THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Sixth Edition

Editor
Simon Latham

THE LAWREVIEWS

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This article was first published in December 2022
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.TheLawReviews.co.uk

ISBN 978-1-80449-136-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARNTZEN DE BESCHE ADVOKATFIRMA AS

AUGUSTA VENTURES

BORDEN LADNER GERVAIS LLP

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DLA PIPER ABBC

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PREFACE

As a law graduate whose first steps in the legal profession were encumbered by a global financial crisis, I faced a fairly bleak outlook. By happenstance (sheer bloody-mindedness), I found myself at the doors of the London branch of a US plaintiffs' firm, little known on these shores at the time. The firm's entrepreneurial culture meant that it was an early adopter of third party funding (TPF). As such, I had the great fortune to be inducted into the world of TPF from my very first day as a trainee solicitor. I witnessed, first-hand, how TPF could catalyse both a firm's growth and its clients' paths to a healthier balance sheet, notwithstanding the burdens that the financial crisis had left in its wake. A spark was lit.

Fast forward to the present and TPF is very much a mainstay across the legal landscape in the UK, Australia and a number of other jurisdictions, especially in the context of arbitration, class actions and litigation arising from breaches of competition law. In some cases, TPF has provided access to justice for those who could otherwise not afford to pursue their claims. In other cases, TPF has played a role in enabling corporates to resolve their disputes without depleting resources that could be invested profitably elsewhere within the business, be it through financing of legal costs or monetisation of future proceeds. With ever-increasing funds under management both by members of the Association of Litigation Funders (ALF) and by the broader TPF fraternity, there are significant resources available for litigants and law firms to utilise.

Yet despite the sector's expansion since the previous global financial crisis, TPF still remains a little-known or often-misunderstood solution. The vast majority of disputes that are eligible for financing are either self-funded, or worse not pursued, simply because of a lack of awareness of the availability of TPF. In particular, awareness of the myriad solutions that TPF can provide, either directly to litigants, or indirectly by way of law firm facilities, which enable law firms to offer more creative fee arrangements for their clients. However, as public awareness of TPF increases, new sectors and jurisdictions will open up, which in turn will improve access to justice and drive innovation within the TPF sector. The in-depth analysis provided by my co-authors in this publication, especially in jurisdictions not previously covered by earlier editions, is testament to this.

All good stories need a villain, though, and TPF is not without its opponents. Dissenting voices can especially be heard from defendants who face funded actions, especially in the class action arena. As this guide will illustrate, challenges to TPF have been brought by defendants in courts across the globe, from England all the way to Australia. Yet, on the whole, courts have (eventually) concluded that TPF plays a key role in facilitating access to justice, and as such tried to afford protection to a funder's returns to continue enabling access to justice in the long term.

I hope this publication provides a useful guide for litigants, lawyers and investors alike as we take on the challenges the new year brings.

Simon Latham
Augusta Ventures
London
November 2022

Chapter 20

SWITZERLAND

Urs Hoffmann-Nowotny and Louis Burrus[1]

I MARKET OVERVIEW

Third party litigation funding is still a relatively new phenomenon in Switzerland. Triggered by the commercial success of FORIS AG in Germany in the late 1990s, first reports about litigation funding emerged in Swiss legal writing around the turn of the century.[2] FORIS AG entered the Swiss market in 2000. At the time, the legality of litigation funding under Swiss law was still uncertain. In the wake of the leading case of the Swiss Federal Court, the country's highest court, which answered the question in the affirmative in 2004,[3] Allianz ProzessFinanz GmbH (Allianz), a subsidiary of the German Allianz Insurance Group, also entered the Swiss market.[4] In 2008, Allianz even opened a representative office in Zurich. However, in 2011, Allianz stopped writing new funding business worldwide (including in Switzerland).

Thereafter, only two funders were known to be actively operating out of Switzerland: Profina Prozessfinanzierung GmbH in Zug, which was founded in 2006,[5] and JuraPlus AG in Zurich, which was founded in 2008.[6] In 2017, a new participant, Nivalion AG in Zug, which was founded in late 2016, entered the market.[7] Furthermore, in 2019, a new participant called Swiss Legal Finance SA opened an office in Geneva.[8] In 2021, blockchain-focused Liti Capital SA was founded in Geneva.[9] Among larger international participants, Omni Bridgeway is the only one with a presence in Switzerland, through an office in Geneva.[10] Several other non-Swiss (in particular German, English and French) funders, as well as global player Burford Capital Limited,[11] are also said to be taking on Swiss cases. Furthermore, Swiss asset managers have recently shown increased interest in litigation funding.

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1 Urs Hoffmann-Nowotny and Louis Burrus are partners at Schellenberg Wittmer Ltd.

2 See Schumacher, Prozessfinanzierung, Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, Thesis Zurich 2015, cited Schumacher, *Prozessfinanzierung*, pp. 22 et seq. with references.

3 For more detail on this case, see Section II.

4 Allianz was one of the complainants that obtained the Federal Court's leading case.

5 See www.profina.ch, last visited on 20 September 2022.

6 See www.jura-plus.ch, last visited on 20 September 2022.

7 See https://nivalion.com, last visited on 20 September 2022. Nivalion focuses on large-scale cases (minimum amount in dispute exceeding €7 million) and is particularly active in arbitration.

8 See https://www.swisslegalfinance.ch, last visited on 20 September 2022.

9 See https://liticapital.com/, last visited on 20 September 2022.

10 See https://omnibridgeway.com/contact/global-contact-details#Emea, last visited on 20 September 2022.

11 In November 2021, Burford Capital Limited announced its decision to dedicate staff to pursuing business opportunities in the DACH region (Germany, Austria and Switzerland): see https://www.burfordcapital.com/media-room/media-room-container/11302021-new-hire-press-release, last visited on 20 September 2022.

Most Swiss-based participants seem to focus primarily on state court litigation, notably civil liability cases as well as intellectual property and inheritance disputes. Other fields of law with funded cases are general contract and corporate law (including liability of directors and officers).[12] Furthermore, there is anecdotal evidence for third party funding in arbitration, in criminal proceedings with seized assets and in claims dormant in foreign bankruptcies,[13] until recently mostly by non-Swiss funders.

The Swiss market is still relatively small. Swiss funders ordinarily require a minimum amount in dispute, ranging from 250,000 Swiss francs to €7 million.[14] Representatives of funders have stated that there are no more than around 50 funded cases in Switzerland per year. According to indications from representatives, Swiss funders receive around 50 to 100 enquiries per year each, which result in the conclusion of between five and 15 agreements per funder.[15] In addition, there are no Swiss industry associations.[16]

II LEGAL AND REGULATORY FRAMEWORK

The legality of litigation funding is no longer an issue in Switzerland since the Swiss Federal Court rendered the already mentioned decision of 10 December 2004.[17] In this case, the Court had to review the constitutionality of a provision of the 2003 Zurich Cantonal Act on the Legal Profession (Zurich Lawyers Act)[18] that made it illegal to fund a lawsuit on a commercial basis and against a participation in the success of the suit. The Court found that the provision violated freedom of commerce as guaranteed in the Swiss Federal Constitution.[19] The Court therefore quashed the critical provision of the Zurich Lawyers Act.

The Federal Court issued a very detailed opinion that provides guidance on a number of critical aspects of litigation funding. The most important points addressed are the following:

a The Court addressed the question of whether third party litigation funding might jeopardise the independence of the lawyer acting for the funded party. Under the Swiss

12 See Wegmüller, Prozessfinanzierung in der Schweiz: Bestandesaaufnahme und Ausblick, in *HAVE* 2013 235 et seqq., p. 240 et seq.; Dähler, Juristische, ökonomische und soziale Aspekte der Prozessfinanzierung, Presentation at the Europa Institut Zürich on 27 January 2012, Section 8.

13 See in this respect Hunkeler/Wohl, Kommerzielle Prozessfinanzierung zu Gunsten von Insolvenzmassen?, in *BlSchK* 2015, pp. 41 et seqq.; for a discussion of bankruptcy-related aspects of third party funding, see furthermore Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, in *ZZZ* 2019 3 et seqq., pp. 5 et seq. and 14 et seqq.

14 As a rule, minimum requirements are 250,000 Swiss francs (Profina), 1.5 million Swiss francs (Swiss Legal Finance) and €7 million (Nivalion), see http://www.profina.ch/eignung.html, last visited on 20 September 2022; https://www.swisslegalfinance.ch/qualifying, last visited on 20 September 2022; https://nivalion.com/en/what-we-do/direct-funding, last visited on 20 September 2022).

15 See for an overview Schumacher, Richterliche Pflicht zum Hinweis auf private Prozessfinanzierung?, in *AJP* 2018 458 et seqq. (cited Schumacher, *Pflicht zum Hinweis*), p. 460 et seq. Accordingly, there has been slight market growth in recent years (see, for comparison, Schumacher, *Prozessfinanzierung*, p. 8 with figures from 2014).

16 However, Nivalion is a member of the International Legal Finance Association (see https://www.ilfa.com/membership-directory, last visited on 20 September 2022).

17 The decision is reported in the Official Case Reporter: BGE 131 (2004) I 223 et seqq. It was confirmed later by the decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.1 (not published in the Official Case Reporter).

18 Anwaltsgesetz of 17 November 2003, LS (Systematic Collection of Zurich Cantonal Laws) 215.1.

19 Article 27 of the Swiss Federal Constitution, SR (Systematic Collection of Swiss Federal Laws) 101.

Federal Act on the Freedom of Lawyers (Federal Lawyers Act), lawyers in Switzerland must exercise their activity independently.[20] The Court found that the plaintiff's contractual obligations under the typical funding arrangements to promptly and fully inform the funder on all aspects of the case and not to settle the case without the funder's prior approval do not jeopardise the lawyer's independence.[21]

b The Federal Court then considered the concern that the lawyer's duty of confidentiality[22] was at risk. In the Court's analysis, it is perfectly permissible for the client to allow his or her lawyer to disclose confidential information to the third party funder and this does not call into question the lawyer's confidentiality obligation.[23]

c The Federal Court finally looked at the issue of conflicts of interest. Swiss lawyers have not only a contractual, but also a statutory, duty to avoid conflicts.[24] The Court found that the party's and the third party funder's interests were, as a rule, aligned, since they are both interested in obtaining the best possible result in the proceedings. However, the Court accepted that conflicts of interest might arise in certain scenarios; for example, when it comes to accepting or rejecting a settlement proposal. However, in the Court's analysis, such potential conflicts can be managed by appropriate arrangements in the funding agreement. Therefore, the mere possibility of such conflicts does not suffice to preclude third party litigation funding.[25]

d The Federal Court also looked at the commercial realities of third party litigation funding. The Court recognised that funders will focus their acquisition efforts on lawyers and that the lawyers thus have a commercial interest in entertaining good relationships with professional funders, thereby being at risk of putting the funders' interests before those of the client. However, the Court found that this was not the only area of potential conflicts of interest for lawyers; it pointed as an example to the situation where the lawyer is paid by the client's professional liability insurer. The Federal Court came to the conclusion that the existence of the lawyer's legal obligation always to put the client's interests first, coupled with the threat of severe sanctions in the event of a breach, adequately addresses this concern.[26]

There are no specific statutory rules concerning third party litigation funding. Certain clauses in litigation funding agreements can be inadmissible; for example, if the funder was granted

20 Article 8(1)(d) of the Federal Lawyers Act of 23 June 2000, SR 935.61. The statutory requirement that lawyers exercise their activity as independent professionals does not prohibit law firms from being organised as corporations, as long as the corporation is controlled by independent lawyers. It also permitted for a lawyer to exercise his or her activity as an employee provided he or she is employed by an independent lawyer or law firm.

21 BGE 131 (2004) I 223 c. 4.5.

22 The duty of confidentiality is based on a number of legal sources: the contract between lawyer and client, Article 13 of the Federal Lawyer's Act and the rules issued by the cantonal bar organisations. Breach of the duty constitutes a severe criminal offence, pursuant to Article 321 of the Swiss Penal Code (PC; SR 311.0); it also entails disciplinary sanctions.

23 BGE 131 (2004) I 223 c. 4.5.6.

24 The duty to avoid conflicts of interest is again based on a number of legal sources, in particular, Article 398(2) of the Swiss Code of Obligations (CO; SR 220), which requires lawyers to diligently and faithfully perform the business entrusted to them, as well as Article 12(c) of the Federal Lawyers Act.

25 BGE 131 (2004) I 223 c. 4.6.

26 BGE 131 (2004) I 223 c. 4.6.3, 4.6.4 and 4.6.6.

an excessive share of the proceeds of the litigation.[27] Furthermore, as discussed by the Federal Court in its leading case, the most important legal limits and prohibitions arise from lawyers' duties to exercise their activity independently, keep client-related information confidential and avoid conflicts of interest.

In this context, the Administrative Court of the canton of Aargau dealt with a case in 2008 in which the lawyer who represented the plaintiff as counsel was at the same time the president of the board of the third party funder financing the litigation. Despite this double function, the Court found that the lawyer's duty to act independently had not been breached as long as the litigation funding agreement provided for the priority of the lawyers' rules of professional conduct over the interests of the funder and did not grant the funder any right to interfere with the lawyers' handling of the litigation.[28]

By contrast, in another decision, of 22 January 2015, the Swiss Federal Court found that a lawyer had breached the duty to avoid conflicts of interest in a situation where the lawyer had represented both his client and the litigation funder when they negotiated the funding agreement. The Court found that there was a conflict between the interests of these parties with respect to the share of the proceeds of the litigation that they would receive.[29] In addition, the Court criticised the fact that the agreement provided for a share of the proceeds to be used to repay private loans that the lawyer had granted his client earlier on. As a consequence, the Court found that the lawyer had breached his professional duties.[30]

Furthermore, Swiss law narrowly restricts the options for lawyers to agree to success-related remuneration. The Federal Lawyers Act bans the possibility of agreeing on a full-success fee (i.e., arrangements under which remuneration is only owed in the event of success, or in which the sole remuneration consists in a share of the proceeds of the litigation (*pactum de quota litis*)).[31] By contrast, Swiss case law has confirmed the permissibility of a *pactum de palmario*, an arrangement pursuant to which the client pays a reduced fee and the lawyer is in turn entitled to a share of the proceeds of the litigation as an additional (contingent) fee component.[32] The courts have held that the fee component that is unrelated to the outcome of the litigation must at least cover the lawyers' costs and must allow for a reasonable profit.[33] In its most recent leading case, the Federal Court has furthermore specified

27 Article 157 PC prohibits profiteering (i.e., exploitation of a party in need). Under Swiss civil law, a party that is affected by an agreement that takes unfair advantage can declare its rescission within one year of the contract having been entered into (Article 21 CO); see also BGE 131 (2004) I 223 c. 4.6.6.

28 AGVE (Official Case Reporter of Court and Administrative Judgments of the Canton of Aargau) 2008 275 et seqq., c. II.2.3.

29 Decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.2.

30 Decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.3.

31 Article 12(e) of the Federal Lawyer's Act; furthermore, BGE 143 (2017) III 600 c. 2.5 with further references. Note that Article 12(a) of the Federal Lawyer's Act is also of relevance with respect to success-related remuneration: according to this provision, lawyers are obliged to exercise their duties carefully and conscientiously. This general clause serves as a legal basis for the review of both success-related and unconditional fee components; see the recent decision of the Federal Court 2C_205/2019 of 26 November 2019, c. 4.

32 BGE 143 (2017) III 600 c. 2.7.4 and 2.7.5; decision of the Federal Court 2A.98/2006 of 24 July 2006 c. 2.1 (not published in the Official Case Reporter); furthermore, the *obiter dictum* in BGE 135 (2009) III 259 c. 2.3. Article 19 of the Rules of Professional Conduct of the Swiss Bar Association also assumes the permissibility of a *pactum de palmario*.

33 BGE 143 (2017) III 600 c. 2.7.5; decision of the Lawyer's Supervisory Commission of the Canton of Zurich of 2 March 2006, in ZR (Official Case Reporter of the Canton of Zurich) 105 (2006) No. 46; see

that the success-related component must not exceed the amount of the unconditional fee component. Furthermore, the agreement of a *pactum de palmario* is only permissible at the outset of the mandate or after the dispute has ended, but not in between.[34] Litigation funding arrangements that circumvent the general ban on success fees are also prohibited. This can be the case if counsel in the litigation is at the same time a shareholder of the funder, in which case the lawyer's duty to act independently would also be violated.[35]

Currently, there is no specific regulation and supervision of third party litigation funding in Switzerland. In particular, the Swiss Federal Court has clarified that third party litigation funding does not qualify as an insurance that would fall under the Insurance Supervision Act[36] because there is no payment of a premium in exchange for insurance against a future risk.[37] Furthermore, the core offering of litigation funders does not fall within the scope of other Swiss financial market laws.[38] The Federal Court does not seem to exclude a need for future regulation,[39] and representatives of litigation funders have considered whether regulation may actually be in the interest of providers to help and better establish the existing offer.[40] Nevertheless, there is currently no prospect of regulation (and no self-regulation either).[41]

III STRUCTURING THE AGREEMENT

There is no specific model agreement in use by Swiss litigation funders and each funder uses its own template. However, most of the relevant agreements are structured very similarly.[42] Some funders provide a template for download from their website.[43]

The process of entering into a funding agreement ordinarily consists of two phases: after a preliminary assessment of the prospects of the case, the funder will require the prospective

also decision of the Federal Court 2A.98/2006 of 24 July 2006 c. 2.2 according to which this only leaves a relatively narrow scope for the agreement of success-related fee components.

34 BGE 143 (2017) III 600 c. 2.7.5; confirmed in decision of the Federal Court 2C_205/2019 of 26 November 2019, c. 3.

35 See AGVE 2008 275 et seqq. c. II.4. As early as 2004, the Swiss Federal Court had in its leading case stated that a lawyer's independence could potentially be jeopardised if counsel to a party held a stake in or acted as a board member of the litigation funder and would thus indirectly profit from the outcome of the litigation (BGE 131 [2004] II 223 c. 4.6.4; see also decision of the Federal Court 2C_814/2014 of 22 January 2015 c. 4.3.1).

36 SR 961.01.

37 BGE 131 (2004) I 223 c. 4.7.

38 Wegmüller, op. cit., p. 238.

39 See BGE 131 (2004) I 223 c. 4.6.6 ('These concerns can be addressed by existing laws or, if need be, regulations that will still be introduced.') and 4.8; furthermore, Schumacher, *Prozessfinanzierung*, pp. 20 et seqq.

40 Wegmüller, op. cit., p. 245.

41 See, however, Schumacher, *Pflicht zum Hinweis*, pp. 464 et seq., who raises the question of whether a duty for courts to inform plaintiffs about the possibility of litigation funding, as was proposed in a preliminary draft law for a partial revision of the Swiss Federal Code of Civil Procedure (CPC; SR 272; see also in this respect Section VII), should go hand in hand with regulation.

42 Wey, Kommerzielle Prozessfinanzierung – ein Überblick über Angebot und Rechtsfragen, in Fellmann/Weber (eds.), *Haftpflichtprozess* 2008, Zurich/Basel/Geneva 2008, pp. 43 et seqq., 52.

43 See template of Profina Finanzierungsvertrag, downloaded from www.profina.ch/ablauf/vertrag.html, last visited on 20 September 2022.

plaintiff to enter into an exclusivity arrangement for a certain period (e.g., three weeks); during the exclusivity period, the funder will conduct a more thorough assessment allowing for an informed decision on whether to take on the case.[44]

Funding agreements in Switzerland are typically structured as a financing (not as a purchase) of the claim.[45] The funder enters into an obligation to pay all costs that are reasonably required to pursue the claim. This relates to court costs (including advances that are payable by the plaintiff) and the plaintiff's own attorneys' fees. Depending on its structure, the funding agreement may in part qualify as a contract for the benefit of a third party (e.g., for the benefit of the lawyers).[46] Furthermore, the potential compensation of the defendant for its legal fees if the claim is unsuccessful is also covered, which is not the case for many non-continental European funders. Depending on the nature of the case, the plaintiff may furthermore require the funding of a party-appointed expert to pursue the claim.[47]

In exchange for the financing, the funder receives a share of the proceeds of the litigation. Generally, Swiss funders can be expected to take a share in the region of 30 per cent of the net revenue.[48] The share may vary, however, depending on the absolute value recovered and the point in time at which the dispute comes to an end (i.e., the funder's share will be lower in the case of high amounts recovered and in the case of an early settlement).[49] In some cases, the funder's share is also calculated as, or limited to, a multiple of the amount invested by the funder.

Under Swiss law, the question arises as to how the funder's claim can be secured. In Swiss civil procedure, a party cannot be authorised by agreement to pursue a claim on behalf of another person.[50] As a consequence, the plaintiff would no longer have standing to sue if the claim was assigned to the funder. Therefore, some agreements merely provide for a duty to assign the agreed share to the funder upon first request.[51] However, a pledge of the claim as security for the funder's share seems to be the preferred option.[52]

The agreements usually provide for the funder's right to withdraw from the contract if events materially affect the initial assessment of the case. Such events typically include:

a the surfacing of previously unknown, detrimental facts;
b a change in case law that affects the case;
c a loss of important evidence; and
d a deterioration of the defendant's financial position.[53]

Some funders will only commit to funding the case before the courts of first instance.[54] In any event, however, the rendering of a judgment that results in a full or partial dismissal

44 Wey, op. cit., pp. 47 et seqq.; Schumacher, *Prozessfinanzierung*, p. 101.
45 Schumacher, *Prozessfinanzierung* p. 104.
46 See decision of the Superior Court of the Canton of Zurich of 17 May 2018, RT180057-O, c. 3.1.
47 Wegmüller, op. cit., p. 241; Wey, op. cit., p. 52.
48 Schumacher, *Prozessfinanzierung*, p. 21. See, however, also Wey, op. cit., p. 53, who reports a range of 20 to 50 per cent.
49 Wegmüller, op. cit., pp. 241 et seq.; Schumacher, *Prozessfinanzierung*, p. 21.
50 BGE 137 (2011) III 293, c. 3.2.
51 Profina Finanzierungsvertrag, § 3.
52 Schumacher, *Prozessfinanzierung*, p. 223; Meier, op. cit., pp. 7 et seq.
53 Wey, op. cit., p. 56.
54 Profina Finanzierungsvertrag, § 1.

of the claim will usually also trigger a right of termination by the funder.[55] In the event of withdrawal, the funder will be required to cover all costs that have been incurred so far (including costs resulting from a termination of the proceedings). However, the plaintiff will be entitled to continue the proceedings at its own cost and risk.[56]

Similarly, funding agreements often provide for an exit mechanism if the parties (i.e., the funder and the plaintiff) fail to reach an agreement regarding a settlement offer. The party rejecting the settlement is usually entitled to continue the proceedings but will become liable to the other party for the proceeds that would have resulted from the settlement.[57]

Recent case law on disputes between funders and plaintiffs in Switzerland has dealt with the scope of a funding agreement (between two individuals);[58] with a funder's request for civil attachment of the alleged proceeds of an arbitration proceeding;[59] with a funder's request for debt collection based on a foreign arbitral award against the insolvent plaintiff;[60] with a funder's request for inspection of the (defaulting) plaintiff's annual and audit reports;[61] and, finally, requests of both the plaintiff's attorney (on his or her own behalf) and the defeated plaintiff itself for debt collection against the funder.[62]

IV DISCLOSURE

In Swiss civil procedure law, the parties can seek disclosure and the production of documents from the counterparty or third parties if the information is of relevance for the court's decision.[63] However, production requests must be precisely worded and relate to documents that are clearly specified since fishing expeditions are inadmissible.[64]

Legal documents stemming from communications between a party or third party and counsel are exempt from disclosure obligations (attorney–client privilege).[65] The scope of this exception was significantly expanded in 2013,[66] and is today predominantly deemed to apply to all types of legal documents (including notes to file, whether prepared by the lawyer or the client, legal assessments, draft contracts, etc.) and irrespective of whether they are in the possession of the lawyer, the client or even a third party.[67] As a consequence, assessments from counsel will be subject to privilege even if they are in the hands of the litigation funder.

55 Schumacher, *Prozessfinanzierung*, p. 99; Meier, op. cit., p. 9.

56 Schumacher, *Prozessfinanzierung*, p. 99; Wey, op. cit., p. 56.

57 Schumacher, *Prozessfinanzierung*, p. 100; see also Wey, op. cit., p. 56.

58 Decision of the Federal Court 4A_556/2021 of 21 March 2022.

59 Decision of the Federal Court 5A_14/2018 of 11 March 2019.

60 Decision of the Federal Court 5A_910/2019 of 1 March 2021.

61 Decision of the Commercial Court of the Canton of Zurich of 7 May 2021, HE210051-O.

62 Decisions of the Superior Court of the Canton of Zurich of 17 May 2018, RT180057-O and of 24 May 2018, RT180059-O.

63 Article 160(1)(b) CPC. The taking of evidence is generally limited to disputed facts that are legally relevant (Article 150 CPC; see also in this respect decision of the Court of Cassation of the Canton of Zurich of 23 February 1981, in ZR 80 [1981] No. 102 c. 7b).

64 Schmid, in Spühler/Tenchio/Infanger (eds.), *Basler Kommentar Schweizerische Zivilprozessordnung*, 3rd ed., Basel 2017, para. 24 ad Article 160 with further references.

65 Article 160(1)(b) CPC; see also Article 166(1)(b) CPC.

66 Formerly, the exception was limited to genuine criminal defence counsel-related correspondence and it was argued that only documents in the hands of external lawyers would be protected.

67 Schmid, in Spühler/Tenchio/Infanger (eds.), *Basler Kommentar Schweizerische Zivilprozessordnung*, 3rd ed., Basel 2017, para. 24 ad Article 160; Schmid/Baumgartner, in Oberhammer/Domej/Haas (eds.),

Under Swiss civil procedure law, there is also no duty to disclose the existence of a litigation funding agreement.[68] In particular, production requests relating to the funding of a claim are not permissible because they are irrelevant for the court's decision.[69] As a consequence, more often than not in court litigation, the existence of a funding arrangement will not be disclosed.

By contrast, in international arbitration, some authors have argued that a claimant would be under a duty to disclose the fact that it is supported by a litigation funder, in particular to allow for the evaluation of a security-for-costs request.[70] Furthermore, under the IBA Guidelines on Conflicts of Interest in International Arbitration, as revised in 2014, any legal or physical person having a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of that party.[71] As a consequence, concerns regarding relationships between an arbitrator and one of the parties with respect to conflicts of interest extend to third party funders and may require the disclosure of the existence of a funding arrangement.[72]

There are indications for a trend towards the introduction of specific new rules addressing the disclosure of third party litigation funding in international arbitration. For example, Article 11(7) of the revised ICC Rules of Arbitration, which entered into force on 1 January 2021, stipulates that '[i]n order to assist prospective arbitrators and arbitrators in complying with their duties [to disclose any facts or circumstances with respect to their impartiality and independence], each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration'.[73]

Kurzkommentar ZPO, 3rd ed., Basel 2021, para. 6a ad Article 160; Hasenböhler, in Sutter-Somm/Hasenböhler/Leuenberger (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung*, 3rd ed., Zürich 2016, para. 18 ad Article 160.

68 An exception applies where a party has previously obtained legal aid, in which case it is required to notify the court upon entering into a litigation funding agreement that it has made sufficient funds available and no longer depends on legal aid (see decision of the Superior Court of the Canton of Zurich of 8 April 2012, LA110040, c. 8.3; furthermore, also of the Federal Court 2C_814/2014 of 22 January 2015 c. 5.2).

69 See Section IV, first paragraph.

70 von Goeler, *Third-Party Funding and its Impact on International Arbitration Proceedings*, Alphen a.d.R. 2016, pp. 130 et seqq. (also with reference to further procedural issues that may require a party to disclose certain facts related to the funding) and pp. 338 et seq.; Scherer, 'Third-Party Funding in International Arbitration: Towards Mandatory Disclosure of Funding Agreements', in Cremades/Dimolitsa (eds.), *Third-party Funding in International Arbitration*, ICC Dossier, Vol. 10, Paris 2013; pp. 95 et seqq.; see also ICC Commission Report, Decisions on Costs in International Arbitration, ICC Dispute Resolution Bulletin 2/2015, para. 89.

71 General Standard 6(b) and 7(a) of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.

72 Voser/Petti, the revised IBA Guidelines on Conflicts of Interest in International Arbitration, in ASA Bulletin 1/2015, pp. 6 et seqq., p. 19; Scherer, op. cit. p. 96 et seq.; see also Born, *International Commercial Arbitration*, 3rd ed., Alphen a.d.R. 2021, Vol. II, pp. 3100 et seq. Voluntary disclosure is also recommended as best practice in the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration of April 2018, p. 188.

73 See in this context also Article 13a of the VIAC Rules of Arbitration and Mediation 2021 as well as Article 13a of the VIAC Rules of Investment Arbitration and Mediation 2021, https://globalarbitrationreview.

In Switzerland, litigation funding agreements are typically subject to confidentiality obligations. A disclosure requires the consent of the other party.[74] Nevertheless, consideration is given to whether the chances of settlement would increase if the case's own financial strength (because of the funder's support) and soundness (given that it has passed the funder's assessment) is demonstrated to the opposing party early on. As a consequence, a voluntary disclosure of the existence of a funding arrangement for tactical reasons is considered.[75]

V COSTS

Swiss law of civil procedure generally follows the loser-pays rule, according to which the losing party has to pay the court costs and also compensate the winning party for that party's attorney's fees.[76] However, party costs are awarded on the basis of tariffs that depend on the amount in dispute.[77] In most cases, the compensations awarded cover only part of the actual costs incurred.

Upon the filing of the statement of claim, the court will usually request an advance on costs from the plaintiff to cover the prospective court costs.[78] The amount of this advance depends on the amount in dispute. Furthermore, each party must advance the costs for the taking of evidence that it has requested.[79] In addition, at the defendant's request, the plaintiff must also provide security for the party costs if, inter alia, the plaintiff is domiciled abroad and no treaty exemption applies; the plaintiff appears to be bankrupt; or there are other grounds for assuming that a claim for party costs would be at risk.[80] The question of whether the funding of a plaintiff's claim (to the extent the defendant becomes aware of this fact) may give rise to a duty to secure the defendant's party costs is hardly discussed in legal writing in Switzerland. In an unpublished decision of the Commercial Court of the Canton of Zurich, however, the Court ordered a plaintiff who – had it not been for a litigation funding arrangement – clearly lacked sufficient funds for conducting major litigation to provide security for the defendant's party costs.[81] Furthermore, in another case before the same court, where the conditions for having to secure party costs were met on the part of the plaintiff (who was bankrupt), the question arose whether the plaintiff could avoid the duty to furnish security by reference to the fact that its funder would be liable under the funding agreement for potential party costs payable if the claim was unsuccessful.[82] The Court held that only the actual party's ability to

com/new-rules-investment-disputes-in-vienna, last visited on 20 September 2022; see also https://globalarbitrationreview.com/isds-reform/uncitral-publishes-proposals-reform-funding-of-isds, last visited on 20 September 2022.

74 Schumacher, *Prozessfinanzierung*, p. 98.

75 Wey, op. cit., pp. 54 et seq.

76 Article 106(1) and (2) CPC.

77 See Article 96 CPC.

78 Article 98 CPC. In the recent draft bill concerning the revision of the CPC, it has been proposed that the advance on costs the plaintiff is required to pay should be reduced to half of the expected court costs (see also Section VII).

79 Article 102 CPC.

80 Article 99(1) CPC.

81 Decision of the Commercial Court of the Canton of Zurich of 6 March 2018, HG170257-O (unpublished), c. 2.3.1.

82 Decision of the Commercial Court of the Canton of Zurich of 12 February 2016, in ZR 115 (2016) No. 17.

meet its financial obligations was relevant for assessing whether party costs had to be secured under the CPC.[83] As a consequence, the Court concluded that the obligation of the funder, which only exists in relation to the plaintiff, to pay compensation for the defendant's party costs, did not release the plaintiff from its duty to furnish a security.[84]

In international arbitration, notable authors even argue that a claimant appearing to lack assets to satisfy a final cost award but pursuing the claim with the funding of a third party makes a strong prima facie case for security for costs.[85]

Therefore, just as in other jurisdictions, there is a risk in Swiss-based proceedings that a funded party bringing a claim will be ordered to pay a security for party costs if the lack of sufficient own funds is apparent or once the existence of a funding arrangement has been disclosed.

VI THE YEAR IN REVIEW

The past few years have seen some movement in the Swiss market for litigation funding, with Nivalion AG, Swiss Legal Finance SA and, just recently, Liti Capital SA entering as new participants.[86] Foreign participants, in particular the ones based in Germany, the United Kingdom or France, and even global players have also shown an increased interest in the Swiss market.

There has also been a slight increase in reported court cases relating to issues of litigation funding.[87] It will be interesting to see whether this trend continues. Furthermore, scholarly writers have recently pointed to the fact that Swiss lawyers are under a duty to advise their clients regarding the availability of third party funding and to represent them when entering into a funding agreement.[88] All these factors indicate an increased awareness of third party litigation funding and the opportunities arising from it.

83 ibid., c. 3; see also the decision of the Commercial Court of the Canton of Zurich of 6 March 2018, HG170257-O (unpublished), c. 2.3.2.

84 ibid., c. 4. The security can, however, be furnished in the form of a payment guarantee by a Swiss bank or insurance company (Article 100[1] CPC).

85 Born, op. cit., pp. 2680 et seq.; see also ICC Commission Report, Decisions on Costs in International Arbitration, op. cit., para. 90. By contrast, Redfern/O'Leary, 'Why it is time for international arbitration to embrace security for costs', in *Arbitration International* 2016 397 et seqq., pp. 407 et seq., suggest that 'the fact of third-party funding alone is not enough to justify an order for security of costs'; for an overview of arbitral practice and the discussion among scholars in Switzerland, see Bachmann, 'The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland. Why and how third-party funding should be considered under the Swiss lex arbitri,' in ASA Bulletin 4/2020, pp. 842 et seqq.

86 See Section I.

87 See, e.g., decision of the Commercial Court of the Canton of Zurich of 6 March 2018, HG170257-O (unpublished); decision of the Commercial Court of the Canton of Zurich of 12 February 2016, in ZR 115 (2016) No. 17; decision of the Federal Court 2C_814/2014 of 22 January 2015; decision of the Superior Court of the Canton of Zurich of 8 April 2012, LA110040.

88 Schumacher/Nater, Anwaltsrubrik: 'Prozessfinanzierung und anwaltliche Aufklärungspflichten', in *SJZ* 2016 43 et seqq. with reference to a corresponding statement of the Federal Court in its decision 2C_814/2014 of 22 January 2015, c. 4.3.1.

VII CONCLUSIONS AND OUTLOOK

In light of the limited number of funded cases in Switzerland so far,[89] litigation funding is not yet an important phenomenon. However, litigation funding is here to stay and will very likely gain further in importance in the future.

The fact that the importance of third party funding in Switzerland has remained rather modest until now may in part have to do with the fact that class actions or other mechanisms of collective redress do not exist in Switzerland at present. In 2013, the government, via the Federal Council, published a report on collective redress, which suggested a number of measures to improve an efficient handling of mass claims in Swiss civil procedure.[90] In this report, the government expressed support for the further development of the Swiss market for litigation funding and described it as an important factor to improve access to justice in mass tort and consumer cases.[91] In March 2018, the Federal Council proposed a partial revision of the CPC, one of the key objectives of which was to strengthen mechanisms of collective redress. Furthermore, the preliminary draft law provided for a duty for courts to inform plaintiffs about the possibility of litigation funding.[92] However, on 26 February 2020, the Federal Council published the draft bill concerning the revision of the CPC, which – if enacted – would oblige only the government (and not the courts) to provide the public with information on third party litigation funding to facilitate access.[93] Beyond that, it is proposed that the advance on costs that the plaintiff has to pay at the initiation of the proceedings should be reduced to half of the expected court costs.[94] This measure would lower the cost barrier for litigation in general. The debate on the proposed revision in parliament is still ongoing.

New mechanisms of collective redress have, however, been made the subject of a separate legislative proposal, which was published by the Federal Council on 10 December 2021.[95] To strengthen collective redress in civil proceedings, the Federal Council proposes to extend both the scope of application and the available relief of the pre-existing group action – which may be filed by associations only and which is to date limited to injunctions and declaratory relief – to include monetary claims.[96] Proceedings could also be concluded by way of a court-approved collective settlement.[97] In general, only those who actively join the

89 See Section I.

90 Report of the Swiss Federal Council on Collective Redress in Switzerland of 3 July 2013, available online at https://www.bj.admin.ch/dam/bj/de/data/publiservice/publikationen/berichte-gutachten/gutachten/vpb-2013-7a-d.pdf.download.pdf, last visited on 20 September 2022.

91 Report of the Swiss Federal Council on Collective Redress in Switzerland of 3 July 2013, p. 46.

92 Explanatory Report of the Swiss Federal Council on the Revision of the CPC (Improvement of the Application of the CPC and the Enforcement of Rights) of 3 March 2018, pp. 50 et seq.; see also Schumacher, *Pflicht zum Hinweis*, pp. 458 et seqq.

93 Article 400(2 bis) of the draft bill concerning the revision of the CPC (Improvement of the Application of the CPC and the Enforcement of Rights) of 26 February 2020 (see also the corresponding Explanatory Report at Swiss Federal Gazette 'BBl' 2020, pp. 2697 et seqq., 2776 et seq.).

94 Article 98(1) of the draft bill concerning the revision of the CPC; see Section V.

95 See the Explanatory Report on the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements), BBl 2021, pp. 3048 et seqq.

96 Articles 89 of the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements).

97 Articles 307b et seqq. of the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements).

action would be involved in the proceeding (opt-in).[98] As an exception to this rule, opt-out settlements would be possible in cases of dispersed damage.[99] However, it remains to be seen whether the draft bill will find a majority in parliament. On 24 June 2022, the commission in charge decided to postpone its decision to enter into the debate of the Federal Council's proposal for the time being and requested various additional clarifications.

Certainly, these legislative efforts to establish mechanisms of collective redress in Swiss law would, if made law in future, further favour the development of third party funding in Switzerland.

98 Articles 307d(1) and 307f(1) of the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements).

99 Articles 307h(2) of the draft bill concerning the revision of the CPC (Collective Actions and Collective Settlements).

Appendix 1

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ISBN 978-1-80449-136-2