Litigation Funding

Handling commercial and financial disputes

Virtual Round Table Series
Disputes Working Group 2018

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Handling commercial and financial disputes

The complexity of global commerce inevitably leads to disputes between parties doing business together across borders, cultures and time zones.

The increasing frequency, scale and complexity of commercial disputes has subsequently led to a rise in litigation and arbitration proceedings as a means of resolution. While the costs of initiating court proceedings aren't usually prohibitive, the ongoing costs associated with litigation, such as attorney's fees and fees for discovery and depositions, can quickly stack up. The same is true for arbitration, where administration and arbitrator fees charged by international arbitration centres can lead to exorbitant costs to see a case through to conclusion.

For claimants based outside the European Union, in dispute with European defendants, there are also other barriers to consider, such as huge security deposits designed to cover the costs of the defendant should the case be lost.

The upshot of this, is that many claimants are unable to adequately fund a dispute and have to let the matter drop unless they can find an alternative way to pay for it.

Third party funding and contingency fee structures have risen to prominence in response to this need, giving plaintiffs with valid claims an opportunity to pursue expensive disputes through the courts. The US has led the way in this field, being one of the few developed countries to allow law firms to employ contingency fee structures with very few limitations.

Third party funding is, however, more widespread and acceptable across other developed jurisdictions, particularly those using Common Law. Research carried out in 2017 by US/UK-based third party funder Burford Capital, found that the percentage of US lawyers who say their firm uses litigation financing grew by 28 per cent between 2015 and 2017 and by 514 per cent between 2013 and 2017.

The research also found that more than half (54 per cent) of UK lawyers who haven't yet used litigation finance expect to do so within two years. For respondents already using financing, most often to fund single matters, more than half (51 per cent) seek amounts between USD1 million and USD10 million.

The eagerness of law firms to embrace third party funding, might explain why Burford Capital set up its own law firm, Burford Law, in 2016, allowing clients to take advice on enforcement, even when not receiving any funding. This move controversially blurred the lines between law firms and funders and has added to the debate about who is in control of litigation or arbitration proceedings where third party funding is utilised.

The concepts of champerty and maintenance should address this concern, but, in reality, they mainly ensure that third party investors in litigation cannot take a controlling interest in cases. A typical third party funding deal for 30 per cent of the recovery could, however, be enough to raise questions around undue influence.

The following IR Global discussion calls upon the expertise of dispute resolution experts from seven countries where third party funding has a presence. We will discuss the structure of court costs and assess the rules around litigation funding in each jurisdiction. We break down the constraints around assignment of claims and cost guarantees and finally look at the rules governing arbitration agreements.

The View from IR

Ross Nicholls

BUSINESS DEVELOPMENT DIRECTOR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

AUSTRIA

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Klaus Oblin specialises in commercial and civil law-related disputes. He also acts as counsel and arbitrator in arbitrations under the rules of bodies such as the International Chamber of Commerce (ICC), the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Swiss Rules and UNCITRAL.

He regularly provides advice with regard to various matters of commercial, contract and construction law and the establishment of businesses.

Klaus established Oblin Melichar in 2004 and before that he worked for Freshfields Bruckhaus Deringer and Vienna McDougal Love Eckis Smith & Boehmer.

He is a member of the ICC, International Centre for Dispute Resolution (ICDR) Austrian Arbitration Association (ArbAut), German Institution of Arbitration (DIS) and the International Bar Association (IBA).

SPAIN

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Daniel Jimenez specialises in complex litigation matters, both nationally and internationally, and has taken part in several of Spain's most important litigation and arbitration cases of recent years.

He has extensive experience in disputes in the field of mergers and acquisitions, commercial disputes, intellectual property rights, partnerships, financial products and foreign judgments and awards. He is also a specialist in white collar criminal litigation.

His main sectors of activity are banking, hotels and tourism, IT, construction and energy. He has acted for multinational companies such as HP, IBM, Barclays, Santander, Goldman Sachs, Accor, Meliá Hotels International, Acciona and Globalia.

Prior to founding SLJ he was a partner and Head of Litigation and Arbitration Department at the Madrid office of Ashurst.

He is member of Spanish Arbitration Club and Madrid Bar Association.

US - CALIFORNIA

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Erwin Shustak is the founder and Managing Partner of Shustak, Reynolds & Partners. He heads the litigation and arbitration department, with over 40 years of extensive experience in a wide variety of complex disputes and transactions, across the country and overseas.

He specialises in litigations, trials, arbitrations and appeals of complex securities, financial and business disputes, with a particular emphasis in the areas of securities and financial services and regulation law. Few attorneys have the depth and range of his legal experience and judgment.

Erwin has handled and overseen several hundred litigations and arbitrations, in Federal and State Courts and arbitration forums across the country.

Erwin has received numerous awards and recognitions for his professional expertise, including, "The Best Lawyers in America©" for his work in Financial Services Regulation Law, while his firm was recognised by U.S. News & World Reports as one of the "Best Law Firms in America" in 2018.

He has been named as a SuperLawyer™ eight times by SuperLawyer Magazine for his achievements in securities and business litigation.

HONG KONG

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Nick is Senior Partner and Head of Litigation at Gall. He has acted for publicly-listed companies, senior employees, the Hong Kong Government, the US Government, major international banks and corporations throughout the world.

Nick has extensive experience in dealing with multi-jurisdictional fraud and international asset tracing litigation. His work often requires making cross-border applications, freezing/gagging applications, urgent injunctive relief, the examination of senior executives/bank officers and recovery and enforcement proceedings generally. He also has extensive experience in forcing banks and financial institutions to provide information to assist in tracing and recovery of funds and fending off vulture funds in respect of international sovereign debt recoveries.

Nick is also regularly instructed to act in respect of investigations and charges arising out of the Independent Commission Against Corruption and other regulatory bodies in Hong Kong.

Nick is consistently recognised as a top tier lawyer in the Hong Kong dispute resolution category in all the major legal guides.

SWEDEN

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Dan is Senior Partner of Advokatfirman Nova and has been practicing commercial dispute resolution since the late 1980s, both as legal counsel and as a commercial litigator.

Dan has had repeated appointments as an arbitrator, both as party-appointed and institutional appointed. The disputes involve (most frequently) franchise, IT/IP and commercial contract disputes. He also has experience both under the Swedish Arbitration Act and under institutional rules, such as the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

He is frequently appointed as a sole mediator by Swedish courts and by the disputing parties, and is admitted to the World Intellectual Property Organization's (WIPO) list of independent international neutrals within arbitration and mediation with a focus on intellectual property dispute settlement. He was recently admitted to ICDR's International Panel of Arbitrators.

GERMANY

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Dr. Florian Wettner is a partner of METIS rechtsanwälte LLP.

Founded as a spin-off of the international law firm Freshfields Bruckhaus Deringer LLP in 2010, METIS has grown to one of the leading business boutique law firms in Germany. The firm provides high-end legal advice to its domestic and international clients with a strong focus on Corporate law/M&A, Employment law and Dispute Resolution.

Florian specialises in domestic and international litigation and arbitration with an emphasis on disputes in financial, capital markets and corporate matters, post-M&A as well as general commercial disputes. He also has extensive experience with respect to the handling of complex claims and liability cases under insurance law (particularly in the area of D&O and other indemnity insurances) and acts for insured companies and directors & officers.

Among others, the 2016 to 2018 ranking lists published by leading German business newspaper Handelsblatt and US publisher Best Lawyers rank Florian as one of the 'Best Lawyers in Germany' for litigation, just recently also for arbitration. According to Legal 500 Germany 2018, Florian "is being described as an 'excellent and assertive lawyer and litigation strategist'".

FRANCE

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Marie-Christine Cimadevilla graduated from the University La Sorbonne and was admitted to the Paris Bar in 1988. She then founded a law office dedicated to national and international business law. The clients of CIMADEVILLA AVOCATS are mainly either foreign companies or affiliated French companies of foreign groups.

Her major practice areas are complex, including cross-border litigation, arbitration and mediation, international recovery of assets and commercial contracts on a national and international level. She focuses largely on commercial and business law including assistance with respect to acquisitions, banking and solvency law.

Marie-Christine is fluent in French, Spanish, German and English. She teaches international trade law at the Institut des Hautes Etudes d'Amérique Latine (IHEAL - Sorbonne III) and European Law at the Social Sciences Faculty of the Institut Catholique and at the Paris Bar practical school.

Marie-Christine is co-author of the ICC International Sale of Goods Model Contract and of the WTO-UN International Model Contracts for SMEs. She is also an active member of the UIA - International Association of Lawyers.

Marie-Christine is also member of several professional societies, including the International Contracts Working Group derived by the Law School of Rotterdam, and the Société Française de Législation Comparée.

QUESTION 1

Court Fees: What are the costs of civil court proceedings in your jurisdiction and who bears them?

US – Erwin Shustak (ES) Even if there is a reimbursement provision which allows the court or other tribunal to award the prevailing party its legal fees and costs, the plaintiff pays the cost in the first instance, subject to being reimbursed, if determined to be the 'prevailing' party. Costs range from filing fees to process servers to get a case started, and we usually tell people to budget around USD1,000 for those costs in a court litigation and 3-5 times that for an arbitration proceeding depending on the arbitration forum.

The filing and initiation fees, however, are just the tip of the iceberg. It is the legal fees, court reporter, expert and outside electronic discovery firms that really add up as the case or arbitration proceeds. Unlike many other jurisdictions, in the US, the 'discovery process' includes depositions; document searching and production and the extensive amount of legal time spent is what makes litigation or arbitration an expensive proposition.

Dan Engström (DE) Application fees for litigation in a district court are SEK2,800 or about USD350. For small claims (below SEK22,750) the application fees are SEK900. Like Erwin says though; it's not the registration fees that create the cost, it's the lawyer's fees. A commercial lawyer in Stockholm, will charge between USD350-450 per hour and the main rule is that the losing party pays the winning party's costs if held fair.

Marie-Christine Cimadevilla (MCC) In France commercial disputes are tried in the first instance by lay judges ("Tribunal de commerce") and specialised chambers of the Courts of Appeal in the second instance.

The initial procedural costs are very low, usually less than EUR100 initially and approximately EUR250 before the Court of Appeal plus costs of service by bailiffs.

There is no discovery or cross-examination except when, the parties having agreed to it, the case is tried by the International Chamber of the Commercial Court of Paris and the International Chamber of the Court of Appeal of Paris, where exhibits may be exchanged in English without translation. Pleas, expert testimonies and other statements can be made in English, with the assistance of simultaneous interpreters. Translation costs are paid by the parties and are considered as procedural costs.

Otherwise, should the judge require technical advice, he may appoint a court surveyor. The party which applies to the Court for the designation of a surveyor bears the surveyor's costs. These vary with the type and scope of the investigation and can be very high.

The winning party will recover theses costs if it has paid for it. Caution is advised though, since court surveys, being time and cost consuming. must be carefully conducted by the parties and their attorneys.

The court survey proceeds under the judge's scrutiny, who decides on the amount of the surveyor's fees. Attorney's fees are freely determined and subject to a written agreement signed by the client, they consist either of an hourly basis or fixed fees plus success fees. The losing party pays the procedural costs plus an indemnity for attorney's fees.

Before the Commercial Court and the Court of Appeal of Paris, judges take into account the real amount of the attorney's fees.

Daniel Jimenez (DJ) Fees in Spain are similar to those in France. The difference is that a litigator needs an attorney and a court agent, who files the writ to the court and receives rulings from the court. It is often the case that the losing party pays the legal costs from the other side, although they are not calculated on the basis of payments to the lawyer, but on a ruling from the Bar Association. Specific rules from each association in Spain are used to calculate legal fees.

We don't have court application fees. We used to, but they were ruled to be against the Spanish Constitution and so were declared null and void.

Arbitration is very similar, but a lot more expensive, since you have to pay administration costs, plus the cost of the arbitrators.

Klaus Oblin (KO) Legal costs comprise court fees and – if necessary – fees for experts, interpreters and witnesses. According to the Austrian Court Fees Act, the claimant (appellant) must advance the costs. The amount is determined on the basis of the amount in dispute. The court fees in Austria are set at approximately 1.2 per cent of the total amount in dispute. Filing for an appeal means 1.8 per cent, which is quite costly to get things started.

You might also need to pay for interpreter and expert fees, and there is a very strict rule on the reimbursement of costs. Prevailing parties get paid for costs incurred.

This applies to all court costs and fees for interpretation and expert witnesses, but is limited with regard to lawyer's fees.

You cannot just choose any lawyer and get reimbursed; there is a tariff, calculated under the Austrian Lawyer's Fee Act, which is worked out based on the amount in dispute. This means there can be gaps between what you actually charge and get reimbursed for.

The Austrian system can be compared to that in Germany and Switzerland since upfront costs are high and can be a turn off for many clients who want to file a law suit. In order to claim their debts, many have to turn to third party funding.

It is very important as lawyers that we cooperate with reliable people in that field, which is a challenge. Third party funding does not have a long track record in Switzerland or Austria and they usually offer a 30 per cent deal, fuelling litigation and arbitration, meaning they take one third of the recouped money if you win.

They might also cover cost obligations towards the prevailing party if you lose, but you need to be very diligent, since UK funders are reluctant to do that, but Austrian, German and Swiss funders do offer such deals.

As far as arbitration goes, the cost regimes can be easily accessed online. It is easy to see what it costs up front, while it is more difficult to give a preview of litigation costs.

Florian Wettner (FW) The German Court Fees Act (Gerichtskostengesetz) governs the fees and expenses charged by a German court. They are calculated on the basis of the value in dispute; this is determined by evaluating the financial interest which the claimant is pursuing through the action. There are special statutory rules and extensive case law on how the financial interest is calculated. For the purpose of calculating the court fees, the value of a matter is capped at EUR30 million.

The court fees will be calculated on the basis of one fee unit which is determined by a fee schedule annexed to the Court Fees Act. For example, a German court will charge fees of EUR4,090.70 for a value in dispute of EUR10,000, fees of EUR16,008 for a value in dispute of EUR1 million and fees of EUR329,208 for a value in dispute of EUR30 million or more, each for regular proceedings in the first instance.

There are statutory attorney fees which are governed by the Attorney Remuneration Act (Rechtsanwaltsvergütungsgesetz) and are also calculated on the basis of the value in dispute. They are similar to the court fees. Again, for the purpose of calculating the attorney fees the value in dispute is capped at EUR30 million, added up to a cap of EUR100 million in case of multiple clients.

It is common practice in commercial litigation matters, however, for attorneys to work on the basis of negotiated fee arrangements and hourly rates. These negotiated fees may exceed, but not undercut, the applicable statutory fees which the attorney has to charge as a minimum.

In German litigation a (modified) loser-pays-rule applies. The unsuccessful party must pay the court costs and reimburse its opponent's statutory attorney fees, but not any negotiated fees that exceed the statutory fees.

Hong Kong – Nick Gall (NG) The most fundamental rule in Hong Kong is that costs are in the absolute discretion of the Court.

The Court has full power to decide who pays legal costs in civil litigation and the amount of those costs. Usually the courts order that costs 'follow the event', except when it appears that some other order should be made. This means that the unsuccessful litigant will usually be ordered to pay the legal costs of the successful party, in addition to paying his own legal costs.

Although costs follow the event, the successful litigant seldom recovers his whole outlay. Unless agreed, the costs have to be assessed (or 'taxed') by the court. For cases commenced in the High Court of Hong Kong, there are five bases for determining costs: party and party, common fund, indemnity, trustee and solicitor and own client.

Costs calculated on the party and party basis allows all costs that were necessary or proper for the attainment of justice, or for enforcing or defending the rights of the party whose costs are being taxed. As a rule of thumb, the unsuccessful party will generally pay 50-75 per cent of the other side's actual expenditure.

Costs determined on the common fund basis are more generous, allowing a reasonable amount in respect of all costs reasonably incurred. Legal aid costs are assessed on the common fund basis between the legally aided person and the Director of Legal Aid.

Costs assessed on the indemnity basis will be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred. In arbitration-related court proceedings in Hong Kong, the courts have developed a practice of ordering costs on indemnity basis against a party that fails in an arbitration-related application.

On a taxation of a solicitor's bill to his own client, all costs must be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred. For costs assessed on the trustee basis, no costs will be disallowed on a trustee basis, except those that should not have been incurred.

QUESTION 2

Litigation Funding: Are there any particular rules around funding litigation in your jurisdiction?

France – MCC In France there are no rules on third party funding. The High Court recognised in 2006 the validity of third party funding agreements as sui generis contracts. About ten years ago there was a project to add some articles to the civil code, yet the new provisions on obligations within the civil code do not mention third party funding.

The French Comity of the International Chamber of Commerce published in 2014 a practical guide on third party funding.

More recently in February 2017 the Paris Bar issued a resolution recognising the value of third party funding for both the parties and their counsels, the latter remaining solely accountable to their clients. Attorneys are not allowed to disclose any information to the third party funder and cannot meet him without their clients, or at least their clients' consent.

To secure the validity and enforceability of a future arbitral award, the Paris Bar recommended the disclosure of third party funding.

In practice, the financing agreement usually provides for:

- The amount granted by the third party funder ;
- The third party funder's level of control over strategic matters in the dispute;
- The scope of the decision as to a settlement, which in principle rests with the funded party and must be in accordance with certain thresholds or conditions set by agreement with the third-party funder;
- The remuneration of the third-party funder, which usually consists of a percentage of the amounts awarded to the funded party at the end of the proceedings,
- The allocation mechanism as to the recovered amounts and the third party funder's preferential claim over the amounts granted by the award;
- The termination of the agreement: some funding agreements deal with the effects of an early termination of the agreement.

US – ES Litigation funding is a growing industry in the US. There are a number of third party funding companies in the US who advance money if they think the case has merit. They will structure a loan (made to the litigant, however, normally not to the lawyer), charge interest and take a percentage of the outcome. This is a growing area in many large 'bet the ranch' cases, negligence cases and business disputes.

The US is one of the countries that does permit attorneys to handle cases on a contingency fee basis, allowing lawyers to handle cases by taking a percentage of the ultimate recovery, if any. Depending on the case, our firm does handle some large damage cases on a hybrid contingency basis, meaning we negotiate a fixed, upfront, minimum fee and then take a percentage of the recovery. Often this allows a client to pursue a claim that it might not otherwise be able to afford on an on-going basis. At the same time, it allows our firm to potentially earn much more than we would on a traditional straight time basis. It is a 'win-win' for both our firm and our clients.

One of the reasons there is so much litigation in the US, is that the loser rarely pays a winner's fees, unless there is a contractual provision or statutory basis that specifically provides for that. Otherwise, each party bears their own legal fees and litigation costs.

If you couple contingency fees with the general prohibition against the loser paying the winner's fees and costs, there is a great incentive for people in the US to bring litigation. This is why there is more litigation brought per capita in the US than any other country in the world.

Sweden – DE There are no legal rules on third party funding in general, meaning that it is perfectly acceptable. The only restriction is that third party funding cannot be provided by a lawyer or a law firm.

We don't allow contingency fees in Sweden, or anywhere else in Europe, as far as I know.

US – ES Do lawyers advance the costs for clients – is that usual?

Sweden – DE Normally clients pay out of pocket costs and an advance on costs, then we secure new clients by asking them to pay an advance on costs before we go into the litigation or arbitration phase.

Hong Kong – NG Hong Kong solicitors and barristers may not enter into conditional or contingency fee arrangements for acting in contentious business. The same restriction applies to foreign lawyers who are registered to practice in Hong Kong. These restrictions stem from legislation, professional conduct rules, and the common law.

Marie-Christine Cimadevilla pictured at the 2017 IR DealMakers Conference in Barcelona

Third party funding in civil ligation is allowed in Hong Kong in limited categories of cases, such as certain insolvency cases.

In those cases, parties need to consider what amount of funding is required, as compared with how much the case is worth, whereas third party funders generally look at cases from the perspective of the ratio of costs and expected return.

Part of the terms of the funding agreement should specify what happens when the litigants negotiate for settlement. Otherwise problems may arise where the funder may want to compromise the claim in order to settle sooner, or a litigant may want a larger sum from the settlement.

Legal aid can be considered as a source of litigation funding in Hong Kong, and is available for most types of civil cases before the District Court, the Court of First Instance, the Court of Appeal and the Court of Final Appeal. Legal aid is not, however, available for money claims in derivatives of securities, currency futures or other future contracts, unless the claims are made by the person seeking legal aid on the basis that they were induced to deal in the derivatives of securities, currency futures or other futures contracts by fraud, deception or misrepresentation.

The Legal Aid Department is funded by the Hong Kong Government, and the provision for legal costs is not subject to an upper limit. To qualify for civil legal aid, the applicant must pass a merits test and a means test. In assessing the merits of an application, the Director of Legal Aid must be satisfied that the case or defence has a reasonable chance of success.

Spain – DJ In Spain there is no specific regulation on litigation funding, but there is a general concept that it is allowed and legally accepted. It's a growing market, with several international litigation funds opening offices in Madrid.

Contingency fee arrangements are not common, but are legal. Conditional fees are a lot more common, which fixes an amount and adds an additional percentage of the recovery.

Most third party funding agreements are subject to US or English law, since all the international funds are from either the UK or US.

Austria – KO It is interesting to learn that contingency fees are allowed in Spain. It was my understanding that, in the major part of European jurisdictions, there was a directive that the lawyer must not accept, ask or agree on a certain percentage of the money recouped in proceedings?

Spain – DJ There was a Supreme Court ruling stating that the directive went against competition laws. Before that it was forbidden.

Austria – KO US colleagues keep asking me how people who are not in a position to fuel their own litigation are able to access courts. Contingency fees would be a valid option to get a case to court, but in Europe there is a totally different system of legal advice. If you don't have the means to finance litigation, you can request that legal aid be provided, and you will not have to pay for court fees, lawyers or reimbursements.

As far as third party litigation funding is concerned though, in my experience, what these companies ask is that you draft the lawsuit. They will then look into the market and see if it has merit and sufficient evidence; they will also check whether a decision is enforceable. It is

Erwin Shustak pictured at the 2016 IR 'On the Road' Conference in San Francisco

important to check before moving forward whether a German court decision is enforceable in another country or not.

As far as I am aware, they will not finance cases below EUR500,000 and will also hire a credit rating agency to look into the financial background of the opponent. They want to make sure there are sufficient funds available to cover the claim should it be successful.

One of the main points of criticism regarding third party funding is that lawyers can work too closely with the funders, and might be more tied to them than their own client. In this case, the client is not the one who is calling the shots, but rather the funder.

It is very important to make sure that any deal signed with funders also covers the opponent's costs. I have seen cases where a client ends up losing the case, and are still liable to pay the expenses of the winner.

Sweden – DE Couldn't that conflict of interest issue raise questions for the lawyer about who is the ultimate client?

Austria – KO Yes, definitely. There is not much case law on this problem yet, but when it comes to a close cooperation between lawyer and third party funder, opponents should want to know whether the lawyer and client are decision makers as opposed to funders.

Germany – FW In general, contingency fees or conditional fee arrangements with attorneys are not permitted under German law. They are only allowed if the client would otherwise be deterred from proceedings, and thus from access to justice, because of its financial situation. German law also allows for the payment of no attorney fees or fees lower than the applicable statutory fees where a case has been unsuccessful.

Litigation funding by non-parties to the litigation is allowed, provided that the litigation funder does not provide legal services in the litigation. Since litigation funders are neither qualified as banks nor as insurers, any regulatory provisions do not apply. Litigation funding is not regarded as frivolous, therefore, the third-party litigation funder cannot be held liable for any adverse costs of the counterparty.

The minimum funding amount for disputes is approximately EUR100,000. German funders usually structure their remuneration either as a percentage of the amount actually recovered, or as a multiple of the amount invested. Standard terms call for a 30 per cent share of proceeds up to EUR500,000 and a 20 per cent share of any proceeds in excess of this amount.

The civil law principle of common decency should limit the agreeable share of proceeds to be paid to the funder in case of success. Shares of up to 50 per cent of the proceeds are discussed to be safe in that respect. Generally, the funder may terminate the funding agreement at any time and at its sole discretion should the chances of success have been impaired for whatever reason. In such case, the funder will of course lose his right to a share of the proceeds.

The claimant is not obliged to disclose the funding agreement to the court or the counterparty. However, in certain litigation scenarios, for example against directors and officers (D&O) insurers, or generally in settlement negotiations, it might be advantageous to disclose the involvement of a (professional) funder.

QUESTION 3

Assignment of claims: Are there any constraints to assigning claims or seeking cost guarantees in your jurisdiction?

Germany – FW The assignment of claims to a third party for the purpose of their recovery is allowed without further ado, if the assignee bears the full financial risk of recovering the claims and acts for his own account (e.g. factoring).

If an assignee collects debts for the account of the assignor and if the debt collection is conducted as a stand-alone business, this is considered a collection service (Inkassodienstleistung) under the Legal Services Act (Rechtsdienstleistungsgesetz).

Pursuant to the latter, persons who provide such collection services (collection service providers) have to seek the permission of competent authorities and have to be registered with the Legal Services Register (Rechtsdienstleistungsregister). The assignment of claims to a collection service provider which is not registered is null and void; the unauthorised collection service provider lacks the capacity to sue.

With regard to certain types of litigation, e.g. consumer actions, the assignment of claims (to registered collection service providers) is common. In general, such assignments appear reasonable to pool small claims in order to benefit from synergy effects and to create a certain 'balance of power' vis-à-vis more financially powerful counterparties. With regard to bigger claims, however, litigation funding will usually be the better, or even only, option to get financial support from third parties.

Spain – DJ The situation is similar in Spain, because the Spanish civil courts were inspired by the Napoleonic French Code. A lot of opportunistic funds arrived in Spain following the economic crisis, to buy bad credits and assets from banks. This has led to a lot of assignments of claims and the courts have established that they are valid and enforceable.

France – MCC Contractual assignment of claims is valid under French law with a condition and a limit. As a condition, the claim has to be fundamentally legitimate and conform to the public order. The debtor's consent is not required unless the right was provided to be non-assignable.

Unless the debtor has already agreed to it, the assignment may be set up against him only if it was previously served to him by a Bailiff, or he has acknowledged it. The debtor may set up against the assignee defences inherent to the debt itself, such as nullity, the defence of non-performance, termination or the right to set off related debts.

He may also set up defences which arose from the relations with the assignor before the assignment became enforceable against him, such as the grant of a deferral, the release of a debt, or the set-off of debts which are not related. The assignor and the assignee are jointly and severally liable for any additional costs arising from the assignment which the debtor did not have to advance. Subject to any contractual term to the contrary, the burden of these costs lies on the assignee

As a limit, if the claim subject to assignment is litigious, the debtor may obtain a release from the assignee by reimbursing him the actual price paid for the assignment, plus costs and reasonable expenses, plus interest calculated from the date on which the assignee paid the price of the assignment made to him. The claim then disappears.

Because of this rule called 'retrait litigieux', assignees have to be very careful and research what happened before the assignment.

US – ES There is no prohibition in the US against assigning a claim, or part of a claim, to a third party, but, of course, any third party taking an assignment of all or part of the claim is subject to all potential offsets and defences that exist against the primary holder of the claim.

Assigning claims is done fairly often, mostly in the intellectual property patent world. Patent trolls are big in the US, buying up patent claims and aggressively litigating and pursuing those claims.

Sweden – DE Almost any claim can be assigned in Sweden, the main rule is that the original claimant must have initiated a lawful claim, then it can be assigned. Claims based on unlawful contracts (Pactum Turpe) can neither be enforced by the first holder of the claim, nor its successor. Apart from that, there are no restrictions of any kind, or any constraints to assigned claims.

As far as cost guarantees are concerned, we have the same situation as any other European country in that EU citizens or companies founded in another country

within the EU cannot be forced to provide a guarantee for legal costs in litigation proceedings in Sweden.

The same applies for claimants in a country that has entered into an international agreement with Sweden, such as The Hague Convention.

Austria – KO If you are representing a client from outside the EU, the opponent may ask the court to order a cost deposit covering all the procedural costs of the defendant.

US – ES Is there a limit on that?

Austria – KO No, if you have a multimillion dollar dispute, your client pays the court fees of 1.2 per cent, plus also the estimated court-related fees including legal fees for the defendant. The policy is clear – if someone is suing us from somewhere in the world and we, as a defendant in Austria, end up winning the case, we might not be able to enforce our cost award against this claimant. As a result, there is an interest of security deposit which has to be paid upon request by a claimant outside the EU.

US – ES Do you find that a successful application by a defendant to require a large security deposit will often end a case?

Austria – KO Yes, it's one of the best strategies to fend off a claimant or to make them reduce the claim, and a common strategy for the defendant's lawyer to ask for a huge security deposit. It's at the discretion of the judge, but overall you will have to deposit a huge amount of money to get the case going. There is discussion going on about legislation to reduce that, but there are two interests to be weighed against each other. It's another argument for why third party funding can be crucial to get cases going.

As to assignments, one single action containing several claims is permitted if the claims get assigned to another legal entity; such legal entity acts as the sole claimant if the claims rely on the same or similar legal and factual basis. The concept has been approved by the Supreme Court.

Hong Kong – NG An order for security for costs in litigation offers protection to a party from the risk of their opponent not being able to pay the party's litigation costs if ordered to do so.

Applications for security for costs are a common feature of civil litigation before the first-instance courts in Hong Kong. Sometimes liability for security for costs and the amount can be agreed between the parties. As for the form of the security for costs, the most common method to give security is to make a payment into court. Other methods included an undertaking to pay, a bond, a bank guarantee or a charge.

Despite their abolition in some other common law jurisdictions, the crimes and torts of maintenance and champerty are still part of Hong Kong law. Third party funding is considered to infringe the doctrines of champerty and maintenance, so it is not generally permitted for litigation in the Hong Kong courts (except for specific cases).

Litigation funding is allowed in some insolvency cases, because debtors often siphon away assets when insolvent, yet liquidators or trustees in bankruptcy often find themselves without sufficient funds to recover assets or pursue other legitimate claims in the name of the debtor.

In light of this, the Hong Kong law has accepted litigation funding arrangements as a legitimate practice in liquidation proceedings. Such arrangements may include the sale and assignment by a liquidator or trustee in bankruptcy, of an action commenced in the bankruptcy, to a purchaser for value.

As far as arbitration is concerned, the Arbitration Ordinance or AO (Cap. 609) has recently been amended, such that the common law tort and offence of champerty and maintenance no longer apply to third party funding of arbitration and mediation.

Under the AO, a Code of Practice sets out the standards with which third party funders are ordinarily expected to comply in connection with arbitration funding. It states the requirements for funding agreements, the minimum amount of capital a third party funder is required to have, the procedure for addressing conflicts of interest and whether third party funders will be liable to funded parties for adverse costs.

QUESITON 4

Arbitration: What formal or informal requirements exist for an arbitration agreement in your jurisdiction?

Hong Kong – NG The Arbitration Ordinance or AO (Cap. 609) applies to an arbitration under an arbitration agreement, whether or not the agreement is entered into in Hong Kong, or the place of arbitration is in Hong Kong. The ordinance is largely based on the UNCITRAL Model Law on International Commercial Arbitration.

The AO contains relatively few provisions that cannot be excluded by the parties and is based on the principle that subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved.

Certain mandatory rules apply including:

- The parties must be treated equally, and the tribunal must be independent and act fairly and impartially towards the parties (Section 46)
- The arbitration agreement must be in writing (Section 19)
- The tribunal has the power to make orders for security for costs, discovery, the collection of evidence and the preservation of property (Section 56)
- The Court has the power to order recovery of the tribunal's fees (Section 62)
- The tribunal has the power to withhold an award for non-payment of the arbitrators' fees and expenses (Section 78)
- The Court has the power to set aside an award (Section 81)

In the context of securities and financial disputes, it is increasingly common for parties to refer such disputes to the Financial Dispute Resolution Centre (FDRC) in Hong Kong. This is a non-profit making, independent organisation which requires its members to resolve monetary disputes with their customers through mediation and/or arbitration.

A major feature of the scheme is that all financial institutions which are authorised by the Hong Kong Monetary Authority or licensed by/registered with the Securities & Futures Commission of Hong Kong are required to join the scheme as members.

US – ES Let me break it into two parts. In the US, when there is a dispute between a customer and a brokerage firm, or an employee and a brokerage firm, it is regulated by FINRA, the Financial Industry Regulatory Authority.

FINRA has a mandatory arbitration requirement that forces all customer and industry disputes involving FINRA licensed broker-dealers and financial advisers to submit their disputes only to arbitration before a FINRA-appointed arbitration panel. While FINRA arbitration is streamlined and much less expensive than court cases, the parties do waive their right to have a jury of their peers decide the case, which is something the securities firms and industry pushed for and obtained many years ago. They wanted a forum where the cases are decided by experienced professionals who make decisions without emotion and who are familiar with the securities industry. Some complain the process is biased against claimants, while others think it is a fair trade-off for a quicker, less expensive dispute resolution process.

While there is limited discovery in a FINRA case, it generally involves obtaining relevant documents and emails. There is no procedure for pre-trial depositions which can be a very expensive and time consuming part of any court litigation.

Any financial or securities disputes involving regulated broker dealer firms must be heard in this forum, and it's fast, taking between 10 and 13 months to complete. There are minimal fees to pay and definite procedural rules. Any claim over USD100,000 is heard by three arbitrators, typically two lawyers and one specialist from the industry.

We do a lot of FINRA work and we find it an effective form of dispute resolution. There are no depositions or discovery, just documents and information. It's been mandatory since the 1980s, with the only exception being class actions, and even the ability to bring a class action is being cut back. Some people choose FINRA specifically because it's much faster and less expensive than a court proceeding.

As far as traditional, non-securities-related business disputes are concerned, we have a number of ADR providers, including JAMS and the American Arbitration Association. There are others we use for informal mediations. Virtually every case we handle is mediated at some point prior to trial or hearings. We resolve close to 99 per cent of all of our cases through the mediation process and we find our clients are much better served by a negotiated settlement than 'rolling the dice' at trial or hearings.

The problem with some ADR providers, however, is they are very expensive, with administration fees paid to the centre and then fees for the individual arbitrators. To provide an example, we had an arbitration at JAMS in New York where the contract required three arbitrators, each of whom charged USD1,000 per

Klaus Oblin pictured at the 2017 IR Annual Conference in Berlin

hour. That's USD3,000 per hour just for the arbitrators to hear the case, in addition to each side's legal fees, expert costs and other charges.

A case going all the way through hearings can easily cost USD100,000 between just the filing and arbitrator fees. In a FINRA case, by comparison, the administrative and arbitrator costs generally are in the range of USD1,600, which is a fraction of the cost and much more affordable for budget-minded clients.

Austria – KO I cannot compare the fees asked for in Europe to the fees Erwin referred to, however, when it comes to costs in regular proceedings, you do have an appeal process and maybe even a second appeal which will take more time. In arbitrations, you do not have a review on the merits of a case, but you can challenge the award for a number of restricted reasons.

Arbitrations tend to be faster, but cost-wise it depends on whether the arbitrators rule on costs the same way the regular courts do or not. It's at their discretion since there is no regulation on how they decide on costs.

As to the requirements, an arbitration agreement must:

- sufficiently specify the parties (they must at least be determinable);
- sufficiently specify the subject matter of the dispute in relation to a defined legal relationship (this must at least be determinable and it can be limited to certain disputes, or include all disputes);
- sufficiently specify the parties' intent to have the dispute decided by arbitration, thereby excluding the state courts' competence; and
- be contained either in a written document signed by the parties, or in telefaxes, emails or other communications exchanged between the parties, which preserve evidence of a contract.

A clear reference to general terms and conditions containing an arbitration clause is sufficient.

Sweden – DE There are no formal requirements for an arbitration agreement in Sweden, but a written arbitration agreement is of course preferred for obvious reasons. Under the Swedish Arbitration Act an oral arbitration agreement is also binding.

In employer-employee relations, Swedish case law stipulates that the employer is entitled to insert an arbitration clause in an employment contract only if such an arbitration clause also imposes on the employer to pay the arbitrator's fees regardless of outcome.

France – MCC French law distinguishes between domestic and international arbitration. The arbitration clause must be put in writing in a domestic dispute, while, in an international arbitration, the agreement can be proved by any means.

French law has a broad concept of international arbitration considering that arbitration is international when it involves the interests of international trade. Consequently, arbitration between two French companies could easily be international, if for instance a payment were made to a foreign entity. Thus, most arbitration procedures are international.

France is part of the New York Convention and is known as arbitration friendly. There are few mandatory rules: these

being the guarantee of the parties' equality and respect of the adversarial principle, the obligation to take trade usages into account and compliance with international public policy.

Whether to choose an institutional or ad-hoc arbitration always depends on what the parties directly or indirectly agree on. In international arbitration the "juge d'appui" is, unless otherwise agreed by the parties, the President of the Paris Civil Court, the Tribunal de Grande Instance of Paris.

As everywhere French practitioners and their clients are concerned by the length and costs of arbitration proceedings. The French and continental approach as they do not include discovery tend to be less expensive than arbitration led according to Anglo-Saxon practices.

Obviously, third party funding fits to a need and helps parties having a solid case to assume the costs and risks of litigation. It could also be used for judicial proceedings such as those aiming at the compensation of damages caused by anticompetitive practices.

Spain – DJ The only formal requirement is that the arbitration agreement has to be written. This can be via an exchange of letters and emails or via a specific contract, but it has to be written. There are no mandatory requirements to the agreement, only that parties must agree to select the relevant law applicable to the dispute.

Germany – FW German law on arbitration (Sections 1025 et seq. German Civil Procedure Code, Zivilprozessordnung) is applicable to all arbitral proceedings if the place of arbitration is within Germany.

In general, under German law, all persons are entitled to solve their disputes through arbitration. However, subjective arbitration can be restricted. For instance, restrictions apply for non-merchants in specific financial service transactions (§ 37h German Securites Trading Act, Wertpapierhandelsgesetz), and for any party subject to insolvency proceedings (§ 160 (2) German Insolvency Act, Insolvenzordnung). Certain types of disputes may not be arbitrated such as criminal law, family law and landlord-tenant law disputes.

To be valid under German law, an arbitration agreement must be clearly linked to a particular legal relationship, such as an underlying contract or to an existing dispute. It is not absolutely necessary to define the institution or arbitral tribunal as long as it is clear from the arbitration agreement, its structure and the surrounding circumstances, that state court proceedings shall be excluded.

An arbitration agreement must meet certain form requirements to be valid under German law. German law distinguishes between arbitration agreements between consumers on the one side and non-consumers on the other side.

In the non-consumer area, an arbitration agreement must be written and signed by the parties to be bound by it. An exchange of letters, faxed correspondence or similar data transmission suffices (as long as a record is available as a matter of proof). A valid arbitration agreement can be concluded between non-consumers through incorporation by reference to general terms and conditions. However, if bound by German law, the arbitration clause is subject to the statutory validity control of general terms and conditions (§ 305 et seq. German Civil Code). For consumers, the arbitration agreement must be in a document separate from the contract to which it applies, and personally signed by both parties to be valid.

Any failure to meet the 'in writing' or 'signature' requirement can be remedied if the parties participate in the arbitral proceedings without raising an objection.

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