10 April 2018

The increasing appetite for third-party funding in Europe

Nicholls: European appetite is beginning to shift in favour of litigation funding

A guest post by Ross Nicholls, director at multi-disciplinary professional services network IR Global

Although investors in common law jurisdictions have for sometime recognised litigation as an asset worth investing in, litigation funding remains less prominent in the civil law jurisdictions of mainland Europe.

However, the European appetite is beginning to shift in favour of litigation funding, and many large dedicated funds active in common law jurisdictions such as the US, UK and Australia are starting to provide third-party capital to claimants with strong cases.

Burford Capital, which has offices in New York, Chicago, London and Singapore, has more than $3bn of funding committed to the legal market and, two years ago, moved into Germany.

Burford provided US law firm Hausfeld with a war chest of €30m to open an office in Berlin and finance litigation in exchange for a share of the proceeds of any victory.

One good recent example of a high-profile class action-type case in Germany, is the claim pursued by consumer rights organisation MyRight against Volkswagen, using funding provided by Burford Capital.

The examples of Germany and Austria serve as good case studies for the rest of Europe with regard to the future development of litigation funding, since they are similar in their sophistication in this area.

Contingency fees or conditional fee arrangements with attorneys are usually not permitted under German or Austrian law.

However, conditional fee arrangements can be permitted if the client would otherwise be deterred from proceedings – effectively from access to justice – due to its financial situation. Contingency fee arrangements are possible in a minority of European countries, such as Lithuania.

By contrast, third-party funding is widely available in both Germany and Austria for litigation and arbitration proceedings, subject to certain provisos.

In Germany, the minimum amount in dispute must be at least €100,000, and leading litigation funders commonly require a 30% fee for an amount in dispute up to €500,000 and 20% for any amount exceeding that.

In Austria, funding agreements are usually designed to ensure that funders receive no payments until (and contingent upon) a successful litigation outcome.

The funder's financial interest can be for a fixed amount or a percentage of the litigation's value, with recourse limited to the value of the legal claim. Financing is usually made available in tranches, subject to progress or other developments.

The leading third-party funders in Germany and Austria are Foris, Legial (part of Ergo Insurance Group) and ROLAND ProzessFinanz (part of Omni Bridgeway). The current trend is for funding complex, high-value cases with significant returns, such as insurance, consumer and cartel litigation. However, the barrier to acceptance is high, with only 10% of German requests for funding successful.

An interesting litigation funding trend in Germany is the growth of legal tech start-ups providing access to litigation funding (and lawyers) via internet platforms.

This first started with claims regarding delayed flights and other flight-related damages and the model is growing quickly, particularly with regard to generic low-value claims.

Funders active in Europe will assess the litigation case like any other investment, only taking on cases they believe have a high probability of success.

They may hire a credit rating agency to look into the financial background of the opponent, ensuring there are sufficient funds available to cover the claim should it be successful.

However, as everywhere else, the key considerations for funders will be whether the case has merit and sufficient evidence, and whether the decision will be enforceable.