

PANORAMIC

LITIGATION FUNDING

Netherlands



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Litigation Funding

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REGULATION

Overview

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

Third-party litigation funding (TPLF) is permitted in the Netherlands in both litigation and arbitration proceedings. Indeed, over the past few years, TPFL has become increasingly common. This trend has gained traction due to the high need for external funding in complex claims, especially in collective redress cases under the Dutch Act on Collective Damages Claims (WAMCA), which allows for mass claims.

Law stated - 18 September 2024

Restrictions on funding fees

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

There are no statutory limits on the fees or interest that funders can charge under Dutch law. The fees can be freely negotiated between the funder and claimant, subject to article 6:248(2) of the Dutch Civil Code, which allows courts to intervene if they find that a provision of a contract is in conflict with the principles of fairness and equity. In practice, courts rarely intervene. An average compensation of 30 per cent is considered common and reasonable in the Netherlands.

In the context of mass proceedings, courts will consider the reasonableness of the funding arrangements when assessing the financing construction of the claim vehicle at the admissibility stage.

In recent case law of 25 October 2023, the District Court of Amsterdam (ECLI:NL:RB:AMS:2023:6694) gave preliminary guidance on the compensation of litigation funders. The court mentioned that a stipulated compensation could possibly be excessive if it is assumed that a certain percentage of the compensation is applicable regardless of the amount of the damages awarded and regardless of the number of injured parties that can claim damages. The court assumed that a maximum multiple of five of the amount invested by the litigation funder or of the amount made available to the foundation can be considered an appropriate maximum. The court acknowledged that it is entering new territory with this approach and allowed parties to respond to the preliminary principles. While this approach has raised question marks within the Dutch legal community, as at the time of writing, this topic has not been further discussed in the pending proceedings.

Law stated - 18 September 2024

Specific rules for litigation funding

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

Currently, no specific legislation or regulatory provisions apply to third-party litigation funding in the Netherlands if the funding concerns regular and non-collective proceedings. Such

agreements are governed by general principles of contract law under article 6:248 of the Dutch Civil Code, which ensures that contracts adhere to principles of reasonableness and fairness.

However, certain rules applying to collective actions brought forward by a claim vehicle under the Act on Collective Redress of Mass Damages (WAMCA) have implications for funders:

- Article 305a, paragraph 2 of the Dutch Civil Code (DCC) provides, eg, that individuals represented by the claim vehicle must have effective and suitable mechanisms to participate in the decision-making process, and that the claim vehicle possesses sufficient financial resources to pursue the claim. It follows from the parliamentary papers associated with article 305a DCC that a court may review the funding structure between a claim vehicle and a funder and that the claim vehicle (not the funder) must have sufficient control over the legal action.
- Directive 2020/1828 obliges every member state to provide for a representative action procedure for consumers in its national law. The Directive was implemented in the Netherlands on 25 June 2023, although most of the Directive's requirements were already included in the WAMCA, which came into effect on 1 January 2020.
- The [Claim Code](#) 2019 is a body of soft law and a code of conduct for foundations and associations (claim vehicles) that bring collective actions or negotiate collective settlement agreements. The Claim Code gives guidance for the Dutch courts on how to assess the standing of claim vehicles and aspects of third-party funding. It consists of seven comply or explain principles, each with a further explanation of the principle.

Law stated - 18 September 2024

Legal advice

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

Lawyers advising clients in relation to TPLF must adhere to the strict ethical rules of the Dutch Bar Association. These rules emphasise independence, confidentiality and the duty to avoid conflicts of interest, as outlined in the Code of Conduct for Lawyers and article 10a of the Lawyers Act. Any information shared with funders must respect the client's confidentiality. Lawyers must ensure that the client's interests are paramount, not those of the funder.

Law stated - 18 September 2024

Regulators

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

There is no specific public body that oversees litigation funding.

Law stated - 18 September 2024

FUNDERS' RIGHTS

Choice of counsel

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

Third-party funders cannot insist on their choice of counsel, as the client has the ultimate right to choose their legal representation. However, funders may condition their investment on the involvement of a specific counsel accepted by the funder. This is supported by article 6:248(1) of the Dutch Civil Code (DCC), which allows parties to contract freely but within the bounds of fairness. In the context of mass proceedings and at the admissibility stage, the court may pay attention to the funding agreement and would typically assess whether decisions on the choice of lawyers would prevent the client from having control over the litigation process, or would allow the funder to have decisive influence over the claim, or both.

Law stated - 18 September 2024

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

Funders are not considered parties to the litigation and generally cannot participate in hearings or settlement proceedings. However, court hearings are public in the Netherlands, as stipulated in article 27 of the Dutch Code of Civil Procedure, allowing funders to attend without actively participating. For arbitration, confidentiality often applies, and whether a non-party to the proceedings may attend depends on the applicable arbitration rules.

Law stated - 18 September 2024

Veto of settlements

Do funders have veto rights in respect of settlements?

In non-collective proceedings, funders could, in principle, include provisions foreseeing veto rights in a funding agreement. However, according to recent best practices, funding agreements do not foresee a veto right, but only require the funder's consultation before settling a claim. Typically, the funder's interest remains safeguarded given the funder's priority position in the waterfall and the structure of its success fee, which is typically primarily or exclusively based on a time-dependent multiple of the committed amount.

In the context of collective actions, article 305a, paragraph 2, subsection b of the DCC provides that an external funder may not exert decisive influence over procedural decisions, which means that a third-party funder may not have ultimate authority to approve or reject a settlement. The Claim Code 2019, a body of soft law, seems to define 'decisive influence' in stricter terms than the law. Recent court decisions also tend towards a stricter interpretation.

Law stated - 18 September 2024

Termination of funding

In what circumstances may a funder terminate funding?

In principle, litigants and funders are free to agree in the funding agreement on the circumstances entitling the parties to terminate funding. In practice, typical grounds for termination by the funder that may be agreed are:

- a material breach of the litigant's contractual obligations;
- insolvency of the litigant or the opposing party; or
- a change of circumstances leading to a significant decrease in the likelihood of success.

Dutch statutory law allows a contract to be cancelled due to fraud or error under articles 3:44 and 6:228 of the DCC. Furthermore, under articles 6:265 and 6:258 of the DCC, Dutch law allows a contract to be dissolved in the case of fundamental breach or unforeseen circumstances.

Law stated - 18 September 2024

Other permitted activities

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?

Funders may take an active role in litigation through contractual provisions granting them access to case updates, documents or litigation strategy decisions. However, in cases relating to collective actions, such participation rights must be clearly outlined in the funding agreement to ensure that the client retains control over the litigation process and the funder does not exert a decisive influence over the claims (article 305a, paragraph 2, subsection b of the DCC). The Claim Code 2019, a body of soft law, seems to define 'decisive influence' in stricter terms than the law.

Law stated - 18 September 2024

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

Dutch law prohibits fully conditional or contingency fee agreements where a lawyer's fees depend entirely on the outcome of the case. 'No cure no pay' arrangements or a fee set as a percentage of the awarded claims are generally prohibited under the applicable professional rules.

However, lawyers are allowed to agree to fee arrangements that include a (temporary) reduction in the hourly rate applicable to the services, provided that the actual costs are

covered. The reduced hourly rates may be raised if and when the proceedings are completed successfully.

Law stated - 18 September 2024

Other funding options

What other funding options are available to litigants?

Litigants can access other funding options, including the following:

- legal aid (under the Legal Aid Act) for individuals with limited financial resources; or
- legal cost insurance, which may include limitations on the type of claims and typically needs to be arranged before the events giving rise to the dispute have occurred.

In many cases, these options do not constitute suitable alternatives to third-party litigation funding.

Law stated - 18 September 2024

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

Commercial claims in the Netherlands typically take between nine months and several years to reach a decision at first instance. This time frame depends on the complexity of the case and the court's caseload. Cases that include expert evidence, witness hearings and multiple rounds of written procedural documents take longer.

Law stated - 18 September 2024

Time frame for appeals

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

In civil law proceedings, according to the [Annual Report 2023 of Dutch Justice](#), the appeal rate was 11 per cent between 2021 and 2023.

Appeals generally take between one and two years, depending on the complexity of the case, the number of submissions and motions and the court's schedule and caseload.

An arbitral award is binding. Both parties must comply with the arbitral award. Appeals are available at some arbitration boards. If the option to appeal is not included in the applicable arbitration rules, arbitral appeal is in principle only possible if the parties have provided for it by agreement (article 1061b of the Dutch Code of Civil Procedure (DCCP)).

Otherwise, the only remedy open, but without suspensive effect, is the reversal of an arbitral award. However, the threshold for a reversal is high – civil courts are very reluctant to set aside arbitral awards. The grounds are exhaustively defined in the law (article 1065 DCCP).

We are not familiar with statistics of the durations of arbitral appeal proceedings.

Law stated - 18 September 2024

Enforcement

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

It follows from article 430 of the DCCP that judgments and court orders given by the Dutch court are directly enforceable in the Netherlands after service by the bailiff. If the losing party does not comply with the judgment or court order after service by the bailiff, the bailiff could attach the assets of this party.

Judgments from foreign courts are not enforceable in the Netherlands, unless there is a basis for it in a treaty or an act. Judgments from other EU member states in civil and commercial matters can directly be enforced based on the Brussels I bis Regulation (No. 1215/2012).

If the law or treaty concerned does not designate any other route, enforcement is dependent on obtaining an exequatur through the procedure of article 985 et seq of the DCCP.

In the event that any legal or treaty basis is missing, the proceedings can be brought again before the Dutch courts (article 431, paragraph 2 DCCP). The Dutch court must – given the circumstances of the case – assess whether, and to what extent, it grants authority to a decision of the foreign court.

According to Dutch case law, a foreign judgment is in principle recognised in the Netherlands if:

- the jurisdiction of the court that rendered the decision is based on a ground of jurisdiction that is generally acceptable by international standards;
- the foreign decision was arrived at in judicial proceedings that meet the requirements of due and proper administration of justice with adequate safeguards;
- recognition of the foreign decision is not contrary to Dutch public policy; and
- the foreign decision is not incompatible with a decision of the Dutch court rendered between the same parties, or with an earlier decision of a foreign court rendered between the same parties in a dispute concerning the same subject matter and based on the same cause of action, provided that such earlier decision is capable of recognition in the Netherlands.

A distinction must be made between the enforcement of a Dutch arbitral award (ie, if the location of arbitration is in the Netherlands) and the enforcement of an arbitral award made in a foreign state.

The enforcement in the Netherlands of a Dutch arbitral award can – according to article 1062 DCCP – only take place after the interim injunction judge of the district court of the district in which the place of arbitration is located has granted leave to do so at the request of one of the parties.

An arbitral award rendered in a foreign state to which a recognition and enforcement treaty applies may, at the request of either party, be recognised and enforced in the Netherlands (article 1075 DCCP). These procedures are frequently governed by the 1958 New York Convention, which the Netherlands has ratified.

If no treaty of recognition and enforcement is applicable or an applicable treaty allows recourse to the law of the country in which recognition or enforcement is sought, an arbitral award rendered in a foreign state may – according to article 1076 DCCP – be recognised in the Netherlands and enforcement thereof may be sought in the Netherlands by one of the parties, upon presentation of the original, or a certified copy, of the arbitration agreement and the arbitral award, unless the formal requirements listed in article 1076, paragraph 1(A)(a)–(e) are not met or the recognition and enforcement of the award is contrary to public policy.

Law stated - 18 September 2024

COLLECTIVE ACTIONS

Funding of collective actions

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

Class actions and mass claims are permitted under Dutch law and can be funded by third parties. The Dutch legal system, particularly with the introduction of the Dutch Act on Collective Damages Claims (WAMCA) in January 2020, encourages collective actions, and litigation funding is an important component in enabling claimants to pursue large-scale claims.

The Dutch Civil Code explicitly supports mass claims, with the implementation of article 3:305a of the Dutch Civil Code (DCC) allowing a foundation or association to represent a group of claimants to protect their shared interests, and claim damages suffered, in the Netherlands. The WAMCA is based on an opt-out arrangement for Netherlands-based claimants and an opt-in arrangement for individuals who have their place of residence abroad. The law is applicable to cases filed after 1 January 2020 and to mass claims related to events that took place on or after 15 November 2016.

Dutch claim vehicles (and other specific EU member state-approved vehicles) may act both on the claimant's side in their own names and in the names of their articles of association for the benefit of the interests of others. WAMCA imposes certain criteria on these vehicles (in article 3:305a DCC), as does the Dutch Claim Code 2019.

Before the court will deal with the merits of the case, it should first decide, in the admissibility phase, that the claim vehicle meets the admissibility requirements pursuant to article 1018c, paragraph 2 of the Dutch Code of Civil Procedure (the formal requirement) and article 3:305a, paragraph 1-3 of the DCC (the substantive requirements). The claim vehicle must prove, inter alia, to have sufficient funding to cover litigation costs and expertise to maintain control over

the lawsuit itself. Third-party funders are not permitted to have dominant control over the claim or lawsuits, and courts tend to request that the party provide the funding agreement so that the court can – as happened in some recent cases – integrally assess that agreement.

Law stated - 18 September 2024

COSTS AND INSURANCE

Award of costs

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?

According to article 237 of the Dutch Code of Civil Procedure (DCCP), the unsuccessful party pays the costs of the litigation, namely, the extrajudicial and litigation costs. Further, the unsuccessful party must pay the court registry fees.

Litigation costs include, among other things, witness and expert expenses, costs of extracts from public registers, bailiff costs and lawyers' fees. The lawyers' fees are assessed according to a fixed rate (the court-approved scale of costs). These costs usually do not cover the actual costs, but only a small fraction of the total costs incurred.

The actual legal costs the successful party incurred may be compensated in full only in cases related to intellectual property, or in cases of misuse of law.

The courts may order the unsuccessful party to pay extrajudicial costs within the meaning of article 6:96, paragraph 2 of the Dutch Civil Code. This includes the costs of experts and expert opinions (not lawyers' fees). Courts apply the test of reasonableness regarding the decision to incur costs and the amount of costs involved. However, as at the time of writing, we are not aware of any specific judgments whereby the courts have awarded these costs.

In proceedings involving mass (tort) claims, a judge may deviate from article 237 DCCP. According to article 1018L, paragraph 1 of the DCCP the court may in its judgment, if the claim is prima facie unfounded, multiply the fees of the successful party's lawyer at the expense of the unsuccessful party by a maximum of 500 per cent. According to article 1018L, paragraph 2 of the DCCP a judgment involving mass (tort) claims shall also include an order for costs whereby the court may, to the extent necessary, order the unsuccessful party to pay reasonable and proportionate court costs and other costs incurred by the successful party.

Finally, and according to legal literature and legislative history, it seems possible, under article 6:96 of the Dutch Civil Code or article 1018L DCCP, or both, to recover from the liable party the success fee stipulated by the litigation funder in exchange for funding a collective action. The profit and risk fee is central to this. It is plausible that the entire success fee is not fully recoverable. Reasonableness limits the amount, but there is no case law on this aspect in the Netherlands yet.

The Netherlands Arbitration Act does not contain provisions for the recovery of costs. Usually, the parties will have agreed upon specific terms in this regard, for example, by relying on arbitration rules such as the arbitration rules of the Netherland Arbitration Institute (NAI),

which contain express provisions. Otherwise, the arbitral tribunal may allocate costs in the way it deems fit.

Law stated - 18 September 2024

Liability for costs

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

Under Dutch law, third-party funders are not directly liable for adverse costs. A funder may, however, agree to cover the adverse cost risk in the funding agreement. In this case, the funder is obliged to hold the funded party harmless for adverse costs. However, usually adverse costs are relatively low, because they are ascertained on the basis of court-approved scale of costs.

Law stated - 18 September 2024

Security for costs

May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

Dutch law does not provide a basis to order a third party, such as a third-party litigation funder, to provide security for costs.

Article 224 of the DCCP states that all persons not domiciled or habitually resident in the Netherlands who file a claim with a Dutch court or intervene in legal proceedings are obliged, at the request of the other party, to provide security for the costs of the proceedings and the damages they might be ordered to pay.

There is no obligation to provide security, if:

- this arises from a treaty or an EC regulation;
- the cost order is enforceable in the place where the claimant is domiciled or habitually resident;
- it is reasonably plausible that recovery is possible in the Netherlands; or
- this would impede effective access to justice.

Dutch law also does not provide any specific rules on the provision of security for costs by arbitral tribunals. It follows from article 1043b, paragraph 3 of the DCCP that the arbitral tribunal may, in connection with an interim relief, require each party to provide adequate security, for example, for the costs of proceedings and legal assistance.

Law stated - 18 September 2024

Security for costs

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

The fact that the claim is funded by a third party does not influence the court's decision by itself. On the basis of article 224 of the DCCP, a party may order that the other party – if not domiciled or habitually resident in the Netherlands – provide security for the costs of the proceedings and the damages they might be ordered to pay.

Law stated - 18 September 2024

Insurance

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

ATE insurance is permitted in the Netherlands. However, given that adverse costs are usually rather low in the Netherlands, ATE insurance solutions are not as commonly used as in some other jurisdictions. Legal cost insurance, which typically needs to be arranged before the events giving rise to the dispute have occurred, is more frequently used to protect against financial risks in litigation.

Law stated - 18 September 2024

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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?

In principle, there is no legal obligation to disclose a litigation funding agreement to the opposing party or the court.

In the context of mass claims, pursuant to article 305a, paragraph 2, subsection c of the Dutch Civil Code, a claim vehicle must have sufficient resources and control over the legal action. Based on these requirements the court may review the funding agreement in order to assess whether the content of the funding agreement, briefly stated, contains unreasonable agreements or allows for disproportionate compensation for the claim vehicle and the funder.

Pursuant to article 22, paragraph 1 of the Dutch Code of Civil Procedure (DCCP), the court may request provision of the funding agreement between the claim vehicle and the third-party funder. The Dutch Supreme Court in 2002 ordered that there is no obligation for the plaintiff to provide the funding agreement to the defendant(s). In practice, most Dutch courts comply with this rule of reasoning. However, the Court of Amsterdam recently ordered differently, but this judgment can be considered an exception.

Where the court has reviewed the funding agreement and believes the claim vehicle does not comply with the requirements as per article 305a, paragraph 2, subsection c, the claim vehicle may be declared inadmissible in its claim. However, Dutch courts tend to allow the

claim vehicle and the funder to comply with the requirements and to amend the funding agreement accordingly. Courts base their decision on admissibility on the facts available at the time of the judgment and not the facts that were presented on the date of the claim's initial filing with the court. See, for instance, Court of Amsterdam, 10 January 2024, ECLI:RBAMS:2024:83.

Besides the possibility for the court to request the claim vehicle to provide the funding agreement on the basis of article 22 of the DCCP, the defendant may also request to see the funding agreements pursuant to the conditions under article 843a of the DCCP, if the defendant can prove relevance.

The Dutch Arbitration Act does not contain any provisions requiring a party to disclose funding. However, the Netherlands Arbitration Institute (NAI) has introduced in article 8, subsection k of its Arbitration Rules a disclosure requirement regarding external funding of the proceedings. These arbitration rules are in force as of 1 March 2024.

Law stated - 18 September 2024

Privileged communications

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

Communications between a lawyer and client are protected by legal privilege under article 165 and article 843a of the DCCP. The privilege is held by the lawyer, not the client. The funder is not covered by this article. However, it is advisable when the lawyer address their communications to the funder that they also address such communications to their client, to be able to argue that the communication is covered by legal privilege, at the very least. In general, communications between a litigant or their lawyer and the funder can be made subject to non-disclosure agreements, but that will not mean that this communication is protected by legal privilege.

Law stated - 18 September 2024

DISPUTES AND OTHER ISSUES

Disputes with funders

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

On 11 January 2023 (ECLI:NL:RBROT:2023:228), the court in Rotterdam dealt with the termination of the funding agreement by the funder due to the fact that the litigant did not inform the funder properly. The funder therefore claimed damages, which claim was mostly awarded by the court.

The Amsterdam Court of Appeal and Dutch Supreme Court dealt with a case in which the funder claimed to be authorised to take over the litigants' position in pending proceedings based on the fact that the funder qualified as the pledgee of the litigants' claim towards the defendant. See Court of Appeal Amsterdam, 26 July 2022, ECLI:NL:GHAMS:2022:2158.

In the context of mass claims, the *TikTok* (ECLI:NL:RBAMS:2023:6694) and *Airbus* (ECLI:NL:RBDHA:2023:14036) cases highlight how courts scrutinise funding agreements to ensure that funders do not control litigation outcomes.

In the *TikTok* case, the Amsterdam court raised concerns about clauses in the funding agreements that gave funders too much control over litigation strategy and settlements, requiring adjustments to ensure the independence of the claim foundation. The court emphasised the risk of conflicts if funders' interests diverge from those of the claimants.

In the *Airbus* case, the Hague court examined how the foundation SILC became overly dependent on its funders, Therium and DRRT, which allowed them to influence key decisions. The court ruled that such dependency undermined the foundation's independence and highlighted the need for decision-making power to remain with the claimant, not the funder.

Law stated - 18 September 2024

Other issues

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

Practitioners should be aware that litigation funding is not heavily regulated in the Netherlands, and parties must ensure that clear contractual terms govern the funding relationship, including the funder's rights and obligations.

Law stated - 18 September 2024

UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends that should be noted?

Litigation funding is expected to grow in the Netherlands, particularly in mass claims and commercial disputes. The use of collective redress mechanisms under the Dutch Act on Collective Damages Claims (WAMCA) and the potential for higher-value claims have driven increased interest in third-party funding. This trend is expected to continue as more claimants pursue large-scale legal actions that require external financial support. The WAMCA will be evaluated in the course of 2025 and may be amended in light of best practices.

Law stated - 18 September 2024