
CHAMBERS GLOBAL PRACTICE GUIDES

Litigation Funding 2025

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Germany: Law & Practice

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Germany: Trends & Developments

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GERMANY



Law and Practice

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1. Legal and Regulatory Framework for Litigation Funding

1.1 Legality of Litigation Funding

In Germany, third-party litigation funding is generally lawful and has been used in practice in connection with civil or commercial litigation before German courts since 1998 (Everding in Veith et al., *Der Versicherungsprozess*, § 3, beck-online). Specific statutory rules governing third-party litigation funding have existed since 2021. Approximately twenty funders are active on the German market and the market volume is estimated to be EUR500 million (*Lieberknecht*, NJW 2022, 3318). Lawyers admitted to the German bar (*Rechtsanwälte*, hereafter “lawyers”) cannot offer third-party litigation funding as a business.

No-Recourse v Full-Recourse Third-Party Litigation Funding

Litigation funding, as discussed herein, is no-recourse third-party litigation funding – ie, the funding of legal action (litigation or arbitration) without recourse to the client if the client is unsuccessful (“no win, no fee”).

Alternatively, a party requiring litigation funding could obtain a loan. A loan may be easier to obtain than no-recourse third-party litigation

funding because the lender may not want, or not be able, to employ the same resources to check the client’s prospects in litigation as a professional litigation funder would. On the other hand, the client may not be prepared, or not be able, to accept the risk of full recourse – ie, of having to repay the loan plus interest, even if it is not successful. Commercial lending requires a banking licence under Section 32 of the German Banking Act (*Kreditwesengesetz*). Banking licences will be issued only to financial institutions managed by a professional management. Consequently, litigation funders wishing to get into the business of full-recourse funding of litigation before German courts should consider applying for a German banking licence.

Exploring both options, no-recourse funding and full recourse funding, and documenting their choice, will be relevant for clients seeking to recover the cost of litigation funding from the respective counterparty, because the counterparty will be obligated, if at all, to reimburse them for the cost of the most economical litigation funding only.

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Commercial Litigation Funding v Consumer Litigation Funding

The focus of this guide is on commercial litigation funding – ie, the funding of commercial litigation and arbitration and investment arbitration. “Funding” in this context primarily means the funding of the cost of the proceedings, but it may also mean the monetisation of disputed claims or claims that have been confirmed by a court judgment or an arbitration award but are now the object of enforcement proceedings, where the client wants to unlock the monetary value of such claims without waiting for the court, arbitration or enforcement proceedings to be completed.

In addition, there are two types of consumer litigation funding in Germany:

- The first is the funding of aggregated actions (*Sammelklagen*) – ie, actions brought by aggregators, as defined in **1.4 Consumer Protection, etc**, where the clients are and remain the beneficial owners of the claims at issue.
- The second is the funding of representative actions (*Verbandsklagen*) – ie, actions brought by qualified entities within the meaning of Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers (the “Representative Actions Directive”) to enforce the interests of consumers or small businesses.

Consumer litigation funding is described in more detail in **1.4 Consumer Protection, etc**.

Insurance

Legal protection insurance (*Rechtsschutzversicherung*), also known as legal expenses insurance or simply legal insurance, has been

available in Germany for much longer than no-recourse third-party litigation funding. Traditionally, legal protection insurance has been offered only as before-the-event insurance in specific areas such as employment, landlord versus tenant or traffic-related disputes. After-the-Event (ATE) insurance has been available in Germany only for certain consumer disputes (see **2.3 Insurance**), but now Legal-Risk Insurance in the forms of Judgment Preservation Insurance, Adverse Judgment Insurance and ATE insurance is reportedly available now from German insurers at a commercial level as well.

Legal protection insurers are subject to regulation under the terms of the Solvency II Directive of the European Union and the German Insurance Supervision Act (*Versicherungsaufsichtsgesetz*, or VAG).

Litigation funding is not regarded as an insurance business because it essentially provides for sharing an expected risk, whereas the insured party pays a premium to insure itself against a risk that it hopes will not materialise (*Everding, l.c.*).

Legal Aid

A specific form of third-party litigation funding available in Germany is legal aid (*Prozesskostenhilfe*, or PKH). Legal aid is regulated in the German Code of Civil Procedure (*Zivilprozessordnung*, or ZPO). Parties who require legal aid need to apply to the court and show that they are unable to pay the court costs and/or the fees for legal representation in a specific matter. Depending on the financial situation of the party, legal aid may cover all or part of such costs, but it will not cover adverse costs (see **2. Adverse Costs and Insurance**). Legal aid does not need to be repaid.

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1.2 Rules and Regulations on Litigation Funding

The essential rules governing litigation funding in Germany are set out in German federal statutes concerning civil procedure, civil law, court costs, and the professional duties of a lawyer admitted to the German bar (*Rechtsanwalt*, hereafter “lawyer”). Statutory rules specifically addressing litigation funding are contained only in:

- the Act on Representative Actions, which sets out specific limitations on the funding of disputes in the field of representative actions for the protection of the collective interests of consumers and certain small business entities, including provisions designed to ensure that the decisions of the funded party, such as decisions on settlement, are not “unduly influenced” by the funder;
- the Act on Lawyers’ Professional Duties (*Bundesrechtsanwaltsordnung*) which sets out specific limitations on the ability of lawyers to agree on success-based fees, essentially barring lawyers from the business of litigation funding; and
- the Legal Services Act (*Rechtsdienstleistungsgesetz*), which since 2021 states that aggregators may arrange for litigation funding, as they habitually do, without exposing themselves to a conflict of interest.

In its resolution of 13 September 2022 with recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL)), the European Parliament speaks of a “regulatory vacuum” in Germany as well as in the rest of the European Union, which would lead to “a risk of fragmentation and regulatory imbalances in the area of litigation funding”. Said resolution of the European Parliament is discussed in the Trends and Developments section.

Litigation

Litigation in civil and commercial matters in Germany, which is a civil-law jurisdiction, differs in many respects from litigation in common-law jurisdictions, including the following particular aspects.

Comprehensiveness of submissions

Under German procedural law and in practice, the statements of claim and of defence must set forth all relevant facts and the evidence offered to prove such facts. Late submissions may be disregarded. Depending on the substance of the submissions, matters may be decided without any evidence being heard. There are no pre-trial discovery or disclosure, and no depositions, with limited exceptions. One such exception applies with regard to corporate disputes regarding German corporations, where the shareholders may require audits that may yield data and evidence on which the shareholders could rely when invoking the liability of the management.

Hearings

The trial is normally discontinuous – ie, a hearing is scheduled whenever the judges decide to hold a hearing and not necessarily in agreement with the parties. In complex cases, hearings may be stretched over months or years. As an exception, the commercial courts (see below) will hold a case management conference at the beginning of the proceedings which should permit the court to schedule hearing dates in agreement with the parties.

Early assessment

For the funder, the requirement that submissions be comprehensive and the fact that the trial is discontinuous mean that it may be possible to assess the scope and direction of a proceeding relatively early, possibly during the first hearing.

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Judges

Litigation in civil and commercial matters never involves a jury. There may be lay judges, but proceedings are dominated by professional judges.

Transcripts

Transcripts of the hearings are written by the judges. These generally summarise the hearing in a general fashion; only applications to the court and settlements, if any, are recorded verbatim. As an exception, the commercial courts (see below) will provide verbatim minutes of the proceedings upon application of the parties.

Evidence

Witnesses and experts are heard by the court. The parties may ask questions, but they are not in control of the hearing. The minutes are taken by the judge, and they only reflect the core of the statements made by the witnesses or experts; there are no verbatim records. Opinions rendered by party-appointed experts may have persuasive value but are not admissible in evidence. The court would, if needed, appoint its own expert at the expense of the party bearing the onus of proof.

No punitive damages

German courts cannot award punitive damages; these would be considered as violating German public policy. However, there are rules in German competition law (unfair competition law and competition or antitrust law) that give claimant parties a right to the disgorgement of profits made by the perpetrator.

Settlement options

German judges expect the parties to explore settlement options very early in the proceedings and often use the hearings to facilitate settlement discussions and make settlement proposals. German arbitrators tend to do the same,

provided this is permitted by the applicable rules of arbitration.

Trade secrets

German procedural law does not contain any hard and fast rules designed to protect trade secrets of the litigants, except that witnesses who have a certain relationship to a party cannot be forced to testify and that the public may be excluded from certain hearings. However, the Act to Strengthen Germany as a Place of Dispute Resolution (discussed in the Trends and Developments section), adopted in 2024, authorises the courts to ensure that trade secrets remain protected in litigation. The protection of trade secrets should be taken into account when considering proceedings before German courts.

Appeals

Appeals are fairly common. If a large amount is at issue, whatever the outcome of the initial procedure before the Regional Court, one or perhaps even both parties frequently appeal. In civil and commercial matters, there are normally two, possibly three stages:

- The first stage is the trial stage before a regional court (*Landgericht*).
- The second stage is the appeal stage before a higher regional court (*Oberlandesgericht*).
- The third stage could be an appeal to the Federal Court of Justice (BGH) on points of law, if admissible, which generally requires a specific order from a higher regional court or from the Federal Court of Justice itself permitting the appeal to the Federal Court of Justice.

Cost of proceedings

The total cost of proceedings (court costs and fees for legal representation on both sides at the statutory rates) is generally lower than the

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respective figure for the United Kingdom or for the United States. According to the Act on Court Costs (*Gerichtskostengesetz*), the court costs consist of two components:

- a basic fee, which is pegged to a certain range of amounts in dispute (eg, EUR666 in basic court costs if the amount in dispute is more than EUR10,000 but no more than EUR13,000); and
- a multiplier (eg, three for the first stage of proceedings before a regional court).

The plaintiff must pay the full court costs for the respective stage of the proceedings in advance but may reclaim them in whole if the complaint is withdrawn before the first court hearing or two-thirds of the costs paid if the matter is settled without a judgment. Similarly, fees for legal representation are also computed based on a basic fee, which is pegged to a certain range of amounts in dispute and a multiplier.

The amount in dispute is capped at EUR30 million. This rule was introduced to cap the cost of litigation concerning nuclear power plants, but it applies universally.

The funder of commercial litigation should expect that the client has agreed on hourly rates with its lawyers and will request funding of the entire fees for legal representation incurred by it, regardless of the statutory rates, but that the client's liability for adverse costs will be limited to the statutory rates.

The ad valorem cost rules described here are intended to facilitate access to justice, at least for smaller claims. For larger claims, they can have the opposite effect if the potential claimant has not arranged for funding. As an example, a California court in 2003 accepted juris-

diction, rejecting a plea that it was forum non conveniens in a case involving only German nationals, because the claimants had argued that they were unable to bring their USD3 billion case before German courts as they could afford neither the advance on court costs the German court would charge (now approximately EUR360,000) nor the statutory lawyers' fees in first instance (now approximately EUR340,000) (*Buettner et al. v Bertelsmann AG et al.*, Superior Court, Santa Barbara County, California, 11 December 2003; Winkler et al., NZG 2005, 241).

Language

The language of court proceedings is German while arbitration in Germany is offered in any language. This is important because translation and interpretation services add costs and delays to cross-border litigation. In 2024, however, the German Court Constitution Act and the Code of Civil Procedure were amended to provide for special chambers (*Kammern*) at regional courts and special panels (*Senate*) at higher regional courts which are commonly referred to as "commercial courts". Commercial courts may conduct entire proceedings in English, provided the amount in dispute is at least EUR1 million and the dispute is a civil or commercial matter between businesses (other than a matter concerning intellectual property, copyright or unfair competition) or a dispute arising out of the acquisition of a business or of shares in a company. Hearings before the commercial courts are held pursuant to a time schedule discussed with the parties in a case management conference (*Organisationstermin*), and the parties have the option of requesting verbatim records.

Arbitration

Commercial arbitration is generally preferred over court proceedings in specific cases, particularly in cases involving closely held compa-

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nies and cases where trade secrets are at issue. German arbitrators are generally willing to depart from German procedural practice and to permit, for instance, limited disclosure, if non-German parties are involved, provided this is permitted by the applicable rules of arbitration.

Alternative Dispute Resolution

Commercial mediation is widely accepted and is used more and more frequently in Germany. Certain courts offer free mediation services provided by specially trained judges. Other services, such as conciliation, expert services and adjudication, are also available in Germany.

Scope of the Commitment to Fund Civil or Commercial Proceedings

The scope of the commitment to fund civil or commercial proceedings before a German court will be determined by the German federal statutes concerning civil procedure, court costs and lawyers' fees. These statutes contain the following essential rules:

Court costs

The court costs for civil and commercial proceedings are regulated by statute and computed ad valorem. They depend on the amount in dispute, capped at EUR30 million. Court costs must be paid in advance, when filing a complaint. Similar rules apply to appeals.

Fees for legal representation

Fees for legal representation are also ad valorem fees regulated by statute and depending on the amount in dispute, again capped at EUR30 million, but the parties and their lawyers are free to agree on another fee basis, such as hourly fees or fixed fees, as long as such alternative fees are not lower than the statutory fees in contentious matters.

Costs follow the event

The losing party will be ordered to reimburse the prevailing party for court costs, fees for legal representation and incidental expenses, even if the prevailing party has obtained funding. For the purpose of calculating recoverable costs, lawyer's fees are assessed on the basis of the statutory fee scale only, irrespective of what the winning party may have agreed with its lawyers. Thus, if the lawyers are paid on an hourly basis, the reimbursement is normally lower than the fees actually paid by the client. If the complaint is successful in part, each party is ordered to reimburse the other for a part of the legal fees incurred by it, depending on the extent of the success, as assessed by the court.

Security

A German defendant may request security for court costs and legal fees grosso modo if the plaintiff resides outside the European Economic Area, except if and to the extent that treaties expressly stipulate that no such security may be requested. Therefore, a party residing outside the European Economic Area and intent on bringing a claim before a German court should determine whether or not it may be required to post security and, if so, prepare to satisfy a court order to that effect if the defendant applies for such an order.

If such a court order is not satisfied – ie, if the claimant fails to provide the security specified in the court order to the defendant within the time period fixed by the court, the complaint will be deemed withdrawn.

Further details regarding security can be found below at **2.2 Security for Costs**.

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No success fees

German lawyers may not enter into success-fee arrangements except under very limited circumstances described in **3.1 Alternative Fee Structures**. This would generally bar lawyers from acting as funders in litigation or arbitration except in small, isolated cases. On the other hand, German clients who are prepared to pay success-based fees should welcome the opportunity to contract with a funder.

Confidentiality

German lawyers are subject to strict professional secrecy. Funders who are approached by German lawyers should ensure that the client has waived confidentiality vis-à-vis the funder. In addition, there may be non-disclosure requirements between the parties to litigation, such as where the parties are shareholders in the same company. This may restrict the client's ability to communicate with the funder about the litigation unless the counterparty has been made aware of the funding and has agreed to the disclosure.

Legal representation

Pursuant to Section 79 of the German Code of Civil Procedure, parties in civil or commercial litigation must be represented by lawyers, except that claimants may instruct legal service providers licensed under the Legal Services Act and financial institutions licensed under the Banking Act to assert their claims in formalised payment-order procedures (*Mahnverfahren* and *Vollstreckungsverfahren*) and in procedures dealing with the enforcement of a judgment as long as such procedures are not contested. There are other exceptions that are not relevant here.

Obligation to advise on funding

German lawyers are obligated to advise their clients of the availability of litigation funding, where appropriate. However, lawyers may incur liability

if they advise their clients that they need not worry about the funding of a given proceeding without having secured a valid and enforceable funding agreement for the client (OLG Brandenburg, 6. Zivilsenat, judgment of 24 September 2024, docket number 6 U 10/23).

General regulatory requirements

German law does not require a litigation funder offering no-recourse third-party litigation funding to have a place of business in Germany, neither in the form of a branch office nor in the form of a subsidiary. However, litigation funders based in Germany would be subject to the same general corporate and regulatory requirements as any other business based in Germany, including registration in the trade register (*Handelsregister*) and with the police (*Gewerbeanzeige*).

Regulation of financial service providers

Third-party funders based in Germany who offer financial services, as defined in the German Banking Act (*Kreditwesengesetz*, or KWG) would require a banking license. Third-party funding as such is not regarded as a financial service, except if the funding is made in the form of loans (full-recourse third-party litigation funding). Obtaining a banking license under Section 32 of the German Banking Act is generally perceived as burdensome, particularly as the applicant needs to be able to prove to the Federal Financial Supervising Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, or BaFin) that it has executives who are qualified to manage an entity providing the financial services at issue.

Regulation of litigation funders based outside Germany

Litigation funders based outside Germany can offer their services to parties litigating before German courts or before arbitral tribunals sitting in Germany without any registration or licensing

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requirements, except that if they plan to act as an aggregator for clients residing in Germany, they should obtain a license under the Legal Services Act, and if they plan to offer full-recourse litigation funding targeted to customers residing in Germany, they should consider obtaining a banking license under Section 32 of the German Banking Act.

Recovering the cost of funding

There is authority supporting the conclusion that a funded party may recover the cost of funding under the rules of contract law dealing with the recovery of damages, which supplement the procedural rules on cost recovery (*Lieberknecht*, NJW 2022, 3318 with citations of relevant case law). Any such recovery however would require that the funded party demonstrate that it would not have had access to justice without funding and that no cheaper alternative, such as a loan or legal aid, was available. In addition, it is suggested that any such claim would be limited to the net cost of funding and would not include any costs for legal representation of the funded party in excess of the cost recoverable under the procedural rules. As suggested in **1.1 Legality of Litigation Funding**, clients seeking to recover the cost of litigation funding from the respective counterparty should consider both no-recourse funding and full-recourse funding and document their choice so as to be able to demonstrate to the counterparty that they chose the most economical way of litigation funding.

As a result, before agreeing to fund litigation in a German court, a funder should determine the extent of the funding, factoring in the potential liability of its client to reimburse the opposing party for costs.

Warning letters and undertakings

German business entities who feel wronged by unfair competition or an (alleged) copyright, patent or trade mark infringement often attempt to settle the matter by dispatching a warning letter. Such warning letter is normally written by an attorney, describes the alleged act of unfair competition or infringement and requests a written undertaking (*Unterlassungsverpflichtungserklärung*) to the effect that the recipient (and potential defendant) will cease and in the future desist from committing the (allegedly) unlawful practices at issue and promises to pay to the claimant a penalty for any future violation of the undertaking. This is done because the potential defendant is deemed to intend to continue the (allegedly) unlawful practices, and therefore may need to be restrained by the court, unless it provides an undertaking unequivocally confirming its willingness to stop. An undertaking without the promise to pay the penalty would not remove such deemed intent to continue the (alleged) unlawful practices. If the undertaking is provided and accepted by the claimant, the matter is closed and the claimant is entitled to be reimbursed for statutory legal fees incurred by it in connection with dispatching the warning letter on the theory that it provided a service to the defendant by pointing out the (allegedly) unlawful practices under German contract law. This practice is intended to settle simple unfair competition or copyright, patent or trade mark infringement disputes quickly and out of court, but it has also led to abuse by lawyers which in turn has led to case law which may be relevant for litigation funding.

1.3 Non-Legal Rules

Voluntary codes relevant to funders apply in arbitration cases. These are the arbitration rules that may be chosen by the parties, such as those of the German Arbitration Institution (DIS), that

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apply to arbitration proceedings where the seat of the arbitration is in Germany. The relevant statutory rules dealing with such arbitration proceedings allow the parties to make the rules regarding the cost of the arbitration proceedings and, if the parties do not reach an agreement, leave this to the discretion of the arbitrators, based on the principle that fees follow the event (§ 1057 of the Code of Civil Procedure). In practice, the costs of arbitration proceedings based in Germany are generally determined and allocated under the arbitration rules chosen by the parties, such as those of the German Arbitration Institution (DIS). In contrast to the rules governing civil or commercial proceedings before a German court discussed herein, according to such rules the lawyers' fees will normally be reimbursed based on the actual cost that the party concerned has reasonably incurred for legal representation, without regard to the statutory fee scale including the EUR30 million cap on the relevant amount in dispute.

Therefore, before funding arbitration proceedings based in Germany, a funder will assess which rules apply to the specific arbitration. If the parties have not agreed on any such rules, it is likely that the arbitral tribunal will determine and allocate the cost of the arbitration proceedings based on the principle that fees follow the event.

1.4 Consumer Protection, etc

The regulation of consumer litigation funding is outlined below.

Regulation of Aggregated Actions

Aggregated actions (*Sammelklagen*) are actions brought by aggregators. "Aggregator" as used herein, means a legal service provider that is in the business of enforcing and collecting claims in or out of court in their own name on behalf of

clients, where the legal service provider is not a lawyer and the clients assign the claims at issue to the aggregator subject to a fiduciary agreement (*Treuhandvertrag*) and so are and remain the beneficial owners of the claims at issue, such as a claims-collection and award-distribution service provider (referred to as *Rechtsdienstleister* in regulatory law and as *Prozessstandschafter* in the law of civil procedure).

According to Section 2 of the Legal Services Act, legal service providers require a license if they assert the claims of their clients based on an individual legal assessment as a stand-alone business (to be distinguished from entities that collect claims as an ancillary activity, such as real estate managers), whether they do so only out of court or also in court (using lawyers admitted to the bar).

There is no such licensing requirement for litigation funders, as long as they do not act as aggregators themselves. According to Section 3 of the Legal Services Act, legal service providers may provide legal services only to the extent expressly permitted by law. According to Section 4 of the German Legal Services Act, legal service providers may not provide legal services if that would expose them to a conflict of interest. In 2021, Section 4 of the German Legal Services Act was amended to state that aggregators will not expose themselves to conflict of interest if they arrange for litigation funding.

Regulation of Representative Actions

Representative actions (*Verbandsklagen*) are actions brought by qualified entities to enforce the interests of consumers or small businesses. "Qualified entity" (*Verband*), as used herein, means an "organisation or public body representing consumers' interests in its own name, which has been designated by a Member State

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as qualified to bring representative actions” in accordance with the Representative Actions Directive “as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both”. In Germany, qualified entities have been known since the 1980s.

The Representative Actions Directive states in its Article 10 (Funding of representative actions for redress measures) that member states of the European Union “shall ensure that, where a representative action for redress measures is funded by a third party... conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers”.

With some delay, the German federal government implemented the Representative Actions Directive in October of 2023 by promulgating the German Act on Representative Actions for the Protection of the Collective Interests of Consumers (*Gesetz zur gebündelten Durchsetzung von Verbraucherrechten*, or VDuG, hereafter the “Act on Representative Actions”). Section 1 of the Act on Representative Actions states that business entities with fewer than ten employees, less than EUR2 million in annual revenues and a balance sheet total of less than EUR2 million, are regarded as consumers as well. Section 4 of the Act on Representative Actions states that a representative action, if funded, will be inadmissible:

- if brought against a defendant that is a competitor of the funder or against a defendant on which the funder is dependent;
- if the funder is entitled to receive no more than ten percent of the proceeds; or

- if it is to be expected that the decisions of the Qualified Entities involved, including decisions on settlement, will be unduly influenced by the funder in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action.

To enable the court and the defendant to verify whether the funder is entitled to receive no more than ten percent of the proceeds, the plaintiff must disclose the funding agreement.

Aggregated actions may be initiated on behalf of business entities too. The same is true for representative actions provided the potential client businesses have fewer than ten employees, less than EUR2 million in annual revenues and a balance sheet total of less than EUR2 million, as provided by Section 1 of the Act on Representative Actions.

Consumer litigation funding should be of interest to litigation funders because of the size of the market, as evidenced, for example, by the large number of customer and shareholder complaints against the Volkswagen Group following the Volkswagen emissions scandal (https://ec.europa.eu/commission/presscorner/detail/en/mex_21_4921) and the litigation following the decision of the European Commission of 19 July 2017 in the Trucks Cartel matter (AT39824 - Trucks, https://ec.europa.eu/competition/anti-trust/cases/dec_docs/39824/39824_8750_4.pdf).

1.5 Unlawful Terms

Most clauses commonly contained in no-recourse funding agreements made in jurisdictions other than Germany, such as clauses fixing the compensation of the funder as a percentage of the litigation proceeds or as a multiple of the

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investment, and clauses dealing with consent requirements, covenants and warranties, would be lawful and enforceable if contained in a funding agreement dealing with litigation or arbitration in Germany.

However, clauses that exclude adverse costs from the scope of the funding should be avoided unless the funder has assured itself that the client will be able to reimburse the opposing party for all costs of the litigation at issue. There is no equivalent in Germany to the theory of champerty and maintenance, but funding a plaintiff who would be financially unable to reimburse the defendant for all of its potential costs without covering such liability in the funding agreement may be considered as aiding and abetting an abusive practice on the part of the client and thus expose the funder to liability towards the opposing party, at least if the funder knew or should have known that the client would be unable to reimburse the defendant for all of its potential costs. Normally, such a complaint would be rejected as abusive (RGZ 83,175; Higher Regional Court Düsseldorf, WuW 2015, 505 – CDC; Lohmann, MitttdtPatA, 2019, 64). In any event, if the defendant prevails and the plaintiff is unable to reimburse the defendant, the defendant may turn to the funder for redress.

Similarly, a complaint brought by an aggregator or another special-purpose vehicle with limited financial resources to enforce a claim beneficially owned by a party resident outside of the European Union with a view to avoiding the need to post security that would normally be ordered by the court would be regarded as abusive and inadmissible (OLG Düsseldorf, BeckRS 2013, 10038; 2013, 11854).

When preparing a funding agreement dealing with a representative action, the funder should

take into account that under the terms of the Act on Representative Actions, the representative action will be inadmissible:

- if brought against a defendant that is a competitor of the funder or against a defendant on which the funder is dependent;
- if the funder is entitled to receive no more than ten percent of the proceeds; or
- if it is to be expected that the decisions of the qualified entities involved, including decisions on settlement, will be unduly influenced by the funder in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action.

There is no specific German legislation other than the Act on Representative Actions limiting the compensation payable to the funder. In particular, there is no German legislation generally prohibiting damages-based agreements (DBAs) (but see *Paccar Inc v Road Haulage Association Ltd* [2023] UKSC 28).

Standard contractual terms in funding agreements governed by German law will be reviewed by German courts based on civil code statutes on consumer protection against unfair standard contract terms. German consumer protection law primarily regulates standard contracts between businesses and consumers (business-to-consumer), but its basic principles also apply to contracts between businesses (business-to-business). German consumer protection law provides for an inherent fairness test, according to which standard contract terms may not deviate beyond a certain degree from the statutory provisions of German law, whether mandatory or not, and may not unreasonably restrict fundamental rights and obligations of the counterparty. The courts tend to strike down standard

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clauses that they regard as unfair or ambiguous and replace such clauses as a whole by the relevant statutory provision, even in business-to-business transactions. Consumer associations and competitors may go to court to challenge standard clauses that they perceive as unfair. Funders should take this into account when drafting model funding agreements, particularly agreements with consumers, or consider subjecting the funding agreement to a law other than German law.

A clause giving the funder the right to settle the dispute in its reasonable discretion without the consent of the client has been considered lawful by the Higher Regional Court in Munich even if provided for in standard contractual terms (BeckRS 2022, 17696 and 2023, 12545).

The provisions of the German Civil Code dealing with consumer protection against unfair lending practices are not relevant here because funders of consumer litigation normally offer no-recourse funding rather than a loan.

The dispute resolution clause in a funding agreement should provide for litigation or preferably arbitration in Germany so as to ensure that the court or arbitral tribunal has the required knowledge of German law and practice.

1.6 Disclosure Requirement

There is no obligation to disclose funding in litigation before German courts nor in arbitration in Germany except under the Act on Representative Actions. Also, the draft European Directive on the regulation of third-party litigation funding (the “Litigation Funding Directive”) proposed by the European Parliament (discussed in the Trends and Developments section) would propose such an obligation in its Article 13, which would provide that litigation funders disclose

“all information that may reasonably be perceived as having the potential to give rise to a conflict of interest”, including at least: (i) details of any arrangements that exist, financial or otherwise, between the litigation funder and any other undertaking that relate to the proceedings, including any arrangements with any relevant qualified entity, claims aggregator, Lawyers, or other interested party; and (ii) details of any relevant connection between the litigation funder and a defendant in the proceeding at issue.

A funded party may want to disclose that it is being funded if it plans to claim the cost of funding back from the counterparty.

2. Adverse Costs and Insurance

2.1 Adverse Costs

In litigation before German courts, the losing party will be ordered to reimburse the winner for court costs, fees for legal representation and incidental expenses (fees follow the event). Fees for legal representation are assessed, for the purpose of reimbursement, on the basis of the statutory fee scale only, irrespective of what the winning party may have agreed with its lawyers. Thus, the amount to be reimbursed will be determined on the basis of the statutory fee scale even if the losing party’s lawyers are paid on an hourly basis, so if the lawyers are paid on an hourly basis, the reimbursement is normally lower than the fees actually paid by the client.

If the complaint is successful in part, each party is ordered to reimburse the other for a part of the legal fees incurred by it, depending on the extent of the success, as assessed by the court. There is authority that these rules should discipline the claimants and keep them from filing unmeritorious complaints. However, the

cap on the amount in dispute of EUR30 million limits this effect where the amount in dispute is substantially higher than EUR30 million. Funding agreements dealing with litigation before German courts would normally provide for an assignment to the funder of the funded party's claims for reimbursement of costs.

2.2 Security for Costs

For litigation in German courts the defendant may request security for court cost and legal fees grosso modo if the plaintiff resides outside the European Economic Area, except if and to the extent that treaties expressly stipulate that no such security may be requested. Therefore, before filing a complaint, a plaintiff residing outside the European Economic Area should ask its lawyer to determine whether or not it may be required to post security and, if so, prepare to satisfy a request to that effect if submitted by the defendant. Plaintiffs may be tempted to circumvent the issue by setting up a German special-purpose entity and assigning the claim to such entity, but such practices would normally be regarded as abusive and the special-purpose entity would be denied standing to sue if it has no adequate financial resources to reimburse the defendant for all costs of the proceedings.

The court will determine the amount of the security, which in most civil or commercial proceedings should cover all of the costs and legal fees that the defendant could incur. These are the costs incurred by the defendant at the trial stage before a regional court, at the appeal stage before a higher regional court and with respect to an appeal to the Federal Court of Justice (BGH) on points of law, if admissible in the specific case, as the defendant may be forced to file an appeal, and to incur the cost thereof, if it loses.

As an example, in litigation between two parties where the amount in dispute is EUR30 million (or more), the total cost of the proceedings which the defendant may have to incur would be in the order of magnitude of EUR2 million, assuming that the court costs in first instance have been paid by the plaintiff, and would comprise: (i) the court costs for second instance, which will be approximately EUR490,000; (ii) the court costs for third instance, which will be approximately EUR610,000; and (iii) the cost of legal representation of the defendant, limited in each case to the statutory rates, which are (excluding disbursements and VAT):

- for the trial stage, approximately EUR260,000;
- for the appeal stage, approximately EUR290,000; and
- for an appeal on points of law to the Federal Court of Justice, approximately EUR390,000.

A German court may order security also in relation to the enforcement of a claim, in which case the amount of the security would be determined on the basis of the loss the opposing party would suffer if the enforcement was later declared unlawful. The legal bases for such orders are Article 44 of the Brussels I Regulation (EU) 1215/2012 and the relevant provisions of the German Civil Code of Procedure.

2.3 Insurance

After-the-event insurance is available in Germany but mainly for certain consumer disputes and it is not yet widely used.

3. Lawyer Ethics

3.1 Alternative Fee Structures

German lawyers may use any type of alternative fee structures other than success-based fees. However, the following should be noted.

Minimum Fees

Pursuant to Section 49 b (1) of the German Act on Lawyers' Professional Duties (*Bundesrechtsanwaltsordnung*, or BRAO), a Lawyer may not charge any fees that are lower than the statutory fees except in individual cases where the personal circumstances of the client so require.

Success-Based Fees

Pursuant to Section 49 b (2) of the Act on Lawyers' Professional Duties, a German Lawyer may enter into success-based fee arrangements only if these are permitted under the German Act on Lawyers' Fees (*Rechtsanwaltsvergütungsgesetz*, or RVG). Section 4 a of the RVG permits success-based fee arrangements only:

- in cases involving small financial claims of no more than EUR2,000;
- in formalised payment-order procedures (*Mahnverfahren* and *Vollstreckungsverfahren*) and in procedures dealing with the enforcement of a judgment as long as such procedures are not contested; and
- where the client would be kept from pursuing its rights if it were not offered a success-based fee arrangement.

Whether or not the client would be kept from pursuing its rights if it were not offered a success-based fee arrangement must be assessed by the lawyer on an individual basis. This last requirement means that lawyers may not generally hold themselves out as funders in such

proceedings (but they could do so in cases involving small financial claims and in collection proceedings). Pursuant to established case law (BGH NJW 1980, 2407), success-based fee arrangements that are not permitted by statute are regarded as violating public policy (*sittenwidrig*) because they are seen as affecting the lawyer's independence, subject to the exceptions described immediately below.

In any event, complaints brought by a claimant whose lawyer has agreed to fund the litigation without recourse to the claimant would be regarded as abusive and inadmissible (Higher Regional Court Frankfurt/Main, GRUR-RR 2007, 56). This case law developed to discourage lawyers from relying on dispatching warning letters to generate income from the potential defendants without having bona fide clients retaining them for such purpose.

Assignment of Fees Claims

Pursuant to Section 49 b (4) of the Act on Lawyers' Professional Duties, a German lawyer may not assign fee claims to third parties except with the consent of the respective client or if they have been finally confirmed by a court.

3.2 Fee Sharing

Pursuant to Section 49 b (3) of the Act on Lawyers' Professional Duties, a lawyer may neither actively nor passively share fees, neither with other lawyers nor with third parties, with the object or effect of generating new business for the lawyer (see BGH, 18 April 2024 – IX ZR 89/23, NJW 2024, 2179 – [geblietzt.de](https://www.gesetze-im-internet.de/geblietzt.de)), but a lawyer may share fees with other lawyers who co-operate with the first lawyer on a given matter, with certain restrictions. As a result, funding schemes should not provide for fee-sharing arrangements with lawyers.

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3.3 Equity Ownership

Pursuant to Section 59 b et seq. of the Act on Lawyers' Professional Duties, Lawyers may establish certain forms of professional corporations or partnerships (*Berufsausübungsgesellschaften*) if, inter alia:

- the other shareholders or partners are lawyers or certain other professionals, notably patent attorneys, tax advisors, and chartered accountants (collectively "Qualified Professionals"); and
- such professional corporation or partnership has been admitted to the bar by the local German bar association (*Rechtsanwaltskammer*) (admission will be refused if, inter alia, the professional corporation or partnership has shareholders or partners who are not Qualified Professionals).

Pursuant to Section 207a of the Act on Lawyers' Professional Duties, professional corporations or partnerships resident in another member state of the World Trade Organization (WTO) may offer legal services in Germany, using a German branch office, if the professional corporation or partnership is exclusively owned by Qualified Professionals and the branch has been admitted to the bar by the local German bar association. Admission will be refused if, inter alia, the professional corporation or partnership is not exclusively owned by Qualified Professionals.

As a result, funding schemes should not rely on enabling non-lawyers to take ownership interests in German law firms (see the decision of the Court of Justice of the European Union of 19 December 2024, Case C-295/23 – *Halmer Rechtsanwaltsgesellschaft*).

4. Taxes

4.1 Taxes on Legal Fees

Under German law, VAT is charged on legal fees unless the client is:

- a "taxable person" within the meaning of Article 9 of the European Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax, as amended, carrying out its business outside Germany; or
- resident outside the territory of the European Union.

VAT is also charged on arbitrator fees if the arbitrators provided their services in Germany unless the client is a taxable person carrying out its business outside Germany.

VAT is reimbursable if the client is a business carrying out an activity subject to German VAT in relation to the claim on which the legal dispute is based.

4.2 Withholding on Payments to Offshore Jurisdictions

There is no German withholding tax on returns paid to a funder under a third-party funding agreement.

Trends and Developments

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Peters, Schönberger & Partner mbB (PSP München) was founded in 1979, and since then has evolved into a comprehensive provider of legal advisory, audit, tax consulting and family office services. PSP advises mid-sized and

international companies, family businesses, private equity and venture capital funds, foundations and non-profit organisations as well as private individuals in all legal, tax and business transactions and disputes.

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The trends and developments in the funding of litigation before German courts and arbitration proceedings in Germany relate to litigation funding in general; the role of lawyers in litigation funding; consumer protection; and the use of English in litigation before German courts.

Litigation Funding in General

The resolution of the European Parliament of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)) (the “EP Resolution”) is still a landmark in the European world of litigation funding.

The EP Resolution is of interest to funders because it proposes a European Directive on the regulation of third-party litigation funding. However, no legislative action in the field of litigation funding had been taken by June of 2024, when the European Parliament was re-elected and thereafter the European Commission was reconstituted, again under the presidency of Ursula von der Leyen, who had led the Commission since 2019. The European Parliament and the European Commission now have until 2029 to consider a European Directive on the regulation of third-party litigation. The EP Resolution may also affect legislation of the individual member states of the European Union, in particular Germany because it restates legislative considerations originating from a German member of the European Parliament, Mr Axel Voss.

The EP Resolution essentially states that, in the view of the European Parliament:

- commercial third-party litigation funding could, if properly regulated, be used more often as a tool to support access to justice, also to “ensure that public interest cases are brought to court and to reduce significant

economic imbalances that exist between corporations and those citizens seeking redress”;

- “[I]tigation funders involved in legal proceedings may act in their own economic interest, rather than in the interest of claimants” and “may demand a disproportionate share of the proceeds” and may “operate in a non-transparent manner”; and
- while Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers (the “Representative Actions Directive”) contained certain useful rules on third-party litigation relating to representative actions on behalf of consumers, the funding of “other types of action, such as those related to business or human rights”, and other “categories of claimants, such as human rights organisations or workers” should also be regulated, and “effective measures and safeguards should apply to all types of claims”.

The EP Resolution therefore:

- recommends “the establishment of a system of authorisation for litigation funders”, including “the introduction of corporate governance requirements and supervisory powers to protect claimants and to ensure that funding is only provided by entities that are committed to complying with minimum standards in terms of transparency, independence, governance and capital adequacy, and to observing a fiduciary relationship vis-à-vis claimants and intended beneficiaries; [and] stresses the need to ensure that this system does not create an excessive administrative burden for member states or for litigation funders”;
- warns that conflicts of interest may arise in the “relationships between litigation funders, representative entities, law firms, aggregators,

including claims-collection and award-distribution platforms, and other entities who may be involved in claims and have an interest in the outcome of a court case”;

- considers that, generally, “litigation funders should not be permitted to abandon funded parties in litigation at any stage in the litigation process, leaving claimants solely responsible for all costs of the litigation, which may have only been pursued due to the involvement of the funder”;
- states that “litigation funders should be responsible for defendants’ costs arising from unsuccessful litigation”;
- states that a limit not higher than 40% of the proceeds should be imposed by law “on the proportion of the award that litigation funders are entitled to receive”; and
- requests “transparency regarding the involvement of litigation funding in legal proceedings”.

The EP Resolution proposes a European Directive on the regulation of third-party litigation funding (the “Draft Litigation Funding Directive”) with “minimum rules” (Article 1 of the Draft Litigation Funding Directive) as follows:

- Member states should, if they permit third-party litigation funding at all, “create a system for the authorisation and monitoring of the activities of litigation funders within their territory” (Article 4 of the Draft Litigation Funding Directive).
- Article 5 sets out certain criteria for granting and maintaining authorisation for litigation funders, including that litigation funders (i) “conduct their business through a registered office in a Member State, and apply for and maintain an authorisation in that same Member State”; (ii) “commit to concluding third-party funding agreements subject to the laws

of the Member State of any intended proceedings, or, if different, of the Member State of the claimant or intended beneficiaries”; (iii) “have procedures and governance structures in place to ensure their ongoing compliance with... transparency requirements and fiduciary relationships”; and (iv) “have established internal procedures to prevent a conflict of interest between themselves and the defendants in proceedings involving the litigation funder”. Member states should mutually recognise authorisations given to a litigation funder in another member state.

- Article 6 states that the “supervisory authorities are empowered to verify whether litigation funders would be able to have at their disposal at all times adequate financial resources to fulfil their liabilities under their third-party funding agreements” including the capacity to “pay all debts arising from their third-party funding agreements when they become due and payable” and to “fund all stages of any proceedings they have committed to, including the trial and any subsequent appeal”, and that “Member States may set up a specific insurance fund to cover all the outstanding costs of claimants that engaged in litigation in good faith, in case a litigation funder becomes insolvent in the course of the litigation procedure”.
- Article 7 provides that the supervisory authorities should be “empowered to verify that litigation funders have the governance and internal procedures in place to ensure that the third-party funding agreements they enter into are based on a fiduciary relationship and that they commit under those agreements to acting fairly, transparently and to observing a fiduciary duty of care requiring them to act in the best interests of a claimant.”
- Article 8 provides, among other things, that “Member States shall ensure that a complaint

procedure is in place for any natural or legal person who wishes to raise concerns before a supervisory authority regarding the compliance of a litigation funder with its obligations under this Directive and the applicable national law.”

- Article 12 regulates the permitted content of third-party funding agreements and requires member states to “ensure that third-party funding agreements are required to be provided in writing in one of the official languages of the Member State in which the claimant and intended beneficiaries are resident, and presented in a clear and easily comprehensible manner” and that third-party funding agreements state as a minimum: “the different costs and expenses that the litigation funder will cover”; “the share of any award or fees that will be paid to the litigation funder or any other third party, or any other financial costs to be borne, directly or indirectly, by the claimants, the intended beneficiaries, or both”; “the responsibility of the litigation funder as regards adverse costs”; “a clause specifying that any awards from which the fees of the funder are deductible will be paid in full first to the claimants”; and “the risks that the claimants, intended beneficiaries or both are assuming”, including the risks of escalating costs, termination of the funding agreement (albeit only “in strictly defined circumstances” as stated in Article 15 of the Draft Litigation Funding Directive) and adverse costs not covered by funding, and “a disclaimer with regard to non-conditionality of funding in relation to procedural steps” and “a declaration of absence of conflict of interest by the litigation funder”.
- Article 13 provides that litigation funders should disclose “all information that may reasonably be perceived as having the potential to give rise to a conflict of interest, including at least: “(a) details of any arrangements that exist, financial or otherwise, between the litigation funder and any other undertaking that relate to the proceedings, including any arrangements with any relevant qualified entity, claims aggregator, lawyers, or other interested party; and (b) details of any relevant connection between the litigation funder and a defendant in the proceeding at issue”.
- Article 15 would “prohibit the unilateral termination of a third-party funding agreement by a litigation funder without the claimant’s informed consent, except where a court or administrative authority has granted the litigation funder permission to terminate the agreement, having considered whether the interests of the claimant and intended beneficiaries would be adequately protected despite the termination”.
- Article 16 deals with disclosure of the funding agreement, stating that “claimants or their representatives are required to inform the relevant court or administrative authority of the existence of a third-party funding agreement and of the identity of the litigation funder and to provide, at the request of the court or the administrative authority or of the defendant, to the relevant court or administrative authority, a complete and unredacted copy of such third-party funding agreements relating to the proceedings concerned to the relevant court or administrative authority at the earliest stage of those proceedings”. Also, the defendants are to be “made aware by the court or the administrative authority of the existence of a third-party funding agreement, and of the identity of the litigation funder”.
- Article 17 provides for a special procedure to review third-party funding agreements, which would empower courts or administrative authorities to “make orders or give directions that are binding on a litigation funder, such as

requiring the litigation funder to provide the funding as agreed in the relevant third-party funding agreement or requiring the litigation funder to make changes in respect of the relevant funding” and to “assess the compliance of each third-party funding agreement with the provisions laid down” in the Directive, “particularly with the fiduciary duty owed to claimants and intended beneficiaries” and, “where that agreement is found not to be compliant, order the litigation funder to make the necessary changes, or declare a clause to be null and void”; and to “assess whether a third-party funding agreement entitles a litigation funder to an unfair, disproportionate or unreasonable share of any award” and “to annul or adjust such an agreement accordingly”.

- Article 18 specifically introduces a responsibility of the funder for adverse costs “where the claimant party has insufficient resources to meet adverse costs”, such that “courts or administrative authorities are empowered to make cost orders against litigation funders”.

The EP Resolution has met with strong criticism in Germany (Meller-Hannich/Gsell, *Anwaltsblatt* online 2023, 160), even though it originates from a German Member of the European Parliament, Mr Axel Voss. Critics point out that:

- the EP Resolution appears to express a biased view of the funders’ business, seeing them as adversaries of the clients;
- it made access to justice unnecessarily more difficult;
- it violated fundamental rights under the German constitution, including the basic right to exercise a profession per Article 12 of the German Basic Law (*Grundgesetz*); and
- the European Commission had no jurisdiction to regulate third-party funding.

It remains to be seen how the member states will officially react to the EP Resolution. The German government, for one, is generally prepared to accept the usefulness of litigation funding, as will be seen below, and is not known to support enthusiastically all initiatives of the European Parliament. Most importantly, the Federal Constitutional Court (*Bundesverfassungsgericht*) regards itself as empowered to verify whether or not legislative acts of the European Union are in line with European and German basic rights (BVerfG, NJW 2020, 314). Its decision that a narrow reading of the Legal Services Act violated the basic right (*Grundrecht*) to exercise a profession except if it was required by reasons of public policy (BVerfG, NJW 2002, 1190) would therefore portend a critical review of the Litigation Funding Directive if it ever enters into force.

The Role of Lawyers in Litigation Funding *Fee sharing*

Pursuant to Section 49 b (3) of the German Act on Lawyers’ Professional Duties (*Bundesrechtsanwaltsordnung*, or BRAO), a lawyer may neither actively nor passively share fees, neither with other lawyers nor with third parties, with the object or effect of generating new business for the lawyer, but a lawyer may share fees with other lawyers who co-operate with the first lawyer on a given matter, with certain restrictions. As a result, funding schemes that provide for fee-sharing arrangements with lawyers in return for new business for the lawyers solicited by the funder appear to be impractical.

Specifically, in 2024, a funding scheme set up by an internet service provider was declared null and void as the internet service provider had agreed with certain lawyers that in consideration of a “commission” it would refer to them prospective clients who had committed a traffic violation and were likely to be charged with a fine

so that the lawyers could represent these clients in the ensuing proceedings (BGH, 18 April 2024 – IX ZR 89/23, NJW 2024, 2179 – geblitzt.de).

Equity ownership

Pursuant to Section 59 b et seq. of the German Act on Lawyers' Professional Duties, lawyers may establish certain forms of professional corporations or partnerships (*Berufsausübungsgesellschaften*) if, inter alia:

- the other shareholders or partners are lawyers or certain other professionals, notably patent attorneys, tax advisers, and chartered accountants (collectively “Qualified Professionals”); and
- such professional corporation or partnership has been admitted to the bar by the local German bar association (*Rechtsanwaltskammer*).

This means that funding schemes cannot rely on ownership interests in German law firms. This legislation has now been tested before the Court of Justice of the European Union (ECJ): The German law firm Halmer Rechtsanwaltsgesellschaft, a corporation established under German law, (“Halmer”) applied to the Higher Bavarian Lawyers' Court in Munich (*Bayerischer Anwaltsgerichtshof*) to challenge a decision of the Munich Bar Association of 9 November 2021 which had revoked Halmer's registration with the bar association because an Austrian investor had acquired shares in Halmer for purely financial purposes. The Higher Bavarian Lawyers' Court referred the issue of compatibility of 59 b of the German Act on Lawyers' Professional Duties with EU law to the ECJ. The ECJ replied “that European Union law and, more specifically, the free movement of capital and the Services Directive which gives concrete expression to freedom of establishment, do not preclude national leg-

islation which prohibits shares in a law firm from being transferred to a purely financial investor and which provides, in the event of that legislation being infringed, for the firm's registration with the bar association to be revoked. That restriction on the freedom of establishment and the free movement of capital is justified by overriding reasons relating to the public interest. A Member State is entitled to conclude that a lawyer would not be able to exercise his or her profession independently and in compliance with his or her professional and ethical obligations if that lawyer were part of a firm, certain members of which are persons who act exclusively as purely financial investors, without practising as a lawyer or exercising another profession subject to comparable rules. Such a restriction does not go beyond what is necessary to attain the objective pursued.” (Press Release of the Court of Justice of the European Union No. 202/24, 19 December 2024, regarding the judgment of the Court in Case C-295/23 – Halmer Rechtsanwaltsgesellschaft)

Consumer Protection

The funding of litigation before German courts for the benefit of consumers so far comes in the form of aggregated actions and representative actions.

Aggregated actions

Aggregated actions are actions brought by aggregators (*Sammelklagen*). “Aggregator” as used herein, means a legal service provider other than a lawyer who is in the business of enforcing and collecting claims in or out of court on behalf of clients who are the beneficial owners of the claims at issue, such as a claims-collection and award-distribution service provider (*Rechtsdienstleister* under regulatory law or *Prozessstandschafter* under the law of civil procedure). Aggregated actions are as close as German

procedural law and practice get to the model of class actions known in the United States.

The field of aggregated (or collective) actions has developed, and provided business for funders, starting with the Capital Markets Disputes Act (*Gesetz über Musterverfahren in kapitalmarktrechtlichen Verfahren*) of 2005, introduced in connection with a large number of investor complaints against Deutsche Telekom AG. In 2018, the Act Introducing a Collective Declaratory Action (*Gesetz zur Einführung einer zivilprozesualen Musterfeststellungsklage*) followed in connection with a large number of customer and shareholder complaints against the Volkswagen Group known as the “Volkswagen Emissions Scandal” or “Dieselgate”.

Until about 2020, several courts held that the appointment of an aggregator by a client was void if the aggregator used litigation funding, arguing that using litigation funding exposed the aggregator to a conflict of interest of the kind targeted by Section 4 of the Legal Services Act. These cases were based on the view that the Legal Services Act should be read narrowly so as to protect clients from any legal service providers that the courts regarded as unqualified. However, in 2002 the Federal Constitutional Court held that the Legal Services Act should be read widely so as to permit, for instance, legal service providers to provide legal advice in connection with collection services, arguing that a more narrow reading of the Legal Services Act would violate Article 12 of the German Basic Law (*Grundgesetz*), which protects the freedom to exercise a profession, except if it was required by reasons of public policy, which in the cases at hand it was not (BVerfG, NJW 2002, 1190).

Citing this decision, the Federal Court of Justice acknowledged in 2019 that the business of

aggregators was generally covered by the Legal Services Act and thus was lawful (BGH NJW 2020, 208). In 2021, the Federal Court of Justice confirmed that the business of aggregators was covered by the Legal Services Act even if they acted primarily or even exclusively with a view to enforcing their clients’ claims in court (BGH NZG 2021, 1175). In 2022, the Higher Regional Court of Munich held that the business of aggregators was covered by the Legal Services Act even if they co-operated with a funder who had reserved the right to enter into a settlement in its reasonable discretion without the consent of the clients (BeckRS 2022, 17696 and 2023, 12545).

In 2021, the Legal Services Act was amended to state expressly that aggregators may arrange for litigation funding, as they habitually do, without exposing themselves to a conflict of interest. With that, the concerns originally expressed by the courts with respect to the funding of aggregated claims should have been laid to rest.

Representative actions

Representative actions are actions brought by Qualified Entities (*Verbandsklagen*). “Qualified Entity” (*Verband*), as used herein, means an “organisation or public body representing consumers’ interests in its own name, which has been designated by a Member State as qualified to bring representative actions” in accordance with the Representative Actions Directive “as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both”.

In Germany, Qualified Entities have been known since the 1980s, but until the Act on Representative Actions for the Protection of the Collective Interests of Consumers (*Gesetz zur gebündelten Durchsetzung von Verbraucherrechten*, or VDuG, hereafter the “Representative Action

Act”) entered into force in 2023, only injunctive relief could be obtained by Qualified Entities.

There was also case law suggesting a representative action requesting an order to disgorge profits made from an infringement of unfair competition law to the benefit of a third-party beneficiary, such as the federal treasury (*Bundeshaushalt*), under Section 10 of the German Unfair Competition Act, was abusive and inadmissible if it was funded by a third party, because in the view of the courts, the statutory provisions that are the basis for profit-disgorgement claims were made to ensure that the entire profits are paid out to the third-party beneficiary identified in the statute, rather than a share of such profits being paid to funders (BGH GRUR 2019, 850).

The Representative Action Act, which also applies to certain small businesses, enables Qualified Entities to request redress measures, such as damages, in addition to injunctive relief. It also regulates the funding of representative actions and states in Section 4 that a representative action will be inadmissible:

- if brought against a defendant that is a competitor of the funder or against a defendant on which the funder is dependent;
- if the funder is entitled to receive no more than ten percent of the proceeds; or
- if it is to be expected that the decisions of the Qualified Entities involved, including decisions on settlement, will be unduly influenced by the funder in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action.

To enable the court and the defendant to verify whether the funder is entitled to receive no more than ten percent of the proceeds, the plaintiff

must disclose the funding agreement. Funders may not welcome these new rules, but at least they should lay to rest the case law cited above.

So far, only a few representative actions have been initiated under the Representative Action Act. Nevertheless, the Representative Action Act is considered a milestone in the field of collective litigation in Germany and is expected to lead to new types of legal action following the model of mass actions in England and Wales or class actions in the United States of America (Röthemeyer, Ein Jahr VDuG, BKR 2024, 977).

Legal Risk Insurance

Legal-Risk Insurance in the forms of Judgment Preservation Insurance, Adverse Judgment Insurance and After-the-Event (ATE) insurance is reportedly available now from German insurers (Hülsberg/Fassbach, Die, Versicherbarkeit von Prozessrisiken, NZI 2024, 65).

Use of English

There are two legislative projects that may lead to increased demand for the funding of litigation before the German courts and arbitration in Germany.

Commercial courts

The Act to Strengthen Germany as a Place of Dispute Resolution (*Gesetz zur Stärkung des Justizstandorts Deutschland*) (the “2024 Act”) was adopted in 2024. The 2024 Act may lead to increased demand for the funding of litigation before the German courts. It amends primarily the German Court Constitution Act (*Gerichtsverfassungsgesetz*) and the Code of Civil Procedure (*Zivilprozessordnung*) and introduces so-called commercial chambers at certain regional courts and commercial courts at certain higher regional courts (commonly referred to in German jointly as “commercial courts”), subject to the discre-

tion of the federal states (*Bundesländer*) where such commercial courts would be located. A number of federal states had already introduced commercial courts; these appear to be operating to the satisfaction of the parties concerned. Under the 2024 Act, the commercial courts may conduct entire proceedings in English, provided the amount in dispute is at least EUR1 million and the dispute is a civil or commercial matter between businesses (other than a matter concerning intellectual property, copyright or unfair competition) or a dispute arising out of the acquisition of a business or of shares in a company. Hearings before the commercial courts are designed following the model of international commercial arbitration hearings. Hearings are discussed with the parties and scheduled in a case management conference (*Organisationstermin*). The parties have the option of requesting verbatim records.

New Arbitration Law

The Act to Modernise Arbitration Law (*Gesetz zur Modernisierung des Schiedsverfahrensrechts*) has not yet been adopted. It would, inter alia, provide that the commercial courts could hear disputes concerning the enforcement of arbitration awards, such that not only the arbitration procedure itself, but also any enforcement disputes arising therefrom, could be held in English.

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