Litigation Funding 2021

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Litigation Funding*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Canada, France, Russia and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford, for their continued assistance with this volume.

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Getting The Deal Through

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Germany

Arndt Eversberg
Omni Bridgeway

REGULATION

Overview

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

Third-party funding was launched in Germany in 1999. As is customary with new ideas, there were a few who took a critical standpoint, but the overwhelming majority of the legal community welcomed the idea. Litigation funding closed the gap between credit facilities provided by banks, which are typically not granted without securities being provided by the claimant, and the prohibition of lawyers providing legal services whose remuneration is based solely on a successful outcome of the case. Commercial litigation funders do not – and are not allowed to – provide legal services. Therefore, statutory limitations on providing funding in return for a share of the proceeds do not apply in their case. Since 2010, conditional fee agreements may be concluded, pursuant to section 4a of the German Law on the Remuneration of Attorneys (RVG), but only in limited cases.

Third-party funding has, in fact, never been legally challenged; today, it is widely known and accepted. A small number of court decisions have also confirmed its legal structure as a partnership organised under the laws of the German Civil Code between claimant and funder. The courts' attitude ranges from neutral to positive, with no negative decisions against professional funders being known. This is different in cases in which lawyers try to use their own funding firms with the intention of acquiring clients and therefore funding their own mandates. Such practices trigger conflicts of interest and accordingly constitute infringements of the German lawyers' code of conduct, the Federal Regulations for Practising Lawyers (BRAO).

Restrictions on funding fees

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

When it comes to determining a reasonable share of the proceeds for which a funder may ask, very few court decisions have been delivered so far. The standard terms and conditions call for a 30 per cent share of proceeds amounting to €500,000, and a 20 per cent share for any proceeds in excess of said amount. The Higher Regional Court of Munich confirmed in one case that a share of 50 per cent was justified because the funder stepped in after the first-instance hearing had already been lost. A good rule of thumb is that a share of 50 per cent is safe, but any share higher than that would, in all likelihood, and unless fully justified, go against public policy. As a matter of principle, the market regulates the share amounts to be agreed in litigation funding.

German funders do not charge interest. They prefer to structure their remuneration either as a percentage of the amount actually recovered or as a multiple of the amount invested. A hybrid model equipped with a cap or a floor is also a conceivable structure, for example, in international arbitration.

Specific rules for litigation funding

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

Because third-party funders are not qualified as banks nor insurers, neither legislative nor regulatory provisions apply.

Legal advice

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

The BRAO stipulate professional and ethical rules and regulations for lawyers; however, no specific rules regarding third-party funding exist. In accordance with various regulations and confirmed by innumerable court decisions, lawyers are obliged to advise their clients comprehensively and impartially. There have been no court decisions to date obliging lawyers to advise a client specifically about litigation funding and its options.

However, various contributions to the legal field champion a duty of enabling the clients to choose whether they would like to take on the cost risk themselves or whether they would like to pass it on to a litigation funder. Because lawyers are already obligated to inform their clients about the possibility of obtaining litigation protection insurance, they are well advised to cover litigation funding, too, when informing their clients. This obligation has been recently confirmed by a decision of the Higher Regional Court of Cologne.

Regulators

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

Financial institutions such as banks and insurance providers are regulated and supervised by the Federal Financial Supervisory Authority, located in Bonn. Commercial litigation funders are neither qualified as banks nor insurance providers, which is why they are not under the oversight of any public authority.

FUNDERS' RIGHTS

Choice of counsel

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

Most cases are referred to the funders by lawyers; the latter have assessed the claim's prospects of success and are aware that their clients do not want to fund or cannot afford to pursue legal proceedings. Funders are thus well advised to not interfere with the already existing lawyer-client relationship. If they did, and if that course of action

became public knowledge, they would irreparably damage their main sales channel.

Hence, funders take into account the lawyer's quality and willingness to cooperate in their own overall assessment of a claim, and they will rather forgo offering funding than demand an alternative lawyer. Only where the claimant has not yet retained counsel do funders recommend lawyers to their clients. Of course, all funders have their own network of lawyers and specialists.

Participation in proceedings

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

This is handled differently depending on the funder. Some like to be involved to a higher degree and some prefer to remain in the background. However, all funders share the general conception of themselves as being more than just a cash provider and have a preference for taking on an advisory role during the funding process.

Veto of settlements

8 | Do funders have veto rights in respect of settlements?

All litigation funding contracts provide for this key issue. As a matter of principle, a settlement always requires the approval of both the claimant and the funder. If one party would like to settle and the other does not, the party willing to settle has a contractual right to terminate the funding contract. This has a twofold effect:

- the terminating party has the right to receive the share agreed for the case of a settlement being reached; and
- the party unwilling to settle at the offered terms proceeds with the case at its own risk (which might end with a better or worse result, or even a total loss).

In practical terms, funders and clients are almost always able to come to a mutual understanding on whether a given settlement offer is to be accepted or denied. The most sensible course of action is for the funder and client (together with the lawyer) to work as a team. Should one party decide to leave the team, this weakens the remaining players, at the very least, and increases the risk for the party proceeding with the case (eg, the funder). As a matter of fact, claimants availing themselves of litigation funding will rarely be in a position to pay out a funder while the case has not yet been brought to a successful close.

Termination of funding

9 | In what circumstances may a funder terminate funding?

The commercial funder may terminate a funded case at any time and at its sole discretion should the chances of a successful outcome become impaired. This may be because of new court rulings to the detriment of the claim, financial problems of the defendant, or new facts that have come to light during the proceedings that negatively influence the assessment of the claim. If, however, the funder terminates the funding contract, it is contractually obligated to pay all costs that have already been triggered in the course of the action (yet limited to those necessary to stop the case as quickly as possible). The funder further loses its right to receive a share of the proceeds. It retains, however, the right to have its investment refunded, provided the claimant finally succeeds on his or her own and receives payment.

This, however, is an ugly situation for a funder. Terminating the funding for an ongoing case, therefore, is always a funder's last resort. In a negative assessment of the case, the funder will have contemplated the case thoroughly and extensively and will also provide reasons for such an assessment.

Other permitted activities

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

As a general rule, German funders see themselves as active partners in a team that includes the claimant and the lawyer. They look at and check all writs and communication, and assist in analysing the best strategy and tactics before the case is officially pursued and also throughout the whole process. The funders' representatives usually join meetings and take part in settlement discussions. It is also common that the funders' in-house lawyer who is responsible for the case to be present in court or arbitration hearings. Because of the confidentiality of the funding, the lawyer's identity will, of course, not be disclosed. The defendant will only be informed of it if a disclosure strengthens the claimant's position (eg, in settlement negotiations).

Because class actions are gaining in relevance for business, litigation funders are book-building ever more cases. This means that the funder is active very early in the process and this, in turn, leads to the funder being heavily involved in the later proceedings as well, which then also includes choosing lawyers and experts. There are, however, no requirements in place for funders to take on an active role, but more than 19 years of experience in professional litigation funding in Germany shows that funders are well advised to do so.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Since July 2010, German lawyers have been allowed to work for a partly success-based fee. The development came about because the government needed to limit expenses for legal aid, while at the same time improving access to justice. Section 4a of the RVG is not very precise, and the new regulation still lacks precedents setting a legal framework. As a matter of principle, it is understood that a lawyer may work for a success-based fee only if the client were deterred from proceeding on his or her own on account of his or her economic situation. The lawyer has to review whether or not this is true for his or her client. The scope of this due diligence has not yet been clearly defined and helpful court decisions are still lacking. One could argue that the lawyer must expend a reasonable amount of time and effort for the purposes of assessing his or her client's financial situation. In contrast to the rule in the United States, a lawyer is not allowed to fund court costs, corresponding costs or disbursements. He or she cannot agree on a success fee that provides for a percentage share in the proceeds, as funders do, because it lacks a connection to the statutory fees. Only a few lawyers – mostly those from big international firms – use this opportunity, which is still quite new. Limited as they are to their fees, these firms and lawyers are not direct competitors for litigation funders. On the contrary, funders make use of this circumstance to diversify the risk by agreeing on a fee that is (at least partially) contingent on a successful outcome.

Other funding options

12 | What other funding options are available to litigants?

If a creditor does not qualify for legal aid in accordance with section 114 of the German Code of Civil Procedure, which applies only to a very limited range of people, and if the claim cannot be sold, which is common for disputed claims, litigation funding is the only remaining possibility to enforce a claim. Some funders offer what is called 'monetarisation' or 'monetisation' and buy the claim for a portion of its value.

This sounds like a good idea, but in practice it usually does not work. Either the creditor's price expectation is too high or the funder's offer is too low. In any case, agreeing on a sale of the claim and the further enforcement, including the involvement of the seller, may turn out to be rather cumbersome, if at all possible.

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

One needs to distinguish between the nature and the complexity of the claims. A comprehensive construction claim always takes longer than a claim based on a standard agency contract because of the necessity of obtaining expert reports in almost all cases. In any case, the majority of first-instance decisions are taken within one to two years, but the length of the proceedings differs from court to court.

Time frame for appeals

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

About one-third of first-instance judgments are appealed, of which appeals about 50 per cent are successful. This can mean a partial change, a settlement, or an overturn. Under normal circumstances, an appeal takes at least another year or two. Difficult cases may run on for years. A third instance needs the approval of the court of appeals, which is delivered along with the decision. Today, only a few appellants move on to the Federal Court of Justice (BGH). If the court of appeals denies its approval, the unsuccessful party may bring a complaint against the refusal to grant leave to appeal on points of law directly with the BGH, but only about 5 to 10 per cent of complainants succeed in doing so.

Enforcement

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

Only a minority of judgments require enforcement proceedings. Because of Germany's long-lasting relative economic stability, non-payment of awards appears to be a negligible problem. Enforcement actions are triggered through the local courts. Court bailiffs work on a tariff system and have to take various legal limitations into account. They usually work slowly, but they do work. The defendant has a certain number of legal remedies at his or her disposal by which to hinder enforcement. As in almost all countries around the world, enforcement is an unpleasant and unsatisfying task.

COLLECTIVE ACTIONS

Funding of collective actions

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

Class actions as such, as they are customary in the US legal system, are unknown in Germany. It is possible to combine claimants through a bundling of claimants, but the legal framework is unclear and jurisdiction is colourful. A bundling of five to 10 claimants in one suit seems possible, provided their claims have the same legal basis and the individual taking of evidence (eg, hearing the individual parties) is not necessary. The handling differs from court to court and there is a risk of the court breaking up the suit into its individual, original cases. Apart from these procedural problems, class actions can be funded.

In any case, the lack of class-action regulations (apart from a special vehicle for the finance market called Kapitalanleger-Musterverfahrensgesetz (KapMuG, Act on Model Case Proceedings in Disputes under Capital Markets Law)) still limits a wider use, but consumer protection is on the agenda of the government and Brussels. The European Commission published the 'New deal for customers' in April 2018, and on 1 November 2018, the German government decided to establish a special kind of class action (Musterfeststellungsklage – the model declaratory action). It is expected that we will see corresponding developments in the next years.

COSTS AND INSURANCE

Award of costs

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

In accordance with section 91 of the Code of Civil Procedure (ZPO), the unsuccessful party always pays the costs of proceedings. These include court costs, expert costs (if ordered by the court), and the adverse costs in accordance with the German tariff system, but no costs beyond these. If the defendant, for example, incurred costs in excess of those stipulated by the German tariff system, or if the defendant provided a private expert opinion, those costs are generally not refundable. In the case of a partial loss or win, costs are apportioned in the corresponding ratio. Because of the tariff system, court costs and those of lawyers can easily be calculated in advance; well-functioning calculators are available free of charge on the internet (eg, www.der-prozesskostenrechner.de).

Court decisions or orders that additionally refund the litigation funding costs, these being the funder's share in the proceeds, do not exist. Theoretically, a claimant would have to prove that his or her ability to enforce his or her claim depended solely on the support by a professional litigation funder (in return for a share in the proceeds). German courts are reluctant to expand access to damages and evidence hurdles are high. Premiums paid for litigation protection insurance are, for example, not accepted as damages (and after-the-event (ATE) insurance is unknown).

Liability for costs

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

No. Third-party funding is neither frivolous (the funder always supports a financially weaker party against a stronger party, and its service allows access to justice and creates a desired 'balance of power' before the courts), nor is the contractual relationship between funder and claimant a contract with a third-party beneficiary.

Security for costs

19 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?)

Court orders for the provision of security for costs are very rare. In practice they are only possible for claimants from outside the European Union. Even an insolvency administrator, who often has no funds at his or her disposal to cover adverse costs in case of a lost trial, cannot be prevented from suing somebody. Because funders are not a party to a trial, they cannot be ordered to deposit securities for the claimant. In addition, no obligations exist to disclose the (commercial) funding of a claim. In the rare case that security for costs is ordered, those costs are

calculated and limited to the applicable tariff system for the defendant's and the court's costs.

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

Court orders for the provision of security for costs are very rare. In practice they are only possible for claimants from outside the European Union. Even an insolvency administrator, who often has no funds at his or her disposal to cover adverse costs in case of a lost trial, cannot be prevented from suing somebody. Because funders are not a party to a trial, they cannot be ordered to deposit securities for the claimant. In addition, no obligations exist to disclose the (commercial) funding of a claim. In the rare case that security for costs is ordered, those costs are calculated and limited to the applicable tariff system for the defendant's and the court's costs.

Insurance

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

Almost 40 per cent of German consumers and 20 to 25 per cent of companies have taken out litigation protection insurance, which covers all standard costs of a trial. ATE insurance is unknown. In practice, there is no necessity for it because of the easily calculated costs of lawyers and courts pursuant to the tariff system (which is, in comparison with the United Kingdom, inexpensive).

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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

No. The disclosure of litigation funding is not required by law or by jurisprudence. As a matter of principle, litigation funding is confidential and will not be disclosed to the opponent unless advantageous (eg, in settlement negotiations).

Privileged communications

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

The client-lawyer privilege common in Anglo-American contexts does not exist in German civil law. A German lawyer is, of course, obliged to keep all client information strictly confidential (as stipulated by section 43a(2) of the Federal Regulations for Practising Lawyers) and client documents in his or her possession cannot be seized by the authorities. But, importantly, there is also no obligation to disclose information in a trial. A party may keep unfavourable information and documents to itself and cannot be forced to disclose those to the other party or to the court. This principle is only deviated from under very limited exemptions (eg, a document that by its nature is only in the party's possession not bearing the onus of proof and that is relevant for a decision).

In addition, a party in civil proceedings (in contrast with criminal proceedings) has no right to lie (see section 138 of the Code of Civil Procedure). A lie in court is punishable under criminal law (as stipulated by section 263 of the German Criminal Code). Because a disclosure obligation similar to that in the British and American legal systems practically does not exist in Germany, the provision for privilege can be dispensed with as well.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

Only very few. Disputes between commercial funders and their clients are rare. Limited attempts at challenging funding agreements as such have all failed.

Other issues

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

The German market of commercial litigation funding is neatly arranged. In fact, only three funders control more than 90 per cent of the market: Roland ProzessFinanz AG in Cologne, Foris AG in Bonn, and Legial AG in Munich. With respect to individual cases, no funders from outside of Germany are currently playing a major role in the German market. The minimum amount in dispute being funded is €100,000, and the standard share of the proceeds amounts to 30 per cent for any sum up to €500,000 and 20 per cent of any amount exceeding €500,000. However, individually agreed shares are common in larger cases.

UPDATE AND TRENDS

Current developments

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

The entry of more and more UK and US funders into the German funding market, announcing their intentions to invest hundreds of millions of euros in the German litigation market, has reawakened the old fear of bringing the 'American litigation style' to continental Europe – a development that is broadly disliked. In the autumn of 2018 and in the spring of 2019, the highest civil court of Germany, the Federal Court of Justice, ruled that the funding by a professional litigation funder of a claim brought by a consumer organisation is illegal. The decision was met almost exclusively with criticism by lower courts as well as by various scholars. However, it shows that Germany is not as easy to 'conquer' as some might think. Unfortunately, this trend was continued in 2020 with various lower courts handing down negative decisions in follow-on cartel damages 'class actions' (which are, in fact, mostly bundled single claims). If investment announcements locally are considered threats, those releases related to marketing and sales may have various negative effects – with regard to individual decisions as well as the reputation of the industry as a whole.

Coronavirus

27 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Just like the rest of the world, Germany has, of course, been affected by the pandemic. Nevertheless, the country has weathered the crisis rather well so far, not least because of the public purse that, after 10 years of uninterrupted economic growth, is bulging. This is why the German government was able to set up extensive financial-aid programmes targeted at individuals as well as enterprises.

The court system has been affected in various ways by the restrictions on public and private life that had been imposed by the German

government. What is true, in any case, is that the repercussions will be felt long into 2021, as there have been significant delays in the processing of cases and in holding hearings for them. Temporary easements, such as extended periods to file for insolvency, as well as other financial and non-fiscal easements, will expire at the latest at the end of 2020 (if not extended due to the ongoing pandemic). It can be expected, however, that the courts will take account of the pandemic and its unique circumstances in their decisions, in particular as regards the ailing manufacturing industry as well as the protection of jobs. As a result, the courts will scrutinise claims even more closely than before. Actions for compensation of damages caused by the laws and regulations passed because of the pandemic that are brought against the state and its institutions will most likely meet with success only in very few individual cases and will be rejected across the board.

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