PANORAMIC

LITIGATION FUNDING 2024

Contributing Editors

Jonathan Barnes and **Steven Friel**

Woodsford

NIVALION
Elevating legal finance

LEXOLOGY

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

Generated on: January 2, 2024

Switzerland

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REGULATION

Overview

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

The permissibility of third-party litigation funding is not an issue in Switzerland. In a landmark decision rendered in 2004, the Swiss Federal Supreme Court made clear that litigation funding by third-party funders is permissible, provided that the funder acts independently of the client's lawyer (BGE 131 I 223). The court even stated that litigation funding could be advantageous for a claimant, offering the benefit of an independent, expert assessment of the financial risk of the litigation, and thus giving a claimant an additional, objective view of the claim (BGE 131 I 223 consid. 4.6.3).

In 2014, the court expressly confirmed this earlier decision and emphasised that, indeed, litigation funding has become common practice in Switzerland. The court further concluded that it is part of the lawyer's professional duties under the Federal Act on the Freedom of Movement for Lawyers (BGFA) to inform claimants about the possibility of litigation funding as the circumstances may require (Federal Supreme Court decision 2C_814/2014 of 22 January 2015 consid. 4.3.1).

Meanwhile, litigation funding continues to grow, both in its use by claimants and acceptance by the courts, but also as an industry within Switzerland. At the judicial level, the Federal Supreme Court has repeatedly endorsed the use of litigation funding, offering a rather comprehensive and detailed legal analysis. This has established a quite favourable environment for the use of third-party litigation funding in Switzerland. As a consequence, the Swiss litigation funding market has grown, with a number of new local funders, as well as global players, entering the Swiss market over the past few years.

Restrictions on funding fees

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

There is no explicit limit on what is acceptable as compensation for a 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).

While not explicitly stating a limit, the Federal Supreme Court 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, the court cited this opinion without any additional confirmation or comment (BGE 131 I 223 consid. 4.6.6).

In most cases, the funder's share is dependent upon the point in time at which the dispute comes to an end: the sooner a case can be settled or resolved, the lower the third-party funder's share. In recent times, the pricing of third-party litigation funders in Switzerland has

become increasingly sophisticated, and pricing structures vary depending on the specific characteristics of a given case. Typically, a third-party funder's success fee is calculated on the basis of a time-dependent multiple of the amount committed by the funder, combined with a percentage share of the proceeds recovered, where appropriate.

Specific rules for litigation funding

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

There are currently no specific provisions applicable to third-party litigation funding under Swiss law. 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) may apply should a litigation funding agreement violate certain principles of Swiss law (BGE 131 I 223 consid. 4.6.6).

With regard to regulatory provisions, the court explicitly stated that third-party litigation funding cannot be considered an insurance offering as defined by the Swiss Insurance Supervision Act (ISA), since there is no payment of a premium for the coverage of future risk (BGE 131 I 223 consid. 4.7). Further, the core offering of a funder does not, in general, fall under the Swiss financial market laws (eg, the Banking and Insurance Acts, the Anti-Money Laundering Act and the Collective Investment Scheme Act). However, depending on their structure, funders may qualify as asset managers of collective investment schemes and must therefore be granted a licence from the Swiss Financial Market Supervisory Authority (FINMA).

Legal advice

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

A lawyer's professional conduct in Switzerland is governed by article 12 of the BGFA. According to several Federal Supreme Court decisions, a lawyer's independence in acting on behalf of their client is crucial; this also applies to cases involving third-party funding. The court determined that a lawyer advising their client in relation to a funder has no conflict of interest provided that there is a clear separation of roles between the lawyer and the funder. According to the court, it is part of the lawyer's professional duty to support their client in negotiations with a third-party litigation funder.

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 developments of the case, not enter into a settlement agreement without the funder's prior approval, etc) 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. Accordingly, there is no interest from the Swiss financial market regulator to generally oversee litigation funding, unless a funder's capital market activities (eg, as an asset manager) fall within its scope of regulation and require specific authorisation.

However, the Federal Supreme Court (BGE 131 I 223 consid. 4.6.6), as well as recent developments across Europe and within the European Union, do not seem to exclude the possibility of future regulation.

FUNDERS' RIGHTS

Choice of counsel

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

Independence when acting on a client's behalf is an important principle of a lawyer's professional conduct in Switzerland. In light of the established third-party litigation funding concept, this means that a litigant's lawyer must be able to act free from any instructions of the third-party funder and solely in the interest 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 approved by the funder, or that if the litigant intends to replace counsel, 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 hearings are conducted in private. However, if the counterparty does not object, a litigant might invite the funder to participate in such a hearing based on a respective clause in the litigation funding agreement.

The latter also applies to arbitration. While arbitration hearings and settlement proceedings are generally held in private, funders may participate if there is no objection by the counterparty.

However, it must be kept in mind that in the majority of funded cases in Switzerland, the funder's involvement is not disclosed (at least insofar as no international arbitration

proceedings are concerned). As such, the relevance of the funder's permission to attend or participate in hearings and settlement negotiations is quite limited.

Veto of settlements

8 | Do funders have veto rights in respect of settlements?

It may well be that a veto right clause regarding a potential settlement is included in the funding agreement. This is generally permissible under the Swiss Code of Obligations and interferes neither with the independence of the litigant's lawyer, nor with any other provision of Swiss law. Thereby, the parties often agree in advance on certain minimum and maximum amounts limiting the funder's veto power.

Similarly, funding agreements frequently provide for an exit mechanism if the claimant and the funder fail to reach an agreement regarding a specific settlement. The party rejecting the settlement offer is usually entitled to continue the proceedings, while assuming liability to the other party for the proceeds that would have resulted from the settlement.

On the other hand, there are also funding agreements that do not include any veto right of the funder with respect to settlements, especially if the funder's success fee is calculated on the basis of a time-dependent multiple of the amount committed.

Termination of funding

9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances entitling the parties to terminate the funding agreement. Usually, such circumstances fall into two categories.

The first category comprises events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or other authority decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown detrimental facts;
- a change in the case law that is decisive for the relevant legal questions;
- a loss of evidence, or evidence that is accepted and tends to negatively impact the proceedings; and
- a major change in the creditworthiness of the respondent.

Under such circumstances, a funder may terminate the funding agreement while bearing any costs incurred up through the point of, and as a result of, termination. Accordingly, such clauses might prevent the funder from continuing to finance proceedings that they have reason to believe are unpromising.

In the second category, the funded party breaches its obligations under the funding agreement. In such a case, the funder may terminate the funding after due notice and typically has no duty to cover any further costs. Given these circumstances, the funded party might even 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?

Since the independence of the lawyer from the litigation funder is considered crucial by the Federal Supreme Court, Swiss law does not allow for direct instructions from the funder to the lawyer during the course of the funded proceedings. A lawyer would violate the professional duties under the Federal Act on the Freedom of Movement for Lawyers if their actions were based on a funder's instructions, as opposed to those of a client.

Therefore, any rights and actions a funder may exercise during the course of the proceedings must be agreed upon in the litigation funding agreement. This may include rights to otherwise confidential information, access to documents and the power to preclude actions that a litigant is usually free to take.

Accordingly, a funded litigant is typically obliged not to conclude or revoke any settlements, waive any claims, initiate any ancillary proceedings in connection with the funded claim, file any appeal or otherwise dispose of the funded claim without prior consultation or permission of the funder.

Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding in Switzerland, funders need only to take an active role insofar as provided for in the litigation funding agreement. The fact that the involvement of a litigation funder is not disclosed to the court or the counterparty in the majority of cases pending before state courts 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 for in the Federal Act on the Freedom of Movement for Lawyers, 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 their services that covers the actual costs of their practice and allows for a reasonable profit, are they permitted to agree on a premium. This would be 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 consid. 2.7.5).

Consequently, the litigation funding agreement must neither directly, nor indirectly, provide a model resulting in a purely conditional or contingent fee for the lawyer. Conversely, it is permissible to agree on a success-related premium for the lawyer within the limits set out by the court.

Other funding options

12 | What other funding options are available to litigants?

Legal cost insurance options 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. Further, the insurance policy typically must be arranged before a party 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 may comprise an exemption from the obligation to pay an advance on costs and to provide security for costs, an exemption from court costs and the appointment of a lawyer by the court, if deemed necessary to adequately protect the rights of the requesting party. It does, however, not exempt the litigant from paying the legal fees of the opposing party in case of defeat. In theory, legal aid is also available to companies, provided that the matter in dispute relates to the company's only remaining asset. Such circumstances are, obviously, 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 practices of the various cantons within 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 eighteen months to render a decision. Only a small proportion of these judgments are appealed before the Swiss Federal Supreme Court. Before the Federal Supreme Court, an average appeal takes less than one year.

Challenges to an arbitral award are heard exclusively by the Swiss 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, while judgments related to the payment of money are enforced pursuant to the provisions of the Federal Debt Enforcement and Bankruptcy Act.

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 inherently burdensome, expensive or risky. 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. Accordingly, funding of this type of proceeding by a third-party funder 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, particularly to allow for the facilitated enforcement of consumer rights. Thereby, the government identified third-party litigation

funding as a driving factor to enable access to justice in mass tort and consumer claims and encouraged its promotion and further development in Switzerland.

Accordingly, the Preliminary Draft of the revised CPC proposed a number of collective redress mechanisms. However, during the consultation phase, 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 decided to exempt the collective redress mechanism from the current revision of the CPC and announced that the topic will be dealt with separately at a later stage.

On 10 December 2021, the Swiss Federal Council presented a new draft amendment to the CPC with proposed provisions on collective redress, providing for an extended application of the existing group action, allowing for the assertion of monetary compensation, and offering possibilities for collective settlements. However, on 24 June 2022, the commission in charge requested various clarifications, including a comprehensive legal comparison of collective redress mechanisms of selected EU states, and decided to postpone its debate about the Federal Council's proposal until late 2023. It remains to be seen which instruments of collective redress will ultimately be adopted and become part of the Swiss civil procedure landscape.

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 costs for the taking of evidence and the opposing party's 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 specifically delineates the 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 to hold the funded party harmless for the adverse costs.

In addition, there may be a situation in which a litigation funder can be held liable for adverse costs directly by the non-funded counterparty: if the unsuccessful claimant assigns their adverse costs claim against the funder 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.

However, under the litigation funding concept developed in Switzerland, there is no legal basis for a court to directly order a third-party funder to pay for the adverse costs of the counterparty.

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 costs that Swiss courts may order a claimant to provide:

- the courts usually order the claimant to post an advance for the expected court costs, the amount of which shall be reduced with the impending revision of the CPC. In addition, the claimant must advance the costs for the taking of the requested evidence; or
- at the request of the defendant, the claimant may also be ordered to provide security for the opposing party's legal costs if the claimant has no residence or registered office in Switzerland and no treaty exemption applies, if the claimant 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.

The CPC does not provide for a basis to request such security from the funder directly 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 not been disclosed to either the court or 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 funding agreement into account. Accordingly, the fact that a claim is financed by a third-party litigation funder does not, in principle, 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 impact the assessment of a security-for-costs request. The prevailing view seems to be, however, that third-party funding is not sufficient to justify an order for security for costs,per se.

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, currently there is 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. It is arranged before the need to litigate arises and 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 any basis for a litigant to mandatorily disclose a litigation funding agreement or even disclose if they are 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 such an obligation in domestic arbitration proceedings in specific circumstances, there have been no cases reported where a litigant was obligated to disclose a litigation funding agreement in a domestic arbitration.

In Swiss-based international arbitration proceedings, on the other hand, several sets of institutional rules (eg, the 2021 ICC Rules of Arbitration, the 2021 VIAC Rules of Arbitration and Mediation, etc), as well as the IBA Guidelines on Conflicts of Interest in International Arbitration, may require the disclosure of the existence and identity of a funder.

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 their client is privileged and is not subject to disclosure to the counterparty 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 their lawyer and a third-party funder must be provided for in the litigation funding agreement.

Obviously, the fact that a funded party shares certain information with a funder cannot be considered as a waiver of the attorney-client privilege.

There have been no cases reported where communications between litigants or their lawyers and third-party funders were ordered to be disclosed by a Swiss court.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

There are a number of cases recorded in Switzerland which concern disputes between litigants and funders.

In one such case, the Supreme Court of the Canton of Zurich ordered a third-party litigation funder to compensate the unsuccessful claimant for the adverse costs of the respondent that the claimant had been ordered to bear (decision RT180059-O/U of 24 May 2018). In another decision concerning the same dispute, the Supreme Court of the Canton of Zurich opined that – depending on the specific contractual terms – a litigation funding agreement may be qualified as a contract for the benefit of a third party under Swiss law, and as a result, such funded party's lawyer may have a direct claim against the funder for the payment of their fees (decision RT180057-O/U of 17 May 2018).

Other decisions addressed, inter alia:

- a funder's claim for a share of the proceeds awarded in a funded arbitration (Federal Supreme Court decision 5A_14/2018 of 11 March 2019);
- a funder's request for inspection of the (defaulting) funded party's annual reports (decision HE210051-O of the Commercial Court of the Canton of Zurich of 7 May 2021); and
- a funder's request for debt collection against an insolvent funded party (Federal Supreme Court decision 5A_910/2019 of 1 March 2021).

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?

During the last few years, third-party litigation funding has become a common business concept and a well-recognised industry in Switzerland and across Europe. Today, it forms an integral part of the Swiss legal landscape.

While the Swiss legislature has thus far refrained from undertaking or announcing any regulatory efforts, a debate on the extent to which third-party litigation funding requires regulation has been gathering pace within the European Union throughout the past year. The constant growth and increased use of third-party litigation funding have prompted the European Parliament to recommend the adoption of a regulatory framework for the European funding industry. However, as recently announced by the European Commission, before rolling out any new rules, a mapping study of the existing European litigation funding landscape shall be conducted. The Commission's proposed mapping study will undoubtedly take some time. Therefore, it seems unlikely that any regulations on third-party litigation funding within the European Union will be adopted in 2024.

Though future regulations by the European Union do not have a direct impact on the Swiss funding industry, the developments within the EU and across Europe will undoubtedly influence the Swiss legislature's standpoint on the need to regulate third-party funding in Switzerland.