



## Overview

# Litigation Finance Industry: Global Perspective

*Kelly Sze, Omni Bridgeway*

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# Litigation Finance Industry: Global Perspective

Contributed by *Kelly Sze, Omni Bridgeway*

The ascent of the commercial litigation finance industry in the United States is the result of an amalgamation of factors, ranging from the rise in demand for alternative fee arrangements following the Great Recession to a market demand for access to an increasingly cost-prohibitive justice system. While litigation finance is still relatively new in the US, its modern use traces back to the mid-1990s in Australia, when Australia was laying the groundwork to ease the financial costs of litigation that would eventually span the globe.

## The Origin of Modern Litigation Finance

The fuse that set off the growth of this industry was lit in 1995, when Australia enacted legislation allowing insolvency practitioners to undertake contracts to finance litigation designated as company property, essentially recognizing legal claims as a corporate asset. As a result, litigation finance companies emerged to assist bankrupt entities with the high costs associated with pursuing their existing legal claims in exchange for a return from the proceeds. This legislative development combined with (i) the legalization of class action lawsuits in Australia a couple of years prior, (ii) the country's ban on contingent fee agreements, and (iii) the existence of the "loser pays" rule requiring the unsuccessful party to pay the other party's legal costs, created the perfect climate for this young industry to thrive.

Despite these developments, third-party financing was only expressly permitted in the insolvency context, and those financing outside these bounds ran the risk their financing agreements would be deemed illegal and thus void as against public policy. This fear came to fruition in *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* (2005) 63 NSWLR 203, when the court held a funding arrangement to be unlawful and an abuse of process. However, this ruling was short-lived. The Australian High Court overturned it by a majority vote of 5-2 in 2006. *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. The High Court held that sufficient measures were already in place to guard against abuse by a third-party financier and further, that the concept behind third-party funding was not against public policy, but rather, in support of it as it facilitated access to justice.

With legal exceptions being carved out for litigation finance in the insolvency and class action context, in addition to the virtual abolition of the doctrines of [maintenance and champerty](#) as crimes and torts in most Australian jurisdictions by that time (e.g., *Maintenance, Champerty and Barratry Abolition Act 1993 (NSW)* ss 3, 4), the foundation for global growth of litigation funding was set. See Law Commission of England & Wales, *Proposals for Reform of the Law relating to Maintenance and Champerty*, 25 October 1966, para 7.

## The Growth of Litigation Finance in Europe

During the 2000s, the concept of a third party assisting with the expense of litigation became normalized and accepted in the United Kingdom as well as in Australia. Faced with similar issues surrounding the costs of bringing suit, plus a decline in the availability of legal aid, access to justice in the UK was becoming an amenity only those with deep pockets could afford. Consequently, public policy concerns preventing financial assistance by a third party were weighed and eventually, began to dissipate. See *British Cash and Parcel Conveyors v Lamson Store Service Co Ltd*. (1908) 1 KB 1006.

Lady Hale noted in *R v Lord Chancellor, ex parte Witham* [1998] QB 575:

[There is] clear evidence [...] of a trend in public policy towards funding access to the courts. [...] Access to the courts is a fundamental aspect of the rule of law in a democratic society, guaranteed by everyone by Article 6(1) of the European Convention on Human Rights. It should not be denied to those who cannot afford to pay the court's fees.

Subsequent case law would lend support for Lady Hale's opinion (see, e.g., *Hamilton v Al Fayed* [2002] EWCA Civ 665), and in 2009, Lord Justice Rupert Jackson spearheaded a government review of civil litigation costs in the English courts aimed at improving access to justice. His final report, released in 2010 and known as the Jackson Reforms, supported the concept of funding and recommended a voluntary code of conduct to oversee litigation funding activity in the country. The Association of Litigation Funders (ALF) of England and Wales was later established in 2011.

While the common law jurisdictions of England and Wales had to contend with the doctrines of maintenance and champerty before greenlighting the use of litigation finance, other European nations operating under civil law were not faced with these obstacles as these doctrines did not exist in their legal framework. Since there was no legal barrier to third-party funding, iterations of litigation finance existed in Germany and the Netherlands since the late-1980s. It was initially offered in Germany as a by-product of legal aid insurance and in the Netherlands in the context of enforcement and recovery of high value unpaid claims, often originating from the credit and political risk insurance markets (e.g. Lloyds of London).

In Switzerland, litigation finance is a welcome practice as it provides financial relief to plaintiffs required under the Swiss Code of Civil Procedure of 2011 to deposit with the court anticipated costs at the outset of litigation. Further support of funding has arisen from Swiss Federal Supreme Court decisions that allow litigation funding so long as funders act independently of a claimant's attorney. BGE 131 I 223/2004. In a nod to its widespread acceptance, the Court also found that it is a lawyer's duty to inform their clients about their funding options. Supreme Court decision 2C\_814/2014.

Germany, the Netherlands, and Switzerland are not the only civil law jurisdictions that now allow litigation finance, as interest in and use of funding is gaining in popularity in Italy, France, and Spain.

### **Litigation Finance in the U.S.**

While Australia and the U.K. began to embrace litigation finance in their halls of justice, dispute financing was but a glimmer in the eye of the American legal system. Although the U.S. legal framework is rooted in common law ideologies and arguably was prime breeding ground for litigation funding at the time it came into vogue in Australia and the U.K., the allowance of contingency fee arrangements and the elective invocation of the loser pays rule (whether via statute or contract) kept the issue of affordability of legal services at a simmer.

However, after the economic downturn in 2008 triggered a growing demand from both individual and corporate clients alike for alternative fee arrangements, coupled with the gradual increase in court costs and attorneys' fees, the need for some financial assistance with legal expenses reached a boiling point. The time was ripe for non-recourse funding to help meritorious cases see their day in court. Deep-pocketed adversaries that were accustomed to engaging in scorched-earth litigation tactics to gain leverage were now being faced with claimants armed with adequate funds to see the merits of their cases through trial and appeal.

Like the introduction of funding in Australia and the U.K., litigation finance was first met with resistance stateside. Detractors dusted off their torts textbooks to refresh their recollection on the doctrines of [maintenance and champerty](#), hoping their state codified them into law. Early funders likewise were cognizant that some states had long ago enacted statutes seeming to prohibit litigation finance; however, uneasiness over the legality of litigation finance started to wane as a body of modern case law gradually developed in favor of its use.

For example, in 2014 in [Miller UK Ltd. v. Caterpillar, Inc.](#), the court dismissed the notion that the use of funding was prohibited by the Illinois maintenance and champerty statute, finding that the statute was penal in nature and must be strictly construed. The *Miller* court further noted that "nothing should be taken by intendment or implication beyond the obvious or literal meaning of the statute" which was "narrowed to a filament." As the funding agreement at issue in *Miller* was not what the legislature intended to prevent, the agreement was found to be legal.

The *Miller* decision went on to become a seminal case regarding the issue of disclosure of litigation finance agreements. *Miller* and its progeny essentially hold that funding agreements are not discoverable if not relevant to the facts of the case, are protected by the work product doctrine, (see, e.g., [Viamedia, Inc. v. Comcast Corporation et al.](#)), and in some cases, the common interest privilege (see, e.g., [In re Int'l Oil Trading Co., LLC](#)). See also [Overview - Disclosure of Litigation Finance in Court](#); [Overview - Privilege and Work Product Issues in Litigation Finance](#); [Comparison Table - Ethics Opinions in Litigation Finance](#).

Public policy concerns surrounding accessibility to the courts also began to help garner approval of funding. In 2015 in [Hamilton Capital VII, LLC, I v. Khorrami, LLP, et al.](#), New York Supreme Court Justice Shirley Werner Kornreich observed that:

Providing law firms access to investment capital where the investors are effectively betting on the success of the firm promotes the sound public policy of making justice accessible to all regardless of wealth.

Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her or his case.

As courts thawed concerns about litigation finance, the U.S. industry evolved from offering only single-case financing options. New products were created to respond to a market need. Not only is financing helping individual claimants seek redress against well-heeled adversaries, but it also allows law firms the opportunity to leverage the use of portfolio funding to offer alternative fee solutions to new and existing clients (such as contingency or hybrid-fee options) while ensuring a consistent cash flow. See [Overview - Law Firm Financing](#). Corporations are also getting in on this new legal solution as funding provides companies with a chance to pursue meritorious claims previously left on the cutting room floor due to departmental budget restrictions. As a result, in-house legal departments are becoming revenue-generators rather than cost centers. See [Overview - Plaintiff Financing](#).

### **Litigation Finance in Canada**

It would not take long for the heat from the ascent of the litigation finance industry in the States to attract the attention of its neighbors to the North. Acquiescence to integration of modern third-party litigation finance in Canada started with the approval of litigation funding agreements in the class action context (so long as there was prior court approval). See *Houle v. St Jude Medical Inc.* [2017] O.J. No. 4489, 2017 ONSC 5129 (August 29, 2017). This followed from a relaxation in 2005 on the doctrines of maintenance and champerty as they pertained to lawyers' contingency fee arrangements in Canada's most populous province.

Courts found that in order to determine whether champerty has occurred and subsequently, whether to authorize a funding agreement for class action matters, it must be done so on a case-by-case basis taking into consideration several factors, such as: 1) a funding agreement "...must be fair and reasonable and provide the representative plaintiffs with access to justice, without compromising the principles of independence of counsel, 2) confidentiality agreements between the parties [must] be observed and, 3) [the agreements are] not to the disadvantage of the representative plaintiffs." Hugh A Meighen, *The Third Party Litigation Funding Law Review - Edition 2, Canada*, December 2018.

The rationale behind the approval of funding agreements for class actions in various provinces in Canada paved the way for litigation finance to be used in single-party commercial matters. *Schenk v. Valeant Pharmaceuticals International Inc.* 2015 ONSC 3215. Decisions by the Federal Court of Canada and the Ontario Superior Court have determined that litigation funding is not unlawful per se, that the litigation privilege attaches to certain aspects of funding agreements (*Seedlings Life Sciences Ventures LLC v. Pfizer Canada Inc.*, unreported Order of July 17, 2017, Court File No. T-608-17), and that while funding arrangements require approval in the context of class actions, outside class actions no such approval is required for simple commercial matters (*Seedlings Life Sciences Ventures LLC v. Pfizer Canada Inc.*, 2017 FC 826, Order and Reasons of September 12, 2017).

And in May 2020, in a positive sign forward for the litigation finance industry, the Supreme Court of Canada (SCC) in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 (commonly referred to as *Bluberi*) affirmed the decision by a Quebec insolvency court to approve a litigation funding agreement by Omni Bridgeway (f/k/a Bentham IMF) as a form of interim financing to an insolvent debtor company. In so doing, the SCC recognized that litigation can be a "pot of gold" from which funding can help claimants retrieve value. With this stamp of approval from the SCC, cash-starved litigants looking to secure their rights in court will have an easier time turning to litigation funding for help in financing their claims and seeking access to justice.

### **International Arbitral Hubs Welcome Litigation Finance**

As obstacles to commercial litigation funding began to fall in common law countries and the benefits it espoused were too great to ignore, the international arbitration community would soon follow suit. In order to remain competitive with those jurisdictions that allowed outside financing for legal disputes, Singapore and Hong Kong—both key locales for litigating arbitral claims—adopted legislation to open the doors to funding.

Singapore took the lead in 2017 when it formally abolished the torts of maintenance and champerty, essentially providing a "safe harbor" for the funding of international arbitrations (and related court proceedings) by professional funders who met a basic capital adequacy requirement. See the Civil Law (Amendment) Act 2017 (No. 2 of 2017) and the Civil Law (Third Party Funding) Regulations 2017. Although critics against allowing funding asserted that this would produce frivolous lawsuits, such criticism was dismissed by legislators as they rationalized that those seeking financing would be required to

undergo an extensive due diligence review of their claim in order to obtain funding and in so doing, any frivolous claims would fall by the wayside.

In Hong Kong, a Law Reform Commission was tasked in 2013 to assess third-party funding and any potential issues arising therefrom. In 2015, the Commission recommended allowing the use of litigation funding for international arbitration proceedings provided certain “ethical and financial safeguards” were met. In mid-2017, amendments to Hong Kong’s Arbitration Ordinance were finalized, and a draft Code of Practice was published for consultation, which adopted many of the provisions in the UK ALF Code. See the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016.

2017 proved to be a big year for funding in the international arbitration community as it took the lead in creating a global blueprint for managing the legality and practicality of the use of litigation finance for arbitral claims. That year, a joint ICCA (International Council for Commercial Arbitration)/Queen Mary University taskforce published a draft report of litigation funding in arbitration that aimed to create consistent rules and procedures. With the intent to craft a unified policy, the ICCA/Queen Mary taskforce analyzed a range of global precedents involving funding, including the UK ALF Code, the 2017 legislation adopted in Singapore and Hong Kong, and relevant case law from around the world. The final recommendations from this taskforce were then published in April 2018 during the ICCA Congress in Sydney, Australia.

### **Continued Development of the Litigation Finance Industry**

The commercial litigation finance industry continues to rapidly evolve and expand as modern tribunals and legislative bodies acknowledge it as a solution to the rising crisis of the unaffordability of legal solutions. Critics can no longer point to archaic measures as a basis to reject outside financing seeing that safeguards are being put in place by both legislative and judicial entities to ensure litigation funding does not promote frivolous lawsuits or unfair advantages. Around the world, courts are consistently finding that litigation funding does not fall into the mischief that the feudal doctrines of maintenance and champerty were intended to prevent, but rather, that it creates an alternative option for litigants with meritorious claims to get their day in court.

As litigation financing has become omnipresent and its use has progressed in various factions of the legal industry—from individual claimants to large law firms to boutique practices to in-house legal departments—the seed that was planted as a solution to the rising expense of insolvency proceedings in Australia has grown global roots in almost all practice areas of the law. In so doing, litigation finance has paved an alternative avenue for commercial claims critical to business operations. No longer stymied by financial concerns, litigation finance has helped bring the focus of legal disputes back to merits-based justice.

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