THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Editor
Leslie Perrin

THE LAWREVIEWS

THE THIRD-PARTY LITIGATION FUNDING LAW REVIEW

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PREFACE

One afternoon in February 2008, my phone rang. It was a partner from a major New York law firm asking if I would like to be a non-executive director on the listing on the Alternative Investment Market in London of a 'third party funder'. I feel now that I was speaking then for (effectively) the entire London lawyer community when I asked my first question: 'What is third party funding?'

Well, now we know! Or do we? The decision by The Law Reviews to publish its inaugural *Third Party Litigation Funding Law Review* is certainly a sign of a substantial build-up of interest in the subject, but the contents of the *Review* itself show that it is perfectly possible for experienced practitioners who are well versed in the subject to differ when it comes to outlining their answers to what is essentially the same question that I asked back in February 2008 – once again, what is third party funding?

Even the naming of third party funding (TPF) can cause difficulties, as besides TPF we have litigation funding, arbitration funding, litigation finance, settlement funding, claims purchase, monetisation (of awards and judgments), law firm funding and in-house legal department finance – the list grows as awareness spreads. Perhaps the best way of describing what TPF has become is 'legal capital'.

The essence of TPF is the deployment of legal capital to fund the realisation of assets that are contingent on the resolution of some form of legal process. If the assets are sufficiently attractive, other things besides (or instead of) legal costs can be funded, including corporate expenses.

Legal capital is (almost) invariably invested on the basis that the investor is without recourse, other than to the proceeds of the legal asset whose realisation is being pursued. The investor's recovery is therefore limited to what can be realised in cash or kind from the legal asset itself. Absent breach, the funded party is not personally liable to the funder and therefore it would almost always be a major solecism to describe a TPF investment as a loan.

There are, of course, fundamental differences in approach between jurisdictions following the common law and those where civil law principles rule, but even within those two broadly distinct systems, there are a host of differences. In the United States alone, there are 50 states with 50 different approaches to describing TPF and how it should (if at all) be regulated.

In general, all common law jurisdictions have various degrees of survival of the ancient doctrines of maintenance and champerty, which historically prevented third parties from intervening in litigation in which they were not already directly involved as parties, although, having said that, maintenance and champerty have been abolished in Australia. On the other wing of opinion, TPF is absolutely forbidden in Ireland, following the Supreme Court ruling

in the *Persona Digital* case. It seems that in Ireland TPF must wait for the legislature to permit it. The civil law, on the other hand, has never held any significant reservations about TPF.

In some common law jurisdictions, there is a difference of approach depending on whether the legal process is arbitration or litigation. In Hong Kong until recently, only insolvency office holders were permitted to access TPF because claims farming remains such a severe problem in personal injury litigation. Now a regulatory framework has been approved in Hong Kong for TPF to operate in commercial arbitration seated there. Singapore immediately followed suit.

Then there are a variety of controversies facing TPF that are generally resolved by individual jurisdictions in individual ways that suit them, thus defying any attempt to identify general principles that apply globally. Currently, those issues tend to revolve around three topics regarding the regulation of TPF providers; whether (and if so, in what circumstances and by what principles) a provider of TPF should be liable in unsuccessful cases to pay the costs of a victorious defendant or to give security for costs; whether disclosure to the court or the arbitral tribunal is required of the fact of TPF being used by a party; and the issue of privilege and confidentiality with reference to documents that are disclosed to a funder by a party to funded litigation or arbitration.

TPF provides access to justice for those who could otherwise not afford to fight their claims, and it brings access to rational commercial risk management for eminently solvent entities who do not wish to expose themselves to the significant costs of resolving their disputes from the own resources. TPF thus serves both those who are unable and those who are unwilling to fund the resolution of their disputes.

Demand grows as acceptance of TPF spreads. Acceptance spreads as law firms increasingly perceive that unless TPF becomes part of their offering, they will become less able to compete for valuable work from every kind of client.

This is a global phenomenon, but the resolution of every dispute by the principal international dispute resolution mechanisms, litigation and arbitration, will be rooted in the law of a particular jurisdiction. The choice of jurisdiction is not always made with wisdom or foresight, and providers and users of TPF sometimes have to reflect that, as the proverb goes, 'as you make your bed so you must lie in it'. This book, covering as it does all the principal TPF centres, should, in the best possible way, help users and providers of TPF to a good night's rest!

Leslie Perrin
Calunius Capital LLP and the Association of Litigation Funders of England & Wales
London
November 2017

Chapter 2

AUSTRIA

Marcel Wegmüller and Mirdin Gnägi[1]

I MARKET OVERVIEW

Compared to other jurisdictions, third party litigation funding is relatively new in Austria and has only recently started to become an established, albeit selective, litigation tool. Nevertheless, as of today litigation funding in Austria is accepted practice and the Austrian courts have judicially endorsed it in recent years. While the courts have not yet comprehensively covered all aspects of litigation funding, they have at least created a stable and favourable environment for third party funding in Austria.

The aspect that has gotten the most exposure and that has substantially influenced the public opinion of third party funding in Austria is its contribution to the Austrian-style class action. While there is no specific collective redress provided for in Austrian law apart from the joinder of parties, there has been a class action mechanism existing in Austria's civil procedural law practice for over 10 years. Said mechanism is based on a combination of several elements of the Austrian Code of Civil Procedure (ZPO) and is commonly referred to as 'Austrian-style class action'.[2] It entails the possibility not only for the original owner of a claim to assert it against the debtor but also for a third party to whom the claim has been assigned to do so. In addition, the Austrian-style class action allows a plaintiff who wants to assert several claims against the same defendant to bundle all these claims into a single litigation. In addition, claim-size restrictions do not apply in case of the assignee and class action claimant being a specific association (e.g., a consumer organisation). This allows for all bundled claims to be brought before the Supreme Court regardless of the individual claim size.[3] In a landmark decision in 2013, the Supreme Court explicitly confirmed the legality of third party funding of such Austrian-style class actions.[4]

Third party funding in Austria has grown in recent years and now covers single case funding both in litigation and arbitration for a broad variety of civil claims, and for corporations as well as for private individuals.

Alternative funding options entailing the same advantages as third party funding are scarce in the Austrian market: while legal cost insurance is widely available in Austria, the coverage it provides is quite limited regarding the maximum amount of legal costs insured as well as the type of disputes insured, depending on the specific policy. Another disadvantage of legal cost insurance consists in the need to arrange it before the event giving rise to a claim even happened, that is before a possible claimant even becomes aware of the need to litigate.

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1 Marcel Wegmüller is a managing partner and Mirdin Gnägi is an associate at Nivalion AG.

2 See especially Sections 11, 187 and 227, ZPO.

3 However, the Austrian-style class action is based on the opt-in principle.

4 OGH, 27 February 2013, 6 Ob 224/12b.

On the other hand, after-the-event (ATE) litigation insurance is not commonly established in Austria, notwithstanding the absence of legal or regulatory restrictions. Still, at the time of writing there is no standard offering available. Only some foreign insurance companies have been reported to make ATE insurance available in a few cases in Austria.

The third alternative consists of legal aid, for which a claimant is eligible if he or she lacks the financial resources to fund the proceedings and if the case does not seem devoid of any chance of success.[5] Here, it is the judicial practice that limits the usefulness of this option, since Austrian courts handle both conditions in quite a strict way.[6] If granted, legal aid can comprise one or a combination of the following measures: an exemption from the obligation to pay an advance on costs or to provide security (or both); an exemption from court costs; or the appointment of a lawyer by the court if judged necessary to protect the rights of the party receiving legal aid. Since 2013, legal aid is not only available to persons but also to companies that meet the two aforementioned conditions regarding the lack of financial resources and at least some chances of success.[7] But, again, the number of claimants benefiting from legal aid is extremely small.

These circumstances together with the shortcomings of the other alternatives mentioned leave a sizeable market of third party funding opportunities and an interesting potential for growth. Currently, the Austrian market is mainly serviced by the local provider Advofin Prozessfinanzierung AG (with a focus on class action funding), Switzerland's Nivalion AG (focusing on arbitration and commercial litigation funding) and JuraPlus AG, as well as Germany's Foris AG and Roland ProzessFinanz AG.[8]

II LEGAL AND REGULATORY FRAMEWORK

The question of the basic admissibility of third party funding for civil litigation and arbitration in the Austrian jurisdiction was favourably decided by the Supreme Court in a 2013 decision.[9] This leading case has been bolstered by two decisions of the Vienna Commercial Court in 2004 and in 2012 when it denied the respective defendants' objections to third party funding.[10]

While the question of third party funding has been taken up by the courts, lawmakers have not yet seen the necessity to deal with it. Austrian legislation contains no specific

5 Sections 63–73, ZPO. Legal aid in Austria is called *Verfahrenshilfe*.

6 E.g., regarding lacking financial resources: VfGH 25 August 2016, E 1891/2016; 22 March 2002, B 254/02; 2 April 2004, B 397/04. E.g., regarding reasonable chances of success: VfGH 17 August 2017, E 1096/2017.

7 Section 63(2), ZPO; VfGH 5 October 2011, G 26/10.

8 http://www.advofin.at/; http://nivalion.ch/; http://www.jura-plus.ch/; https://www.foris.com/; https://www.roland-prozessfinanz.de/; last visited on 24 October 2017.

9 See footnote 4 above. The first decision stating the admissibility of someone lending financing support in litigation against a share of the proceeds in Austria dates back to the 1980s and remained very isolated until the 2013 landmark decision: OGH 11 December 1984, 4 Ob358-365/83, Öbl 1985,71.

10 https://www.foris.com/fuer-aktionaere/investor-relations/news/detail/handelsgericht-wien-bestaetigt-erneut-zulaessigkeit-von-prozessfinanzierung.html; HG Wien 7 December 2011, 47 Cg 77/10s, available at: https://verbraucherrecht.at/cms/index.php?id=49&tx_ttnews%5Btt_news%5D=2709&cHash=22ed0518d1c211afc704b438764b8078; OLG Wien 23.8.2012, 3 R 41/12i, available at: https://verbraucherrecht.at/cms/index.php?id=49&tx_ttnews%5Btt_news%5D=2849&cHash=6725fce59f65f57bb77c4063ac4594c3, last visited on 25 October 2017.

provisions regarding third party funding. What is more, neither the Austrian financial regulator nor any other governmental body has so far taken any steps to install any oversight of reported litigation funding.

Therefore, a specific legal or regulatory framework concerning third party funding is absent in Austria. However, third party funders and their clients have to take into consideration the rules and regulations regarding the professional conduct of lawyers in Austria, since the client's mandated lawyers do play a role in any client's relationship with his or her litigation funder. In Austria, lawyers are prohibited from working on a contingency-fee basis only.[11] The reasoning behind this relates to the lawyer's independence: if a lawyer has a financial stake in a case that exceeds the basic compensation for his or her services (i.e., if he or she works on a contingency-fee basis), the assumption is that he or she would no longer have only the client's interests on his or her mind but might start to look out for his or her own (financial) interests. This, in turn, might conflict with the client's interest as a lawyer may excessively insist on taking a case to court when the best advice for the client would be to settle the case.

The prohibition of a pure contingency-fee remuneration for the client's lawyer has to be taken into account when drafting the litigation funding agreement. Any stipulation therein that would – directly or indirectly – result in a pure contingency-fee model regarding the remuneration of the client's lawyers, would be in violation of the above-mentioned legislative provisions in the Lawyer's Ordinance (RAO) and the Austrian Civil Code (ABGB). However, if the lawyers charge a basic fee (flat or on an hourly basis) for their services that covers the actual costs of the lawyers' practice, the fee arrangement could entail an additional remuneration in addition to the basic fee, such as a premium in the event of a successful outcome.[12] Within those limits, the litigation funding agreement can stipulate a remuneration model for the client's lawyers that is partially responsive to the outcome of the case. What must be strictly avoided is a pure contingency-fee-based model – or any model that would allow for it to be interpreted as such.

Furthermore, since the lawyers' independence is a crucial principle of the RAO,[13] it is not sufficient to factor it in only regarding the financial aspects of the funder-lawyer relationship. It is equally important that the funder and the lawyers assume distinct roles, meaning that the funder provides a financial service while the lawyers advise their clients on all legal aspects – including the client's relationship to the funder. Thus, any conflict of interest on the lawyers' part can be prevented.

An additional point to consider is the prohibition of profiteering under Austrian law (i.e., exploitation of a person in need).[14] In principle, there is no explicit limit on a funder's share of proceeds and no definition of what constitutes an acceptable compensation for the funder's services, but any agreement under Austrian law, including a litigation funding agreement, must not constitute profiteering.

11 Prohibition of the *pactum de quota litis*: Section 16(1), RAO and Section 879(2), ABGB.

12 In contrast to the *pactum de quota litis*, the *pactum de palmario* is allowed in Austria, the difference being that the latter – while being dependent on a successful outcome – is not dependent on the extent of the success. See Marcel Pilshofer, 'Grundlagen und Grenzen freier Honorarvereinbarungen im Anwaltsberuf', doctor's thesis Vienna 2010, p. 161 et seq., 292 et seq.; as well as Michael Kutis, Das «pactum de quota litis» in Österreich, in: *Anwaltsrevue* 2008/10, p. 457 et seq.

13 Cf. Section 9(1), RAO.

14 Section 1 of the Act against Profiteering.

III STRUCTURING THE AGREEMENT

Normally, litigation funding agreements in Austria contain a standard clause regarding confidentiality and non-disclosure, basically prolonging the reciprocal obligation that the parties might have entered into under a non-disclosure agreement at the very start of their relationship. This standard clause usually concerns itself with protecting the litigant's interest, but, since in Austria there is no duty to reveal a third party funder's involvement,[15] the confidentiality clause in the litigation funding agreement could also contain some obligation for the litigant such as not to disclose the funder's involvement without the funder's express written consent.

Another standard issue of litigation funding agreements in Austria is the funder's exclusivity. The litigation funding agreement is usually conditional upon the funder's extensive due diligence review. Normally, funders reserve the right to exclusively carry out such review within a period of a few weeks. By doing so, their interests are protected and they can be sure that if their assessment of the case turns out positive, they will have the opportunity to fund the case. This manner of proceeding has become common practice in Austria, although there are slight differences between the third party funders regarding the appellation and the timing of this twofold step of due diligence review coupled with exclusivity – some funders prefer to make the litigation funding agreement conditional upon the achievement of said step, others prefer to have a separate, earlier agreement that governs this aspect.

The principle of the lawyer's independence in acting on behalf of the litigant, as described above, has to be taken into account when structuring the litigation funding agreement, in order to adhere to the regulations on the lawyer's professional conduct. 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 his or her client. Nevertheless, a litigation funding agreement in Austria may very well stipulate a funder's right to grant funding only for a specific lawyer accepted by the funder. These situations are part of the usual contractual negotiations between parties to a litigation funding agreement. In addition, a litigation funding agreement may provide that if the litigant intends to replace his or her lawyer, further funding will only be granted if the new lawyer is accepted by the funder, considering that the funder's belief in the lawyer's skills is an essential element when the former is assessing a case and concluding a litigation funding agreement. But these two special stipulations do not really concern the fundamental element of any client-lawyer relationship – namely, the client's right to instruct his or her lawyer. In this respect, the claimant's lawyer has to stay independent from the third party funder. Thus, the funder must not instruct the lawyer during the proceedings.

Of course, in a normal working relationship the funder will express his or her opinion on the progress of the case and will mention any steps he or she thinks should be taken in the best interest of the case, but only the client has the right to instruct his or her lawyer, and the lawyer has the obligation to take instructions only from his or her client. If, instead, the lawyer acts upon instructions by the funder, he or she would violate the professional conduct as provided in the RAO. Any rights and actions that the funder might intend to exercise during the course of the litigation process must therefore have been agreed upon in the litigation funding agreement, to which the funder and the claimant, not the claimant's lawyer, are parties. In this context, the parties need to consider any information rights, access to documents produced during the ongoing litigation, and any rights for the funder to veto

15 See Section IV, below.

actions that a litigant is usually free to take, respectively the offsetting mechanisms triggered if a litigant takes such actions against the funder's preference. Often, these considerations lead to contract clauses stipulating the litigant's obligation not to: conclude or revoke any settlements; waive any claims; initiate any additional proceedings in connection with the funded claim; adopt any legal remedies; expand the claim; or otherwise dispose of the funded claim without the written permission of the funder. By negotiating these terms beforehand and including them in the litigation funding agreement, the claimant's rights to his or her claim are respected.

Clauses containing a veto right with respect to a potential settlement have been commonly included in Austrian funding agreements. Such a clause is permissible under the ABGB and does not violate the independence of the litigant's lawyer nor any other stipulation of Austrian law. The litigant and funder often agree in advance on certain minimum and maximum amounts in the range of which the funder's veto right, as well as his or her right to demand that the litigant accepts a particular settlement or that he or she sets the funder off against the benchmark of the proposed settlement, apply. Such clauses have become frequent practice in Austria.

Regarding the right to terminate the funding, litigants and funders can freely agree on various events or circumstances that trigger such a right. Habitually, these circumstances form two distinct categories. The first category includes events that are deemed to have a substantial effect on the risk of the proceedings, such as:

a court or authority decisions that result in a full or partial dismissal of the claim;
b the disclosure of previously unknown facts that have a negative effect on the current litigation process;
c a change in case law that has a negative effect on the current litigation process;
d a loss of evidence or harmful evidence adduced by the respondent; and
e a major change in the creditworthiness of the respondent.

When a funder exercises his or her right to terminate under such circumstances, in practice he or she would terminate the agreement and bear any costs incurred up until this moment as well as costs that are incurred as a consequence of the termination.

These clauses lift the funder's financing obligation in cases that appear reasonably unpromising, whereas the second category covers breaches of obligations under the funding agreement committed by the litigant. If the litigant breaches his or her obligations under the agreement, usually the funder has the right to terminate the funding after due notice and he or she is not obliged to cover the outstanding costs of the proceedings but rather the litigant usually has to reimburse the funder for his or her costs and expenses.

IV DISCLOSURE

In Austrian domestic litigation, court hearings are normally public, which allows funders to attend without needing special permission.[16] In contrast, settlement as well as organisational proceedings are normally conducted in private.[17] Nonetheless, if there exists a clause in the litigation funding agreement providing for the funder's right to attend and if the counterparty does not object to it, a litigant can invite his or her funder to these proceedings.

16 Section 90 of the Austrian Constitution (B-VG), Sections 171 et seq., ZPO.
17 Section 175, ZPO.

Arbitration proceedings are generally private, but the same principle applies here: if the counterparty does not object, a funder may attend hearings and proceedings. However, most of the cases funded by third parties in Austria so far have been taking place without disclosure of the funder's involvement. As this is widespread practice in Austria, the question of the funder's permission to attend is not very relevant in practice.

The ZPO does not provide any obligation for a litigant to mandatorily disclose the fact that he or she is supported by a third party funder, or even the details of the litigation funding agreement. Nor does the ZPO provide a basis for an Austrian court to order a litigant to disclose potential third party funding. This means that the decision of whether to disclose the funder's involvement rests fully with the litigant and can be used in his or her dispute strategy. While it has been argued that there should be a disclosure obligation for the litigant in international arbitration under specific circumstances,[18] there have not been any reported Austria-based arbitrations in which such an obligation has been applied.

Regarding privilege, there is a distinction between the communications between a litigant and his or her lawyer and the communications between those two parties and a third party funder. While the former is privileged and does not have to be disclosed either to the opposing party or the court,[19] the latter – between the funder and the litigant or his or her lawyer – is, as such, not covered by legal privilege. Notwithstanding this, there have not been any reported cases where this type of communication has had to be disclosed to the defendant or the court by way of a court order.

V COSTS

In Austria, court fees and all other expenses arising from the litigation, including the opposing lawyer's fees, are borne by the losing party, with a proportional split between the two parties if one party only partially prevails.[20] If the parties agree to settle the case, the costs are divided between the parties as provided by the terms and conditions of the settlement agreement.[21]

In order to determine and allocate court costs and party costs, the Austrian courts refer to the applicable tariff schedules. These tariff schedules often differ from the legal fees actually incurred (i.e., the actually incurred costs are higher than what the courts allocate). The same holds true with regard to appellate proceedings before the state courts and the Supreme Court.[22]

The issue of a funder's liability for adverse costs in Austria is quite straightforward, but there are a few nuances. In third party litigation funding, as practised and understood in Austria, a funder's contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect. Furthermore, the ZPO does not stipulate that a court could order a third party funder to pay adverse costs. Therefore, in principle, a third party funder cannot be held liable for adverse costs unless he or she contractually obliged himself or herself to do so (towards the claimant). If this contractual obligation exists, it can naturally be enforced by the funder's contractual partner (the claimant). It is also possible to detect two ways in which the prevailing respondent or the bankruptcy estate consisting of the

18 Third-party Funding in International Arbitration, ICC Dossier, Vol. 10, Paris 2013; pp. 95 et seq.

19 Section 9, RAO, Section 321, ZPO.

20 Sections 41 and 43, ZPO.

21 Section 47, ZPO.

22 Section 50, ZPO; Federal Law on Court Fees (GGG).

claimant's assets could hold a third party funder liable for his or her costs (i.e., the adverse costs), though both require that in the litigation funding agreement there is a contractual obligation on behalf of the funder to pay adverse costs to the claimant. First, if the claimant succumbs, he or she could assign his or her claim against the funder to cover the adverse costs to the respondent – provided that the litigation funding agreement allows for such an assignment. The respondent can then take the assigned claim against the funder to court and force the funder to fulfil the obligation. Second, if the claimant does not assign the above-mentioned claim to the respondent (maybe because the funding agreement does not allow for an assignment) and at the same time refuses to pay the adverse costs, a funder could be forced to fulfil his or her obligation to cover adverse costs at the end of a long process of enforcement, namely if the respondent takes legal action against the claimant, the claimant is declared insolvent and the claim against the funder is realised as part of the bankruptcy assets. In practice, the prevailing respondent is granted recourse against the claimant to recover such costs in the courts' judgments. The enforcement of a judgment is governed by the Austrian Enforcement Regulation,[23] which provides that the successful respondent can request the competent debt collection office to issue a payment order against the claimant on the basis of the existing judgment,[24] which, as described, grants the prevailing respondent recourse against the claimant. Once the payment order is handed to the claimant, if he or she fails to pay the amount due the competent court will eventually declare him or her insolvent.[25] The claim against the funder to cover adverse costs will consequently become part of the bankruptcy assets. This constitutes the basis for the bankruptcy estate or, if specific circumstances apply, the respective creditors to subsequently bring this claim against the funder before the competent court.

Regarding security for adverse costs,[26] generally a claimant may be ordered to provide two distinct types of security for costs by Austrian courts. First, the courts can order the claimant to provide security for the expected court costs, which the court calculates by using tariff schedules and that depend mainly on the claim size.[27] Second, the claimant can be ordered to advance the costs for taking the evidence he or she requested in his or her submissions.[28]

The claimant must only provide security for the potential compensation of the opposing party's costs if the respondent requests it and if the claimant has no residence or registered office in Austria.[29] If the claimant is domiciled in a country that has entered into a treaty excluding respective security bonds with Austria, then the claimant cannot be ordered to post security for adverse costs even if the respondent requests it.[30]

23 Law on Enforcement and Execution (EO).

24 Sections1(1), 3(2) and 54, EO.

25 Sections 1, 66, 67, and 70 of the Federal Law on Insolvency.

26 Security for adverse costs is called *aktorische Kaution* in Austria.

27 Sections 6, 7(1), and 14, GGG, Sections 54–60 of the Law on Jurisdiction and Competence.

28 Section 365, ZPO.

29 Section 57, ZPO.

30 Section 57(1), ZPO. Thus, claimants domiciled in the European Union (cf. Article 6(1) of the EC Treaty; case C-323/95 Hayes European Court Reports 1997 I-01711; and Article 51 of the Council Regulation (EC) No. 44/2001 (Brussels I)) or in a country that is a party to the Lugano Convention of 30 October 2007 (Article 51 Lugano Convention) cannot be ordered by Austrian courts to provide security for adverse costs.

Therefore, while the claimant can be ordered to provide security for costs (a circumstance that contributes to the need of third party funding), the ZPO does not contain a stipulation regarding the third party funder of a claim. Also, there have been no reported cases in which Austrian courts have considered a request of security from the third party funder of a claim.

As mentioned in Section IV, so far in most of the cases involving third party funders in Austria, the fact of this involvement has not been disclosed to the court or to the respondent. In the very few cases where it has been openly communicated that a third party is funding the litigation, the respective courts have solely taken the claimant's status into account when deciding on advances and securities. The fact that the litigation was funded by a third party did not influence the courts' reasoning in those instances.

A final issue regarding costs is the potential recovery of the costs of securing third party funding through a court order. To date, no Austrian court has ordered an unsuccessful party to pay the litigation funding costs of the successful party. But, theoretically, Section 41 of the ZPO provides a sound basis for a wide range of cost compensation in favour of the successful party, potentially including recovery of litigation funding costs.[31]

VI THE YEAR IN REVIEW

Two interesting developments have occurred in the past year or so regarding third party funding in Austria. First, the share of third party funding in arbitration as opposed to civil litigation has increased. Given Austria's importance as an arbitration forum this development was long overdue, but it remains noteworthy nonetheless, as it only occurred recently. Second, some third party funders have begun to offer a wider array of funding solutions, including offering sophisticated forms of funding in litigation finance. The most noteworthy of these novel forms of third party funding is the monetisation of claims for corporate litigants, which means that a third party funder would not only fund the costs of a litigation or arbitration, as has traditionally been the case, but would also provide funds to be used by the litigant for general corporate purposes against the company's litigation or arbitration case as collateral.

31 Section 41(1), ZPO provides for the compensation of 'necessary costs for the expedient and adequate enforcement of one's rights' (authors' translation). What is decisive are considerations regarding usefulness and prospects of success (Martin Mahrer, Zulässigkeit von "leeren" Klagebeantwortungen?, in: *AnwBl* 2004/6, pp. 336-341, p. 339), which always have to be evaluated *ex ante* (Michael Bydlinski, *Kostenersatz im Zivilprozess*, Vienna 1992, p. 15). Further reflection on this matter could be informed by the following aspects: regarding certain pre-proceedings costs, such as expert opinions and detective costs, some opinions in Austria have held that, depending on the exact circumstances, such costs could be claimed either as costs under Section 41, ZPO or as separate damages (Alfred Tanczos, Konstantin Pochmarski and Nicole Konrad, Kosten und Nutzen des Privatgutachtens im Bauprozess, in: *bauaktuell* 2014/1, pp. 9–12, p.11 et seq.; Clemens Thiele, Der Ersatz von Detektivkosten in Österreich, in: *RdW* 1999/12, pp. 796 et seq.).

VII CONCLUSIONS AND OUTLOOK

While third party litigation funding in Austria has only recently started to become an established litigation tool, it is accepted practice and judicially endorsed by the Austrian courts, which have created a stable and favourable environment for third party funding in Austria.

In addition, the Austrian market for third party litigation funding is slowly opening up to a broader array of approaches regarding litigation in need of funding, thus connecting the claimants' needs with the funders' resources.

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