Litigation Funding 2021

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 manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Litigation Funding*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Canada, France, Russia and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford, for their continued assistance with this volume.

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Switzerland

Marcel Wegmueller, Isabelle Berger and Franziska Studer
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REGULATION

Overview

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

The Swiss Federal Supreme Court held in 2004 that litigation funding by third-party funders is permissible in Switzerland if the funder acts independently of the client's lawyer (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 is an accepted practice in Switzerland 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 quite a clear and favourable environment for third-party litigation funding in Switzerland.

Nevertheless, the Swiss third-party litigation funding market is still relatively small. The reasons for this might be the rather late establishment of litigation funders in Switzerland compared with other jurisdictions and the fact that class actions and other mechanisms of collective redress do currently not form part of Switzerland's civil procedural law practice. However, with the envisaged revision of the Swiss Civil Procedure Code (CPC), third-party funding in Switzerland will be further promoted, since the Final Draft of the revised CPC requires the Swiss Federal Counsel to provide the public with adequate information regarding third-party litigation funding to facilitate access to justice.

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 (ie, 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 did not explicitly state 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).

In practice, the funder's share is usually dependent on the amount of proceeds recovered by the claimant and on the timeline within which the dispute can be resolved. Typically, the third-party funder's share is lower, the sooner a case can be settled. In recent times, the pricing of third-party litigation funders in Switzerland has become increasingly sophisticated so that the pricing structure may vary depending on the specific characteristics of the case. Frequently, a third-party funder's success fee is based on a time-dependent multiple of the amount invested or committed by the funder.

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), since there is no payment of a premium for the coverage of a future risk (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 several Federal Supreme Court decisions, the lawyer's independence in acting on behalf of the litigant is crucial; this also applies to cases involving a third-party funder. The court determined that by a clear separation of the roles between the lawyer and

the funder, a lawyer who advises his or her client in relation to a funder has no conflict of interest in principle. Quite to the contrary, the court considered that it is part of the lawyer's professional conduct to support his or her client in negotiations with a third-party litigation funder, obviously, always advising in the interest of the client.

In addition, the court made clear that the claimant's obligations under the litigation funding agreement (eg, to fully inform the funder about all the aspects and the developments of the case, not to enter into a settlement agreement without the funder's prior approval) do not jeopardise the lawyer's independence from the funder.

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 in part when it determined that litigation funding is not deemed to be an insurance offering as defined by the ISA and is thus not regulated by FINMA. 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.

However, the Federal Supreme Court does not seem to exclude a need for future regulation (BGE 131 I 223 c. 4.6.6).

FUNDERS' RIGHTS

Choice of counsel

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

Independence in acting on behalf of the client 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 is approved by the funder.

Participation in proceedings

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

In domestic litigation, court hearings are generally open to the 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 in hearings and settlement proceedings is quite 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 power and the funder's right to oblige the claimant to accept or decline 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 might be 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 reject the actions a litigant is usually free to take.

In consequence, the litigant is tipically obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written permission of the funder.

Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding, funders only need to take an active role as provided by the litigation funding agreement. The fact that 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) further 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 the Federal Act on the Freedom of Movement for Lawyers (BGFA) prohibits fee agreements in which the lawyer's fee depends entirely 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 his or her services that covers the actual costs of the lawyer's practice and allows for a reasonable profit, is he or she permitted to agree on a premium in addition to the basic fee in the event of a successful outcome of the case. However, according to the 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. Conversely, it is permissible to add a success fee for the lawyer in the funding agreement within the limits described above.

Other funding options

12 | What other funding options are available to litigants?

Legal cost insurances are widely available and frequently used 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 typically 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.

A litigant may also seek legal aid if he or she lacks the financial resources to fund litigation 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 for costs, an exemption from court costs, or the appointment of a lawyer by the court, if necessary to protect the rights of the requesting party. It does, however, not exempt the litigant from paying the legal fees of the opposing party in the case of defeat. In theory, legal aid is also available to companies, provided, among other things, that the matter in dispute is the company's only remaining asset. Obviously, this constellation is extremely rare.

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 Swiss-based 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 the 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 arbitral award are heard exclusively by the Federal Supreme Court (unless explicitly otherwise specified in an arbitration agreement providing for Swiss-based domestic arbitration) 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 related to non-monetary claims is governed by the Swiss Civil Procedure Code (CPC), while judgments related to the payment of money are enforced pursuant to the provisions of the Federal Debt Enforcement and Bankruptcy Act (DEBA).

In principle, a judgment rendered by a Swiss court is 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 rendering a judgment regarding a non-monetary claim may directly order the required enforcement measures.

In Switzerland, the enforcement of an enforceable judgment or arbitral award is not seen as particularly burdensome, expensive or unsecure. Also, it is important to note that an enforceable decision 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?

Class actions are not part of Switzerland's civil procedural law practice. The only form of collective redress currently available under the Civil Procedure Code (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 respondents and to allow for a facilitated enforcement of consumer rights in particular. The authors of the Report also suggested the promotion of third-party funding to cover the costs of the envisaged collective redress proceedings.

Against this background, the Preliminary Draft of the revised CPC proposed a number of collective redress mechanisms. However, during the consultation phase of the Preliminary Draft the proposals related to

collective redress were discussed controversially and heavily criticised by representatives of the business community. As a consequence, the Swiss Federal Council recently decided to exempt the collective redress mechanism from the current revision of the CPC.

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 Civil Procedure Code (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 are 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).

Liability for costs

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

Provided that the litigation funding agreement stipulates an obligation of the funder to cover the adverse cost risk, which is common practice in Switzerland, the third-party litigation funder has a legally enforceable obligation towards the litigant to hold him or her harmless for adverse costs.

In theory, there may also be two ways in which a litigation funder can be held liable for adverse costs by the prevailing party:

- 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 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 Federal Debt Enforcement and Bankruptcy Act (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, by the claimant's creditors and thus also by the respondent.

However, there is no basis for the court to directly order a third-party funder to pay for adverse costs. In the litigation funding concept developed and observed in Switzerland, the funder's contractual obligation towards the litigant has no reflex effect.

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 may also be orderd to 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 and did not take the existence of the third-party funder into account. Accordingly, the fact that a claim is financed by a third-party litigation funder does, in principle, not discharge the claimant from its obligation to provide security for costs.

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. The prevailing view seems to be, however, that third-party funding per se is not sufficient to justify an order for security for costs.

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. Moreover, the Swiss market leader in the field of third-party litigation funding offers its clients an exclusive solution for the coverage of adverse costs by way of ATE insurance.

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 Civil Procedure Code (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 International Bar Association 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. Consequently, the confidentiality of information exchanged between a litigant or his or her lawyer and a third-party funder must be provided for in the litigation funding agreement.

Obviously, the fact that a litigant or his or her lawyer share certain information with a third-party funder cannot be considered as a waiver of the attorney-client privilege by the litigant.

There have been no cases reported where communications between litigants or their lawyers and third-party funders 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?

So far, only one dispute between a litigant and his or her funder has been recorded in Switzerland. In that case, the Supreme Court of the Canton of Zurich ordered the third-party litigation funder to compensate the unsuccessful litigant for the adverse costs of the successful respondent that the litigant had been ordered to bear (decision RT180059-O/U).

In an unpublished decision, the Supreme Court of the Canton of Zurich further established that pursuant to Swiss law a litigation funding agreement – depending on the contractual terms – may be qualified as a contract for the benefit of a third party so that the claimant's lawyer has a direct claim against the third party funder regarding his or her fees.

Other issues

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

No.

NIVALION
Elevating legal finance

Marcel Wegmüller
marcel.wegmueller@nivalion.com

Isabelle Berger
isabelle.berger@nivalion.com

Franziska Studer
franziska.studer@nivalion.com

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

UPDATE AND TRENDS

Current developments

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

The uncertainty and challenges that come with the covid-19 crisis have increased the demand for third-party litigation funding in Switzerland and throughout Europe, and sparked the interest in less common and more sophisticated funding products, such as portfolio funding, claim or award monetisation, and the funding of defence cases. Moreover, Swiss law firms start to realise how they may benefit from litigation funding and show increasing interest in collaboration with third-party litigation funders.

Coronavirus

27 What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

On 16 March 2020, the Swiss Federal Council declared an 'extraordinary situation' under the Federal Law of Epidemics which allows the Swiss government to adopt the necessary emergency legislation to adequately address the covid-19 pandemic.

Shortly thereafter, the Swiss Federal Council adopted two ordinances by which (1) an extension of the annual Easter court recess was implemented, and (2) a temporary stay for debt enforcement and bankruptcy actions were ordered. These two ordinances are no longer in force but will still have to be taken into account for the calculation of certain procedural deadlines.

On 16 April 2020, the Swiss Federal Council passed special legislation in order to relax the Swiss insolvency regime by introducing different measures (ie, a suspension of the duty to notify the judge in the case of over-indebtedness, a covid-19 moratorium for SMEs, and the softening of certain conditions to be fulfilled to apply for a debt restructuring moratorium).

In 20 April 2020, another ordinance was put into force that provides for the possible use of videoconferencing for the conduct of state court hearings.

In addition, several judicial authorities have adopted informal measures to ensure a smooth functioning of the judicial system despite the current crisis (eg, suspending or postponing court hearings, granting generous extensions of deadlines). For third-party litigation funders no specific measures have been put into place.

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