

Litigation Funding 2021

Contributing editors
Steven Friel and Jonathan Barnes



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

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First published 2016

Fifth edition

ISBN 978-1-83862-361-6

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



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Contributing editors**Steven Friel and Jonathan Barnes**

Woodsford

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.



London

November 2020

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This article was first published in December 2020

For further information please contact editorial@gettingthedealthrough.com

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Austria

Marcel Wegmüller and Jonathan Barnett

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REGULATION

Overview

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

Third-party funding is permitted in Austria. The Austrian Supreme Court approved litigation funding by third parties in a 2013 decision (OGH, 6 Ob 224/12b). In addition, in 2004 and 2012, the Vienna Commercial Court denied the defendants' objections to third-party funding of the respective claims.

Thus, today, litigation funding in Austria is accepted practice and has been judicially endorsed by the Austrian courts. Although the courts did not comprehensively cover all aspects involved, they established an unquestioned and favourable environment for third-party litigation funding in Austria.

Compared to other jurisdictions, third-party litigation funding has had a late start in Austria. Recently, it has started to become an established litigation tool, but with regard to the potential market size, it might still be an exaggeration to declare third-party litigation funding to be of common use in Austria.

Restrictions on funding fees

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

There is no explicit limit on what is an acceptable compensation for the funder's services. However, as a general rule, a third-party funding agreement – as any other agreement under Austrian law – must not constitute profiteering (ie, exploitation of a person in need; article 1 of the Act against Profiteering).

Specific rules for litigation funding

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

There are no specific provisions in Austrian legislation.

Lawyers' professional conduct in Austria does not allow for lawyers to be paid only on the basis of contingency fees (section 16 of the Lawyer's Ordinance (RAO) and section 879 II of the Austrian Civil Code (ABGB)), so any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer violates these provisions.

Legal advice

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

Lawyers' professional conduct in Austria is provided by the RAO. In light of the RAO, the lawyer's independence in acting on behalf of the litigant

is crucial, and this also applies to cases involving a third-party funder. However, by a clear separation of the roles between the lawyer and the funder, in principle, a lawyer who advises their clients in relation to a funder has no conflict of interest.

Regulators

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

As at the time of writing, neither the Austrian financial regulator nor any other governmental body has any known interest in overseeing litigation funding.

FUNDERS' RIGHTS

Choice of counsel

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

Independence in acting on behalf of the litigant is an important principle of the lawyer's professional conduct. In light of the established third-party litigation funding concept, this means that, in general, the litigant's lawyer must be able to act freely from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder's right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that, if the litigant intends to replace their lawyer, funding will only be further granted if the new lawyer is accepted by the funder.

Participation in proceedings

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

In domestic litigation, court hearings are generally public and funders can attend without having to obtain specific permission. On the other hand, settlement and organisational proceedings are conducted in private. However, if the counterparty does not object to it, a litigant might invite their funder to participate in such proceedings.

This also applies to arbitration. While the respective hearings and proceedings are generally private, funders may participate if there is no objection by the counterparty.

However, it has to be kept in mind that the majority of cases funded by third-party funders in Austria so far have been carried out without disclosing the funder's engagement. As such, the relevance of the funder's permission to attend or participate is limited.

Veto of settlements

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

It is common practice to include a veto right clause regarding a potential settlement in a funding agreement. This is, in general, permissible under the Austrian Civil Code (ABGB) and does not interfere with the independence of the litigant's lawyer or with any other provision of Austrian law. Moreover, it is common for litigants and funders to agree in advance on certain minimum and maximum amounts concerning the limitation of the funder's veto right and their right to oblige the claimant to accept a particular settlement.

Termination of funding

9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. Usually, such circumstances fall into two categories. On the one hand, there are events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or authority decisions that result in a full or partial dismissal of the claim;
- the disclosure of previously unknown facts;
- a change in case law that is decisive for the current litigation process;
- a loss of evidence or evidence that is accepted and tends to be negative; and
- a major change in the creditworthiness of the respondent.

In practice, a funder would, under such circumstances, terminate the funding agreement and bear any costs incurred or caused until the termination, as well as costs that occur as a result of the termination.

While these clauses prevent the funder from having to continue funding legal proceedings that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such cases, the funder can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, given these circumstances, the litigant is usually obliged to reimburse the funder for its costs and expenses.

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?

In light of the independence of the claimant's lawyer from the third-party litigation funder, a funder is not allowed to instruct the lawyer during the proceedings. The lawyer would violate professional conduct rules as provided by the Lawyer's Ordinance if their actions were based on a funder's, rather than on their client's instructions. Therefore, any rights and actions the funder intends to exercise during the course of the litigation have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation and any rights to veto the actions a litigant is usually free to take.

Consequently, the litigant is usually obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written permission of the funder. Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding, funders only need to take an active role as provided by the litigation funding agreement. In addition, the involvement of a

litigation funder is not disclosed to the court nor the counterparty in the majority of the cases, which also considerably limits the funder's role within the litigation.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

The lawyer's professional conduct prohibits fee agreements in which the lawyer's fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are not permitted. Only if the lawyer charges a basic fee (flat or on an hourly basis) for the services that cover the actual costs of the lawyer's practice are they allowed to agree on a premium in the event of a successful outcome.

Consequently, the litigation funding agreement must not directly or indirectly provide a model resulting in a conditional or contingency fee for the lawyer. However, it is permissible to add a success fee for the lawyer within the limits described above in the funding agreement.

Other funding options

12 | What other funding options are available to litigants?

Legal cost insurance is widely available in Austria. However, the extent and limits of coverage depend upon the specific policy, as this kind of insurance usually only covers the costs of certain types of claims. Furthermore, the insurance policy usually has to be arranged before a person or entity becomes aware of the need to litigate. After-the-event (ATE) litigation insurance is not common in Austria.

A claimant may also seek legal aid if they lack the financial resources to fund the proceedings and if the case does not seem devoid of any chance of success. However, both conditions are handled rather strictly by Austrian courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs, to pay court costs and to provide security. It can also comprise the appointment of a lawyer by the court if this is necessary to protect the rights of the party. Since 2013, legal aid has also been available to companies with financial constraints if the claim does not seem devoid of any chance of success.

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?

In general, a commercial litigation before a court of first instance in Austria takes between 12 and 18 months. If the case is rather complex or if the court accepts an extended range of evidence to be heard, the litigation process may take considerably longer. In domestic arbitration, the duration is normally between one and three years.

Time frame for appeals

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

There is a considerable difference in the respective practice of the various states of Austria. As a general rule, approximately half of the judgments are appealed before the second instance of the respective state. On average, the second instance takes between 12 and 18 months. Only a small proportion of these judgments are appealed before the Austrian Supreme Court. There, an average appeal takes approximately one year.

Enforcement

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

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective number seems to be rather low.

The enforcement of Austrian judgments is governed by the Code of Civil Procedure and by the provisions of the Austrian Enforcement Regulation. A judgment rendered by an Austrian court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement or it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

In general, the enforcement of an enforceable judgment or arbitral award in Austria is not seen as particularly burdensome, expensive or unpredictable.

COLLECTIVE ACTIONS

Funding of collective actions

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

Apart from the joinder of parties, Austrian law does not provide for specific collective redress. However, a class action mechanism has nevertheless been part of Austria's civil procedural law practice for more than 10 years. This particular instrument, often referred to as 'class action Austrian-style' is based on the combination of several elements of the Code of Civil Procedure. In principle, a claim can be asserted by the original owner of a claim and a third party to whom the claim has been assigned. Furthermore, if a plaintiff asserts several claims against the same defendant, they can bundle all claims into a single set of proceedings. Finally, if the assignee and class action claimant happen to be a specific association (eg, a consumer organisation), claim-size restrictions are removed so that all claims can be brought before the Supreme Court, regardless of their individual claim size. The Austrian Supreme Court explicitly approved the funding of such a class action by a third party in the 2013 Austrian Supreme Court decision. Subsequently, third-party funders have shown increasing interest in funding Austrian-style class actions, which has gained public interest. Cases include those against VW, a trucks cartel, GIS and AWD.

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?

As a general principle, court fees as well as all other expenses arising from the litigation, including the opposing lawyer's fees, are borne by the losing party. If a party prevails only in part, the fees and expenses will be split proportionately between the parties. In the event of a settlement, the costs are incurred by the parties according to the terms and conditions of the settlement agreement.

The Austrian courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before the state courts and the Austrian Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party, although section 41 of the Code of Civil Procedure (CCP) would provide the basis for a rather broad spectrum of costs compensation in favour of the successful party.

Liability for costs

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

The CCP does not provide a basis for the court to order or find liable a third-party funder to pay adverse costs. In practice in Austria, a funder's contractual obligation towards the claimant to cover the costs of the litigation does not apply to the opposing party.

In theory, there are two ways in which a litigation funder can be held liable for these costs by the prevailing respondent.

If the unsuccessful claimant assigns their claim against the funder to cover the adverse costs imposed on them by the court to the respondent (and the litigation funding agreement allows for such an assignment), the respondent can take the assigned claim against the funder to the competent court.

If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow for an assignment), then the respondent must take legal action against the claimant. In practice, the Austrian courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the enforcement order that govern the enforcement of a judgment, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

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?)

There are two different types of security for costs that Austrian courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs. In addition, the claimant must advance the costs for taking the evidence they requested.

At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party's costs if the claimant has no residence or registered office in Austria. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Austria has entered into a treaty that excludes such security.

The CCP does not provide a basis to request such security from the funder of a claim and there have been no cases reported where Austrian courts considered such a request.

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

In most of the cases funded so far by third-party funders in Austria, the funder's engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts determined advances and securities solely based on the claimant's status and did not take the existence of the third-party funder into account.

Insurance

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

ATE litigation insurance is not common in Austria. Although no legal or regulatory restrictions limit the respective product, there is currently no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases in Austria.

By contrast, legal costs insurance is commonly used in Austria. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy, but usually it is limited to certain types of claims.

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?

The Code of Civil Procedure (CCP) does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that they are supported by a third-party funder. It also does not provide a basis for an Austrian court to order a litigant to do so.

Whereas some authors have argued that a litigant might have such an obligation in domestic arbitration under specific circumstances, there have been no cases reported where a litigant had to disclose the litigation funding agreement in an Austria-based arbitration.

Privileged communications

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

Whereas any legal advice given by an Austrian or non-Austrian lawyer to a litigant is privileged and does not have to be disclosed to the other party or the court, the communications between litigants or their lawyers and third-party funders are not protected by legal privilege. Confidentiality can be provided, however, by way of non-disclosure agreements between a funder, lawyer and client.

However, there have been no cases reported where such communications had to be disclosed by order of an Austrian court.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No disputes between litigants and funders have been reported in Austria so far.

Other issues

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

Yes.

NIVALION

Elevating legal finance

Marcel Wegmüller

marcel.wegmueller@nivalion.com

Jonathan Barnett

jonathan.barnett@nivalion.com

Fichtegasse 5
1010 Vienna
Austria
Tel: +43 1 25 32220

Turmstrasse 28
6312 Steinhausen
Zug
Switzerland
Tel: +41 41 748 43 00
www.nivalion.com

UPDATE AND TRENDS

Current developments

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

The Austrian Supreme Court declared permissible the sale of insolvency avoidance claims, and thus overruled the view of scholars in Austria, which has prevailed for decades (OGH 17 June 2019, 17 Ob 6/19k). This opens up new possibilities for third-party funders to finance avoidance claims in insolvency proceedings, and will give insolvency administrators a valid new option to pursue claims, which was previously not possible due to a lack of assets. The creditors in insolvency proceedings will ultimately benefit from this development.

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?

In response to the covid-19 pandemic, the Austrian government has acted to protect commercial and related interests including by extending time limits in administrative, civil, insolvency and commercial law matters. These measures were adopted on 16 March 2020, 22 March 2020 and 5 April 2020 and comprise five pieces of legislation that regulate issues arising out of the covid-19 pandemic, most of which expires on 31 December 2020 (see: <https://www.bmdw.gv.at/Themen/International/covid-19/Gesetze-und-Verordnungen.html>). The pandemic has resulted in a significant increase in demand for litigation funding for commercial litigation, insolvency, investor-state and commercial arbitration. Further, the pandemic has extended the length of cases in many instances, and increased a funder's scrutiny of the parties and associated risks including health of the parties and witnesses, parties' financial viability and risks associated with enforcement and recovery.

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