt-out actions); and

b class actions in which the claim entity only represents claimants with which it has entered into an agreement to that effect (opt-in actions).

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 a certain event or product (a 305a Organisation). Until 2020, a 305a Organisation could only file a claim for the determination of liability on behalf of its class members, and could not 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 known as a 305a Settlement can be approved by the court and declared binding on the entire class, including inactive claimants, who must be provided with an opt-out period of at least three months. If, after determination of liability, no settlement had been reached, individual claimants had 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* and *Fortis/Ageas*. In 2018, Dutch district courts assumed jurisdiction in international securities class actions brought by 305a Organisations in *Petrobras* and *Steinhoff* (still the subject of litigation).

On 1 January 2020, the Act on Redress of Mass Damages in a Collective Action (WAMCA) entered into force. The WAMCA enables representative entities to bring damages claims on behalf of (international) parties in a class action before any district court in the Netherlands.

In addition to the general rule of international private law that a company can be sued where it has its corporate seat, for a Dutch court to have jurisdiction to hear a WAMCA case 'there must be a sufficient connection to the Dutch legal sphere'. The explanatory notes to the WAMCA show that the Dutch government felt this addition to the law was necessary to provide comfort to international businesses that use the Netherlands in their international tax structures. The explanatory notes state that the fact that a company is seated in the Netherlands merely for fiscal reasons is itself not a sufficient connection to the Dutch legal sphere in the required sense.

The WAMCA introduces the appointment of an 'exclusive representative', who will act as a kind of lead plaintiff. Finally, pursuant to the WAMCA, claimants located outside the Netherlands will not be included in the collective action on an opt-out basis, but instead on an opt-in basis.

From a funding perspective, it is relevant that the WAMCA 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, although it will be allowed to appoint a representative of the funder to the supervisory board. The aim is to prevent the litigation funder from exercising control over the lawsuit when funding the claims of a 305a Organisation.

A further restriction on control by the litigation funder is implied by the legislature in the explanatory memorandum to the WAMCA. According to the legislature, 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 legislature 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 that this may 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 WAMCA (only partially discussed above), has 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. In the coming years, it will be very interesting to see how the WAMCA is applied in practice.

In March 2020, the first major class action was brought in the Dutch courts under the WAMCA. In this case, the Diesel Emissions Justice Foundation is suing Volkswagen on behalf of 8.5 million car owners to demand compensation for its manipulation of emissions tests. This is likely to become an important test case for the WAMCA.

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 (a recent example being the *Trucks* cartel cases) 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 industry models or generally accepted best practice 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, whereby we not only fund but also manage the claim, and a plain funding agreement, where 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 a kind of general contractor who contracts to prosecute the claim, including the management of litigation, on behalf of the client for a 100 per cent contingency 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, know-how 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 in 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 a deadlock.

e Representations – the most important representations made by 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 costs orders – the costs of defence against possible counterclaims and liability for costs 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 rights, where the costs order is based on actual litigation expenses, costs 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 legal concern.

305a Organisations are an exception to this general rule. The WAMCA 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 legislature, 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 has 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 the inadmissibility of the claim. Neither the WAMCA nor the legislature'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. We have

already seen, in the context of the class action settlement proceedings in the *Fortis/Ageas* case, a court demonstrate that it is not shy about using its power to review the agreed distribution scheme, which, at least in part, will also reflect the funding structure.

V COSTS

Outside intellectual property infringement litigation, costs 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 costs 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 costs 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 claims against 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 in the past. Another type of class action typically funded by third parties and for which the Netherlands has proven to be a popular jurisdiction is follow-on damages claims in anti-cartel cases. With the introduction of the WAMCA, we may expect the scope of class actions brought in the Netherlands to widen. Among other things, this year saw two international 'Dieselgate' claims brought in the Netherlands, against Volkswagen and Chrysler.

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 WAMCA extended the scope of action of 305a Organisations to claims for actual damage compensation and simultaneously raised the bar for admissibility as a 305a Organisation. The WAMCA and the increase in claims brought by 305a Organisations have triggered a debate about the way that these organisations are funded. Although it is generally recognised that third party litigation funding can play a positive role in bringing well-founded class actions to fruition, restrictions have been 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 by the courts. In the coming years it will become apparent whether these developments will affect the viability of 305a Organisations.

Appendix 1

ABOUT THE AUTHORS

REIN PHILIPS

Redbreast Associates NV

Rein Philips 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.

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