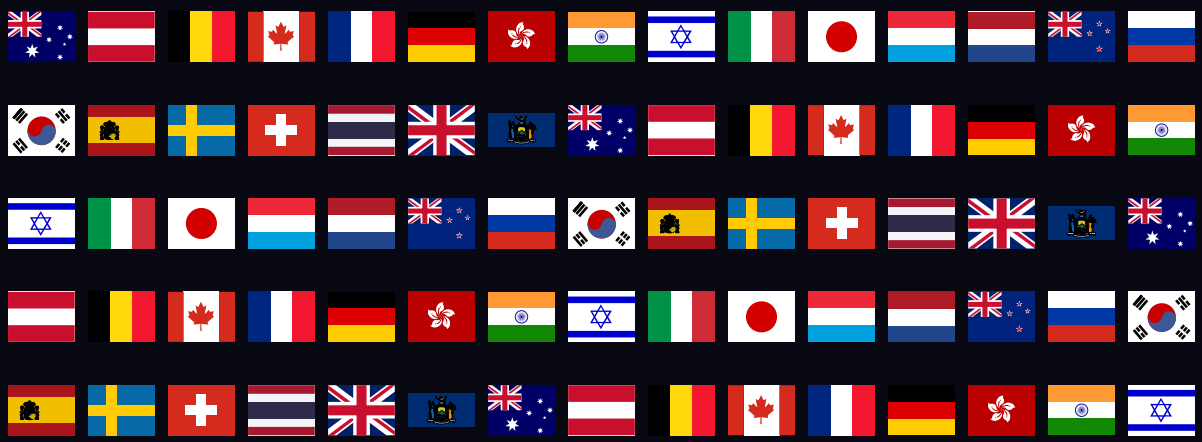
LITIGATION FUNDING

Switzerland



LEXOLOGY
Getting The Deal Through

Consulting editor
Woodsford

Litigation Funding

Consulting editors

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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.

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Table of contents

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REGULATION

Overview

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

The Swiss Federal Supreme Court held in 2004 that litigation funding by third-party funders is permissible in Switzerland provided that the funder acts independently of the client's lawyer (BGE 131 I 223). The court stated that it could even be advantageous for a claimant to have his or her claim assessed by an independent expert who intends to cover the financial risk of the envisaged litigation process and who is thus complementing the claimant's lawyer's view (BGE 131 I 223 c. 4.6.3).

In 2014, the court expressly confirmed its earlier decision and emphasised that, meanwhile, litigation funding has become common practice in Switzerland. The court further concluded that it is part of the lawyer's professional duty as provided for in the Federal Act on the Freedom of Movement for Lawyers (BGFA) to inform claimants about a potential litigation funding option as the circumstances require (Federal Supreme Court decision 2C_814/2014 c. 4.3.1).

Thus today, litigation funding is an accepted practice in Switzerland and has been judicially endorsed repeatedly by the Federal Supreme Court in recent years. In light of its rather comprehensive and detailed legal analysis, the court established a quite favourable and predictable environment for third-party litigation funding in Switzerland.

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

Law stated - 28 September 2021

Restrictions on funding fees

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

There is no explicit limit on what is an acceptable compensation for the funder's services. However, as a general rule stated by the Swiss Penal Code (ie, article 157), a third-party funding agreement – as any other agreement under Swiss law – may not constitute profiteering (ie, exploitation of a person in need).

The Federal Supreme Court did not explicitly state a limit, but has indirectly approved the common practice in Switzerland with success fees ranging from 20 to 40 per cent of the net revenue of the proceeds. In its legal analysis, the court cited a source who described a success fee of 50 per cent as 'offending against good morals and thus illegal', however, without confirming or even commenting on this opinion (BGE 131 I 223 c. 4.6.6).

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

Law stated - 28 September 2021

Specific rules for litigation funding

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

There are no specific provisions in the CPC or in any other Swiss legislation. However, the Federal Supreme Court held that a range of existing general provisions in various parts of the Swiss legislation (eg, article 27 of the Civil Code, article 19 of the Code of Obligations or article 8 of the Unfair Competition Act) would be applicable should a litigation funding agreement violate certain principles of Swiss law (BGE 131 I 223 c. 4.6.6).

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

In light of the rules pertaining to lawyers' professional conduct in Switzerland, which do not allow for lawyers to be paid on the basis of contingency fees only, it has to be kept in mind that any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer would violate the respective provisions.

Law stated - 28 September 2021

Legal advice

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

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

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

Law stated - 28 September 2021

Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

The Federal Supreme Court clarified this question in part when it determined that litigation funding is not deemed to be an insurance offering as defined by the ISA and is thus not regulated by FINMA. As the core offering of a funder generally does not fall under the Swiss financial market laws, there is no known interest of the Swiss financial regulator to oversee litigation funding.

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

Law stated - 28 September 2021

FUNDERS' RIGHTS

Choice of counsel

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

Independence in acting on behalf of the client is an important principle of the lawyer's professional conduct in Switzerland. In light of the established third-party litigation funding concept, this means that, in general, the litigant's lawyer must be able to act freely from any instructions of the third-party funder and solely on behalf of the client. However, this does not exclude the funder's right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that, if the litigant intends to replace his or her lawyer, funding will only be further granted if the new lawyer is approved by the funder.

Law stated - 28 September 2021

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

In domestic litigation, court hearings are generally open to the public and funders can attend without having to obtain specific permission. On the other hand, settlement and organisational proceedings are conducted in private. However, if the counterparty does not object to it, a litigant might invite his or her funder to participate in such proceedings based on a respective clause in the funding agreement.

This also applies to arbitration. While the respective hearings and proceedings are generally private, funders may participate if there is no objection by the counterparty.

However, it must be kept in mind that the majority of cases funded by third-party funders in Switzerland so far have been carried out without disclosing the funder's engagement. As such, the relevance of the funder's permission to attend or participate in hearings and settlement proceedings is quite limited.

Law stated - 28 September 2021

Veto of settlements

Do funders have veto rights in respect of settlements?

It is common practice to include a veto right clause regarding a potential settlement in the funding agreement. This is generally permissible under the Swiss Code of Obligations and interferes 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 typically 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 but will become liable to the other party for the proceeds that would have resulted from the settlement.

Law stated - 28 September 2021

Termination of funding

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. On the one hand, there are events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or authority decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown 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.

In practice, a funder would, under such circumstances, terminate the funding agreement and bear any costs incurred until the termination, as well as costs caused as a result of the termination.

While these clauses prevent the funder from continuing to fund proceedings that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such a case, the funder can usually terminate the funding after due notice and has no duty to cover any further costs. On the contrary, given these circumstances, the litigant might even be obliged to reimburse the funder for its costs and expenses.

Law stated - 28 September 2021

Other permitted activities

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 client's lawyer from the litigation funder is considered crucial by the Federal Supreme Court, a direct approach of the funder in order to instruct the lawyer during the proceedings is not permissible under Swiss law. The lawyer would violate the professional duties as provided for by the Federal Act on the Freedom of Movement for Lawyers (BGFA) if his or her actions were based on a funder's rather than on his or her client's instructions.

Therefore, any rights and actions the funder intends to exercise during the course of the proceedings have to be agreed with the funded party in the litigation funding agreement. This includes any information rights, access to documents produced during the process and any rights to reject the actions a litigant is usually free to take.

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

Since there are no specific legislative or regulatory provisions applicable to third-party litigation funding, funders only need to take an active role insofar as provided for in the litigation funding agreement. The fact that the involvement of a litigation funder is not disclosed to the court nor the counterparty in the majority of cases (at least as long as no international arbitration proceedings are concerned) further limits the funder's role within the litigation process.

Law stated - 28 September 2021

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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 (BGFA) prohibits fee agreements in which the lawyer's fee depends entirely on the outcome of the case. Hence, pure contingency fee arrangements are inadmissible. Only if the lawyer charges a basic fee (flat or on an hourly basis) for his or her services that covers the actual costs of the lawyer's practice and allows for a reasonable profit, is he or she permitted to agree on a premium in addition to the basic fee in the event of a successful outcome of the case. However, according to the Federal Supreme Court, such success-related premium is not allowed to exceed the total amount of the basic fee (Federal Supreme Court decision 4A 240/2016 c. 2.7.5).

Consequently, the litigation funding agreement must neither directly nor indirectly provide a model resulting in a pure conditional or contingency fee for the lawyer. Conversely, it is permissible to add a success fee for the lawyer in the funding agreement within the limits described above.

Law stated - 28 September 2021

Other funding options

What other funding options are available to litigants?

Legal cost insurances are widely available and frequently used in Switzerland. However, the extent and limits of coverage depend upon the specific policy as these insurances usually only cover the costs of certain types of claims. Furthermore, the insurance policy typically has to be arranged before a person or entity becomes aware of the need to litigate. After-the-event litigation insurance is not common in Switzerland.

A litigant may also seek legal aid if he or she lacks the financial resources to fund litigation proceedings and if the case does not seem devoid of any chance of success. However, both conditions are handled rather strictly by Swiss courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs and to provide security for costs, an exemption from court costs, or the appointment of a lawyer by the court, if necessary to protect the rights of the requesting party. It does, however, not exempt the litigant from paying the legal fees of the opposing party in the case of defeat. In theory, legal aid is also available to companies, provided, among other things, that the matter in dispute is the company's only remaining asset. Obviously, this constellation is extremely rare.

Law stated - 28 September 2021

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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.

Law stated - 28 September 2021

Time frame for appeals

What proportion of first-instance judgments are appealed? How long do appeals usually take?

There is no comprehensive statistical data available regarding the proportion of appealed first-instance judgments. There is also a considerable difference in the respective practice of the various cantons of Switzerland. As a general rule, approximately one-third of judgments are appealed before the second instance. On average, the second instance takes between one year and 18 months to render a decision. Only a small proportion of these judgments are appealed before the Federal Supreme Court. An average appeal here usually takes less than one year.

Challenges to an arbitral award are heard exclusively by the Federal Supreme Court (unless explicitly otherwise specified in an arbitration agreement providing for Swiss-based domestic arbitration) and are generally adjudicated within a time period of four to six months from the date of the challenge.

Law stated - 28 September 2021

Enforcement

What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective number seems to be rather low.

The enforcement of Swiss judgments related to non-monetary claims is governed by the Swiss Civil Procedure Code (CPC), while judgments related to the payment of money are enforced pursuant to the provisions of the Federal Debt Enforcement and Bankruptcy Act (DEBA).

In principle, a judgment rendered by a Swiss court is enforceable if it is final and binding and if the court has not suspended its enforcement, or if it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court rendering a judgment regarding a non-monetary claim may directly order the required enforcement measures.

In Switzerland, the enforcement of an enforceable judgment or arbitral award is not seen as particularly burdensome, expensive, or unsecure. Also, it is important to note that an enforceable decision allows for an attachment of known assets of the debtor located in Switzerland.

Law stated - 28 September 2021

COLLECTIVE ACTIONS

Funding of collective actions

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 such litigation processes 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, and to allow for a facilitated enforcement of consumer rights in particular. The authors of the Report also suggested the promotion of third-party funding to cover the costs of the envisaged collective redress proceedings.

Against this background, the Preliminary Draft of the revised CPC proposed a number of collective redress mechanisms. However, during the consultation phase 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. The Swiss Federal Council is expected to present a new draft amendment to the CPC with proposed provisions on collective redress towards the end of 2021.

Law stated - 28 September 2021

COSTS AND INSURANCE

Award of costs

May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

As a general principle of the Civil Procedure Code (CPC), court fees as well as all other expenses arising from the litigation, including the opposing lawyer's fees, are borne by the losing party. If a party prevails only in part, the fees and expenses are split proportionally between the parties. In the event of a settlement, the costs are charged to the parties according to the terms and conditions of the settlement agreement.

The Swiss courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before cantonal courts and the Swiss Federal Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party and there is little legal basis for such an argument in Swiss law, neither in the rules pertaining to material damages nor in those regarding procedural costs (eg, adverse costs).

Law stated - 28 September 2021

Liability for costs

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

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

In addition, there may be a constellation in which a litigation funder can be held liable for adverse costs directly by the non-funded party: if the unsuccessful claimant assigns his or her claim against the funder, to cover the adverse costs imposed on him or her by the court, to the respondent (and the litigation funding agreement allows for such an assignment), the respondent can take the assigned claim against the funder to the competent court.

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

Law stated - 28 September 2021

Security for costs

May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

There are two different types of security for costs that Swiss courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs based on the CPC. In addition, the claimant must advance the costs for taking the evidence he or she requested.

At the request of the defendant, the claimant may also be ordered to provide security for the potential compensation of the opposing party's costs if the claimant has no residence or registered office in Switzerland, appears to be insolvent, owes costs from prior proceedings, or if, for other reasons, there seems to be a considerable risk that compensation will not be paid. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Switzerland has entered into a treaty that excludes respective security bonds.

The CPC does not provide for a basis to request such security from the funder of a claim and there have been no cases reported where Swiss courts considered such a request.

Law stated - 28 September 2021

If a claim is funded by a third party, does this influence the court's decision on security for costs?

In most of the state court cases funded so far by third-party funders in Switzerland, the funder's engagement has neither been disclosed to the court nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts decided on advances and securities solely focusing on the claimant's status and did not take the existence of the third-party funder into account. Accordingly, the fact that a claim is financed by a third-party litigation funder does, in principle, not discharge the claimant from its obligation to provide security for costs.

In Swiss-based domestic and international arbitration proceedings, in contrast, the fact that the claimant is supported by a third-party funder may have an impact on the evaluation of a security-for-costs request. The prevailing view seems to be, however, that third-party funding per se is not sufficient to justify an order for security for costs.

Law stated - 28 September 2021

Insurance

Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE litigation insurance is not common in Switzerland. Although no legal or regulatory restrictions limit the respective product, there is, currently, no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases. Moreover, the Swiss market leader in the field of third-party litigation funding offers its clients an exclusive solution for the coverage of adverse costs by way of ATE insurance.

By contrast, legal cost insurance is commonly used in Switzerland. 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.

Law stated - 28 September 2021

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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 the litigation funding agreement or even the fact that he or she is supported by a third-party funder. It also does not provide a basis for a Swiss court to order a litigant to do so.

While some authors have argued that a litigant might have, under specific circumstances, such an obligation in domestic arbitration, there have been no cases reported where a litigant had to disclose the litigation funding agreement in a Swiss-based arbitration.

In Swiss-based international arbitration proceedings, on the other hand, several sets of institutional rules (such as the newly revised ICC Rules of Arbitration), as well as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, may require the disclosure of the existence of, or relevant provisions contained in, a funding agreement.

Law stated - 28 September 2021

Privileged communications

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 his or her client is privileged and does not have to be disclosed to the other party or the court, the communications between litigants or their lawyers and third-party funders do not fall within the legal privilege. Consequently, the confidentiality of information exchanged between a litigant or his or her lawyer and a third-party funder must be provided for in the litigation funding agreement.

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

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

Law stated - 28 September 2021

DISPUTES AND OTHER ISSUES

Disputes with funders

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

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

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

Law stated - 28 September 2021

Other issues

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

No.

Law stated - 28 September 2021

UPDATE AND TRENDS

Current developments

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

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

Law stated - 28 September 2021

Jurisdictions

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France	Nivalion AG
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Hong Kong	Herbert Smith Freehills LLP
India	Khaitan & Co
Israel	Woodsford
Italy	Fideal S.R.L
Japan	Miura & Partners
Luxembourg	Nivalion AG
Netherlands	De Brauw Blackstone Westbroek
New Zealand	Thorn Law Limited
Russia	Aperio Intelligence
South Korea	KL Partners
Spain	Procurator Litigation Advisors
Sweden	Nivalion AG
Switzerland	Nivalion AG
Thailand	Rajah & Tann Asia
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