THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Editor
Leslie Perrin

THE LAWREVIEWS

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PREFACE

Just as you start to think it might be safe to assume that everyone who needs to understand third party funding of litigation and arbitration really does understand it, you stand, as I did the other day, in one of London's finest clubs chatting socially to a Circuit Judge, who asks what you are doing these days and you reply that you invest capital in the costs of litigation in return for a share of the proceeds contingent on success. He looks you magisterially in the eye and asks, as if you would never have thought of it, 'isn't that unlawful?'

The task of proselytising third party funding, as anyone directly involved in it will tell you, goes on. Right across the global reach of third party funding, every meeting or conference, with lawyers or with potential claimants, can be expected to require a run through of the basics of how it is done. The process is not assisted by the silo mentality of most major law firms, where it is absolutely not possible to make the assumption that, having spoken to one, or even several partners, you have spoken to the firm.

This past year has also meant for most funders, a merry-go-round of encounters with investors, as blue-chip pension funds, family offices, endowments and seemingly all known fund management vehicles have realised that it might be possible to invest in an asset that is not only non-correlated with other asset classes, but also, where concentrations are properly managed, one where the individual assets in a portfolio are not internally correlated. Eye-catching returns are being reported by the listed funders, while rumours of similar performance circulate around the private funders.

Individual managers and underwriters of litigation risk with a track record of success are rarer than the proverbial hens' teeth though. Some observers estimate that in the entire world there are no more than about 35 people with a 10-year investment management record delivering the sort of results that investors are seeking. This has led to an aggressive global hiring spree by funders in an attempt to remedy this shortage, aimed at the cream of senior associates (and occasionally partners) from all types of firm, including the very largest.

As the pipeline to equity narrows at all law firms, but especially at the largest and most profitable, and that pathway comes to depend on ever greater commitments of time to the firm, over all else, many lawyers outside law firm equity have begun to be tempted by the stories they hear of the opportunities to earn an equity stake at a litigation funder where hard work and dedication are, of course, an absolute requirement, but where an 18-hour-day time commitment is not expected.

All this has led to a debate within funders as to what ingredients make up the ideal senior recruit from a law firm. Does it have to be a litigator? Not really. Third party funding can be seen as a corporate finance transaction where competitive advantage for a funder may lie in being able to field top-class transactional input to the way a deal is negotiated from the outset. Does it have to be a lawyer? No. Experienced finance professionals should play a role

in case assessment, not just in the process of understanding the true quantum of a claim but in establishing the return that will be required by the investors in given time and quantum outcomes.

Interesting business pressures are also mounting in consequence of the global nature of third party funding. Although the Association of Litigation Funders of England & Wales (of which I remain the chairman) continues to provide voluntary regulation to the third party funding sector that seems to be respected and understood in the senior ranks of the judiciary and beyond in the Ministry of Justice and in other government circles, it is becoming clear that some form of international trade association is now required, to give a collective global voice (albeit, not as a regulator) to the interests of the third party funding industry. It would not surprise me if such a body were to be launched in the coming months, possibly in the wake of the inquiry currently being run by the Australian Law Reform Commission (ALRC), which might only directly affect the Australian market but will achieve global significance because so many non-Australian funders are active in that market. The ALRC's final report is likely to be highly influential on what happens next, not only in the regulation of third party funding in Australia but also how the entire third party funding industry will organise its approach to marketing and opinion forming in the global market.

This all adds up to a remarkable 12 months since the first edition of the *Third Party Litigation Funding Law Review* was published. Awareness of the industry has spread, not just in the context of the funding of the legal costs of a single case from its inception through to resolution (what might be called Litigation Funding 101) but in the monetisation of judgments and awards. In civil law jurisdictions, monetisation of claims can also be achieved. In the common law countries, by and large, monetisation of a claim would still, even in these enlightened times, offend against maintenance and champerty.

Businesses have learned that there is a way out of the accounting bind that contingent claims against you must (as a matter of principle) be accounted for as a debit in your balance sheet but contingent assets can be ascribed no value until they are turned into cash. This fact of business life, combined with what could be described as 'litigation fatigue' (which requires no explanation!), means that monetisation transactions are very much on the rise.

A modest extension of the market in monetisations takes you squarely into consideration of secondary markets, where funders might sell their interest in an investment to (say) a hedge fund at a price that appeals to both sides of the transaction. The development of monetisations and the development of secondary markets might well be major themes for the year ahead.

Leslie Perrin
Chairman
Calunius Capital LLP and Association of Litigation Funders of England amd Wales
November 2018

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. This 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.

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 18 September 2018.

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 18 September 2018.

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 this 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.

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, commonly referred to as the 'Loser Pays Principle', 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]

The Rules of Arbitration of the Vienna International Arbitral Centre (the Vienna Rules 2018) provide that the arbitral tribunal shall decide on the allocation of costs according to its own discretion, unless the parties have agreed otherwise. The conduct of any or all parties as well as their representatives, and in particular their contribution to the conduct of efficient and cost-effective proceedings, may be taken into consideration by the tribunal.[22]

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.[23]

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

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 Rules of Arbitration by VIAC (www.viac.eu), Article 38(2).

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

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 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,[24] 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,[25] 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.[26] 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,[27] 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.[28] Second, the claimant can be ordered to advance the costs for taking the evidence he or she requested in his or her submissions.[29]

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.[30] 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.[31]

24 Law on Enforcement and Execution (EO).

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

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

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

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

29 Section 365, ZPO.

30 Section 57, ZPO.

31 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

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.[32]

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.

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.

32 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 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.

Appendix 1

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