Litigation Funding 2020

Contributing editors
Steven Friel and Jonathan Barnes

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Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the fourth 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 Italy and the United States of America.

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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 Litigation Funding, for their continued assistance with this volume.

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Nivalion AG

REGULATION

Overview

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

In 2004, the Swiss Federal Supreme Court held that litigation funding by third-party funders is permissible in Switzerland if the funder acts independently of the client's lawyer (decision BGE 131 I 223). The court stated that it could even be advantageous for a claimant to have his or her claim assessed by an independent expert who intends to cover the financial risk of the envisaged litigation process and who is thus complementing the claimant's lawyer's view (BGE 131 I 223 c. 4.6.3).

In 2014, the court expressly confirmed its earlier decision. It further concluded that, in the meantime, litigation funding has become common practice in Switzerland, and it held that it is part of the lawyer's professional conduct as provided by the Federal Act on the Freedom of Movement for Lawyers (BGFA) to inform claimants about a potential litigation funding option as the circumstances require (Federal Supreme Court decision 2C_814/2014 c. 4.3.1).

Thus today, litigation funding in Switzerland is an accepted practice and has been judicially endorsed by the Federal Supreme Court twice in recent years. In light of its rather comprehensive and detailed legal analysis, the court established in Switzerland quite a clear and favourable environment for third-party litigation funding.

Nevertheless, third-party litigation funding is still not broadly used in Switzerland. The reasons for this might be the relatively late establishment of litigation funders in Switzerland compared with other jurisdictions and, notwithstanding the Swiss Federal Supreme Court's verdicts, a certain reluctance for the option of third-party litigation funding on the part of some Swiss lawyers. Another reason why the relevance of third-party litigation funding is still relatively modest may have to do with the fact that class actions or other mechanisms of collective redress do currently not form part of Switzerland's civil procedural law practice. However, with the envisaged partial revision of the Swiss Civil Procedure Code (CPC), as proposed in the Preliminary Draft, collective redress shall be strengthened so that group actions and collective settlement proceedings will become admissible procedural tools in Switzerland.

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 stated by the Swiss Penal Code (article 157), a third-party funding agreement – as any other agreement under Swiss law – must not constitute profiteering (ie, exploitation of a person in need).

The Federal Supreme Court has not explicitly stated a limit, but has indirectly approved the common practice in Switzerland with success fees ranging from 20 to 40 per cent of the net revenue of the proceeds. In its legal analysis, the court cited a source who described a success fee of 50 per cent as 'offending against good morals and thus illegal', however, without confirming or even commenting on this opinion (BGE 131 I 223 c. 4.6.6).

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 the CPC or in any other Swiss legislation. However, the Federal Supreme Court held that a range of existing general provisions in various parts of the Swiss legislation (eg, article 27 of the Civil Code, article 19 of the Code of Obligations or article 8 of the Unfair Competition Act) would be applicable should a litigation funding agreement violate certain principles of Swiss law (BGE 131 I 223 c. 4.6.6).

With regard to regulatory provisions, the court explicitly stated that third-party litigation funding cannot be regarded as an insurance offering as defined by the Swiss Insurance Supervision Act (ISA, BGE 131 I 223 c. 4.7). Furthermore, the core offering of a funder does not, in general, fall under the Swiss financial market laws (eg, Banking and Insurance Acts, the Anti-Money Laundering Act and the Collective Investment Scheme Act). However, depending on the funding structure, funders might qualify as asset managers of collective investment schemes and must be authorised by the Swiss Financial Market Supervisory Authority (FINMA).

In light of the rules pertaining to lawyers' professional conduct in Switzerland, which do not allow for lawyers to be paid on the basis of contingency fees only, it has to be kept in mind that any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer would violate the respective provisions.

Legal advice

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

The lawyer's professional conduct in Switzerland is provided in article 12 of the BGFA. According to the Federal Supreme Court decisions mentioned in question 1, the lawyer's independence in acting on behalf of the litigant is crucial; this also applies to cases involving a third-party funder. However, the court also stated that by a clear separation of the roles between the lawyer and the funder, a lawyer who advises his or her clients in relation to a funder has no conflict of interest in principle. In addition, the court held that it is part of the lawyer's professional conduct to support his or her clients in negotiations with the funder; obviously, always advising in the interest of the client.

Regulators

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

The Federal Supreme Court clarified this question with regard to the point that litigation funding is not deemed to be an insurance offering as defined by the ISA and is thus not regulated by FINMA (see question 3). As the core offering of a funder generally does not fall under the Swiss financial market laws, there is no known interest of the Swiss financial regulator to oversee litigation funding reported.

In its 2013 report on collective redress, the Swiss Federal Council suggested promoting litigation funding in Switzerland in general, without pointing at a specific need for regulation or oversight.

FUNDERS' RIGHTS

Choice of counsel

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

Independence in acting on behalf of the litigant (see question 4) is an important principle of the lawyer's professional conduct in Switzerland. 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 his or her lawyer, funding will only be further granted if the new lawyer will be 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 his or her funder to participate in such proceedings based on a respective clause in the funding agreement.

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 must be kept in mind that the majority of cases funded by third-party funders in Switzerland 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 the funding agreement. This is generally permissible under the Swiss Code of Obligations and interferes with neither the independence of the litigant's lawyer nor with any other provision of Swiss law. Moreover, it is quite usual that litigants and funders agree in advance on certain minimum and maximum amounts concerning the limitation of the funder's veto right and his or her 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 decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown facts;
- a change in the 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 continuing to fund litigation processes that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such a case, 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?

As the Federal Supreme Court emphasised the independence of the claimant's lawyer from the litigation funder, a direct approach of the funder in order to instruct the lawyer during the proceedings is not permissible. The lawyer would violate the professional conduct as provided by the BGFA if his or her actions were based on a funder's, rather than on his or her client's, instructions.

Therefore, any rights and actions the funder intends to exercise during the course of the litigation process have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation process and any rights to veto the actions a litigant is usually free to take.

In consequence, 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 (see question 3), 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 cases (at least as long as no international arbitration proceedings are concerned), which also considerably limits the funder's role within the litigation process.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

The lawyer's professional conduct as provided by BGFA prohibits fee agreements in which the lawyer's fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are inadmissible. 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 and a reasonable profit, is he or she allowed to agree on a premium in the event of a successful outcome in addition to the basic fee. However, according to the Swiss Federal Supreme Court such success-related premium is not allowed to exceed the total amount of the basic fee (Federal Supreme Court decision 4A 240/2016 c. 2.7.5).

Consequently, the litigation funding agreement must neither directly nor 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 insurances are widely available in Switzerland. However, the extent and limits of coverage depend upon the specific policy as these insurances usually only cover 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 litigation insurance is not common in Switzerland (see question 21).

A claimant may also seek legal aid 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. However, both conditions are handled rather strictly by Swiss courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs and to provide security, an exemption from court costs or the appointment of a lawyer by the court if necessary to protect the rights of the party. In theory, legal aid is also available to companies, provided, among other things, that the object in dispute is the company's only remaining asset which, in practice, happens relatively rarely.

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 Switzerland takes between one and two years. 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 no comprehensive statistical data available regarding the proportion of appealed first-instance judgments. There is also a considerable difference in the respective practice of the various cantons of Switzerland. As a general rule, approximately one-third of judgments are appealed before second instance. On average, the second instance takes between one year and 18 months to render a decision. Only a small proportion of these judgments are appealed before the Federal Supreme Court. An average appeal here usually takes less than one year.

Challenges to an arbitration award are heard exclusively by the Swiss Federal Supreme Court and are generally adjudicated within a time period of four to six months from the date of the challenge.

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 Swiss judgments is governed by the CPC and by the provisions of the Federal Debt Enforcement and Bankruptcy Act (DEBA). A judgment rendered by a Swiss court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement or if 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 Switzerland is not seen as particularly burdensome, expensive or unsecure. Also, it is important to note that an enforceable Swiss judgment allows for an attachment of known assets of the debtor located in Switzerland.

COLLECTIVE ACTIONS

Funding of collective actions

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

As mentioned in question 1, class actions are not part of Switzerland's civil procedural law practice. The only form of collective redress currently available under the CPC is the joinder of parties. Unlike class actions, the parties to the joinder may not seek damages on behalf of others who have not joined the proceedings. The funding of such litigation processes by a third party is comparable to the funding of individual claims, and is thus permissible without any restrictions.

In its 2013 report on collective redress, the Swiss Federal Council suggested a number of measures to support the effective and efficient procedural handling of a large number of identical claims against the same respondent or respondents and to allow for a facilitated enforcement of consumer rights in particular. The authors of the report also suggested the promotion of litigation funding by third parties to cover the costs of the envisaged collective redress proceedings.

On 2 March 2018, the Swiss Federal Council initiated the consultation phase regarding the Preliminary Draft of the revised CPC which proposes a number of collective redress mechanisms including group actions.

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 of the CPC, 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 proportionally between the parties. In the event of a settlement, the costs are charged to the parties according to the terms and conditions of the settlement agreement.

The Swiss 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 cantonal courts and the Swiss Federal Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party and there is little legal basis for such an argument in Swiss law, neither in the rules pertaining to material damages nor in those regarding procedural costs (eg, adverse costs). A potential ground for a respective decision could be seen in article 95(3a) of the CPC ('necessary expenses'): where a claimant has turned to a litigation funder for reasons of dire financial necessity as a result of the defendant's refusal to settle an outstanding invoice, one might argue that the counterparty should be liable for this involuntary financial situation since, if the claimant won the case, the counterparty was wrong not to pay the invoice in the first place. In the spirit of this argument, a claimant for which, financially speaking, the assistance of a litigation funder is the only way to receive what turns out to be rightfully his or hers, should have the funder's share of the successful claim compensated by the counterparty – or at least a part, taking into account a deduction for the 'risk-free' character of proceedings when being funded compared to unfunded proceedings.

Liability for costs

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

The CPC does not provide for a basis for the court to order a third-party funder to pay adverse costs and to hold him or her liable for such costs. In the litigation funding concept developed and observed in Switzerland, the funder's contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect.

In theory (provided that the litigation funding agreement stipulates an obligation of the funder to cover the adverse cost risk, which is common practice in Switzerland), 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 his or her claim against the funder to cover the adverse costs imposed on him or her 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 has to take legal action against the claimant. In practice, the Swiss courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the DEBA that govern the enforcement of a judgment related to the payment of money, 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 Swiss courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs based on the CPC. In addition, the claimant must advance the costs for taking the evidence he or she 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 Switzerland, appears to be insolvent, owes costs from prior proceedings, or if, for other reasons, there seems to be a considerable risk that compensation will not be paid. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Switzerland has entered into a treaty that excludes respective security bonds.

The CPC does not provide for a basis to request such security from the funder of a claim and there have been no cases reported where Swiss 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 state court cases funded so far by third-party funders in Switzerland, 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 decided on advances and securities solely focusing on the claimant's status (see question 19) and did not take the existence of the third-party funder into account.

In Swiss-based domestic and international arbitration proceedings, in contrast, the fact that the claimant is supported by a third-party funder may have an impact on the evaluation of a security-for-cost request.

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 Switzerland. 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.

By contrast, legal cost insurance is commonly used in Switzerland. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy, but usually only for 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 CPC does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that he or she is supported by a third-party funder. It also does not provide a basis for a Swiss court to order a litigant to do so.

While some authors have argued that a litigant might have, under specific circumstances, such an obligation in domestic arbitration, there

have been no cases reported where a litigant had to disclose the litigation funding agreement in a Swiss-based arbitration.

In Swiss-based international arbitration proceedings, on the other hand, the applicability of the IBA Guidelines on Conflicts of Interest in International Arbitration may require the disclosure of the existence of a funding agreement if there are any concerns with regard to a potential conflict of interest.

Privileged communications

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

While any legal advice given by a Swiss or non-Swiss 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 do not fall within the legal privilege.

However, there have been no cases reported where such communications had to be disclosed by order of a Swiss 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 recorded in Switzerland 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?

No.

UPDATE AND TRENDS

Current developments

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

No updates at this time.

NIVALION

Marcel Wegmueller
marcel.wegmueller@nivalion.ch

Isabelle Berger-Steiner
isabelle.berger@nivalion.ch

Nivalion AG
Erlenweg 6
6312 Steinhausen/Zug
Switzerland
Tel: +41 41 748 43 00
www.nivalion.ch

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