

Expert Analysis

Litigation Funding Is On The Rise In Europe

By **Klaus Oblin** and **Florian Wettner** April 27, 2018, 11:13 AM EDT

Using finance to pursue commercial disputes is becoming established practice in those common law countries where litigation costs are high, and the historical torts of maintenance and champerty have been relaxed. It is less prominent in the civil law jurisdictions of mainland Europe, but the landscape there is beginning to shift in favor of funding.

Litigation finance can be defined as the provision of capital to a litigant or law firm in exchange for returns tied to commercial litigation outcomes. Plainly, investors in common law jurisdictions have recognized litigation as an asset worth investing in for enhanced returns, and many have set up dedicated funds designed to provide third party capital to claimants in strong litigation cases.

This trend is highlighted by one of the largest of those funds, [Burford Capital](#), which has offices in New York, Chicago, London and Singapore. They have more than \$3 billion of funding committed to the legal market. A recent survey carried out by Burford found that 81 percent of U.K. lawyers are aware of litigation finance and more than half of those U.K. lawyers who haven't yet used litigation finance expect to do so during the next two years.

While commercial litigation funding is thriving in London and New York, it's influence in Europe is slightly more muted, focused, in many cases, on high value litigation such as antitrust or class action type lawsuits. Germany and Austria are similar in terms of sophistication in this area and serve as good case studies for the rest of Europe with regard to the future development of litigation funding.



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In general, contingency fees or conditional fee arrangements with attorneys are not permitted under German or Austrian law. They are only allowed if the client would otherwise be deterred from proceedings, and thus from access to justice, because of its financial situation. Contingency fee arrangements are only recognized in a handful of European countries, such as Lithuania.

Third party funding, however, is available in both Germany and Austria for litigation and arbitration proceedings. In Germany, the minimum amount in dispute must be at least 100,000 euros. As an unwritten rule of thumb, the leading litigation funders demand a 30 percent fee for an amount in dispute up to 500,000 euros and 20 percent for any amount exceeding 500,000 euros.

Funding agreements in Austria, typically include provisions ensuring that funders receive no payments until (and contingent upon) a successful litigation outcome. A funder's financial interest may be a fixed amount and/or a percentage of the litigation's value, with recourse limited to the value of the legal claim. Financing is usually made available in tranches subject to progress or other developments.

The key third party funders in Germany and Austria are Foris AG, Legial AG, part of Ergo Insurance Group, and ROLAND ProzessFinanz AG (part of Omni Bridgeway). Foreign third party funders, such as Burford Capital, have also begun developing a presence. Their preference is to fund complex, high value cases with significant returns, such as insurance litigation, consumer litigation and cartel litigation. The barrier to acceptance though is high, with only 10 percent of German requests for funding accepted.

Funders will assess the litigation case like any other investment, only taking on cases they believe have a high probability of success. They will look into the market and see if the case has merit and sufficient evidence; also checking whether a decision is enforceable. They may hire a credit rating agency to look into the financial background of the opponent, ensuring there are sufficient funds available to cover the claim should it be successful.

A typical Austrian litigation funding agreement with Roland ProzessFinanz AG, for example, would provide finance for collective and individual actions with amounts in dispute of at least 200,000 euros. The funding pays for the assertion of claims both extrajudicial and in court, as well as mediation and arbitration. The agreement also covers the costs of the claimant's lawyer, pursuant to the Austrian Act on lawyer's fees,

Rechtsanwaltstarifgesetz, as well as the court costs and costs incurred for the taking of evidence and any specialist reports.

One recent example of a high profile case in Germany, is the claim pursued by consumer rights organization, MyRight, against [Volkswagen](#), using funding provided by Burford Capital. Volkswagen, or VW, agreed to compensate U.S. owners of diesel-powered cars because they contained illegal software allowing the vehicle to beat emissions tests. VW rejected compensation for 8.5 million vehicle owners in Europe because of weaker legal rules.

MyRight gathered more than 15,000 VW owners for a class action type lawsuit and began the expensive process of taking the case to the European Court of Justice in a bid to force VW to buy back the affected vehicles at the original price. MyRight's law firm, Hausfeld, received 30 million euros from Burford Capital to open an office in Berlin and finance litigation in exchange for a share of the proceeds of any victory.

The increasing use of litigation and arbitration funding in both countries, as illustrated above, has started a debate around the relative influence of third party funders.

German funders tend to take an active role, supporting the claimant and its lawyer in developing and pursuing a strategy and reviewing all submissions. The funders' representatives also take part in meetings and settlement negotiations. The lawyer representing the claimant acts only in the interests of the party as his client, but will have to execute the cooperation and reporting obligations of his client vis-à-vis the funder. The funder is also able to insist on a change of counsel, if there is an issue around the quality of existing representation.

This is in contrast to Austria, which follows a slightly more cautious approach. Funders are not allowed to directly instruct the lawyer during litigation or arbitration proceedings, since the lawyer would violate professional conduct rules if their actions were based on a funder's instructions, rather than their client's. Any rights and actions the funder intends to exercise during the course of the process have to be agreed with the claimant in the funding agreement. This includes any information rights, access to documents produced during the litigation process and any rights to veto.

The right of the funder to veto in respect to settlement is common to both countries, since a settlement requires the approval of both the claimant and the funder. If one of them wants to settle and the other does not, the one willing to settle has a contractual

right to terminate the funding contract.

The overall conclusion must be that litigation funding is a positive force for the future in Europe across both litigation and arbitration proceedings, but its growth and influence should be carefully managed.

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