Litigation Funding

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LITIGATION FUNDING

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GETTING THE DEAL THROUGH

Poland

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1 Is third-party litigation funding permitted? Is it commonly used?

Third-party litigation funding is permitted in Poland on the basis of the rule of freedom of contract. Since third-party litigation funding has not yet become popular in Poland, there are no court rulings that allow us to establish the Polish courts' attitude towards third-party litigation funding.

2 Are there limits on the fees and interest funders can charge?

Polish law does not lay down specific rules limiting the fees of third-party funders. If Polish law governs the funding agreement, funders and litigants may determine their legal relationship at their own discretion within the general limits of freedom of contract laid down by Polish law. These limits follow the nature of the contractual relationship, good customs and the provisions of law.

3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

No specific legislative or regulatory provisions applicable to third-party litigation funding have been adopted in Poland.

4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

No specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding. The rules of ethics applicable to qualified lawyers do not distinguish funders from other third parties. Lawyers are obliged to act in the best interest of their clients and may not be under any third-party influence, including that of funders. Lawyers may take instructions from their clients only. All information the lawyers obtain in relation to the case is confidential.

5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?

According to publicly available information, so far, no public bodies, including the financial regulator and the Minister of Justice, have any particular interest in or oversight over third-party litigation funding.

6 May third-party funders insist on their choice of counsel?

The choice of attorneys belongs only to litigants. Nonetheless, it seems that it would not violate Polish law if funders and litigants agreed that the choice of a reputable attorney indicated by the funders would be a condition for funding the case.

7 May funders attend or participate in hearings and settlement proceedings?

Funders may attend all hearings that are open to the public. In Polish domestic litigation, the general rule is that the public may attend all hearings, unless the court orders a closed hearing. The court orders a closed hearing if hearing the case with the public in attendance would be a threat to public policy or morality, or if there is a possibility that protected confidential information or company secrets might be revealed.

According to the rules of the two leading Polish arbitration courts: the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, and the Court of Arbitration at the Confederation of Lewiatan, hearings held in arbitration proceedings are closed unless the parties agree otherwise. Thus, funders may attend the hearing only upon the consent of both parties.

Funders may participate in out-of-court settlement proceedings. There are no restrictions on attending institutionalised settlement proceedings before the court, which are in general open to the public. Funders may not attend institutionalised mediation proceedings, which are confidential. The parties and their lawyers are not allowed to disclose any facts made known to them in mediation proceedings to any third parties, including funders, without the consent of both parties.

8 Do funders have veto rights in respect of settlements?

Funders do not have veto rights in respect of settlements.

9 In what circumstances may a funder terminate funding?

Polish law does not determine in which circumstances funders may terminate funding. If Polish law governs a funding agreement, the agreement should indicate the circumstances in which a funder may terminate funding.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Polish procedural rules do not envisage that the funders may take any active role in the litigation process.

11 May litigation lawyers enter into conditional or contingency fee agreements?

According to the rules of ethics applicable to qualified lawyers, they are not permitted to enter into conditional or contingency fee agreements if the whole fee is payable only if the case is won. However, lawyers may enter into an agreement upon which a part of fee is due regardless of the outcome of the case, while the remaining part of the fee is paid if the case is won. The rules of ethics do not give a clear-cut answer as to what the proportion between these two parts of the fee should be.

Specific provisions apply to lawyers representing clients in class action proceedings. Lawyers may be entitled to a conditional or contingency fee only; however, the fee cannot exceed 20 per cent of the award. It is disputable whether these provisions only limit conditional and contingency fees, or the sum of the conditional or contingency fee and fee due regardless of the outcome of the case.

12 What other funding options are available to litigants?

An alternative funding option available to litigants in domestic litigation is to apply to the court for legal aid by way of releasing the party from the duty to pay court costs and to appoint an attorney for the party whose fee would be paid by the state. Court costs include court fees, the costs of the opinions of court-appointed experts and witnesses' costs. Providing the litigant with legal aid does not release the litigant from all expenses. Even if a litigant was provided with legal aid, he or she may be liable for adverse costs if the opposite party wins the case.

The court will provide legal aid to a litigant who, as an individual, cannot bear court costs without affecting his or her ability to support himself or herself and his or her family. A litigant who is a legal person will be provided with legal aid if it has no sufficient funds to bear court

costs. However, experience shows that courts are reluctant to provide entrepreneurs with legal aid even if they are on the verge of insolvency.

If legal aid is granted, the State Treasury will cover court costs and attorney's fee instead of the litigant. The fees of court-appointed attorneys are regulated by law. The adverse party will be ordered to reimburse the State Treasury if it loses the case.

Litigants cannot be granted legal aid in class action proceedings. However, if consumers bring a class action, they will not incur court costs if the consumers' ombudsman agrees to join the proceedings on the side of consumers as the class representative. The body may decide to join the case at its own discretion. As the class representative, it may also be liable to pay adverse costs if the case is lost, and be ordered by the court to provide security for those costs.

Legal aid is not available to litigants in arbitration proceedings pursuant to rules of Court of Arbitration at the Polish Chamber of Commerce in Warsaw and Court of Arbitration at the Polish Confederation Lewiatan.

13 How long does a commercial claim usually take to reach a decision at first instance?

According to the information published by the Polish Ministry of Justice, the average length of legal proceedings in commercial cases heard before district courts that ended in the first quarter of 2018 was just under 16 months. District courts generally adjudicate in cases exceeding 75,000 zlotys at the first instance; thus, a third-party funded case will most probably be heard by these courts. In 89.9 per cent of cases heard before district courts, it took no more than three years to reach a decision at first instance. This data does not include the duration of order for payment proceedings that usually precede the main proceedings. For payment proceedings, the court orders the defendant to pay the money sought by the claimant or to deny the claim within 14 days. The average duration for an order for payment proceedings is four months. As regards total length of time, an average commercial case before district courts takes just under 20 months to reach a decision at first instance.

The length of proceedings at first instance depends on the complexity of the case, the number of witnesses, and the number of court-appointed experts. The place where the case is heard may also have an impact on the duration of case. For example, because of the high number of cases heard by courts in Warsaw, proceedings before these courts are significantly longer. In the first half of 2018, the average duration of proceedings in commercial cases before the District Court in Warsaw was just under 22-and-a-half months, and the average duration for an order for payment proceedings, which usually precedes the main proceedings, was just over four months. As regards total length of time, an average commercial case heard before this court took just over 26-and-a-half months to reach a decision at first instance. (The averages presented above were calculated on the basis of data published by the District Court in Warsaw.)

Class action proceedings at first instance last longer because of the additional stages of these proceedings involving the verification of the admissibility of class action, and the summons of potential litigants to join the class action on the side of the class representative. These stages may delay the whole proceedings by two years or more.

14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

According to statistics published by the Polish Ministry of Justice, in the first half of 2018, district courts made decisions in 8,175 commercial cases at first instance, while 4,765 appeals were filed with appellate courts against the first-instance rulings of district courts. However, experience shows that in high-profile or high-value cases, a losing party even more often appeals against the ruling.

Calculations made on the basis of information published by the Appellate Court in Warsaw show that the average length of appellate proceedings before this court in commercial cases that ended in the first half of 2018 was 17 months.

Appellate proceedings last much longer if the court decides to take additional evidence. Moreover, in specific circumstances, the court may refer the case back for reconsideration to the court of first instance, which considerably lengthens the whole proceedings. For instance, in regard to appellate proceedings before the Appellate Court in Warsaw, which ended in the first half of 2018, less than 9.5 per cent of commercial cases were referred back to district courts for reconsideration pursuant to data published by this court.

Appeals in commercial cases quite often succeeded in the first half of 2018. Appellate courts dismissed or entirely rejected 56.2 per cent of appeals in commercial cases. The remaining appeals resulted in the court of first instance's ruling being overruled, at least partially, or in the referral of the case back to the court of the first instance for reconsideration.

In specific situations, the party that loses appellate proceedings may appeal against the ruling of the appellate court to the Supreme Court. The appeal does not suspend the enforceability of the ruling unless the appellate court decides otherwise.

There is no publicly available detailed data for the duration of arbitration proceedings in Poland. According to the Polish Arbitration Survey 2016 carried out by Kocur & Partners law firm, in cooperation with Kozminski University in Warsaw and the University of Economics in Katowice, among Polish arbitration practitioners and the largest companies operating in Poland, the duration of arbitration was graded 4.21 points on average on a scale of one to seven points, where seven stood for a short duration.

15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no official data as to what proportion of judgments made by Polish courts in domestic litigation require enforcement proceedings. Usually, solvent debtors pay the award voluntarily to avoid paying the costs of enforcement proceedings. Still, it is not uncommon for fraudulent debtors to dispose or conceal assets. In all enforcement proceedings in 2017, bailiffs recovered 18.6 per cent of the sum of all awards to be enforced. There are no official statistics regarding the effectiveness of enforcement proceedings in commercial cases.

In respect to arbitral awards, according to the Polish Arbitration Survey 2016, only 10 per cent of respondents indicated that the arbitral award was voluntarily complied with in all cases they were involved in, while 18 per cent of respondents claimed that it happened in the majority of cases. Twenty per cent of respondents indicated that the arbitral award was voluntarily complied with in around half of the cases. Some 22 per cent of participants admitted that the losing party voluntarily complied with the award in a minority of cases, while 15 per cent indicated that it happened in none of the cases. About 12 per cent of respondents answered that it is difficult to say, and 3 per cent indicated that no award was issued in any of the cases they were involved in.

16 Are class actions or group actions permitted? May they be funded by third parties?

Opt-in class actions are permitted in Poland in cases concerning product liability claims, unfair enrichment claims, disputes over breach of agreements and delicts, excluding in general claims for the protection of personal rights. Moreover, class actions are permitted in all cases concerning consumers' claims.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

In Polish domestic litigation, the rule is that the court orders the losing party to pay the reasonable costs of proceedings the winning party incurs, including court cost, the costs of appearing in person before the court and the fee of one attorney.

The reimbursement of an attorney's fee is limited and usually does not correspond to the fees actually paid to that attorney. In cases exceeding 5 million zlotys, the court will order the losing party to pay from 25,000 zlotys to 150,000 zlotys to cover the opposing attorney's fee for proceedings at the first instance. The limits to reimburse an attorney's fee for appellate proceedings and proceedings before the Supreme Court are in the range of 50 per cent to 100 per cent of fees for first instance proceedings. The courts rarely order the losing party to pay more than the minimal rate, regardless of the fees actually paid (eg, 25,000 zlotys in cases exceeding 5 million zlotys).

If a part of a claim is awarded, the court may order the losing party to pay a proportional part of the adverse costs or decide that each party has to pay its own costs. If only a minor part of the claim is denied, the losing party has to reimburse the adverse costs in full within the

aforesaid limits. In certain justified circumstances, the court may order the losing party to pay only part of adverse costs or no adverse costs at all. The winning party may be ordered to pay adverse costs if the defendant accepts the claim in the first response addressed to the court and, simultaneously, did not give the claimant any reasons to file the statement of claim.

Different rules apply in arbitration. According to the rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, the arbitral tribunal decides which party should cover the adverse costs, taking into account the outcome of the case and other relevant circumstances. The adverse costs include arbitration and registration fees, expenses incurred in relation to the arbitration proceedings and reasonable attorneys' fees. The arbitrational tribunal decides what fees are reasonable in each given case. The Court of Arbitration at the Confederation of Lewiatan has adopted similar rules.

18 Can a third-party litigation funder be held liable for adverse costs?

A third-party litigation funder may not be held liable for adverse costs.

19 May the courts order a claimant or a third party to provide security for costs?

In domestic litigation, the court orders the claimant to provide security for costs if the claimant comes from a country outside the European Union. Moreover, the court may order the class representative in class action proceedings to provide security for costs. The court cannot order a third party, including funders, to provide such security.

Upon the defendant's motion, the court is obliged to order the claimant to provide security for costs if the claimant has its place of residence, 'usual stay' or a registered office outside the European Union. However, there are a number of cases in which a foreigner cannot be obliged to provide security. In particular, a foreigner cannot be ordered to provide security if it has assets in Poland sufficient to cover the costs of the proceedings, or the parties subject the case to the jurisdiction of Polish courts or the ruling of a Polish court in regard to costs is enforceable in the country where the claimant has its place of residence, 'usual stay' or registered office. In addition, Poland has entered into a number of treaties that release foreigners from the duty to provide security for costs (eg, with China and Russia).

The court calculates security taking into account the anticipated costs the defendant may incur in the first-instance proceedings and the appellate proceedings, except for the costs of counterclaim. The costs that may be incurred in proceedings before the Supreme Court should also be included if an appeal to the Supreme Court is permitted in a given case. Since the aim of the security is to ensure the enforcement of the claimant's payment of adverse costs, the amount of security should in general correspond to the hypothetical amount of adverse costs that the court would order the claimant to pay if it loses the case. The security should be deposited in cash or by wire transfer to the designated bank account of the Polish Ministry of Finance, unless the court decides otherwise. If the security is not paid, the statement of claim will be rejected by the court.

In class action proceedings, upon the defendant's motion, the court may order the class representative to provide security for costs. The security cannot exceed 20 per cent of the claim. The security should be provided in cash or by wire transfer within the term indicated by the court, which should be no shorter than one month.

The defendant seeking security has to convince the court that there is a high probability of the claim being dismissed and that the defendant most likely will not be able to enforce the reimbursement of its costs without the security. In arbitration proceedings before the leading courts of appeal in Poland, the Polish Chamber of Commerce in Warsaw, and Court of Arbitration at the Confederation of Lewiatan, the arbitral tribunal may not order a claimant to provide security for costs.

20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

Third-party litigation funding is irrelevant for the court in respect of deciding on security for costs.

21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE legal expense insurance is not used in Poland. It is disputable if Polish law even permits ATE insurances. There is a risk that they might be deemed as unenforceable or as an illegal wager. Before-the-event legal expenses insurances are permitted, but are not popular.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

It is not obligatory for the litigant to disclose a litigation funding agreement to the opposing party or to the court. The court cannot order the disclosure of funding.

23 Are communications between litigants or their lawyers and funders protected by privilege?

The communication between litigants or their lawyers and funders is not privileged. Nonetheless, Polish law permits litigants and funders to conclude a non-disclosure agreement that would secure confidentiality between them. The breach of the confidentiality established by such an agreement may be deemed a criminal offence pursuant to Polish law in certain circumstances. The parties may also agree on contractual penalties in the case of a breach of confidentiality. The non-disclosure agreement does not release the parties from the duty to disclose information to authorised public bodies if the disclosure of information is mandatory under provisions of law. Moreover, information covered by a non-disclosure agreement may be used in court as evidence.

24 Have there been any reported disputes between litigants and their funders?

According to publicly available information, no disputes between litigants and their funders have been reported.

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25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

The practitioners of litigation funding should be aware that Poland is relatively affordable for litigants in relation to high-value claims.

In domestic litigation, the court fee to file a lawsuit is generally 5 per cent of a claim. The fee for filing a lawsuit in class action proceedings is 2 per cent of the claim. The same fees apply for filing an appeal. Each fee cannot exceed 100,000 zlotys.

In arbitration proceedings before the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, if the claim exceeds 1 million zlotys, the arbitration fee equates to 62,200 zlotys plus 0.9 per cent of surplus over 1 million zlotys. This percentage of surplus being a part of fee is reduced to 0.6 per cent in regard to a surplus over 10 million zlotys, and to 0.3 per cent in regard to a surplus over 100 million zlotys. Arbitration fees at the Court of Arbitration at the Confederation of Lewiatan are similar.