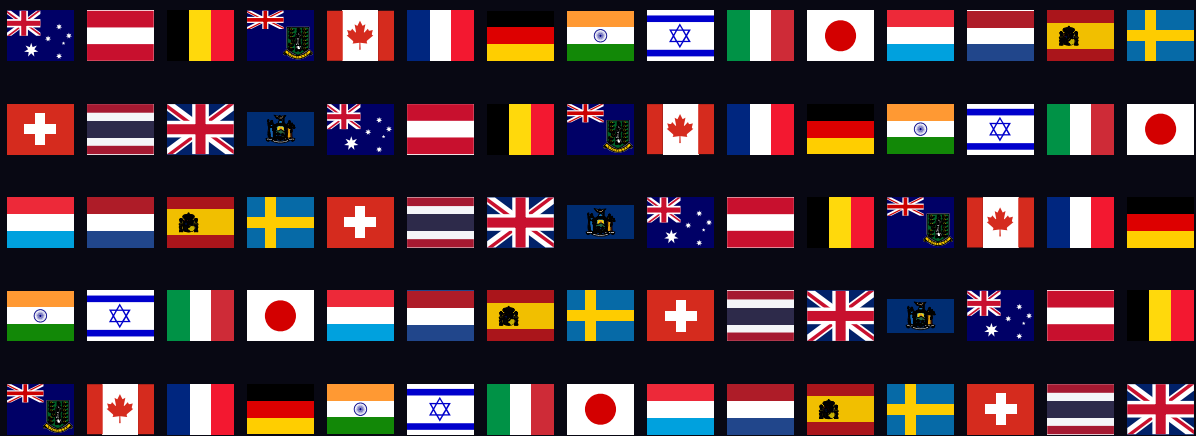


LITIGATION FUNDING

Austria



Litigation Funding

Consulting editors

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Woodsford

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

REGULATION

Overview
Restrictions on funding fees
Specific rules for litigation funding
Legal advice
Regulators

FUNDERS' RIGHTS

Choice of counsel
Participation in proceedings
Veto of settlements
Termination of funding
Other permitted activities

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees
Other funding options

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions
Time frame for appeals
Enforcement

COLLECTIVE ACTIONS

Funding of collective actions

COSTS AND INSURANCE

Award of costs
Liability for costs
Security for costs
Insurance

DISCLOSURE AND PRIVILEGE

Disclosure of funding
Privileged communications

DISPUTES AND OTHER ISSUES

Disputes with funders

Other issues

UPDATE AND TRENDS

Current developments

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REGULATION

Overview

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

Third-party funding is permitted in Austria. The Austrian Supreme Court approved litigation funding by third parties in a 2013 decision (OGH, 6 Ob 224/12b). In addition, in 2004 and 2012, the Vienna Commercial Court denied the defendants' objections to third-party funding of the respective claims.

Thus, today, litigation funding in Austria is accepted practice and has been judicially endorsed by the Austrian courts. Although the courts did not comprehensively cover all aspects involved, they established an unquestioned and favourable environment for third-party litigation funding in Austria.

Compared to other jurisdictions, third-party litigation funding has had a late start in Austria. Recently, it has started to become an established litigation tool, but with regard to the potential market size, it might still be an exaggeration to declare third-party litigation funding to be of common use in Austria.

Law stated - 06 September 2022

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, a third-party funding agreement – as any other agreement under Austrian law – must not constitute profiteering (namely, exploitation of a person in need; article 1 of the Act against Profiteering).

Law stated - 06 September 2022

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 Austrian legislation.

Lawyers' professional conduct in Austria does not allow for lawyers to be paid only on the basis of contingency fees (section 16 of the Lawyer's Ordinance (RAO) and section 879 II of the Austrian Civil Code), so any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer violates these provisions.

Law stated - 06 September 2022

Legal advice

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

Lawyers' professional conduct in Austria is provided by the RAO. In light of the RAO, the lawyer's independence in acting on behalf of the litigant is crucial, and this also applies to cases involving a third-party funder. However, by a clear separation of the roles between the lawyer and the funder, in principle, a lawyer who advises their clients in relation to a funder has no conflict of interest.

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

As of the time of writing, neither the Austrian financial regulator nor any other governmental body has any known interest in overseeing litigation funding.

Law stated - 06 September 2022

FUNDERS' RIGHTS**Choice of counsel****May third-party funders insist on their choice of counsel?**

Independence in acting on behalf of the litigant is an important principle of the lawyer's professional conduct. In light of the established third-party litigation funding concept, this means that, in general, the litigant's lawyer must be able to act free from any instructions of the third-party funder and only 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 their lawyer, funding will only be further granted if the new lawyer is accepted by the funder.

Law stated - 06 September 2022

Participation in proceedings**May funders attend or participate in hearings and settlement proceedings?**

In domestic litigation, court hearings are generally 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 their funder to participate in such proceedings.

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 has to be kept in mind that the majority of cases funded by third-party funders in Austria 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 is limited.

Law stated - 06 September 2022

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 a funding agreement. This is, in general, permissible under the Austrian Civil Code and does not interfere with the independence of the litigant's lawyer or with any other provision of Austrian law. Moreover, it is common for litigants and funders to agree in advance on certain minimum and maximum amounts concerning the limitation of the funder's veto right and their right to oblige the claimant to accept a particular settlement.

Termination of funding

In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. 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 facts;
- a change in case law that is decisive for the current litigation process;
- a loss of evidence or evidence that is accepted and tends to be negative; 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 or caused until the termination, as well as costs that occur as a result of the termination.

While these clauses prevent the funder from having to continue funding legal proceedings that appear reasonably unpromising, a second category involves breaches of obligations by the litigant under the funding agreement. In such cases, the funder can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, given these circumstances, the litigant is usually obliged to reimburse the funder for its costs and expenses.

Law stated - 06 September 2022

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?

In light of the independence of the claimant's lawyer from the third-party litigation funder, a funder is not allowed to instruct the lawyer during the proceedings. The lawyer would violate professional conduct rules as provided by the Lawyer's Ordinance if their actions were based on a funder's, rather than on their client's instructions. Therefore, any rights and actions the funder intends to exercise during the course of the litigation have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation and any rights to veto the actions a litigant is usually free to take.

Consequently, the litigant is usually obliged not to conclude or revoke any settlements, to waive any claims, to initiate any additional proceedings in connection with the funded claim, to adopt any legal remedies, to expand the claim or to otherwise dispose of the funded claim without written 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 as provided by the litigation funding agreement. In addition, the involvement of a litigation funder is not disclosed to the court nor the counterparty in the majority of the cases, which also considerably limits the funder's role within the litigation.

Law stated - 06 September 2022

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

The lawyer's professional conduct prohibits fee agreements in which the lawyer's fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are not permitted. Only if the lawyer charges a basic fee (flat or on an hourly basis) for the services that cover the actual costs of the lawyer's practice are they allowed to agree on a premium in the event of a successful outcome.

Consequently, the litigation funding agreement must not directly or indirectly provide a model resulting in a conditional or contingency fee for the lawyer. However, it is permissible to add a success fee for the lawyer within the limits described above in the funding agreement.

Law stated - 06 September 2022

Other funding options

What other funding options are available to litigants?

Legal cost insurance is widely available in Austria. However, the extent and limits of coverage depend upon the specific policy, as this kind of insurance usually only covers the costs of certain types of claims. Further, the insurance policy usually 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 Austria.

A claimant may also seek legal aid if they lack the financial resources to fund the proceedings and if the case does not seem devoid of any chance of success. However, both conditions are handled rather strictly by Austrian courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs, to pay court costs and to provide security. It can also comprise the appointment of a lawyer by the court if this is necessary to protect the rights of the party. Since 2013, legal aid has also been available to companies with financial constraints if the claim does not seem devoid of any chance of success.

Law stated - 06 September 2022

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 Austria takes between 12 and 18 months. 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 domestic arbitration, the duration is normally between one and three years.

Law stated - 06 September 2022

Time frame for appeals

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

There is a considerable difference in the respective practice of the various states of Austria. As a general rule,

approximately half of the judgments are appealed before the second instance of the respective state. On average, the second instance takes between 12 and 18 months. Only a small proportion of these judgments are appealed before the Austrian Supreme Court. There, an average appeal takes approximately one year.

Law stated - 06 September 2022

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 Austrian judgments is governed by the Code of Civil Procedure and by the provisions of the Austrian Enforcement Regulation. A judgment rendered by an Austrian court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement or it is not yet legally binding but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

In general, the enforcement of an enforceable judgment or arbitral award in Austria is not seen as particularly burdensome, expensive or unpredictable.

Law stated - 06 September 2022

COLLECTIVE ACTIONS

Funding of collective actions

Are class actions or group actions permitted? May they be funded by third parties?

Apart from the joinder of parties, Austrian law does not provide for specific collective redress. However, a class action mechanism has nevertheless been part of Austria's civil procedural law practice for more than 10 years. This particular instrument, often referred to as 'class action Austrian-style' is based on the combination of several elements of the Code of Civil Procedure. In principle, a claim can be asserted by the original owner of a claim and a third party to whom the claim has been assigned. Further, if a plaintiff asserts several claims against the same defendant, they can bundle all claims into a single set of proceedings. Finally, if the assignee and class action claimant happens to be a specific association (eg, a consumer organisation), claim-size restrictions are removed so that all claims can be brought before the Supreme Court, regardless of their individual claim size. The Austrian Supreme Court explicitly approved the funding of such a class action by a third party in the 2013 Austrian Supreme Court decision. Subsequently, third-party funders have shown increasing interest in funding Austrian-style class actions, which has gained public interest. Cases include those against VW, a truck cartel, GIS and AWD.

Law stated - 06 September 2022

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, 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 will be split proportionately between the parties. In the event of a settlement, the costs are incurred by the parties according to the terms and conditions of the settlement agreement.

The Austrian 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 the state courts and the Austrian Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party, although section 41 of the Code of Civil Procedure (CCP) would provide the basis for a rather broad spectrum of costs compensation in favour of the successful party.

Law stated - 06 September 2022

Liability for costs

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

The CCP does not provide a basis for the court to order or find liable a third-party funder to pay adverse costs. In practice in Austria, a funder's contractual obligation towards the claimant to cover the costs of the litigation does not apply to the opposing party.

In theory, there are two ways in which a litigation funder can be held liable for these costs by the prevailing respondent.

If the unsuccessful claimant assigns their claim against the funder to cover the adverse costs imposed on them 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.

If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow for an assignment), then the respondent must take legal action against the claimant. In practice, the Austrian courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the enforcement order that govern the enforcement of a judgment, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

Law stated - 06 September 2022

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 Austrian courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs. In addition, the claimant must advance the costs for taking the evidence they requested.

At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party's costs if the claimant has no residence or registered office in Austria. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Austria has entered into a treaty that

excludes such security.

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

Law stated - 06 September 2022

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

In most of the cases funded so far by third-party funders in Austria, 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 determined advances and securities solely based on the claimant's status and did not take the existence of the third-party funder into account.

Law stated - 06 September 2022

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 Austria. 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 in Austria.

By contrast, legal costs insurance is commonly used in Austria. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy, but usually, it is limited to certain types of claims.

Law stated - 06 September 2022

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 Code of Civil Procedure does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that they are supported by a third-party funder. It also does not provide a basis for an Austrian court to order a litigant to do so.

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

Law stated - 06 September 2022

Privileged communications

Are communications between litigants or their lawyers and funders protected by privilege?

Whereas any legal advice given by an Austrian or non-Austrian lawyer to a litigant 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 are not protected by legal privilege. Confidentiality can be provided, however, by way of non-disclosure agreements between a funder, lawyer and client.

However, there have been no cases reported where such communications had to be disclosed by order of an Austrian court.

Law stated - 06 September 2022

DISPUTES AND OTHER ISSUES

Disputes with funders

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

No disputes between litigants and funders have been reported in Austria so far.

Law stated - 06 September 2022

Other issues

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

With no legislation regulating third-party funding in Austria, the Austrian Supreme Court's judgments give guidance on various aspects including the legality and enforceability of funding agreements. The ongoing discussions and initiatives to regulate third-party funding at the EU level will more than likely impact the future of third-party funding in Austria.

Law stated - 06 September 2022

UPDATE AND TRENDS

Current developments

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

The Austrian Supreme Court declared permissible the sale of insolvency avoidance claims, and thus overruled the view of scholars in Austria, which has prevailed for decades (OGH 17 June 2019, 17 Ob 6/19k). This has opened up new possibilities for third-party funders to finance avoidance claims in insolvency proceedings, and has given insolvency administrators a valid new option to pursue claims, which was previously not possible due to a lack of assets. The creditors in insolvency proceedings have ultimately benefited from this development. The Austrian Supreme Court also determined that the prohibition of a pactum de quota litis agreement (client promises a remuneration to its lawyer based on a percentage of the damages or sums recovered) does not apply to third-party funding as – in contrast to legal advisers – funders do not provide legal advice to a party (OGH, 23 February 2021, 4 Ob 180/20d). The court noted, however, that funders must not exert influence on the proceedings and need to remain independent from the funded party.

Shortly after the Supreme Court confirmed that the prohibition of a pactum de quota litis agreement is only applicable to legal supporters (Rechtsfreund) including lawyers, notaries public, tax advisers and auditors (OGH, 25 March 2021, 2 Ob 10/21s).

At the end of 2021, the Austrian Supreme Court reiterated in an obiter dictum statement that third-party funding is

permissible under Austrian law (OGH, 15 December 2021, 18 OCg 5/21s).

Law stated - 03 August 2021

Jurisdictions

	Australia	Piper Alderman
	Austria	Nivalion AG
	Belgium	Nivalion AG
	British Virgin Islands	Martin Kenney & Co
	Canada	Omni Bridgeway
	France	Nivalion AG
	Germany	Omni Bridgeway
	India	Khaitan & Co
	Israel	Woodsford
	Italy	Fideal S.R.L.
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