



2019 Global Survey on the Commercialisation of Disputes

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Introduction

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Just as economies and businesses have to adapt and evolve in order to keep pace with the changing world, so too does the practice of law.



Whereas litigation and related disputes work was once regarded by those forced into its sometimes unforgiving arena purely as a 'distressed' purchase, and an unwelcome even if necessary drain on resources, in some quarters it is increasingly being looked at in a quite different way. A claim (or indeed an order/judgment) can have its own intrinsic, measurable value, and so properly can be regarded and treated as an asset - something which in turn can be bought, sold and financed.

The growing Third Party Funding market is at the forefront of a move towards commoditising the resolution of disputes and the enforcement of judgments. However, while the concept and practice of "litigation/arbitration funding" has been around for longer than many may realise, the commercial businesses that have emerged in this area still constitute a relatively young market, and one that is yet to make inroads in all jurisdictions. One driver of growth has been the push to ensure that a party should not inevitably be barred from pursuing an entitlement merely by reason of their own impecuniosity; the argument is that this risks an imbalance between parties' ability to seek justice

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purely based on the availability of resources.

That said, the key characteristics of a Third Party Funding arrangement are often what pose the biggest hurdle to acceptance of such arrangements i.e. (i) the provision of financial support to one party involved in a dispute (call them Party A), with such financial support coming from a third party totally unconnected to anyone actually interested in the dispute (let's call the funder Party C); and (ii) in return for Party C's provision of financial support it is agreed, but only upon a successful outcome for Party A, that the third party funder (Party C) will be repaid its investment together with a percentage (in some cases up to 40-50%) of any settlement amount or damages award the successful party (Party A) might receive from the loser (Party B).

The reason such arrangements can present an issue is because they fall foul of many jurisdictions' prohibition (civil and criminal) of Maintenance (i.e. the involvement of a disinterested party in the encouragement of a lawsuit) and Champerty (i.e. the provision of support to a person in a lawsuit on condition that a share of the spoils will go to the supporter). However, these doctrines are, at best, centuries old, and based on historic concerns (at least when considering England & Wales) that arose from feudal power structures and the risk of abuse by powerful landowners supporting otherwise unmeritorious claims for their own ends. However, with the established independence of the judiciary in many jurisdictions, arguably such concerns should no longer hold sway in twenty first century disputes. That is, of course, not to say there are not still potential risks with the Third Party Funding concept. Arguments are often made about: the kind of bargains struck and their impact on the actual amounts ultimately received by a party bringing a claim; the dangers of a flood of litigation that would otherwise be avoided; unnecessarily prolonged litigation; of oxygen being given to otherwise vexatious litigation; and of course ethical concerns in the prosecution of any litigation (and crucially pursuit of settlement), when lawyers and third party funders are inevitably relying on the quantum of recovery for a significant part of their remuneration.

Nevertheless, in a marketplace of relatively choosy funders increasingly populated by sophisticated and

savvy client counterparties, the benefits of Third Party Funding, both as a way to access justice and to manage the bottom line, are often being seen to outweigh the potential risks - so the market continues to grow.

Similarly, there continues to be considerable growth in the availability and use of technology enabling lawyers and their clients to benefit from the commoditisation of more process driven day-to-day legal work, as well as gains in efficiency, speed and therefore cost-savings when undertaking other labour intensive tasks such as document review and electronic disclosure. Increasingly local courts/tribunals and their procedure rules are supportive of the use of such new technologies, and arguably they have little option. It is now difficult to ignore that, as we collectively create more and more electronic documents and data (estimated at more than 2.5 quintillion bytes of data every single day), and grow more and more accustomed to dealing with and using our electronic assistants and portable tablets both at work and at home, that when the situation is right such technology also can bring efficiency and cost savings to the business of disputes (and not just as to their preparation, but also their presentation to a court/tribunal).

Taking all of this into consideration, the aim of this project was to seek a better understanding of two key areas impacting legal practice across various jurisdictions: (1) the availability and reality of Third Party Funding; and (2) the availability and use of technology in local Court hearings and the broader practice of dispute resolution. The underlying survey was conducted with the assistance of the firms listed as contributors. Brown Rudnick's gratitude and sincere thanks goes to all of them, and their contributing attorneys, for their patience and efforts in putting together what it is hoped will be a useful resource on at least two key aspects of what we are increasingly seeing as a growing move towards the commoditisation of disputes.

Jurisdiction Overview

Jurisdiction	Contingency Arrangements	Third Party Funding	Litigation Insurance	Technologically Equipped Courts	E-Filing	Online Docket	Court Apps	E-Disclosure Tools (TAR) Promoted/Widely Used
Argentina	✓	∅	✓	Not Well Equipped	✓	✓	∅	∅
Azerbaijan	∅	∅	✓	Getting There	✓	✓	∅	∅
Bermuda	∅	✓	✓	Lagging Behind	∅	∅	∅	∅
Bulgaria	✓	∅	✓	Not Well Equipped	∅	∅	∅	∅
Canada	—	✓	✓	Getting There	✓	∅	∅	∅
Cayman Islands	∅	✓	✓	Getting There	∅	∅	∅	✓
Chile	✓	∅	∅	Lagging Behind	✓	✓	∅	∅
Cyprus	∅	∅	✓	Not Well Equipped	∅	∅	∅	∅
Ecuador	✓	✓	∅	Getting There	∅	∅	∅	∅
Egypt	✓	✓	∅	Not Well Equipped	∅	∅	∅	∅
England & Wales	✓	✓	✓	Well Equipped	✓	✓	∅	✓
France	✓	✓	✓	Not Well Equipped	✓	∅	∅	∅
Georgia	✓	✓	∅	Lagging Behind	∅	∅	∅	∅
Guatemala	✓	✓	✓	Getting There	∅	∅	∅	∅
Guernsey	∅	✓	✓	Getting There	∅	∅	∅	∅

Jurisdiction	Contingency Arrangements	Third Party Funding	Litigation Insurance	Technologically Equipped Courts	E-Filing	Online Docket	Court Apps	E-Disclosure Tools (TAR) Promoted/Widely Used
Hungary	✓	✗	✗	Lagging Behind	✓	✗	✗	✗
Indonesia	✓	✓	✓	Not Well Equipped	✓	✗	✗	✗
Ireland	✗	✗	✓	Well Equipped	✓	✗	✗	✓
Italy	✗	✓	✗	Getting There	✓	✓	✗	✗
Japan	✓	✗	✓	Lagging Behind	✓	✗	✗	✗
Jersey	✗	✓	✓	Getting There	✓	✗	✗	✓
Kazakhstan	✓	✗	✓	Lagging Behind	✓	✓	✓	✗
Latvia	✓	✗	✗	Getting There	✓	✗	✗	✗
Lebanon	✓	✗	✗	Not Well Equipped	✗	✗	✗	✗
Lithuania	✓	✓	✗	Getting There	✓	✓	✗	✓
Malta	✗	✗	✓	Lagging Behind	✗	✓	✓	✗
Nigeria	✓	✗	✓	Not Well Equipped	✓	✗	✗	✗
Singapore	✗	✓	✓	Well Equipped	✓	✓	✗	✓
South Africa	✓	✓	✓	Not Well Equipped	✗	✗	✗	✗
Spain	✓	✓	✓	Getting There	✓	✗	✗	✗
The Netherlands	✗	✓	✓	Getting There	✓	✓	✗	✗
United Arab Emirates	✗	✓	✗	Getting There	✓	✓	✓	✗
Ukraine	✓	✓	✓	Not Well Equipped	✗	✓	✗	✗
USA (New York)	✓	✓	✗	Getting There	✓	✓	✗	✓

Japan

Contributors: Teruhisa Toyama and Naoki Kanehisa - Atsumi & Sakai



Q. Are lawyers able to enter into contingency / damages sharing agreements with clients?

Yes. In disputes matters it is common to enter into a compensation agreement containing contingent fee provisions. However, it is very rare to enter into so-called “no win, no fee” contingency arrangements. Outside of disputes it is uncommon to have contingency agreements.

Q. Recoverability of client costs and/or success fees?

In civil actions the general rule is for each party to bear their own costs irrespective of success/loss. However, in tort cases it is sometimes possible that an award may be made on account of the legal costs incurred by a successful plaintiff. However, this is at the discretion of the court and will not be the amount actually paid by a plaintiff. Typically the amount is in the region of 10% of the amount of the claim recognised by the court.

Q. Can a Defendant obtain an order for security for costs?

Yes. In some cases, to prevent an abuse of process, an order to provide a security deposit can be made



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against a plaintiff at the request of a defendant. Similarly, in an action filed by a non-resident (including a corporate) against a resident defendant, an order to provide security may be issued at the request of the defendant.

Q. How active is the Court costs management? Are cost budgets required?

It is unusual to see the Court involved in such matters.

Q. Is Third Party Funding of disputes available?

It is strictly prohibited by the Attorney Act and rules of bar associations for non-lawyers and non-lawyer associations to procure legal work and litigation, etc. for lawyers for profit. As interest, dividends and other profits to be collected by so-called litigation funders are likely to be viewed as consideration for procuring legal work and litigation for lawyers, litigation funding is not permitted in Japan. However, these rules only apply in Japan and to Japanese individuals and entities. Accordingly, a foreign party to Japanese litigation may be able to take advantage of litigation funding if it is arranged offshore; there has been a gradual increase in the number of such cases. However, arbitration is not common in Japan, and there will be very few (if any) cases where a litigation fund has been involved in an arbitration case in Japan.

Q. Is there any applicable code of conduct /regulation for Third Party Funders? How involved are funders permitted to become with a funded case?

Under the Attorney Act and the rules of bar associations only lawyers may conduct litigation. Litigation funders can be involved in the preparation and conduct of a case through their clients but not otherwise.

Q. Is insurance for legal costs available?

Yes for litigation, but on the basis of D&O insurance policies which are common in Japan. There is though typically a special condition applied in such policies which exempts insurer liability in the event of gross negligence, or makes the application in the case of derivative action optional.

Q. Is there any applicable code of conduct /regulation for insurers?

No. Where D&O is called upon and an insurer may be in line to pay out monies, there are cases (limited to road traffic matters and directors and officer liability matters) where the insurer participates in proceedings. This may be either directly as a party or in support of an existing party.

Q. Are any other claim financing / insurance arrangements available to a Claimant?

Yes. Although not yet common, there are damages insurance products for attorney's fees available for the filing of an action.

Q. How technologically equipped is your Court system e.g. paperless / live transcripts / touch screen technology etc?

They are lagging behind. There are a few cases where such facilities are used in court trials, but the court procedure law reforms are far behind technical innovation. The government is considering the introduction of an e-court starting in approximately 2022, and then e-filing and e-case management thereafter.

Q. Are any or all of the following available: e-filing; on-line access to the court docket/file; smart-phone applications to assist court interactions?

Claims for payment of unpaid rent, loaned money, compensation payments, purchase payments, communications fees or lease fees can be e-filed.

Q. Are Judges available 24/7?

No. Other than criminal procedural matters in which judges are involved, including issuing arrest or search warrants etc., courts are not available Saturdays, Sundays or national holidays.

Q. Are interim/interlocutory hearings heard by telephone conference / Skype / Video conference ?

Yes, but only telephone conference hearings using fixed telephone lines and video conferencing are used.

Q. Is evidence at trial capable of being by Skype / Video conference?

Yes. For an examination of a witness, or a statement of opinion by an expert, video conferencing is allowed if such witness or expert resides in a remote area or certain other conditions are met.

Q. What are your court's views on the use of e-disclosure technology?

No view.

Q. How widespread is the use of technology aided review tools such as predictive coding?

TAR is not officially introduced to law enforcement /regulators. While private companies collect and analyse evidence efficiently using these technologies, there are few cases where the results of these technologies are actually submitted to the court. It is, for example, common to use TAR for internal investigations (forensic) in corporate scandal cases. If TAR becomes approved for use in litigation it likely will be in great demand.

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