

# FUNDING IN FOCUS

## CONTENT SERIES

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REPORT TWO

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# Contents

Welcome to the second edition of Funding in Focus, a collaboration between Vannin Capital and Legal Week Intelligence. In this edition we have captured the views of a broad range of stakeholders. Each article draws upon the authors' own experiences, be that as a barrister, judge, auditor, solicitor, general counsel or funder, providing a range of perspectives on the past, present and future status of the global dispute resolution landscape and the impact of litigation funding on that landscape.



*Rosemary Ioannou,  
editor and senior counsel,  
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# ● The view from the board



*'I'm not interested in the legal principle... That's what the lawyers are for. I'm in it for what's the most effective result for my business and my finance guys.'*

*Andrew Magowan,  
general counsel, Asos*

The consequences of getting litigation wrong are clear: the business is exposed to unnecessary and hazardous risk, executives are distracted by the process and the financial downsides of an unsuccessful claim are only too real. So how can businesses make sure they protect themselves from the worst of the risks? What role should the financial director (FD) play in assessing legal strategy, and what should a good general counsel (GC) bring to the table to make sure costs are kept under control in case litigation does become a real possibility?

Different companies will take different approaches – for some it's a question of internally bridging the gap between finance and legal, while for others techniques such as third-party litigation funding come into the mix as a means of mitigating both financial and legal risk.

Understanding both the legal and financial implications of a particular strategy is vital if the business is to protect itself from the worst risks. Indeed, according to exclusive research conducted by Legal Week Intelligence over half (64%) of in-house respondents polled say their litigation spend has increased over the past two years.

It's vital, therefore, that finance and legal come together to ensure that litigation is properly handled. For FDs, the need to work closely with general counsel to understand the potential pitfalls of any legal strategy is paramount. But our survey shows that this doesn't always happen: only 44% of those polled confirmed that the FD (or fellow senior finance manager) was always consulted. That may be as a result of time pressure,

or the FD not at ease with legal matters. Whatever the reason, the disconnect is a concern.

Robin Brown is FD of United Biscuits. He has been intimately involved with several legal proceedings as part of his job, one in particular that threatened to end in significant litigation.

"Back in 2005, we had a big flood at our Argyle biscuit factory, one of the biggest biscuit factories in the UK," he recalls. "As a result, with the factory temporarily under water, and out of production for quite an extended period of time, it had a big impact on our sales in the market."


"We had a business interruption policy with our insurers so obviously that brought us into an involved process of running a claim under the insurance. As a result I was heavily involved in working on that, together with our head of legal."

Brown says his focus fell very much on the detailed work of getting the right advisory

support to help the business, "So we used an independent advisor to help with loss assessment and advise us how the whole process would work," he explains. "They helped us look at how much it might cost to litigate the claim and how the insurer would look at it to make sure that we got the best position possible on the insurance cover."

In addition to insurance advice, Brown also engaged KPMG as forensic accountants in order to validate United Biscuits' position and its own assessment of the impact which the flood had had on the business.

"That was a lengthy and quite tortuous process and at the end we felt we had a big claim and the insurers were trying to loss adjust it down," he remembers. "But after quite a bit of negotiation (and once it got to the point where we were running presentations in London back to the other insurers up the chain who were also involved, trying to explain to them what was happening) we ended up taking legal counsel that we were prepared to litigate on this particular subject if we needed to."



It's a familiar story for many FDs, who, faced with an uncertain outcome in a legal proceeding, turn to the legal team for help and advice not only on the technicalities but also on the possible financial risks in proceeding.

For Andrew Magowan, GC at online fashion retailer Asos, the issue is also familiar. In his view, when these situations arise, the GC role must encompass a firm grasp of the financial impact of any potential litigation.

"I'm an initial screener, so I may kill certain ideas that various members of my department might have if I don't think there's enough in them. Certainly I'm not going to push them forward without being aware of their potential impact on the business, not just from a cost perspective but also the outcomes of it," he says. And those outcomes are not just financial – there are the potential PR risks, not to mention the drag on precious management time. "I don't go ahead with anything without making sure that they're aware of it and to be honest, if it was big enough, I'd even want to take it to the rest of the execs and quite possibly the plc board just to check that they're alright with it," Magowan says.

The GC is at pains to point out the difference in approach depending on whether the company is defending an incoming claim, or launching an outgoing action. "With an incoming claim there is not a lot you can do," he says. "You are there and you've got to deal with it. But launching an outgoing claim is a voluntary choice, you engage in something that could be a huge distraction in terms of time that you don't have, so to do it is about way more than just numbers."

Of course, many FDs are taking a safety first approach to litigation, with risk uppermost in the mind. However, while this makes sense in the majority of cases, there are times when a different approach is called for. As the Legal Week Intelligence research shows, 56% say 'yes, frequently' or 'somewhat frequently' that the costs of litigation has resulted in not pursuing a meritorious claim.

Critically, it is in managing budgets that the GC can really add value to the finance team. That is backed up by the Legal Week Intelligence research. Of the in house GCs polled, the vast majority confirmed they worked with the finance department to provide a budget before starting any new

litigation. Encouragingly, almost 9 out of 10 reported they stuck to the budget and stayed within the limits set.

However, there is a flipside to that: the research also shows that 28% of respondents say their external counsel never come within budget and only 8% say they 'always' come within budget. Indeed, more worryingly, 14% do not even set a budget. It is in scenarios like this that financial risk can rear its head, and where solutions such as

*'The need for clear understanding of the financials is clearly desirable... many in-house lawyers report that finance directors have blocked meritorious claims citing costs risks.'*

third-party litigation funding can offer a way of mitigating the worst of the risk.

For his part, Magowan is clear that the GC should take the lead in the process of assessing potential downsides of litigation. "That should be my number," he says. "It should be me telling them and convincing them that it's the right number and I quite openly talk to them about what we should be fighting for and what we shouldn't be. They expect me to bring them a very reasoned and clear rationale of what it's going to cost in terms of fees."

This sentiment is supported by the Legal Week Intelligence research. The need for clear understanding of the possible financials is clearly desirable, but despite this, many in-house lawyers report that finance directors have blocked meritorious claims citing cost risks. 56% said this had happened to them on occasion, a worrying

statistic considering the potential upside of pursuing a meritorious claim.

But what does Magowan need from his finance counterparts in order to successfully run a claim? "The flipside is I need to understand exactly what they need from me in order to be allowed to run it. I don't see how you can leave it to them. I'm paid to assess that. It's my head on the block if it goes wrong, it's the way it should be so it has to work like that."

The GC explains that, as a well-known fashion retailer, Asos can sometimes land in the crosshairs of rivals, facing (usually frivolous) accusations of copyright infringement over certain designs. In the past that would often force the legal team to spend time and money arguing over the matter with the claimant; strategy not only expensive in terms of fees but also exposing the company to significant brand risk, when all it would take is a competitor or supplier to post on social media complaining of bullying tactics from the big bad fashion giant.

Now, it's different. "When I came in and told the team, I don't care whether we're right or wrong or not; what does it look like? If it looks dreadful and we get out of it and then it's a matter of how much it will cost to defend using lawyers. And often it's as simple as saying, as long as I offer the person less than the possible fees then it makes sense."

So while the GC is balancing the probabilities of successful litigation, Brown is firmly of the belief that the FD brings a unique viewpoint





to the debate. "I think for us it's more about understanding what is the quantum and what's the balance in terms of probabilities, (not that you'll ever get that so clearly spelt out by a lawyer)," he says. "And it's also trying to get some sense of the strength of

But ultimately that's why you employ a litigator: to take a look at the strength of your argument to come back and give you a perspective on what's the best approach for a claim based on the facts they've been provided with as to how likely you are to succeed. In the end you're asking people for their professional judgement and then deciding internally based on that whether we think we need to go there."

Indeed, Magowan points out that establishing the GC's financial bona fides can make that conversation a more



*'They helped us look at how much it might cost to litigate the claim and how the insurer would look at it to make sure that we got the best position possible on the insurance cover.'*

*Robin Brown,  
financial director, United Biscuits*

who can step into the breach and underpin any litigation strategy.

*'It is in scenarios like this that financial risk can rear its head, and where solutions such as third-party litigation funding can offer a way of mitigating the worst of the risk?'*

our case and therefore are we going to get the payback from going through that."

So what does that mean in practice? Brown says that the disciplines must work closely together, but with a clear division of duties. "I think as FD you end up being an interested layman to a certain extent. Of course you're part of the conversation, which allows you to get a sense from the conversation in the room and the tone.

productive one. "I'm not interested in the legal principle," he says. "That's what external lawyers are for. I'm in it for what's the most effective result for my business and my finance guys, the rest of my business colleagues I think know that that's what I am."

Of course not all GCs may feel quite so sure-footed in delivering financial risk assessments – which has led to a growth in external advisory as well as litigation funders

Both Brown and Magowan agree that in an uncertain arena – litigation is never a sure thing – what the FD needs from the GC is a rational, clearly set out assessment of the positive, and more importantly, the negatives and the potential impact on the business. "I'm not really interested in winning an argument, I never really have been," says Magowan. "It has to be about what's the most effective thing for the business overall."



# The view from abroad

Competition between jurisdictions in Asia keen to promote themselves as hubs for international arbitration is flourishing: Hong Kong and Singapore remain at the forefront, but other contenders like South Korea are emerging. The leading institutions with origins in the region, the Hong Kong International Arbitration Centre (HKIAC) and Singapore International Arbitration Centre (SIAC) have seen significant growth in their caseloads over the last 10 years, and demonstrated that they are at the forefront of innovation in arbitral procedure. The future of arbitration in the region looks bright.

## Growth of international arbitration in Asia

The growth of international arbitration in Asia is evident from a number of sources. Perhaps the simplest way of demonstrating such growth is through statistics. The two main regional hubs have seen significant growth in terms of caseload over the last 10 years: new cases handled by SIAC have grown from 74 in 2005, to 160 in 2009, to 222 in 2014, with the cases now handled by the HKIAC and SIAC predominantly international in nature. In 2014, 93% of the HKIAC's new administered arbitrations were international, featuring parties from 38 jurisdictions (by comparison, in 2011, 65% of the HKIAC's cases were international).

Indeed it would no longer be right to characterise HKIAC and SIAC as regional institutions: they now have a place on the global stage. The quality of their case management services and secretariats rivals that of other global players. Both have been active in making revisions to their rules and procedures, not just reflecting the evolution of international arbitration practice, but often leading the way in terms of innovation. For example, in July 2015 the HKIAC announced a new system that allows users to evaluate the conduct of their arbitral proceedings and the performance of arbitrators. It would not be surprising if other institutions follow.

There are other indicators of growth. The

presence of institutions with origins from outside Asia has increased over the last 10 years. In 2008 the International Commerce Centre (ICC) opened a branch of its secretariat in Hong Kong, and a liaison office in Singapore. The London Court of International Arbitration (LCIA) opened its first independent subsidiary in India in 2009. In May 2013 the Seoul International Dispute Resolution Centre was established and a number of international institutions have a presence there, including the ICC, SIAC, HKIAC, the American Arbitration Association (AAA) the International Centre for Dispute Resolution (ICDR), and the LCIA. Similarly the number of law firms seeking to establish an international arbitration practice in the region has grown significantly, particularly in the last two to three years.

This growth is attributable to a number of factors.

Governments in the region have recognised the benefits of promoting their jurisdictions as centres for international arbitration. In 2008 the Secretary for Justice of Hong Kong publicly stated that it was a "policy objective" to strengthen Hong Kong as a centre for arbitration. Since then the Arbitration Ordinance in Hong Kong has been significantly revised and, in combination with an independent, experienced and pro-arbitration judiciary, Hong Kong has cultivated the right legislative and judicial environment in which

international arbitration can flourish. Users are becoming more sophisticated and varied. Whereas historically parties in Asia commonly chose an established seat outside the region, including in particular London, they are now much keener to resolve disputes within the region. This has been a major factor driving growth. A further factor has been the growth in the popularity of arbitration among a wider variety of users. For example, banks and financial institutions have historically preferred to resolve their disputes in the courts, but within Asia are increasingly relying on arbitration to resolve disputes (particularly for ISDA agreements, in private wealth management and private equity). The expansion of arbitration into new sectors has also contributed to growth.

The enforcement benefits of the New York Convention are often cited as a key reason for the popularity of arbitration. This benefit is all the more real within Asia, where there is no widespread cross-border enforcement mechanism for the enforcement of court judgments (unlike within the EU and across states in the USA). As a result, the increase in cross border disputes is a key driver underlying the growth of arbitration in the region. The growth in cross border disputes within Asia has in turn been driven by increasing cross border transactions and investment. The United Nations Convention on Trade and Development (UNCTAD) reports that Foreign



*'If arbitration hubs want to continue attracting business in the longer term, they will need to ensure they have a framework in place which permits users to have access to third-party funding.'*

*Frances van Eupen  
partner, Allen & Overy*



Direct Investment (FDI) inflows across Asia have increased from 15.9% of the world total in 2008 to 31% in 2014, and that China has surpassed the US to become the largest FDI recipient in the world. Similarly FDI UNCTAD figures reveal that FDI outflows across Asia have increased from 9.8% of the world total in 2008 to 28.3% in 2014. There is every sign this trend will continue. The Asian Development Bank estimates that investment in infrastructure across Asia will exceed \$8 trillion between 2010 and 2020, and of course big infrastructure projects often spawn complex disputes.

Against this background, the future of international arbitration in Asia looks bright. Yet, to stay at the forefront of international dispute resolution, it is necessary to evolve in line with user demands and international practice. And if jurisdictions within the region want to remain competitive into the future, one important area which merits attention is the use of third-party funding.

#### Third-party funding in Asia

The growing enthusiasm for third-party funding which was identified in the first "Funding in Focus" series gives food for thought. 52% of in-house respondents said they would be open to using third-party funding. This reflects a significant level of potential demand and so, if arbitration hubs want to continue attracting business in the longer term, they will need to ensure they have a framework in place which permits users to have access to third-party funding.

Currently the position with respect to the permissibility of third-party funding across Asia is somewhat patchy. But there is momentum towards reform, particularly in Hong Kong. Perhaps this is best reflected by the fact that two funders (Burford Capital and Harbour Litigation Funding) have announced they are launching in Hong Kong with a view to financing arbitration (and certain other types of claims) throughout the region. Other funders, including Vannin Capital, service this market from outside the region.

In Hong Kong, principles of maintenance and champerty apply, by virtue of section 3 of the Application of English Law Ordinance (Cap 88), which imported common law and rules of equity into Hong Kong, and remain applicable by virtue of Article 8 of the Basic Law. However, judicial pronouncements have narrowed the scope of the doctrines, and sought to confine the doctrine of champerty to litigation proceedings.

In particular, in *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 HKC 179, Kaplan J (as he then was) rendered a judgment in which he considered the history of champerty (whose precise origins are difficult to trace but whose importance by medieval times was clear) and concluded that it was not appropriate to extend the doctrine from the public justice system to the private consensual system of arbitration in circumstances where the reasons for its introduction had long since passed. In a prescient observation he noted that "to subject international parties to a rule of law which is not applicable in many other jurisdictions will be to make Hong Kong a less desirable venue for international arbitration".

In *Unruh v Seeberger & Anor* [2007] 2 HKC 609, the Hong Kong Court of Final Appeal examined the evolution in the concepts of maintenance and champerty and observed that their prohibition involves "a value judgement that certain conduct should be considered 'officious intermeddling' in someone else's litigation... which deserves to be made unlawful. Unsurprisingly, the content of that value judgement has fundamentally changed, reflecting the radical development of society in general and of the legal system in particular over the last 700 years." The Court of Appeal concluded that it would be inappropriate for the Hong Kong courts to strike down an agreement on the grounds of maintenance or champerty in circumstances where mature commercial parties had chosen to arbitrate in a jurisdiction (the Netherlands) which does not recognise those concepts.

In light of these and other judicial pronouncements, as well as calls for consideration of this issue by the Hong Kong legal community, the Law Reform Commission established a sub-committee, chaired by Kim Rooney, to consider the use of third-party funding in arbitrations in Hong Kong and whether reform is needed. Their report is due to be published soon; indeed speculation is rife that it will be published in time for Hong Kong arbitration week in October. Of course we will have to see precisely what the sub-committee recommends, but there is certainly momentum towards reform.

In Singapore, third-party funding arrangements are normally unenforceable in both litigation and arbitration proceedings, subject to limited exceptions. In the 2007 case of *Otech Pakistan Pvt Ltd v Cough Engineering Ltd* [2007] 1 SLR (R) 989, the Court of Appeal concluded that the law of champerty applies to all types of disputes, whether the parties have chosen to

refer them to the courts or to a private system like arbitration. The court observed that "the concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation."

The more recent decision of the Singapore High Court in *Re: Vanguard Energy Pte Ltd* [2015] SGHC 156 perhaps demonstrates a greater willingness on the part of the Singaporean judiciary to tolerate funding arrangements, although the decision was focused on funding in the context of insolvency proceedings under section 272(2)(c) of the Companies Act (Cap 50).

During a speech in August 2013, Chief Justice Menon observed that the growth of third-party funding in Asia and associated issues "will reach Asia" and called for appropriate regulation. In 2014 the Law Reform Committee of the Singapore Academy of Law prepared a report which concluded that litigation funding ought to be permissible subject to regulation. The sense is that the tide in Singapore is gradually turning.

The permissibility of third-party funding at the seat of arbitration is only part of the picture. Claimants considering using third-party funding would be well advised to consider whether it is permissible at the likely place of enforcement, in order to try to minimise potential difficulties at the enforcement stage. Among other potential issues, it is possible that a court might refuse to enforce a foreign award procured in circumstances where the claimant was funded by a third party, if doctrines of maintenance and champerty apply in that country, and the court concludes it would be contrary to public policy to enforce the award pursuant to Article V (2)(b) of the New York Convention.

Unfortunately, in a number of jurisdictions in Asia, the permissibility of third-party funding in arbitration is not expressly addressed in domestic legislation and the issue has not been tested in the local courts. India, Indonesia and Vietnam are among such countries. As a result, while it is right to say that the use of third-party funding in Asia is likely to grow, the level of growth, particularly in respect of regional disputes, is uncertain.

# ● The view from the auditors

03



*‘Certainly in my career I cannot recall a time when my client base has been so distracted by litigation.’*

**Simon Nicholas,**  
director, KPMG

You are the chief financial officer of an up and coming high growth company. To paint the picture, it’s Friday late afternoon, you are mentally picking out a nice bottle of red to crack open on your arrival home, when the head of product development and chief executive officer walk into your office (uninvited), sit down and kick off with “Houston, we have a problem... sooooo... who would we use if we wanted to take action against a competitor for stealing our IP?”.

As they explain further, several thoughts pass through your mind in quick succession: ‘seriously, could this not have waited until Monday?’; ‘but I have just finished our budgets for next year’; ‘cash flow was already tight with the new product launch, how on earth are we going to pay the legal bills?’; ‘while I get their argument and we are undoubtedly in the right, if I miss the banking covenants we are in serious trouble so can we really afford to take on this fight?’; and finally ‘did these guys save this up all week to ruin my weekend?!’.

Unfortunately this disruption at the end of a long week may be just a tiny portent of what will follow. For, as an audit partner to many growing businesses who unfortunately find themselves involved in litigation, this scenario is increasingly common - certainly in my career I cannot recall a time when my client base has been so distracted by litigation - and recent studies have corroborated what I am seeing. Norton Rose Fulbright<sup>1</sup> recently conducted a global survey of corporate counsel which found a clear trend towards the growing litigiousness

of the business environment, with 84% of respondents expecting the number of legal disputes (and the spending thereon) to at least remain at the same level; 25% of whom expected increases.

Whether acting as a defendant or claimant, we all know that litigation can carry both operational and financial risks. Potentially costly, time consuming and unpredictable, specifically it can put a colossal strain on management resources, cause reputational damage, prohibit effective budgeting of future financial performance, and bring significant cash flow drawbacks which could span several years. Norton Rose noted that, across all respondents, 75% indicated they had at least one ongoing lawsuit, 42% indicated they had more than five - in many cases individuals or businesses simply do not have access to the financial resources or management bandwidth to undertake such feats. This is ever true given the backdrop of 64% of

companies having increased their spend on litigation over the last two years, as found by a recent survey undertaken by Legal Week Intelligence and Vannin Capital.

With ever-increasing capital and solvency pressures faced by businesses today, the threat of legal disputes causes significant uncertainty about the future. We see time and time again the effect that lengthy, unpredictable litigation can have on a business and particularly on its financial position and stability. For regulated businesses, the regulatory environment has led to heavily scrutinised fiscal results and, when paired with significant legal costs and provisions, an increased risk of breaching regulatory requirements - particularly those which may already be close to the limit. This is especially relevant given Norton



*'64% of companies [have] increased their spend on litigation over the last two years'.*

Rose estimates that more than 39% of legal activity relates to regulatory enquiries and investigations.

There are many examples where share prices are suppressed due to the ongoing uncertainty surrounding material litigation which, once resolved, leads to a healthy spike in the share price. Often the spike in share price is regardless of the result, demonstrating investors' low tolerance for uncertainty.

While analysts are aware of the damaging effect of management distraction, it is very hard to quantify and the hope would be that the organisation has sufficient depth and breadth to weather the storm without impacting strategy implementation. What analysts can quantify, or at least reasonably estimate, is the impact on cash flow and the bottom line of the significant legal costs. 62% of respondents to the Legal Week Intelligence/Vannin survey noted that, on average, commercial disputes they are involved in take over a year to resolve. For a start-up or early growth company this length of uncertainty over cash flow can be quite damaging to future prospects and thus, without funding support, the case will not be pursued as the risks to financial resources are too great. In fact, 56% of companies surveyed noted that, because of this, they do not pursue even meritorious claims.

With interest rates over the past few years at all-time lows, several forms of alternative funding have become prevalent and come to the rescue of many varying sized businesses. From an investor perspective, financial exposure to litigation, while not for the faint hearted, provides welcome diversification within portfolios and the opportunity of healthy returns.

One such funding source is litigation funding.

In our industry, following the financial crisis and the resulting surge in corporate distress leading to restructuring, we have seen funding being used by liquidators who are required to obtain the best possible result for the shareholder but who are faced with either illiquid or depleted assets and would otherwise not have the resources to pursue or fight seemingly worthwhile cases.

Litigation funding spreads the risks and lowers the barriers faced by many individuals and businesses that may not have the means necessary to seek justice. Depending on the structure of the funding agreement, engaging a litigation funder could be seen as a win-win for a claimant - retaining the potential upside whilst transferring most, if not all, of the downside risk. We are seeing litigation funding being considered increasingly by our clients as they seek to move from carrying onerous on-balance sheet, costly legal proceedings, to having minor balance sheet and cash flow impacts until a time when a judgment is received resulting in, at worst, the removal of uncertainty at a minimal cost. With the shift of risk from the claimant to the funder the pursuit of large scale litigation is much more accessible if the case is considered to be strong.

Third-party legal financing is growing in popularity for obvious reasons and is not just being employed by small to medium sized businesses. It is frequently preferred by the law firms themselves as it allows them to meet their clients' financial needs, share risk and increase their caseloads.

Third-party funding is still seen by some claimants as novel and untested. With the development and growth of the industry, we do not consider these as concerns. Importantly, seeking to legitimise

the industry through regulation, several key players in the funding industry have sought to improve confidence in this niche area of finance, providing consumer protection to ensure that litigants are engaging with financially stable finance providers with ethical and responsible business practices. This can only be a good thing. One such regulatory body that we work with is the Association of Litigation Funders of England and Wales (ALF), which sets out the rules

*'Third-party funding is still seen by some claimants as novel and untested. With the development and growth of the industry, we do not consider these as concerns.'*

governing the relationship between a funder and its clients, ensuring transparency on key issues such as case control, settlement and withdrawal and undertakes a rigorous complaints procedure where necessary<sup>2</sup>. Its members are required to comply with the Code of Conduct for Litigation Funders, first published by the ALF in 2011.

As we have seen, particularly for those operating in financial services, while regulation does bring a burden, for emerging industries it can significantly enhance their growth and impact. I am confident this will be the same for litigation funding - especially given the ever-increasing demand for financial solutions and alternative fee arrangements for those involved in or contemplating litigation.

Simon Nicholas, director &  
Laura O'Sullivan, audit manager, KPMG

<sup>1</sup> [http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey\\_v24-128746.pdf](http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey_v24-128746.pdf)

<sup>2</sup> <http://associationoflitigationfunders.com/>

# ● The view from the bench

As I now write, it is almost 40 years to the day since I started as a pupil on 1 October 1975 at what were then the Chambers of R A MacCrindle QC in 4 Essex Court, Temple. I am not sure how much had really changed in the previous 250 years since the building had originally been constructed in 1720 - shortly after Alexander Pope published *The Rape of the Lock*. But there is no doubt that much has changed since 1975.

In those days, sets of chambers were generally small in size – minnows (perhaps 10 or so tenants) compared to some of the giants (75+) of today. At No. 4, the day often started off with the narrow wooden staircase being washed down with a pungent detergent. There was no heating (apart from the odd small electric fire or oil-filled radiator); no photocopying machine (I remember the first gestetner-type cyclostyle machine being installed shortly after becoming a tenant); and, of course, no “search engines” let alone any email or internet. Conferences/consultations almost invariably took place in Chambers. Other communication with the outside world was limited to the telephone or the then revolutionary “telex”. Opinions were mostly written in long-hand and then typed-out by secretaries with mucky carbon copies that smudged easily and seemed to spread their dark blue ink generously in every direction.

Bob MacCrindle (who left to join Shearman

& Sterling in Paris) and Michael Mustill (later Lord Mustill) occupied rather grand rooms on the first floor overlooking Essex Court – with the young John Thomas (now the Lord Chief Justice) squeezed in between in what can only be described as a large cupboard. The grandly named “pupil room” was even smaller – a dark dungeon in the basement with a narrow window not much bigger than a postage stamp shared by a number of hopefuls - including Ros Higgins (now Dame Rosalyn Higgins, former president of the International Court of Justice and Angus (now Lord) Glennie). No pupillage awards then!

Even with Lord Denning at the helm (still going strong in 1975 at the age of 76 with another seven years to go before he eventually retired in 1982 at the age of 83), the common law was developing quite slowly. It is now difficult to believe that the possibility of claiming damages in tort for economic loss had only been



*‘The level of costs remains a matter of very great concern notwithstanding the Jackson reforms.’*

**Sir Bernard Eder,  
Essex Court Chambers**

properly recognised by the House of Lords just over 10 years previously in *Hedley Byrne* (1964); that it was only eight years since Parliament had enacted the Misrepresentation Act 1967; and that the old rule that the English court could only order the payment of debts or damages in English currency was only abandoned by the House of Lords in *Miliangos* in that very year i.e. 1975. Although the criminal offences of maintenance and champerty had only recently been abolished by the Criminal Law Act 1967, litigation funding did not exist – and, indeed, was inconceivable.

Civil litigation was, in many respects, little more than trial by ambush. Pleadings were generally very short (ah, those were the days!). Given the non-existence of desktop computers, laptops, data-bases, emails or mobile phones, discovery (i.e. disclosure of documents) was often quite limited. There were no witness statements (these were not introduced until, I think, the early 1980s); no



case memorandum; no list of issues; and no skeleton arguments or written opening submissions. The result was that, apart from what the judge might glean from the terse pleadings, he/she would know very little about the case in advance of the trial until the plaintiff's counsel stood up in court and opened the case orally – an exercise which was often carried out over a number of days by taking the judge laboriously through each trial bundle page by page by page in open court. This would generally be followed by the calling of the plaintiff's witnesses who would give their evidence orally in chief. This was not always an easy exercise given the prohibition of leading questions – and it occasionally produced moments of some amusement when the baffled witness was unable to produce the promised goods in response to rather oblique questions.

There was no requirement for either party to inform the other of the identity of the witnesses it intended to call still less the order in which the witnesses might be called – although a deal might often be struck (i.e. I will tell you mine if you tell me yours). This would be the first time that the other party (or the judge) would know what the witness had to say. Although stenographers would sometimes appear, there was no livenote so that all of this would generally be recorded by the judge in long-hand. Many judgments (even in the Commercial Court) would often be delivered *ex tempore*.

Most of the changes which have taken place (including, of course, the transfer of the Commercial Court, Chancery Division and TCC to the Rolls Building) have led to a more efficient system of civil justice which I – and I think most practitioners – would applaud. However, there are certain aspects of modern civil litigation which cause me real concern and, in some way or another, need to be addressed – although I accept that there are (sometimes) no easy answers.

First, at the risk of sounding like Victor Meldrew, I lament deeply the general

disappearance of the art of pleading. The recent judgment of Leggatt J in *Tchenguiz & Ors v Grant Thornton & Ors* [2015] EWHC 405 is a tour de force which will, I hope, be read and re-read by any pleader (if I might still use that term) – and, who knows, will perhaps mark the beginning of a new trend.

Second, whilst I warmly welcome the abandonment of a purely literal approach to the construction of contracts, it is my strong view that this development needs to be managed carefully. It is all very well and good permitting reference to “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man” (see per Lord Hoffmann in *ICS v West Bromwich* (1998) as explained in *BCCI v Ali* (2001)). However, at the same time, it has to be recognised that this approach potentially expands (often hugely) the scope of the evidence in any case, particularly since the distinction between what is and what is not admissible may not be straightforward: see, for example, the observations of Lord Clarke in *Oceanbulk Shipping & Trading v TMT* [2010] UKSC 44 in particular at [39] and my own judgment in *The Falkonera* [2012] EWHC 3678 (Comm). In order to address this issue, the Commercial Court Guide now contains a requirement in para C1.2(h) which merits close attention:

*“(h) Where proceedings involve issues of construction of a document in relation to which a party wishes to contend that there is a relevant factual matrix that party should specifically set out in his pleading each feature of the matrix which is alleged to be of relevance. The “factual matrix” means the background knowledge which would reasonably have been available to the parties in the situation in which they found themselves at the time of the contract/document.”*

It is noteworthy that the Courts of Singapore have adopted a similar approach: see *Sembcorp Marine v PPL Holdings* [2013] SGCA 43 at [73].

*‘There is a duty on all concerned - parties, legal representatives and the court - to ensure that costs are reasonable and proportionate: and, in my view, this will only be achieved if the court has sufficient resources to engage properly in active case management - and adopts a robust approach’*

Third, although I generally welcome the introduction of written witness statements with a signed statement of truth, it is worth recognising that it is, in my view at least, perhaps the most important change in litigation in the last (say) 50 years. Just think about it. The English legal system has always emphasised (rightly, in my view), the importance of oral evidence. In that context, the (old) rule that such evidence should be adduced orally in chief without the benefit of leading questions was a long-standing feature of our legal system.

The introduction of written witness statements was revolutionary, not merely because it provided a mechanism for permitting evidence to be adduced in

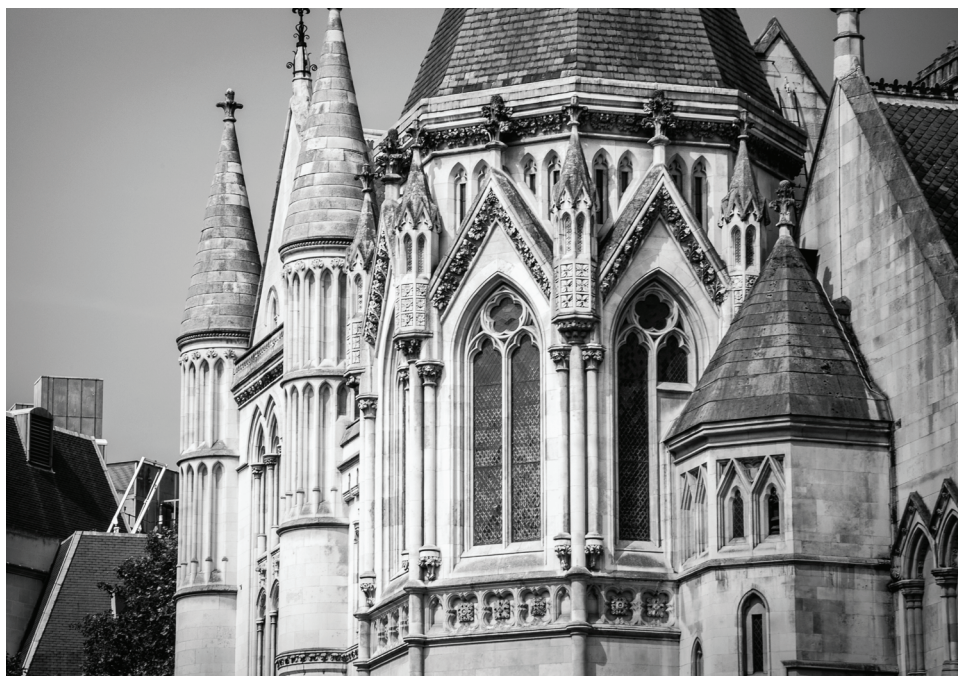


a written form but also because the formulation of the written witness statement is (almost invariably) the result of an iterative drafting exercise between solicitor and witness involving not only leading questions but also leading answers by a third party in the sense that the words drafted are often those of the solicitor. For present purposes, I am prepared to assume that the solicitor is doing his (or her) best to convey what he (or she) honestly believes is what the witness would like to say. However, the result is that the court is often faced with a lengthy manicured statement which is in breach of the rules and contains not only a vast quantity of evidence dealing with matters which have little, if anything, to do with the issues in the case but also – and even worse – argument rather than evidence. This is not only impermissible but often counter-productive as the courts have repeatedly emphasised: see, for example, *Kaupthing Singer & Friedlander Ltd (in administration) v. UBS AG* [2014] EWHC 2450 (Comm).

What should the court do in such circumstances? One answer might be to exclude the witness statement in whole or in part and to require the witness to give oral evidence in chief in the old-fashioned way. That robust approach has obvious attraction but, in some cases at least, it will simply lead to additional delay and increased cost. This is a real and constant problem in modern litigation.

Fourth, I also warmly welcome “active case management” by the court in the preliminary stages of litigation and the lead-up to the trial; and I recognise that some of the issues referred to earlier are best addressed and dealt with by active case management. I strongly believe that active case management is the best way to reduce costs and, more generally, to ensure that the litigation is conducted efficiently. In my view, this is particularly important when considering issues concerning disclosure and expert evidence. However, active case management requires more judicial time – which is in short supply. Without the latter, active case management is no more than an idealised aspiration.

Fifth, I also lament (Victor Meldrew again) the decline of oral advocacy which has always been at the heart of our legal system. As stated by Longmore LJ in *Meritz Fire & Marine & Ors v Jan de Nul NV & Ors* [2011] EWCA 82 at [31]: “In this country, unless the court otherwise orders, arguments are to be made orally in the face of the court where they can be tested; it is by disputation that the law is made known.” In my view, oral advocacy is particularly important



with regard to closing submissions. Whilst written closing submissions are obviously very helpful to the court, I firmly believe that they are not the be-all-and-end-all. This is so for two main reasons. First, written closings are generally far too long and diffuse. The explanation may be that they are often the result of a collaborative effort of a large team of solicitors and barristers, all of whom want to have their say. The effort is no doubt commendable but the product often ignores the golden rule that brevity is generally the advocate’s most powerful weapon; and what the judge has to read may not be as helpful as might otherwise be the case. Second, the tendency is for each party to highlight their own “good points”. The result is that when the judge comes to write his or her judgment, it is often difficult if not impossible to identify what the answer is to a particular point (if any). That is why it is, in my view, crucial for the judge to be given sufficient time both to read the written closing submissions critically and to test the parties’ respective arguments in the course of an oral hearing.

Sixth, the level of costs remains a matter of very great concern, notwithstanding the Jackson reforms. *Ted Baker v Axa* [2014] EWHC 4178 (Comm) - where total costs (approaching £7 million) far exceeded the amount in dispute (by the start of the trial approximately £1 million) - is a good illustration of a case which, as I said in my judgment at paragraph [5], brings no credit to modern commercial litigation. There is a duty on all concerned – parties, legal representatives and the court – to ensure

*‘Looking ahead, the key aims must be the same as they have ever been - to deliver justice fairly, efficiently, within a reasonable time-frame and at a cost which is reasonable and proportionate’*

that costs are reasonable and proportionate; and, in my view, this will only be achieved if the court has sufficient resources to engage properly in active case management – and adopts a robust approach.

Despite these concerns, the many changes which have taken place over the past 40 years have been crucial in maintaining the worldwide reputation of our legal system – and, in particular, the success of the Commercial Court, Chancery Division and TCC. Looking ahead, the key aims must be the same as they have ever been – to deliver justice fairly, efficiently, within a reasonable time-frame and at a cost which is reasonable and proportionate; and so too must be the drive and flexibility to continue to make changes wherever necessary to achieve those aims.



## The sector view

# Patent disputes: who wins, where & why

Professional third-party funders tend to stay away from patent disputes. It is unfortunate because this is an area where SMEs and individual inventors whose only assets are often their ingenuity need help. This is a category of claimant that is arguably most in need and deserving of the assistance provided by professional third-party funders.

But the reality is that patent disputes are tricky - often not because of the dispute but because of the process. Patent disputes have a reputation for being expensive, slow and worst of all, unpredictable. What seems like a solid dispute can be ruined by the sudden appearance of prior art (ie where a defendant can identify that the method or process protected by the patent was in the public domain before the patent was applied for). Expensive, slow and unpredictable means that from a funding perspective, patent disputes are tough to fund. But not all jurisdictions are equal, as we know. As we did for electricity disputes in the previous issue, to assess the risk we must ask the questions – who wins, where and why?

As explained below, the answers to these questions identify Germany as a hotspot for patent disputes offering higher win rates than either the UK or the US and the third-largest market for IP disputes in the world. Professional third-party funders need not fear the process: IP claims in Germany are a massive growth area. This is good for patent holders, good for law firms and good for funders.

## The Market

The sheer volume of patent disputes globally means that as a market for potential legal fees, investment opportunities and damages, patent disputes are enormous. There were approximately 90,000 patent disputes over 15 years across the top three IP jurisdictions and the UK (Fig. 1). From a funder's perspective, that's a market size of approximately 6,000 disputes per year. However, before measuring risk (ie impact vs probability) claimants and funders must first consider the time, cost, quality triangle.

## Time, Cost, Quality

Claimants and funders alike, regardless of jurisdiction, want to know the answer to four basic questions when considering whether to invest in a patent dispute:

1. How long will it take?
2. How much will it cost?
3. How strong is our case?
4. What will we get?

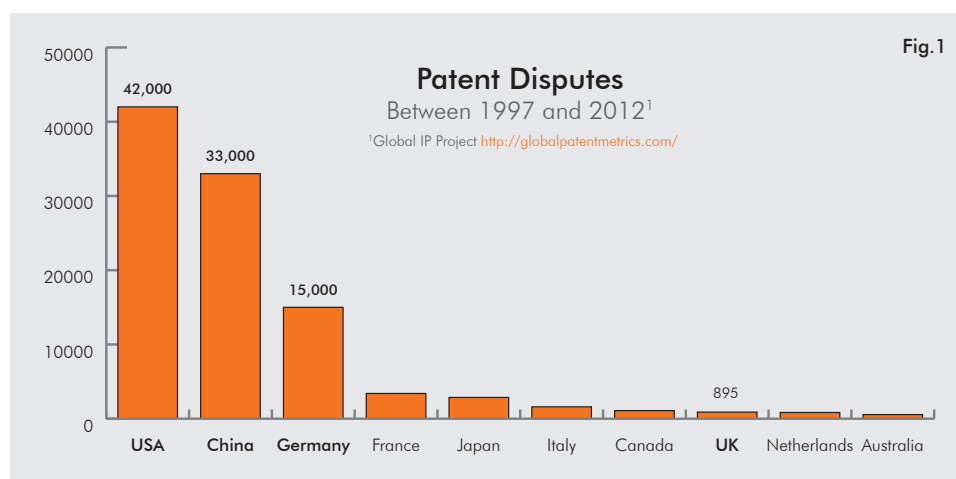
As Microsoft's former vice president of intellectual property and general IP guru Marshall Phelps has said, business managers do not like a 'random walk through life'. These are the types of high-level tactical questions that allowed Phelps to implement a strategy that took IBM from a few million dollars in IP-related revenues in the late 1980s to over a billion dollars in a little over a decade. These questions are essential for every patent claimant and every funder considering investing in a patent dispute. Patent disputes, like most modern

*'IP claims in Germany are a massive growth area. This is good for patent holders, good for law firms and good for funders.'*

**Iain McKenny,**  
general counsel of disputes,  
Vannin Capital

commercial disputes, are not just about the dispensation of justice. They are about the compensation of loss. Accordingly, time and cost are essential variables in the assessment of a claim's prospects of success. These factors are just as important for funders as they are for claimants.

Which jurisdiction is faster (time), cheaper (cost) and fairer (quality), are the three components of the time, cost, quality



triangle. With the extensive information available on patent disputes from studies such as the Global IP Project, it is apparent that not all jurisdictions are equal from a claimant's, or indeed, a funder's point of view.

Project managers, far more than lawyers, are familiar with the time, cost, quality triangle: the basic premise being that you can only ever have two at the expense of the third. A process might be fast and cheap, but it will suffer in quality. Or a process might be good and fast, but it will suffer in cost. Accordingly, we can measure our four jurisdictions in reference to the time, cost, quality triangle to determine which jurisdiction is best for patent claimants and, accordingly, funders. Perfection would look like this: 0 months, 0 costs, 100% of claim. It is the platonic ideal, useful in practical terms only as a yard stick to measure the actual results.

Time and cost can be readily assessed - simple metrics compared on a simple chart (see Fig.2)

These sorts of charts are necessarily rounded. Outliers undoubtedly exist in each jurisdiction in respect to time and cost, but they need not spoil the analysis. For instance, in the US there are notable differences between states. In Virginia, the time to trial averages less than 20 months, whereas patent disputes in Illinois average nearly 60 months to trial. But when these outliers are stripped out, the average time taken is 30 months. Similarly, costs can be much higher or much lower. In some jurisdictions, such as China and Germany, the amount in dispute determines, within a defined band, the court costs. Similarly, legal fees tend to increase with the value in dispute even if complexity does not increase. Accordingly, for the purposes of assessing costs, the above chart generally considers quantum levels measurable in the US\$ 10s of millions.

A more difficult analysis, however, is

*'With the extensive information available on patent disputes from studies such as the Global IP Project, it is apparent that not all jurisdictions are equal from a claimant's, or indeed, a funder's point of view.'*

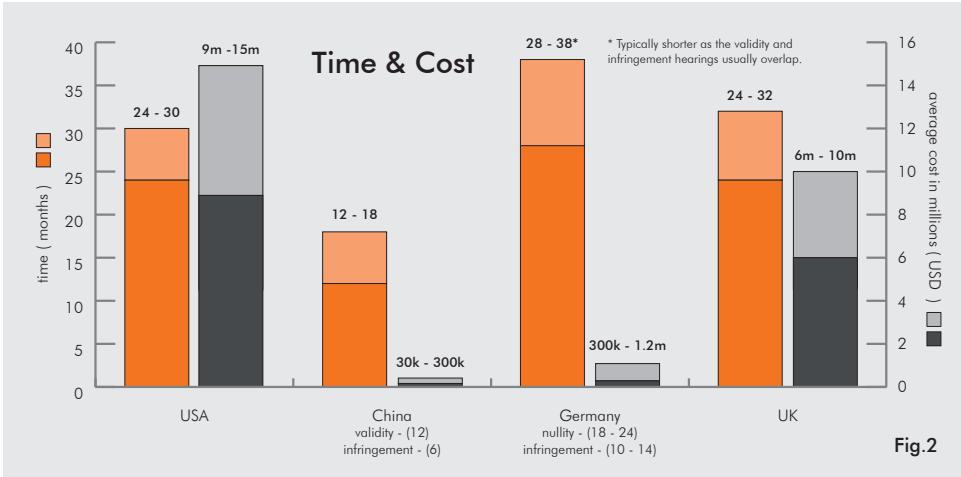


Fig.2

quality. Time and costs are quantitative assessments for which data is readily available, as demonstrated above. Qualitative assessments necessarily require consideration of less quantifiable factors such as legal representation, judicial capacity and capability, and legal process. These are factors that do not lend themselves easily to measurement. For instance, in the US and the UK there is extensive disclosure/discovery.

This has a detrimental impact on time and cost but can anyone argue that it is not a more thorough process because of it? China is seemingly faster and cheaper, but, without a process of disclosure, are key facts being overlooked? Germany and China have bifurcated systems, separating validity from infringement. How does this compare to the US and UK processes where validity and infringement are entwined? In China and Germany, you have specialist and technically trained judges, whereas in the US there is a constitutional right for either side to insist on trial by jury. In each of these jurisdictions what is the role of experts?

In the US and the UK, experts can often be the most expensive single disbursement and can be decisive in determining who wins. In contrast, in Germany, specialist courts and technically trained judges, in validity proceedings in particular, seldom require experts and when they do, they are generally appointed by the court. These are all qualitative factors that patent lawyers in a global economy weigh carefully when considering their dispute strategy.

But what really matters when we are considering these qualitative nuances? It is what Phelps determined 'walkers through life' expect: the win rates. Who's winning in these jurisdictions regardless of their peccadillos and peculiarities? 'Who wins?'

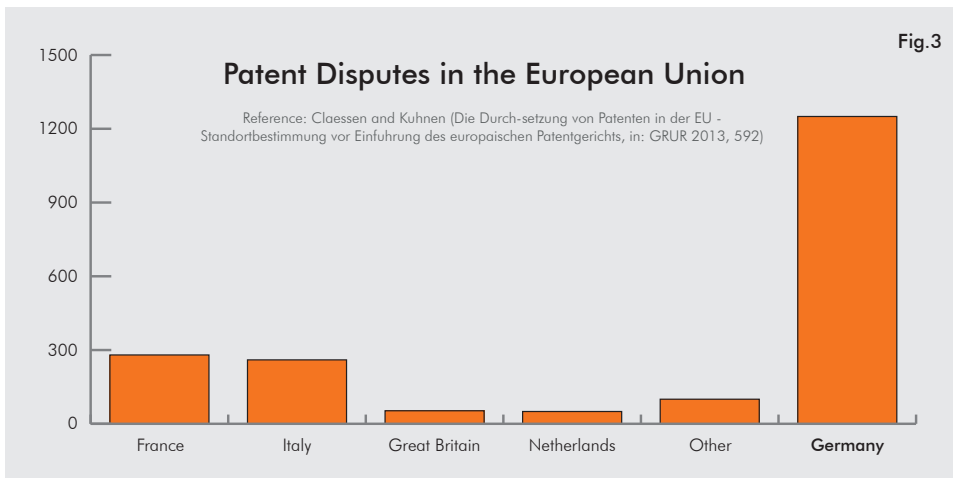
is the question we pose when jurisdictions are qualitatively assessed. Is a claimant more likely to win in Germany or the UK? In the US or China? Thanks to research like that conducted by the Global IP Project, we have the raw data that at least provides some quantitative support for this qualitative assessment.

Win Rates

In comparison to the platonic ideal of the time, cost, quality triangle for patent disputes, China is the fastest and the cheapest of the top three IP disputes jurisdictions. However, we know that in China disclosure is non-existent and its patent disputes are handled in ordinary civil courts. Furthermore, and according to Ms Shen of the Beijing Sanyou Intellectual Property Agency Ltd, damage awards tend to be lower in China than in other jurisdictions.

Country	Win Rates
China	For invention patents 66% of claimants win on infringement but only 57% win in validity proceedings. For design patents, claimants win 85% of infringement proceedings but only 42% clear validity proceedings. Similarly, although claimants for utility models win 72% of infringement proceedings, only 46% pass the validity proceedings.
Germany	Overall patentee win rates (in Dusseldorf) for infringement proceedings is 60-66% (533 of the 811 decisions between 2009 - 2013) However, like China that is only for those who succeed in validity proceedings (38%).
UK	Overall patentee win rate of 27% (35 out of 129 decisions where infringement/validity were in dispute between 2009 - 2013)
US	59% overall; 25% 'contested'; PI win rate 31%; 47% in US ITC





*'Patent disputes for claimants in Germany are cheaper than in the US and the UK with win rates similar to those found in China.'*

In any event, from a funding perspective, as China still does not allow third-party funding the jurisdiction is off limits - for now (as with Singapore, Hong Kong is reconsidering its position on champerty and maintenance). In contrast, the US system is by far the most expensive in terms of costs, but damages are potentially extremely high as claimants may be entitled not only to compensatory damages (i.e. reasonable royalty) but also enhanced damages for wilful infringement.

Meanwhile, the UK offers a seemingly excellent jurisdiction for wealthy defendants, having high costs, long durations and low win rates. Which, of course, leaves Germany: patent disputes for claimants in Germany are cheaper than in the US and the UK with win rates similar to those found in China.

#### Germany, the undiscovered country

From a funder's perspective, Germany may well be the undiscovered country. It is a particularly interesting jurisdiction for foreign patent holders. Parties based abroad are involved in approximately half of the patent infringement actions in Germany. Of the 2,043 patent infringement cases across the five main jurisdictions in Europe for patent disputes last year, Germany accounts for over 90% of them.

The separation principle stipulates that questions of infringement and validity of the proprietary rights are answered by different authorities. In Germany, the district courts have the jurisdiction for infringement issues

at the first instance. This means that, unlike in most other jurisdictions, a defendant cannot mount a defence on the grounds that the patent which is the basis of the claim made against it is invalid or should be declared invalid.

According to Daniel Hoppe-Jaenisch of white & Case, Hamburg, Germany, bifurcation is a relatively unique feature of German patent infringement law in comparison with most jurisdictions. Germany is very popular amongst plaintiffs because it allows for a swift enforcement of patents. Defendants fear bifurcation and fight it because the principle bears the risk that the court might find against them based on a non-valid proprietary right, and thus they may suffer significant damages. In this way, Germany appears very clearly to be a pro-claimant jurisdiction for patent disputes.

#### Do the maths

The Global IP Project has worked up a formula that appears to be a recipe for success for claimants and a method to

*'The jurisdiction is very popular amongst plaintiffs because it allows for a swift enforcement of patents.'*

assess this decorrelated asset class for funders.

Plugging in the metrics extracted from the time, cost, quality assessment above into this formula reveals a simple conclusion. Among the jurisdictions where third-party funding is permitted, far more patent disputes are likely to be successful, with significant damages and less cost, in Germany than in any other jurisdiction: but only in respect of infringement proceedings. The high bar remains for validity. But here too, Germany's bifurcated system offers more certainty in respect of time and cost. This is good news for claimants and their funders.

Expected Value ( EV ) = Win Rate x ( A+B+C ) - Lose Rate x ( D+E ) - F	
Win Rate	Probability Patentee Will Win
A	Expected Value of Past Damages Award
B	Expected Value of Future Remedy
C	Expected Value of Reimbursed Litigation Costs
Lose Rate	Probability Patentee Will Lose
D	Expected Value of Lost Licensing Revenues
E	Expected Value of Reimbursing Opposing Party Costs
F	Costs of Going to Trial



# Patent disputes: what the experts say



UK

*The English Court system is often thought as being a high-cost forum for patent litigation that is prohibitively expensive for all but the deepest pockets. In fact, over recent years (and especially since completion of its reform in 2013) the Intellectual Property Enterprise Court ("IPEC") has established itself as providing a relatively quick and low-cost alternative to proceedings in the Patents Court. However, even with the streamlined procedures of IPEC, many potential claimants find that the time and cost of protecting their patents through the Patents Court puts access to justice beyond their reach. This, of course, is where third party funding can bridge the gap and allow meritorious claims, that would otherwise flounder, to proceed.*

*John Runeckles, counsel, Jenner & Block, London*



France

*Patent litigation in France is advantageous in many respects. The well-known French "saisie-contrefaçon" is a very efficient tool to gather evidence of the materiality, the origin and the scope of the infringement. The system is not bifurcated meaning that infringement and validity are litigated in one single procedure, which proves efficient and leads to balanced decisions. Litigating in France is more affordable than in other jurisdictions and the winning party is usually awarded a reasonable amount for the reimbursement of its legal fees. Finally, damages which are often assessed within the scope of a judicial expertise can be substantial.*

*Anne-Charlotte Le Bihan, partner, Bird & Bird*



USA

*While new patent infringement filings have declined for the first time in many years, this may be a temporary transition as the US patent system recalibrates. We have found that increased attention to such changes permit for reasonable predictability in the enforcement and defense of patents. Clients have also been more open to financing enforcement efforts as a way of adding predictability to their budgets. The overall acceleration of key decision making, such as to claim construction and validity, can be useful in early resolution and settlement of disputes where the early decision is applicable in later proceedings.*

*Eley O. Thompson, partner, Foley & Lardner, Chicago*



# VANNINCAPITAL

## Netherlands



*In the Netherlands, patent owners are able to quickly obtain a well-reasoned (final relief) decision on the merits of the case (on both infringement and validity) from a specialised and very experienced patent court. Costs of proceedings on the merits (first instance) tend to range from about €75,000 for relatively simple mechanical cases to € 500,000 (and occasionally higher) for very complex pharmaceutical or high-tech/telecoms cases. The winning party in patent enforcement action is entitled to claim compensation of its costs, including lawyers' costs. The cost involved in patent litigation in the Netherlands is quite reasonable, especially compared with the UK or the US, inter alia due to the fact that Dutch procedure does not provide for disclosure/discovery proceedings. The lack of disclosure/discovery proceedings means that the case is limited to what parties decide to put forward, which enables parties to keep focus on the most important aspects of the case, thus preventing the volume of the work to be invested from spiralling out of control.*

*Jaap J.E. Bremer, attorney at law, BarentsKrans, The Hague*

## Germany



*Germany is of huge importance as a jurisdiction for patent litigation in Europe. Year after year, a large number of patent infringement actions are brought in Germany. The German judiciary offers patent holders exceptionally good chances to successfully enforce their proprietary rights. Hence the German patent infringement litigation is of considerable interest for companies around the world. Vannin is my first choice for third party funding of strong claims that otherwise might not proceed to litigation. Vannin's process is very efficient and timely. The experience has been very positive and based on that I have recommended third party funding to other claimants. I consider Germany the European leader for patent disputes and owing to the strengths of the German system, here I would have thought funders would be keen to support meritorious claims in the region.*

*Daniel Hoppe-Jaenisch, partner, White & Case, Hamburg*

## Italy



*Italy is one of Europe's largest jurisdictions for patent disputes and one of its major economies. Despite costs being far more reasonable in Italy than in other European jurisdictions and though its system offers a very effective implementation of interim remedies such as ex parte search order, seizure of infringing goods also against third parties or publication of orders and judgments often patent infringements go unchallenged. With liquidity being a very precious asset, in particular for domestic companies, frequently patent holders prefer not to invest the time and the costs involved in pursuing a claim. Infringement of claims of foreign patent holders often are not pursued due to lack of familiarity with the particulars of the Italian system. Third-party funding may significantly lower the involved risks and offer a solution not only to those for whom time and cost are impediments but also to patent holders who still gain first experiences in foreign jurisdictions.*

*Tankred Thiem, head of German desk, LGV Avvocati, Milan*

## China



*"Why China? Five reasons: 1. Large Market (1.4 billion people); 2. Huge number of valid patents (over 3.5 million patents including over 1.098 million invention patents); 3. Quick – first instance, normally within one year and second instance, even quicker; 4. Stronger weight in negotiations; and 5. Inexpensive – first instance attorney fee is normally in the US\$30,000 – US\$300,000."*

*Lena Shen, partner, Beijing Sanyou Intellectual Property Agency, China*

# Arbitration funding: the burning questions

Those of you who are regular attendees at international arbitration conferences will be only too familiar with the catchy session on “Hot Topics”. You will also know that third-party funding has been a resident hot topic on the arbitration conference circuit for a number of years. In this context, the topics that seem to arise most are:

- a funder’s potentially harmful control of claims; and
- the potential conflicts of interest for arbitrators.

This article seeks to set the record straight on these and other key topics in the context of funding international arbitration, although many of the points made apply equally to litigation more generally.

## *Control vs Monitoring?*

### **Settlement**

Concerns about third-party funders’ potential control of a claimant’s case once it is funded are often raised.

A funder that has made a serious and well analysed investment decision will never, and in most jurisdictions simply cannot, interfere with the progress of a claim, and that includes any settlement that may be reached. A settlement decision is always that of the claimant. The claimant does not have to involve the funder in any way if it does not wish to do so. Simply put, the consent of the funder is not required to settle a dispute and in most jurisdictions, including

the UK, a contractual clause giving a funder such power may be unlawful.

In reality, when undertaking initial due diligence of a claim and before committing to fund it, a funder will examine the estimated damages in detail and undertake its own assessment of the realistic quantum of the claim. In so doing, the funder will take into account, and discuss with a claimant, settlement options to ensure that all parties have realistic figures in mind which will satisfy both the funder and the claimant if a settlement offer arises.

It should not be forgotten that commercial realities mean it is in the funder’s best interests to recover its investment and a return on that investment earlier, by means of a settlement, rather than hoping for a potentially greater return later in the proceedings, given the inherent risks involved in dispute resolution.

*‘We are frequently asked whether the funder chooses the lawyer. The answer is no. A claimant is free to select any lawyer of their choosing.’*

**Yasmin Mohammad**  
senior counsel, Vannin Capital

### **Lawyer selection**

We are frequently asked whether the funder chooses the lawyer. The answer is no. A claimant is free to select any lawyer of their choosing. However, as far as possible, funders ensure that the claimants they finance are well represented with the best legal team available and a funder may refuse to fund a good case if it believes that the claimant is not adequately represented. This is not a tool used by funders to take control but is an attempt by the funder to get the best representation for the claimant and, at the end of the day, for their own investment.

*‘Once a case is funded all we request from the legal team is regular contact to enable us to keep abreast of relevant issues that may arise in the claim.’*



Once a case is funded all we request from the legal team is regular contact to enable us to keep abreast of relevant issues that may arise in the claim.

Similarly, the strategy, choice of experts and witnesses are issues for the claimant and their lawyers to ultimately decide. However, with a good collaborative relationship, a funder can also bring a helpful set of extra eyes or share relevant past experiences that may help the decision making process.

#### *Privilege and confidentiality*

These issues vary according to each jurisdiction and upon each lawyer's ethical rules. The best practice is to adapt each relationship to the particular circumstances of each case. We fund cases across the globe and have had the occasion to recently review cases involving lawyers across a number of different jurisdictions including England, France, Germany, Australia, New Zealand, South Africa, the United States and Dubai (DIFC). In each case we adapt the terms of our relationship with the respective lawyers to ensure the applicable procedural and ethical rules in each jurisdiction are respected at all times.

Importantly, we treat everything our clients say and every piece of information they send us with the highest level of confidentiality. We store all documentation securely on our bespoke case management software platform (VCMS) which uses 128 bit Secure Sockets Layer encryption and sits on our own secure virtual private network (VPN).

Responsibility and flexibility must be key when examining these important issues.

#### *To disclose or not to disclose?*

There are risks and benefits for a claimant deciding whether or not to disclose willingly that their claim is funded, which need to be examined on a case-by-case basis. Whether or not to make such a disclosure is ultimately a decision for the claimant.

However, in an arbitration context, we are increasingly seeing requests from respondents asking tribunals to order claimants to disclose whether there has been funding and, if so, the identity of the funder.

The professed reason for such requests is that the information may identify a potential conflict of interest of one of the tribunal which can thereafter be disclosed and dealt with appropriately, depending on the situation, without jeopardising the integrity of proceedings or the consequential decision or award. In reality, most of the time, these



requests seem to be a procedural dilatory tactic used by respondents to delay and complicate arbitral proceedings.

However, such disclosure requests arguably hide a more significant consideration in the context of security for costs applications. The decision on security for costs rendered in *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, has given rise to much discussion and heated debate. The debate encompassed two different questions which harboured varying degrees of controversy:

*‘A funder that has made a serious and well analysed investment decision will never, and in most jurisdictions simply cannot, interfere with the progress of a claim, and that includes any settlement that may be reached.’*

- 1) Can an ICSID tribunal order security for costs absent specific provisions in the ICSID Convention and the arbitration rules; and
- 2) Is the presence of a third-party funder relevant, and, if so, to what extent, to that decision?

For present purposes we are naturally more interested in the second question. To the surprise of a significant portion of the arbitral community, the assenting opinion went as far as to argue for an automatic award of security when a funder was involved, in contravention of a long line of established precedents about security in the ICSID context.

More recently, in the case of *Eurogas and Belmont v The Slovak Republic*, ICSID Case No. ARB/14/14, another tribunal seems to have settled the matter, deciding that the fact of funding should have no incidence on the decision to award security for costs.

As a funder we are, of course, only too aware of these issues and we strive to carefully consider them with the client and lawyers as appropriate before they even arise.

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\* Vannin Capital is the trading name of Coope Litigation Management Pty Ltd, ACN 607 233 821