THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Third Edition

Editor
Leslie Perrin

THE LAWREVIEWS

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PREFACE

When my phone rang one afternoon in February 2008 with a request from a lawyer at a major New York law firm for me to take on a role as a non-executive director on the listing on the Alternative Investment Market in London of a 'third party funder', all I could think to say was: 'What is third party funding?'

Since then, with my partners at Calunius, I have raised hundreds of millions of pounds for three private funds that have successfully completed their investment periods, acted as Chairman of the Association of Litigation Funders of England and Wales (ALF) from its foundation in November 2011 until September 2019, been instrumental in the ALF's intervention in the Court of Appeal's leading case on third party litigation funding (TPF), known universally as *Excalibur*,[1] and have been one of the leaders in evidence before the Competition Appeals Tribunal in the Trucks Cartel case.

What a journey!

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

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

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

In general, all common law jurisdictions are subject to the effects of the varying degrees to which the ancient doctrines of maintenance and champerty survive. Historically these prevented third parties from intervening in litigation in which they were not already directly involved as parties, although, having said that, maintenance and champerty have been abolished in Australia. On the other wing of opinion, TPF is absolutely forbidden in the Republic of Ireland, following the Supreme Court ruling in the *Persona Digital* case. It

1 *Excalibur Ventures LLC v. Texas Keystone Inc* [2017] 1 WLR 2221 (CA).

seems that, in the Republic, TPF must wait for the legislature to permit it. The civil law, on the other hand, has never held significant reservations about TPF in principle, although each jurisdiction, as will be clear from this book, has its own nuanced attitude.

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

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

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

This is a global phenomenon, but the resolution of every dispute by the principal international dispute resolution mechanisms of litigation and arbitration will be rooted in the law of a particular jurisdiction, and this is the landscape across which this book will travel. Enjoy your journey.

Leslie Perrin
Chairman
Calunius Capital LLP and Association of Litigation Funders of England and Wales
November 2019

Chapter 2

AUSTRIA

Marcel Wegmüller and Jonathan Barnett[1]

I MARKET OVERVIEW

Compared to other jurisdictions, in Austria third party litigation funding is relatively new and has only started to become an established litigation tool over the past few years. Nevertheless, currently 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 received 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 under Austrian law apart from the joinder of parties, a class action mechanism has existed 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 the 'Austrian-style class action'.[2] It provides for the possibility of not only the original owner of a claim asserting that claim against the debtor, but also a third party to whom the claim has been assigned doing so. In addition, the Austrian-style class action allows a plaintiff seeking to assert several claims against the same defendant to bundle all these claims into a single litigation action. In addition, claim size restrictions do not apply to cases where the assignee and class action claimant are part of 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 2013 landmark decision, the Supreme Court explicitly confirmed the legality of third party funding of such Austrian-style class actions.[4] Since then, third party funders have shown increasing interest in funding Austrian-style class actions, which have gained public interest. Cases include those against VW, the Trucks Cartel, GIS and AWD.

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. Portfolio funding is also available for disputes of this kind and is gaining wider attention, in particular from corporate clients looking to manage their risk across their portfolio of disputes.

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1 Marcel Wegmüller is a managing partner at Nivalion AG and Jonathan Barnett is head of the Austrian office at Nivalion AG (Austria).

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.

Alternative funding options providing the same advantages as third party funding are scarce in the Austrian market: while legal costs insurance is widely available in Austria, the maximum coverage it provides and the types of dispute insured are quite limited, depending on the specific policy. Another disadvantage of legal costs insurance is that it has to be arranged before the occurrence of the event giving rise to a claim, that is before a possible claimant even becomes aware of the need to litigate.

On the other hand, after-the-event (ATE) litigation insurance is not commonly established in Austria, notwithstanding the absence of legal or regulatory restrictions. Nonetheless, at the time of writing there is no standard offering available. Only foreign insurance companies have been reported as making 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 and Switzerland's Nivalion AG (focusing on arbitration, commercial litigation and insolvency funding), as well as Germany's Foris AG.[8]

II LEGAL AND REGULATORY FRAMEWORK

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

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; and, 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/; each last visited on 19 August 2019.

9 See footnote 4 above. The first decision stating the admissibility of someone lending financial 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=22ed

While third party funding has been endorsed by the courts, lawmakers have not yet seen the necessity to regulate or otherwise monitor it. Austrian legislation contains no specific 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 clients' mandated lawyers do play a role in clients' relationship with their litigation funder. In Austria, lawyers are prohibited from working on a contingency fee basis only.[11] The reasoning behind this relates to a 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 the work is undertaken on a contingency fee basis), the assumption is that the lawyer would no longer have only the client's interests in 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 might 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 lawyers 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 stipulate 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 could be interpreted as such.

Furthermore, since 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

0518d1c211afc704b438764b8078, last visited on 19 August 2019; 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 19 August 2019.

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.

share of the proceeds and no definition of what constitutes acceptable compensation for the funder's services, but any agreement under Austrian law, including a litigation funding agreement, must not constitute 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, for example, an obligation for the litigant not to disclose the funder's involvement without the funder's express written consent.

Another standard issue in 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 is 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 identification and 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 this step, while 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, to adhere to the regulations on lawyers' professional conduct. In general, the litigant's lawyer must be able to act without regard to any instructions from the third party funder, and only on behalf of the 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 the lawyer handling the case, 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 the 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 its opinion on the progress of the case and will mention any steps it thinks should be taken in the best interest of the case, but only the client has the right to instruct the lawyer, and the lawyer has the obligation to take instructions only from the client. If, instead, the lawyer acts upon instructions by the funder, the lawyer would violate the code of professional conduct provided in the RAO. Any rights and actions that the funder might intend to exercise during

15 See Section IV.

the course of the litigation process must therefore have been agreed in the litigation funding agreement, to which the funder and the claimant, not the claimant's lawyer, are parties. In this context, the parties have to consider any information rights, access to documents produced during the ongoing litigation and any rights for the funder to veto actions that a litigant is usually free to take – in particular, 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 to obtain written permission from the funder before concluding or revoking any settlements; waiving any claims; initiating any additional proceedings in connection with the funded claim; adopting any legal remedies; expanding the claim; or otherwise disposing of the funded claim. By negotiating these terms beforehand and including them in the litigation funding agreement, the claimant's rights to the 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 apply, as well as the funder's right to demand that the litigant accepts a particular settlement or sets the funder off against the benchmark of the proposed settlement. Such clauses have become frequent practice in Austria.

Regarding the right to terminate 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 its right to terminate under such circumstances, in practice it would terminate the agreement and bear any costs incurred up until that moment, as well as costs 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 obligations under the agreement, usually the funder has the right to terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. Instead, the litigant usually has to reimburse the funder for its 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 and 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, a litigant can invite the funder to these proceedings.

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 taken place without disclosure of the funder's involvement. As this is widespread practice in Austria, the question of permission for the funder to attend is not very relevant in practice.

The ZPO does not provide any obligation for a litigant to mandatorily disclose the support of 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 any 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 litigant and lawyer and the communications between those two parties and a third party funder. While the former are privileged and do not have to be disclosed either to the opposing party or the court,[19] the latter – between the funder and the litigant or the lawyer – are, 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 (in what is 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 settlement agreement.[21]

The Rules of Arbitration of the Vienna International Arbitral Centre[22] provide that the arbitral tribunal shall decide on the allocation of costs at its own discretion, unless the parties

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

17 Section 175, ZPO.

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 The Vienna Rules 2018.

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.[23]

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 incurred costs are higher than the courts' allocation). The same holds true with regard to appellate proceedings before the state courts and the Supreme Court.[24]

The issue of a funder's liability for adverse costs in Austria is quite straightforward, but there are a few nuances. In third party litigation funding, as practised and understood in Austria, a funder's contractual obligation towards the claimant to cover the costs of the litigation has no reflex effect. Furthermore, the ZPO does not stipulate that a court could order a third party funder to pay adverse costs. Therefore, in principle, a third party funder cannot be held liable for adverse costs unless it is so contractually obliged. 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 administering the claimant's assets could hold a third party funder liable for costs (i.e., for the adverse costs), although both require the litigation funding agreement to contain a contractual obligation for the funder to pay adverse costs to the claimant. First, if the claimant succumbs, the claim against the funder to cover the adverse costs could be assigned 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 its 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,[25] 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,[26] which, as described, grants the prevailing respondent recourse against the claimant. Once the payment order is handed to the claimant, if the amount due is not paid, the competent court will eventually declare the claimant insolvent.[27] 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 relevant creditors to subsequently bring this claim against the funder before the competent court.

Regarding security for adverse costs,[28] generally a claimant may be ordered to provide two distinct types of security for costs by Austrian courts. First, the courts can order the

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

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

25 Law on Enforcement and Execution (EO).

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

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

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

claimant to provide security for the expected court costs, which the court calculates by using tariff schedules that correspond mainly to the size of the claim.[29] Second, the claimant can be ordered to advance costs for the taking of evidence requested in the claimant's submissions.[30]

The claimant need 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.[31] If the claimant is domiciled in a country that has entered into a treaty with Austria excluding relevant security bonds, then the claimant cannot be ordered to post security for adverse costs even if the respondent requests it.[32]

Therefore, while the claimant can be ordered to provide security for costs (a circumstance that contributes to the need for third party funding), the ZPO does not contain a stipulation regarding the third party funder of a claim. There have also been no reported cases in which Austrian courts have considered a request for 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, a funder's 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 courts concerned have taken only 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.[33]

VI THE YEAR IN REVIEW

Some 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.

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

30 Section 365, ZPO.

31 Section 57, ZPO.

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

33 Section 41(1), ZPO provides for the compensation of 'necessary costs for the expedient and adequate enforcement of one's rights' (author's 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: certain pre-action costs, such as expert opinions and investigation costs. Some opinions in Austria have stated 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.).

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 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. Third, the Austrian Supreme Court declared the sale of insolvency avoidance claims permissible, and thus overruled the view of scholars that has prevailed for decades in Austria. This opens up new possibilities for third party funders to finance avoidance claims in insolvency proceedings, and will give insolvency administrators a valid new option to pursue claims where previously this was not possible because of a lack of assets. The creditors in insolvency proceedings will ultimately benefit from this development.

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 circumstances in which funding is required, thus connecting claimants' needs with funders' resources.

Appendix 1

ABOUT THE AUTHORS

MARCEL WEGMÜLLER

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Marcel Wegmüller is a co-founder and managing partner of Nivalion AG, a Swiss third party litigation and arbitration funder focusing on continental Europe, with offices in Switzerland, Germany and Austria. He has many years of experience in the funding of judicial and, in particular, arbitration proceedings in various European jurisdictions, and has played a key role in establishing the first Swiss provider, which he led as managing director until 2016. Prior to that, he held senior positions in the areas of strategy and corporate development and legal and compliance for various units of the Credit Suisse Group. He is a Swiss lawyer, holds a degree in law from the University of Zurich and has completed executive programmes at INSEAD and at the London Business School. He regularly publishes and speaks at conferences on the topic of litigation funding.

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