THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Fifth Edition

Editor
Simon Latham

THE LAWREVIEWS

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This article was first published in November 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-835-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARNTZEN DE BESCHE ADVOKATFIRMA AS

AUGUSTA VENTURES

BORDEN LADNER GERVAIS LLP

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PREFACE

This now represents my sophomore year as editor, a role I undertook during the onset of the covid-19 pandemic. As the global economy begins to creak back into motion, I'm reminded of my first steps into the legal profession as a law graduate following the last global financial crisis. Much like now, it was a challenging time for those entering the profession. 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 they were early adopters of third party funding (TPF). As such, I had the great fortune of being immersed in 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 their clients' paths to a healthier balance sheet, notwithstanding the burdens that the global financial crisis had left in its wake. A spark was lit.

Fast forward to the present and TPF is very much a mainstay across the legal landscape in the UK. It feels like every week there are press releases announcing the latest funder on the scene, the latest law firm facility, the latest representative action in the Competition Appeal Tribunal, etc. But how does it all work in practice? Well, just as the list of legal remedies available to litigants varies between jurisdictions, so too does the menu of TPF options. The past couple of years has seen both shifts and endorsements of the respective regulatory frameworks that underpin the sector across the globe. In contrast to the booming UK landscape, for example, the Australian market has found itself on the receiving end of stringent regulations, both in terms of operating structure and commercial terms (in class actions). The overwhelming bigger picture, however, is one of growth, development and innovation. Savvy investors continue to navigate the nuances of each jurisdiction to devise new ways to provide finance to the market, all of which ultimately facilitates broader access to justice. Personally, I'm excited to see how this positive force for change can progress into something even more impactful, as TPF helps facilitate the latest evolution of ESG-related disputes . . . watch this space!

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 2021

Chapter 1

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, litigation finance has become an accepted tool in the toolbox of lawyers and their clients who lack the means to bring a valid claim. As such, in past years, more and more lawyers have gained experience working with litigation finance in some capacity or other. Some frontier law firms invest significant amounts of time and work into investigating potential claims, in particular class actions, in order to present them to funders and claimants' representative organisations. It is hard to determine potential market size for litigation funding in general, as no data is publicly available that could serve as a guideline. A clear area of growth is Dutch class actions on which more data are available, and is discussed in more detail, below.

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 already was a favoured jurisdiction for the litigation and settlement of anti-cartel litigation and 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 Victimes Des Dechets Toxiques Cote d'Ivoire stichting admissible in its case against Trafigura in relation to toxic waste dumping by the tanker Probo Koala on the coast of Côte d'Ivoire. On 30 June 2021, the Court of Amsterdam declared the Data Privacy Stichting admissible in a claim against Facebook to determine its liability for the violation of the data protection rights of its users. All or part of the funding for these cases was secured from third party litigation funders. In some cases, US claimants' law firms act as funders in Dutch class actions. US firms such as Bernstein Litowitz Berger & Grossmann and Grant Eisenhofer have had permanent feet on the ground in the Netherlands for some time whereas, more recently, US claimants law firm Scott+Scott set up shop in the Netherlands. Notable and ongoing anti-cartel claims include the Air Freight cartel litigation and Truck cartel litigation.

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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.

On 1 January 2020, the Act on redress of mass damages in a collective action (WAMCA) entered into force, for the first time allowing representative organisations, in most cases a Dutch foundation (stichting), to also seek damages in a collective action. The WAMCA also introduces a public register in which writs of summons in new collective actions have to be registered. From 1 January 2020 to 4 October 2021, until the time of writing, 42 writs have been registered in 39 cases, of which 11 are financed by third party funders.[3] Notably six out the 11 writs have been filed in the past five months, showing an acceleration of the rate of funded collective actions.[4] Even with a linear increase of the number of funded class actions, in a few years, we could easily reach a point where, at any given point in time, 50 or more funded class actions are pending before Dutch courts.

Dutch insolvency administrators and supervisory judges in insolvencies have been lagging in the adoption of litigation finance when compared to the widespread use of litigation finance in insolvency in countries such as Australia, Germany and the United Kingdom. While this could in part be due to country-specific differences in insolvency law and practices, there should be potential for further development in this area.

So far, outside the realm of securities litigation for institutional investors and anti-cartel claims, there are no signs that general counsel and the chief finance officers of large Dutch companies are widely 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 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 high-value litigation and arbitration. In 2021, it founded a fund that is exclusively dedicated to Dutch 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

3 Competing representative organisations may file a writ for the same collective claim within three months, or, if extension is granted, six months. After that, the court will select one or more exclusive representatives. See further Section II at '305 a Class actions'.

4 The 11 writs of summons regard seven collective claims as in some cases multiple writs were filed by competing representative organisations. Of these seven cases, four were filed in the past five months.

boom. More recently, it has also been active in the funding of anti-cartel class actions and high-value litigation, arbitration and class actions. 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 'representative organisation'). Until 2020, a representative 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 representative organisation and the defendants reach an agreement regarding damages, the 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. Representative 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 a representative organisation in *Petrobras* and *Steinhoff* (still the subject of litigation).

As mentioned above, on 1 January 2020, the WAMCA entered into force enabling representative organisations to bring damages claims on behalf of an entire class of claimants on an opt-out basis. While thus expanding the scope of claims a representative organisation can bring, the admissibility requirements for representative organisations have been significantly increased. We mention just a few here.

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. Claimants located outside the Netherlands cannot be included in the collective action on an opt-out basis, but only on an opt-in basis.

From a funding perspective, it is relevant that the WAMCA stipulates that, to qualify as a representative 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 cannot be representatives of a third party litigation funder financing the suit, although it is allowed to appoint a representative of the funder to the supervisory board.

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 as an example 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. Further guidelines relevant to the admissibility of the representative organisation can be found in the 'Claimcode2019'.

The *Fortis/Ageas* settlement showed that the court, when asked to confirm a settlement by a representative organisation, may critically review the compensation received under the settlement by the claimants' organisations, and that this may be cause to deny the confirmation. That being said, after some amendments, the Court of Appeal eventually confirmed a settlement that allowed for a market practice compensation of the representative organisations and their funders.

It is generally assumed that the litigation funder is allowed to charge a percentage fee on the total realised damages to the exclusive representative, and that the exclusive representative can in turn charge to all claimants who benefit from the action and have not opted out (common fund doctrine). While this would certainly be desirable, it remains uncertain how the courts will evaluate such arrangements and how a common fund approach, if accepted, will apply to fee arrangements of potential other representative organisations involved in the case.

Under the WAMCA, the court may award a claim for compensation of costs by the representative organisation, including costs of funding. It should be noted that the court has a significant discretion in evaluating such a claim, and it remains to be seen to what extent actual funding costs (i.e. the percentage fee on total damages) will be awarded.

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 notable example being the *Trucks* cartel claims) 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 a representative 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 always 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. While some of what follows will also apply to the funding of a representative organisation in a class action, in that case specific attention is required in the funding agreement with respect to admissibility requirements of the organisation as they relate to the relationship with the funder.

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 representative 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.

Representative organisations are an exception to this general rule. The WAMCA stipulates that, to qualify as a representative 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 representative 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 representative organisation. Defendants' attorneys in class actions argue that they should be allowed full insight into the finances and funding arrangements of the representative 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, that the court 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 THE YEAR IN REVIEW

From the entry into force of the WAMCA on 1 January 2020 to the time of writing (4 October 2021), 42 writs have been registered in 39 cases. Of these, 11 are financed by third party funders, and six were filed in 2021. The claims all regard high value, high-profile cases, namely Dieselgate-related claims (six) against Daimler, Renault, Volkswagen, privacy-related claims (three) against TikTok, Oracle and Salesforce and consumer protection-related claims (two) against Airbnb and Apple. On 30 June 2021, in a claim under the old regime (pre-WAMCA) of Data Privacy Stichting against Facebook regarding various alleged violations of data protection rights of Facebook users, the Court of Amsterdam denied all of Facebook's objections to jurisdiction of the Dutch court and the admissibility of the stichting.

VII 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 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, the number of class actions brought in the Netherlands notably increased and widened in scope to include, among other things, privacy infringement claims and large consumer protection claims.

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 representative organisations to claims for actual damage compensation and simultaneously raised the bar for admissibility as a representative organisation. The WAMCA and the increase in claims brought by representative organisation 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. This has not kept representative organisations and third party funders from taking large bets on the Netherlands as a jurisdiction for the litigation and settlement of high-stake class actions.

Appendix 1

ABOUT THE AUTHORS

REIN PHILIPS

Redbreast Associates NV

Rein Philips is managing director and co-founder of Redbreast Associates, a litigation fund focusing on high-value claims and Dutch class actions.

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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ISBN 978-1-83862-835-2