LEXOLOGY
Getting The Deal Through

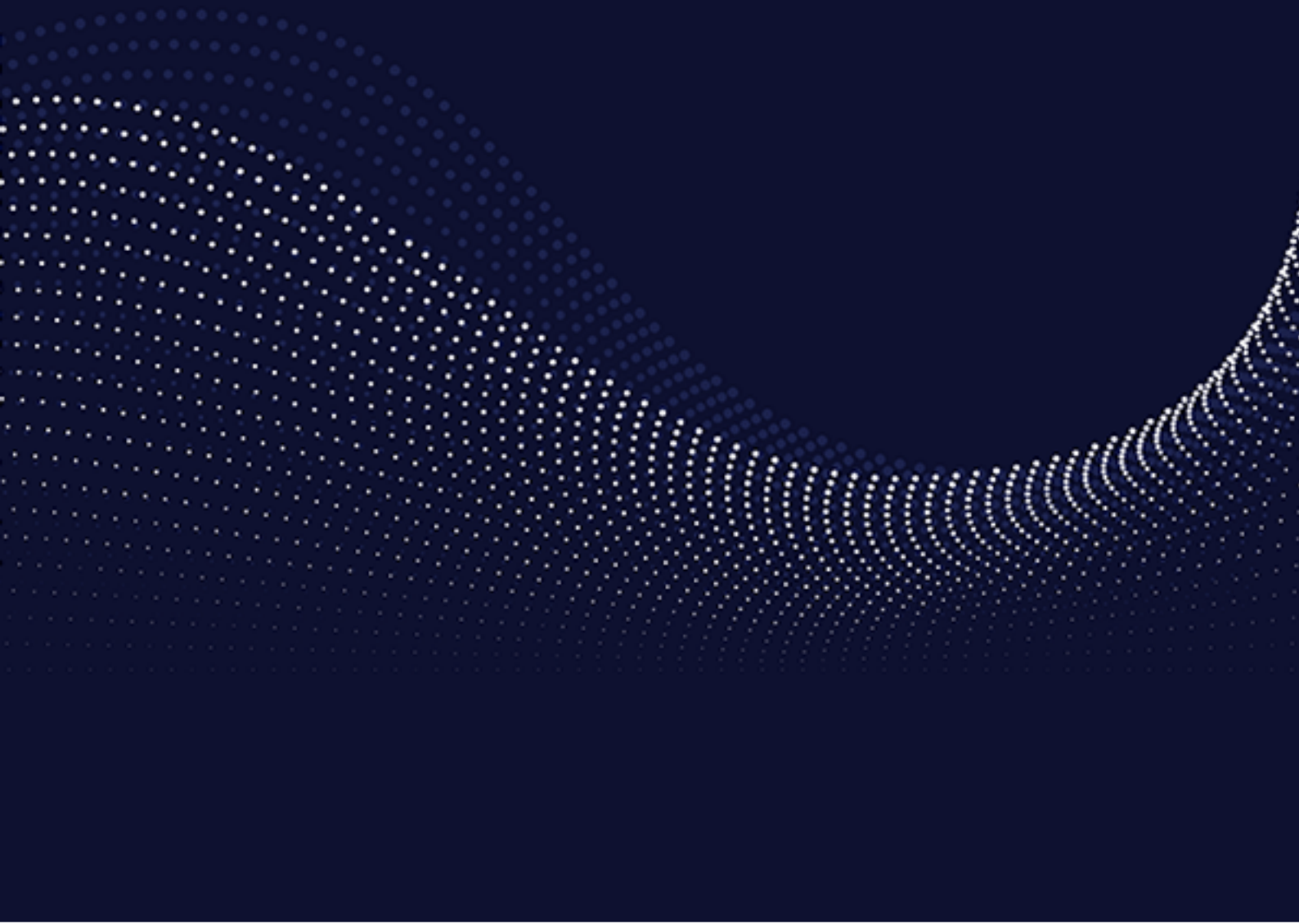
LITIGATION FUNDING

Spain

Contributing Editors

Jonathan Barnes and **Steven Friel**

Woodsford



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REGULATION

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

Third-party litigation funding is not expressly regulated in Spain but it is allowed under the general civil and commercial laws, provided that the funding agreements do not infringe on the law or public order, and that the rules of professional conduct for lawyers are respected. In fact, articles 1526 et seq of the Spanish Civil Code and the case law of the Supreme Court allow for the possibility of buying credit rights in a broad sense, including rights relating to a claim.

Third-party funding is a relatively new practice in Spain and we cannot say that it is commonly used. However, there is a growing interest from the different stakeholders in learning more about this industry, and rising demand from companies and law firms that see litigation funding as a tool to reduce costs and manage risks.

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

Currently, there are no limits on the fees and interest that funders can charge.

At the EU level, the European Parliament has adopted a Resolution of 13 September 2022 (P9_TA(2022)0308) with its recommendations to the Commission on responsible private funding of litigation. The European Parliament requests the Commission to submit a proposal for a Directive to regulate third-party funding and recommends that only under exceptional circumstances should arrangements between litigation funders and claimants vary from the rule that a minimum of 60 per cent of the gross settlement or damages is paid to the claimants. It is to be seen if the European Union decides to regulate this matter.

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

Currently, there are no specific legislative or regulatory provisions applicable to third-party litigation funding in Spain.

At the EU level, the European Parliament is currently promoting an initiative to regulate third-party litigation funding and has requested the EU Commission to submit a proposal for a directive (Resolution of 13 September 2022 (P9_TA(2022)0308)), seeking to ensure a balance between access to justice and providing appropriate safeguards to those engaged in litigation. The European Parliament recommends that member states may determine in accordance with national law whether third-party funding agreements can be offered. Even when this could take years to crystallise, it seems likely that third-party funding will be expressly regulated in Spain at some point.

In the field of commercial arbitration, the Spanish Court of Arbitration Arbitration Rules 2019 and the Madrid International Arbitration Center Arbitration Rules 2020 provide that where a party has received funds or obtained funding from a third party, it shall inform the arbitrators and the counterparty of this fact and disclose the identity of the funder.

Additionally, there are voluntary codes of conduct that govern the conduct of funders when providing litigation funding, to which funders may decide to adhere. One example is the Code of Conduct of the European Litigation Funders Association, to which some Spanish funders, including PLA Litigation Funding, have adhered.

Legal advice

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

In Spain, there are general rules of professional conduct for lawyers that apply to lawyers advising clients in any given situation, such as the General Statute of the Spanish Legal Profession (2021), the Code of Ethics of the Spanish Legal Profession (2019) and the regulations of the different bar associations.

Although these rules are not specifically designed to regulate third-party litigation funding, they do apply to lawyers advising clients in relation to third-party litigation funding. They cover matters such as legal privilege, independence, avoidance of conflict of interest, publicity, relationships with clients, opposing parties and other legal professionals.

Regulators

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

To our knowledge, public bodies in Spain have not yet expressed any particular interest in or oversight over third-party litigation funding.

In the private sphere, there is an ongoing debate between legal professionals, legal associations and third-party funders on whether litigation funding should be regulated, and if so, to what extent.

FUNDERS' RIGHTS

Choice of counsel

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

According to the general principles of Spanish law and the professional and ethical rules that apply to the legal profession, claimants should have the right to freely choose their counsel. This principle is closely related to the independence of lawyers and to the avoidance of conflicts of interest.

However, there are no specific provisions in the Spanish legislation concerning the possibility of delegating the choice of counsel to a third party. In our opinion (and depending on the circumstances), the validity of this practice could be questionable.

In practice, most of the third-party funders acting in Spain follow the best practices of the industry and allow funded parties to freely choose their counsel, without insisting on or imposing the funder's choice of counsel.

At the same time, it is important to point out that the background, track record and expertise of the legal team chosen by the funded party are factors that the third-party funder will undoubtedly consider when deciding whether or not to fund a case.

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

Judicial proceedings are governed by the principle of publicity recognised in the Spanish Constitution, whereby court hearings are generally open to the public. In consequence, funders can attend hearings if they wish.

Regarding participation in court hearings, in theory, any person or entity with a direct and legitimate interest in a claim can request to participate in the proceedings under the Spanish Civil Procedure Rules. In practice, the court has wide discretion to order the participation of third parties and we consider it difficult for a funder to be allowed to participate. To date, there are no judicial precedents of the application of these provisions to third-party funders.

In arbitration proceedings, the general rule is that hearings are closed to the public unless the parties agree otherwise. Accordingly, funders can only attend or participate in arbitration hearings if there is no objection by the counterparty, or if this is allowed by the applicable arbitration rules and by the arbitrators.

The participation of litigation funders in settlement discussions would depend on the specific agreement reached between the funded party and the funder. Best practice dictates that the funder should not directly participate in settlement negotiations.

Veto of settlements

Do funders have veto rights in respect of settlements?

In Spain, funders have no veto rights in respect of settlements. Funders usually ask to be informed of any settlement negotiations and settlement offers received, and generally give their opinion to the funded parties. But the decision to settle a dispute ultimately lies with the funded party, with the advice of its legal team.

It is market practice not to include veto rights on settlements in litigation funding agreements, but to regulate the economic consequences of the funded party settling the claim in different thresholds. This way, funded parties know and accept from the outset what their share of the proceeds would be when settling the claim for any given amount, and the funders can ensure a fair return on their investment.

Termination of funding

In what circumstances may a funder terminate funding?

As third-party funding is not expressly regulated in Spain, the general rules of commercial contracts apply to the termination of litigation funding agreements. Consequently, a funder may terminate funding if there is a repudiatory breach of the litigation funding agreement. In the end, this will depend on the specific contractual terms agreed by the parties.

It is usual practice to include generic termination clauses pursuant to which the funder can terminate the funding agreement, for instance in the case of a material breach of the litigant´s obligations under the agreement; and also, specific clauses in line with the Code of Conduct for Litigation Funders (2018) of the Association of Litigation Funders of England and Wales. This Code allows a funder to terminate funding if the funder:

- reasonably ceases to be satisfied with the merits of the dispute;
- reasonably believes that the dispute is no longer commercially viable; or
- reasonably believes that there has been a material breach of the litigation funding agreement by the funded party.

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?

There is no specific regulation requiring funders to take an active role in the litigation process. The role of the funder will depend on what the parties agree to in the funding agreement while respecting the applicable legislation.

Funders may play an active role in assisting the litigants and their lawyers in strategic decisions about the conduct of the case, and giving an objective and independent opinion at any stage of the proceedings. This is often very useful, given funders' expertise in managing complex litigation.

Depending on the agreement of the parties, funders may also coordinate or act as a link between the different parties involved in the litigation or arbitration, such as lawyers, court representatives, experts and other service providers – in any case, bearing in mind that the litigant will always have control of the case and respecting the applicable professional and ethical rules.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

In Spain, litigation lawyers may enter into conditional or contingency fee agreements. Quota litis agreements (damages-based agreements) are permitted and they are actually quite

common in court proceedings. Competition in the Spanish legal market is very high and many firms and sole practitioners seek to compete on price, offering damages-based agreements.

On the other hand, conditional fee agreements of the kind we encounter in other jurisdictions (where the success fee is expressed as a percentage uplift over and above the time costs amount that would be payable if there was no contingency fee agreement) are not common. This is because the general practice in Spanish litigation is to agree with the client a fixed fee depending on the complexity and quantum of the case, or to cap the maximum fees if acting on an hourly-rate basis. In any case, it is common to combine these fixed fee or hourly-rates fee agreements with a success fee, which is usually a fixed amount agreed upon beforehand or a percentage of the amounts recovered.

Other funding options

What other funding options are available to litigants?

Other funding options available to litigants include:

- private funds;
- union and association funding;
- insurance, such as motor, home, directors' and officers' insurance;
- legal aid, although it is rarely applicable to complex litigation; and
- litigation funding.

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?

According to the latest official statistics published by the Spanish judiciary, the average duration of ordinary proceedings at first instance in civil courts was 16 months in 2022.

In commercial courts, the average duration of ordinary proceedings at first instance was 20 months in 2022. Commercial courts have jurisdiction to hear insolvency proceedings and specific matters such as legal claims relating to unfair competition, intellectual property and maritime law, among others.

In arbitral proceedings in Spain, arbitral awards are typically issued in 10 to 15 months. The duration of the proceedings differs depending on the arbitral institution and applicable rules.

In any event, the timescale to receive a judgment or arbitral award will depend on several factors, especially the workload of the specific court and the complexity of the proceedings.

Time frame for appeals

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

According to the latest official statistics published by the Spanish General Council of the Judiciary, 16.7 per cent of the judgments made by civil and commercial courts were appealed in 2022. To correctly analyse this figure, it is important to note that judgments made in the small claims track, juicios verbales, for claims with a value of up to €3,000 cannot be appealed.

According to public data, the average duration of appeals in civil ordinary proceedings ranges between 5.1 and 19.3 months, depending on the region. The national average for 2022 was 12 months.

Enforcement

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

According to the official statistics published by the Spanish General Council of the Judiciary, Spanish civil and commercial courts registered 536,951 applications to enforce judgments in 2022, and 522,426 in 2021. Considering that the civil and commercial proceedings initiated amounted to 2,809,693 in 2022 and 2,587,127 in 2021, we can conclude that a relevant proportion of judgments (around 20 per cent) require contentious enforcement proceedings.

In general, judgments (and arbitral awards) are easy to enforce in Spain. The claimant must file a claim for the enforcement of the judgment, and the court will examine the formal requirements and issue an enforcement order. The grounds for the debtor to challenge the enforcement are very narrow and the courts have powers to investigate the debtor's assets within the jurisdiction.

In any case, the ease of enforcing a judgment depends on several factors, mainly on the type of order made by the judgment and on the kinds of assets that the defendant has within the jurisdiction. If a judgment orders the payment of money and the defendant has money in bank accounts within the jurisdiction, enforcement proceedings are usually quite straightforward. Funds in bank accounts can be easily frozen and deposited in the court's bank account.

If the judgment that is to be enforced contains an order different from the payment of money, or if the defendant has no money in bank accounts within the jurisdiction and other assets need to be seized, the enforcement proceedings become more complex and burdensome.

COLLECTIVE ACTIONS

Funding of collective actions

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

Collective or representative actions are permitted in Spain for consumer claims, but only certain subjects have legal standing to file them and to act for the consumers. These include:

- legally constituted consumer associations and representative consumer associations;
- groups of consumers aggrieved by a harmful event – provided that the claims are filed by the majority of the consumers pertaining to the relevant group; and
- the public prosecution service.

While individuals cannot file class actions, it is possible to join several claims in a single set of proceedings, provided that the claims are based on the same facts. In any case, courts are usually reluctant to allow the joinder of many claims in a single set of proceedings.

These restrictions and the lack of a comprehensive regulation make the viability of class actions and group actions very limited in Spain as compared to certain other jurisdictions. However, there has been a push in recent years to facilitate class actions in Europe in general and in Spain in particular. In 2020, the European Union adopted Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. This Directive sets out rules to ensure that a representative action mechanism for the protection of the collective interests of consumers is available in all EU member states, while providing appropriate safeguards to avoid abusive litigation.

Given the current regulation of collective actions in Spain, it would be unusual for them to be funded by third parties. Directive (EU) 2020/1828 contemplates the possibility that these actions be funded by third parties, and this option has been positively seen by the Spanish legislator and included in the Preliminary Draft Bill on representative actions for the protection of the collective interests of consumers. It remains to be seen how Spain transposes this Directive, and what changes are made in relation to class or group actions and in relation to third-party funding.

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?

The general rule in the Spanish legal system is that costs follow the event. The courts shall order the unsuccessful party to pay the costs of the successful party, provided that the successful party has succeeded in all of its pleadings. This general rule may be excepted if the court considers and reasons that the case poses serious doubts on points of fact or points of law, or both.

If the successful party has succeeded only in some but not all of its pleadings, each party shall bear its own costs, unless the court considers that a party has been reckless in bringing or defending the claim.

It is important to note that costs are not based on an indemnity principle, so litigants are not truly entitled to recover all the costs incurred. The costs are assessed by the court's clerks and usually amount to a percentage of the quantum of the claim, in line with the non-binding guidelines of the different Spanish bar associations. The recoverable legal costs

(excluding court representatives' fees) are in any event limited to a maximum of one-third of the quantum of the claim.

The position differs a little in relation to arbitration, where the arbitrators usually have wider discretion to decide on adverse costs issues. The answer will ultimately depend on the agreement of the parties, the applicable arbitration rules and the criteria of the arbitrations appointed.

There is no provision in Spanish law that allows courts to order the unsuccessful party to pay the litigation funding costs of the successful party, nor are we aware of any case law in this regard. Litigation funding costs do not qualify as 'costs' under the Spanish Civil Procedure Rules, and we do not consider that they qualify as recoverable 'expenses' either.

Liability for costs

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

Spanish legislation and case law do not contemplate the possibility of holding a third-party litigation funder liable for adverse costs. In principle, only the parties to a case can be held liable for adverse costs.

Moreover, in a typical litigation funding agreement structured as a silent partnership under Spanish law, the silent partner (namely, the funder) would be protected from claims by third parties pursuant to article 242 of the Spanish Commercial Code, and therefore cannot be held liable for adverse costs.

This is regardless of the contractual relationship between a party and a third-party litigation funder, under which the parties to such contract may agree that the litigation funder covers the risk of adverse costs. In any event, the doctrine of privity of contract will apply; therefore courts cannot hold a third-party litigation funder liable for adverse costs even if a contract of this kind exists.

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?)

The Spanish Civil Procedure Rules do not provide for the possibility of ordering a claimant or a third party to provide security for the defendant's costs. A defendant cannot apply for security for costs via an application for an interim injunction either, since the possibility of applying for interim injunctions is restricted to claimants.

In commercial arbitration with a seat in Spain and to which the Spanish Arbitration Act applies, the arbitrators may have discretion to make an order for security for costs. There is neither clear case law nor a uniform approach to security for costs applications and the answer will ultimately depend on the agreement of the parties, the applicable rules and the discretion of the arbitrators. In our experience, unless otherwise agreed by the parties, arbitrators (especially international arbitrators) are increasingly assuming that they have the

power to decide on security for costs applications. In any case, security for costs orders in arbitrations sited in Spain is still rare.

Security for costs

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

As the Spanish Civil Procedure Rules do not contemplate the possibility of ordering a claimant or a third party to provide security for costs, the fact that a claim is funded by a third party does not influence the court's decision in this regard.

In arbitration, there is no settled position, mainly because security for costs applications is not as common as in certain other jurisdictions, and because third-party funding is relatively new in Spain.

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 Spain, but it is not commonly used. The moderate risk of adverse costs and the lack of local ATE providers make it not worth taking out ATE insurance in most cases.

Nonetheless, claimants are becoming interested in ATE insurance, especially for complex disputes in which litigation funders are involved. ATE insurance is increasingly being demanded in complex international arbitrations, portfolio litigation and mass litigation.

Common insurances used by claimants in Spain include car insurance and home insurance, which normally include civil liability insurance and legal expenses insurance to cover the costs of a legal action related to the insured risks.

In the business context, there are insurance policies that cover the risk of non-payment of commercial debts. These insurances must normally be taken out before the prospect of non-payment and consequent legal proceedings arise.

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 civil court proceedings, litigants have no obligation to disclose a litigation funding agreement to the opposing party or to the court.

In Spain, there is no disclosure and inspection, or discovery as compared to certain other jurisdictions, such as England and Wales and the United States. The parties can only request

that the opposing party produce specific documents provided that they refer to the subject matter of the dispute or constitute relevant evidence. The courts retain discretion to decide on such applications and are normally reluctant to order the production of documents unless they are truly relevant to decide the dispute. Based on this and in the absence of judicial precedent, it would be unlikely for a court to compel disclosure of a funding agreement.

In commercial arbitration, the procedure is more flexible, and arbitrators normally have a wider discretion to order the disclosure or production of documents. Soft-law instruments and arbitration rules of some arbitral institutions in Spain have promoted the need to disclose the existence of third-party funding agreements and the identity of the funder to avoid potential conflicts of interest. In this regard, the Spanish Arbitration Club Code of Good Arbitration Practice 2019, the Spanish Court of Arbitration Arbitration Rules 2019 and the Madrid International Arbitration Center Arbitration Rules 2020 provide that where a party has received funds or obtained funding from a third party, it shall inform the arbitrators and the counterparty of this fact and disclose the identity of the funder.

Privileged communications

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

Any spoken or written communications between a party's lawyers and a funder is protected by legal privilege, secreto professional, and must be kept confidential. This also includes communications between a party's in-house legal counsel and a funder.

In theory, legal privilege would not extend to the relationship between the funded party and the funder. However, if the relationship is between the funded party and the funder's lawyers, there are grounds to argue that their communications should also be protected by privilege. Given the relative novelty of litigation funding in Spain, there is no authority in this regard. In any event, funding agreements usually contain strict confidentiality clauses that may protect the parties from unwanted disclosure.

Also, the lack of disclosure and inspection, or discovery as compared to certain other jurisdictions, such as England and Wales and the United States, protects the parties from unwanted disclosure.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

We are not aware of any disputes between litigants and their funders in Spain being reported.

Other issues

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

In the contentious-administrative jurisdiction, practitioners should be aware of Supreme Court Judgment No. 53/2020 of 22 January 2020. In this judgment, the Supreme Court (Contentious-Administrative Chamber) found that, unlike in civil proceedings, in claims for damages against the Spanish public administration, litigants are not allowed to sell their litigious or contentious credit rights or rights to claim (or both). Litigants would only be allowed to sell their credit rights if those credit rights have been acknowledged by a final administrative decision or by a final court judgment.

The judgment contains a dissenting opinion of Justice Mr Ángel Ramón Arozamena Laso, which supports the possibility of selling future credit rights and specifically addresses the practice of third-party funding.

UPDATE AND TRENDS

Current developments

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

The litigation funding market has matured in Spain over the past few years. Funders are becoming common players in the dispute resolution landscape.

This trend has been confirmed by the First PLA Survey on the Spanish litigation funding industry 2021–2022, where 74 per cent of respondents have a medium to high probability of using the services of litigation funds in the short to medium term.