Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

2018

GETTING THE DEAL THROUGH

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Woodsford Litigation Funding

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2016
Second edition
ISSN 2399-665X

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Germany

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

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

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

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

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

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

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

Because third-party funders are neither qualified as banks nor as insurers, neither legislative nor regulatory provisions apply.

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

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

However, various contributions to the legal field champion such a duty of enabling the clients to choose whether they would like to take on the cost risk themselves or whether they would like to pass it on to a litigation funder. As lawyers are already obliged to inform their clients about the possibility of obtaining litigation protection insurance, they are well advised to also cover litigation funding when informing their clients.

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

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

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

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

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

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

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

8 Do funders have veto rights in respect of settlements?

All litigation funding contracts provide for this key issue. As a matter of principle, a settlement always requires the approval of both the claimant and the funder. If one party would like to settle and the other does not, the party willing to settle has a contractual right to terminate the funding contract. This has a twofold effect. First, the terminating party has the right to receive the share agreed for the case of a settlement being reached; second, the party unwilling to settle at the terms offered proceeds with the case at its own risk (which might end with a better or worse result, or even a total loss).

In practical terms, funders and clients are almost always able to come to a mutual understanding on whether a given settlement offer

is to be accepted or denied. Seeing as they best function as a team (together with the lawyer), this is, of course, the wisest course of action. Should one party decide to leave the team, this weakens the remaining players, at the very least, and thus increases the risk for the party proceeding with the case (eg, the funder). As a matter of fact, claimants availing themselves of litigation funding will rarely be in a position to pay out a funder while the case has not yet been brought to a successful close.

9 In what circumstances may a funder terminate funding?

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

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

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

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

As class actions are gaining in relevance for business, litigation funders are book-building more and more cases. This means that the funder is active very early in the process and this, in turn, leads to the funder being heavily involved in the later proceeding as well, which then also includes choosing lawyers and experts. There are, however, no requirements in place for funders to take on an active role, but more than 18 years' worth of experience in professional litigation funding in Germany shows that funders are well advised to do so.

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

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

Update and trends

More and more legal tech startups provide consumers easy access to funding (and lawyers) via internet platforms. This trend started some years ago with damages for delayed flights and other flight-related damages, but it is growing more and more into a considerable market today. The non-existent 'class action' still blocks it from being a real threat to traditional options, but this situation, benefiting from the recent diesel scandal of (mainly) German car manufacturers, will probably change in the near future.

12 What other funding options are available to litigants?

If a creditor does not qualify for legal aid in accordance with section 114 of the German Code of Civil Procedure (ZPO), which applies only to a very limited range of people, and if the claim cannot be sold, which is common for disputed claims, litigation funding is the only remaining possibility to enforce a claim. Some funders offer what is called 'monetarisation' or 'monetisation' and buy the claim for a portion of its value. This sounds like a good idea, but in practice it does not usually work. Either the creditor's price expectation is too high or the funder's offer is too low; in any case, agreeing on a sale of the claim and the further enforcement, including the involvement of the seller, may turn out to be rather cumbersome, if at all possible.

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

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

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

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

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

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

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

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

original cases. Besides these procedural problems, class actions can, of course, be funded.

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

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

Court decisions or orders that additionally refund the litigation funding costs, these being the funder's share in the proceeds, do not exist. Theoretically, a claimant would have to prove that his or her ability to enforce his or her claim depended solely on the support by a professional litigation funder (in return for a share in the proceeds). German courts are very reluctant to expand access to damages and evidence hurdles are high. Premiums paid for litigation protection insurance are, for example, not accepted as damages (and ATE insurance is unknown – see question 21).

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

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

19 May the courts order a claimant or a third party to provide security for costs?

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

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

See question 19.

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

Almost 42 per cent of German consumers and 20–25 per cent of companies have taken out litigation protection insurance, which covers all standard costs of a trial. ATE insurance is unknown. In practice, there is no necessity for it because of the easily calculated costs of lawyers and courts pursuant to the tariff system (which is, in comparison with the UK, inexpensive).

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

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

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

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

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

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

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

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

The German market of commercial litigation funding is neatly arranged. In fact, only three funders control over 90 per cent of the market. These are ROLAND ProzessFinanz AG in Cologne, FORIS AG in Bonn and LEGIAL AG in Munich. With respect to individual cases, no funders from outside of Germany are currently playing a role in the German market. The minimum amount in dispute being funded is €100,000, and the standard share of the proceeds amounts to 30 per cent for any sum up to €500,000 and 20 per cent of any amount exceeding €500,000.

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