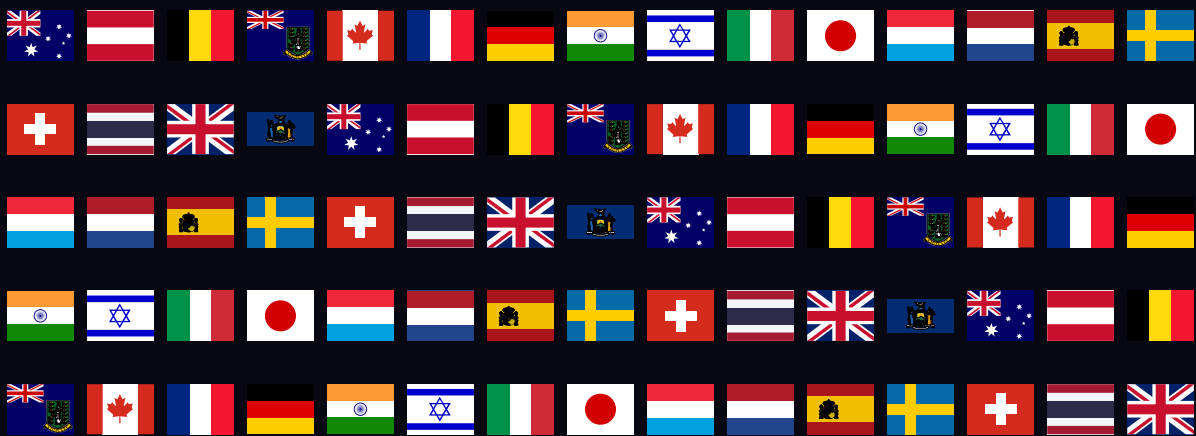


# LITIGATION FUNDING

## Germany



# Litigation Funding

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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## REGULATION

### Overview

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

Third-party litigation funding in Germany came about in 1999 and was met with excitement by the vast majority of the legal community. A void existed for claimants looking for a means to pay for legal services as German law prohibited success-based fee agreements for lawyers providing legal services and bank loans required claimants to provide security. Since commercial litigation funders do not, and are not, allowed to provide legal services, any statutory limitations on providing funding in return for a share in the proceeds did not apply in their case. With the addition of section 4a to the German Act on the Remuneration of Lawyers in 2008, contingency fee agreements became possible, albeit only under specific circumstances.

At present, litigation funding has become an established and well-known practice. The legal relationship existing between claimants and their funders has been confirmed by a few court decisions as being that of a partnership organised under the laws of the German Civil Code. The adjudication so far has shown that the courts take a neutral to positive view of litigation funding; there is no knowledge of any court decisions handed down to the detriment of professional funders. However, lawyers attempting to circumvent the rules by using their own funding companies to attract, and acquire, clients is another matter entirely. Conflicts of interest, which are an infringement of the German lawyers' code of conduct and the German Federal Code for Lawyers, are inevitable in this situation.

Although litigation funding has not been challenged in the German courts, there have been regulatory developments at the national and international levels of which litigation funders should be aware. None of the existing initiatives to further regulate litigation funding, however, has made any headway. This present contribution accurately reflects the legal situation in Germany as of the date of publication.

*Law stated - 26 October 2022*

### Restrictions on funding fees

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

There have been few court rulings answering the question of what constitutes a reasonable share in the proceeds that a funder may request. Standard terms and conditions frequently provide for a 20 per cent share in any proceeds in excess of €500,000 and a 30 per cent share in any proceeds up to and including €500,000. However, depending on the individual case, the agreed-upon share in the proceeds may vary. In one instance, the Higher Regional Court of Munich ruled that a 50 per cent share was justified because the funder became involved only after the case had already been lost in the first instance.

A sensible rule of thumb is that a share of up to 50 per cent is reasonable, while anything more than that – unless properly justified – would most likely go against public policy. It is not yet clear if this general norm will continue to hold true once third-party funding is more regulated. In any case, and as a matter of principle, the share of proceeds to be agreed upon is determined by the market.

Litigation funders in Germany do not charge interest. Recovery on funding proceeds is typically a multiple of the amount invested or a percentage of the amount actually recovered. In international arbitration, for example, a hybrid approach with a cap or floor is also an available option.

*Law stated - 26 October 2022*

## Specific rules for litigation funding

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

Other than the fact that litigation funders are not legally permitted to operate as banks or insurers, no legislative or regulatory provisions are applicable to funders yet. There are currently ongoing discussions in the European Union and also in Germany if and how to regulate litigation funders.

*Law stated - 26 October 2022*

## Legal advice

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

There are no provisions within the ethical rules and regulations of the BRAO that pertain specifically to third-party litigation funders. Although lawyers are under obligation, ex officio, to provide comprehensive and impartial advice to their clients (this obligation has been codified in a number of rules and regulations and confirmed by several court decisions, lawyers are neither obligated – by law nor by virtue of any court decisions thus far – to advise a client specifically about litigation funding).

Despite the absence of a specific ethical rule or regulation about funding, scholars in the legal field advocate for lawyers to take the position of informing their clients about litigation-funding options. The rationale behind this stance is to enable clients with the choice of whether they would like to take on the cost risk themselves or pass it on to a third party interested in funding their case. Since lawyers are already under an obligation to inform clients about the possibility of obtaining legal expenses insurance, it is sensible for lawyers to inform their clients about possible litigation-funding options as well. The validity of the obligation to inform clients about legal financing has recently been confirmed by a decision of the Higher Regional Court of Cologne.

*Law stated - 26 October 2022*

## Regulators

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

Financial institutions such as banks and insurance providers are regulated and supervised by the Federal Financial Supervisory Authority (BaFin), located in Bonn. Since commercial litigation funders are licensed to operate neither as banks nor insurance providers, they are not under the oversight of any public authority.

*Law stated - 26 October 2022*

## FUNDERS' RIGHTS

### Choice of counsel

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

Most cases come to funders by referral from lawyers who have already assessed the matter and are aware of whether their clients are unwilling or unable to pursue legal proceedings on their own. Funders are mindful that any interference

on their part with an existing lawyer-client relationship would be detrimental as any such conduct would irreparably damage their main sales channel should it become public knowledge

Hence, when assessing a claim as to whether it is suitable for litigation funding, funders must consider the quality of the lawyers representing the claimant and their willingness to cooperate. As a general rule, they will forego an offer of funding rather than demand that the claimant retains a different lawyer. Only in the instance where the claimant has not yet retained counsel is it typical for funders to recommend lawyers to their clients. It is common for established funders to have their own network of lawyers and experts

*Law stated - 26 October 2022*

## Participation in proceedings

### May funders attend or participate in hearings and settlement proceedings?

As a general rule of public hearings, funders can attend hearings and settlement proceedings. Whether funders avail themselves of this possibility depends entirely on the respective funder. Some funders prefer to be actively involved while others prefer to remain in the background. However, there is a consensus among all funders that they can offer more than just cash as claimants can also benefit from a funder taking on an advisory role during the funding process. Since the lawyers retained by the claimants are the ones providing legal services to their clients, the litigation funder's role can evolve from that of an advisor into that of a 'sparring partner' that acts as a sounding board during the funding and litigation process.

*Law stated - 26 October 2022*

## Veto of settlements

### Do funders have veto rights in respect of settlements?

Generally, all litigation funding agreements provide for this central issue. In principle, and as long as there are no legal rules or regulations setting out requirements in this respect, settling a case requires the approval of both the claimant and the funder. If either the claimant or the funder wishes to settle the case and the other party disagrees, the party intending to settle has a contractual right to terminate the funding contract. The result is two-fold:

- the terminating party has the right to receive their agreed-upon share for the case in the event a settlement is reached; and
- the party unwilling to settle at the offered terms proceeds with the case at its own risk (which might end with a better or worse result, or even a total loss).

Funders and clients are almost always pragmatic enough to come to a mutual understanding on whether a given settlement offer should be accepted or denied. All parties involved are aware that the most sensible course of action is for them to work as a team. If one party decides to leave the team, it increases the risk for the party proceeding with the case.

*Law stated - 26 October 2022*

## Termination of funding



## In what circumstances may a funder terminate funding?

Commercial funders may terminate their funding of a case at any time and at their sole discretion if the prospect of success for a case has substantially deteriorated. For example, new court rulings that are a detriment to the claim, financial problems of the opposing party, or new facts that have come to light during the proceedings that materially impact the initial positive assessment of the claim are detrimental factors to be considered when terminating funding. However, the decision to terminate is not taken lightly and funders will conduct a thorough and comprehensive assessment of the case and will provide their rationale for terminating a funding agreement should their assessment lead to that decision.

In the event a funder indeed terminates a litigation funding agreement, the funder is contractually obligated to cover all costs that have been incurred up until the point of termination (yet limited to those costs necessary to stop the case as quickly as possible from going forward). And while the funder is no longer entitled to a share in the proceeds, it retains the right to a refund on its investment, provided the claimant succeeds on his or her own and receives payment.

However, this situation is far from ideal for funders, which is why termination of funding is a last resort in an ongoing case.

*Law stated - 26 October 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?

Funders in Germany act as team players and take an active role during the course of litigation along with the claimant and lawyer. They review all writs and communications and assist with litigation strategy during all phases of a case. The funders will also typically join meetings and take part in settlement discussions. Additionally, funders will have their in-house lawyers attend court or arbitral hearings to monitor the progress of the litigation. Due to the confidential nature of a funded case, the lawyer's identity as a funder will, of course, not be disclosed on such occasions. The opposing party will only be informed of a funder's presence if such disclosure strengthens the claimant's position (eg, in settlement negotiations).

As class actions are becoming more relevant commercially, book-building is becoming more of a focus among funders. For instance, funders are actively involved in the early stages of the process and remain throughout the proceedings, including taking part in selecting lawyers and experts. While funders are not required to take on an active role, the history and trajectory of the professional litigation funding industry in Germany show that it would be wise to do so.

*Law stated - 26 October 2022*

## CONDITIONAL FEES AND OTHER FUNDING OPTIONS

### Conditional fees

#### May litigation lawyers enter into conditional or contingency fee agreements?

When the latest amendment of section 4a of the German Act on the Remuneration of Lawyers was entered into on 1 October 2021, success-based fee agreements were permitted in the following cases:

- where attachable monetary claims of no more than €2,000 are concerned;

- in the event of out-of-court collection services on an attachable claim; and
- in the event that, upon reasonable consideration, clients would be deterred from pursuing legal proceedings where the agreement of contingency fees is not permissible.

This amendment of the Act ensures that the economic situation of the claimant is no longer the decisive factor when determining whether to pursue a claim, as was previously the case. However, the scope of this new regulation has not yet been clarified. Prior to the 2021 amendment, only a few lawyers – and mostly those from international firms – welcomed the opportunity to use contingency fee agreements in excess of the statutory minimum fees. However, as there are limitations with contingency fee arrangements in the sense that lawyers are at risk of their own fees being increased in the case of success, these firms are not considered direct competition to litigation funders. On the contrary, by agreeing on a lawyer's fee that is (at least in part) contingent upon a successful outcome, funders diversify the cost risk involved in pursuing the claim.

*Law stated - 26 October 2022*

### Other funding options

What other funding options are available to litigants?

Litigation funding is the sole option left to pursue a claim if a claimant does not qualify for legal aid under section 114 of the German Code of Civil Procedure – which very few people do not – and if the claim cannot be sold – which is typical for disputed claims. Some investors offer to 'monetize' the claim by purchasing it for a portion of its value.

*Law stated - 26 October 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?

The time it takes to reach a decision at first instance depends upon the nature and the complexity of the claims. Because expert reports are almost always required, comprehensive construction claims always take longer to process than claims based on conventional agency contracts. While the time required to bring proceedings to a close varies from court to court, the majority of first-instance decisions are handed down within one or two years.

*Law stated - 26 October 2022*

### Time frame for appeals

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

Roughly 35 per cent of judgments handed down in the first instance are appealed, about half of which are successful. Success in these cases can mean a new judgment that deviates in part from that of the first instance, a settlement, or an overturned judgment. As a general rule, an appeal will take anywhere between one and two years, with more complex or challenging cases expanding over several years. For a claimant to be able to seek redress before a court of third instance, the competent court of appeal, in its decision on the case, must have granted leave to appeal on points of law. The Federal Court of Justice (BGH) is the court competent to hear such an appeal on points of law. Today, only a few appellants are able to move on to the BGH. If the competent court of appeal denies leave to appeal on points of law, the relevant party may bring a complaint against such denial directly with the BGH, with only about 5 to 10 per cent

of complainants being granted leave to appeal on points of law by the BGH.

*Law stated - 26 October 2022*

## **Enforcement**

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

Enforcement proceedings are only required for a small percentage of judgments handed down by German courts. Enforcement in Germany can be a frustrating process, as it most likely is in almost all jurisdictions. Due to the relative economic stability that prevailed in Germany for several years, the number of adjudicated claims that resulted in default tends to be a minor issue. Enforcement proceedings are initiated in the local courts, where court-appointed enforcement officers are instructed to execute the respective judgment; they operate under a fee scheme and are subject to a number of legislative restrictions. The court-appointed enforcement officer system is a slow, but steady one. The judgement debtor has a limited number of legal remedies available to thwart such enforcement.

*Law stated - 26 October 2022*

## **COLLECTIVE ACTIONS**

### **Funding of collective actions**

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

While class actions may be common in the US legal system, they do not exist as such in the German legal system. Plaintiffs may be bundled together, but the legal landscape is murky, and the case law is complex. If the claims of five to 10 plaintiffs share the same legal foundation and no individual evidentiary hearings (such as hearing the individual parties) are necessary, grouping their claims into one action is feasible. Courts handle cases differently and there is a chance that the court will separate the action into its individual, original cases. Apart from these formal issues, it is possible to provide litigation funding for the German version of a class action.

In any case, a wider use of third-party funding in these instances is still constrained by the lack of regulation regarding class actions (aside from a special vehicle for the financial market called the Act on Model Case Proceedings in Disputes under Capital Markets Law), but the German and EU governments have the issue of consumer protection on their agenda. In April 2018, the European Commission published the 'New Deal for Customers,' and on 1 November 2018, the German government went on to create a special kind of class action: 'The Model Action for a Declaratory Judgment'.

In light of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of collective interests of consumers and repealing Directive 2009/22/EC, dated 24 November 2020, additional significant developments are to be expected in the upcoming years. The Directive opens the door to more comprehensive collective litigation options for consumers in Germany. To comply with the Directive, the EU member states must transpose it into national law and put in place an effective procedural structure that would let qualified entities bring representative lawsuits on behalf of consumers.

*Law stated - 26 October 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?

The unsuccessful party always carries the costs of the proceedings, according to section 91 of the German Code of Civil Procedure. These include court costs, expert fees (if the court commissioned expert opinions or expert witnesses), and the expenses the opposing party incurred under the German fee scheme – for example for its legal representation – but no expenses above and beyond these. Due to the German fee scheme, these costs are easily calculated in advance. However, any costs incurred by the opposing party – for example, for its own experts or any costs that exceed the statutory fee – are usually not recoverable. In the event of a partial loss or partial win, the costs will be allocated in the proper ratio.

Additionally, there are no court decisions or orders that provide for reimbursement of the costs of litigation funding (namely, the share in the proceeds due to the funder). In theory, claimants would need to demonstrate that they would be unable to enforce their claims unless a commercial litigation funder steps in and provides the necessary resources in return for a share in the proceeds. Evidence thresholds are high in Germany, and German courts are reluctant to expand access to damages. The costs of legal expenses insurance, for example, do not count as damages, and post-loss insurance (after-the-event insurance) does not exist.

*Law stated - 26 October 2022*

### **Liability for costs**

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

No. The legal relationship between the funder and claimant is not that of a contract with a third-party beneficiary, nor is third-party funding frivolous, as the litigation funder provides financial support to a financially weaker party to create the desired 'balance of power' before the courts. Put simply: litigation funders provide access to justice.

*Law stated - 26 October 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?)

Very rarely do courts order that security for costs be provided by the claimant or a third party. In practice, such orders are only given where claimants from outside the European Union are concerned. Liquidity is not a factor that is relevant in legal terms to a claimant's ability to assert claims in court. Even insolvency administrators, who usually have only insufficient funds at their disposal to cover adverse costs in the case of a trial loss, cannot be prevented from bringing suit against somebody.

While funders have a relationship with the claimant, they themselves are not a party to the trial. Since no obligation exists to disclose the involvement of a (commercial) litigation funder in a trial, a funder cannot be ordered to provide security for costs. In the rare case that a court orders security for costs be provided, those costs (encompassing both the opposing party and the court costs) are determined based on the applicable fee scheme.

*Law stated - 26 October 2022*

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

Court orders for the provision of security for costs are very rare. In practice, they are only possible for claimants from outside the European Union. Even an insolvency administrator, who often has no funds at his or her disposal to cover adverse costs in the case of a lost trial, cannot be prevented from suing somebody. Because funders are not a party to a trial, they cannot be ordered to deposit securities for the claimant. In addition, no obligations exist to disclose the (commercial) funding of a claim. In the rare case that security for costs is ordered, those costs are calculated and limited to the applicable tariff system for the defendant's and the court's costs.

*Law stated - 26 October 2022*

## Insurance

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

While almost 40 per cent of German consumers and 20 to 25 per cent of German companies have taken out legal expenses insurance, which covers all standard costs of a trial, ATE insurance does not exist in Germany. ATE insurance is unnecessary in Germany because there is little to no uncertainty about court costs and of the costs of legal representation. These costs are easily calculable, since they are based on the official fee schemes (which, in comparison to the United Kingdom, are inexpensive).

*Law stated - 26 October 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?

No. There is no German law or German jurisprudence that requires litigation funding be disclosed. As a matter of principle, litigation funding is confidential and will only be disclosed to the opposing party where such disclosure is beneficial to the claimant (eg, in settlement negotiations).

*Law stated - 26 October 2022*

### Privileged communications

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

While lawyers in Germany are under an obligation to keep all client information strictly confidential (as stipulated by section 43a(2) of the Federal Code for Lawyers), the attorney-client privilege common under Anglo-American law does not exist in German civil law. In addition to the obligation of confidentiality that lawyers in Germany must observe, there is also a duty to retain client documents in their possession, as such documents cannot be seized by the authorities. Conversely, there is no obligation to disclose information in a trial. A party may keep information and documents that may be detrimental to its objectives to itself and cannot be forced to disclose to the opposing party or to the court. Only in very specific circumstances would there be justification to disregard this principle, such as the existence of a relevant document that by its very nature is in the possession of the party that does not carry the burden of proof.

The parties to civil proceedings are obligated to make their declarations regarding the facts and circumstances of the case truthfully and completely (see section 138 of the Code of Civil Procedure), with perjury being punishable under criminal law (as stipulated by sections 153 and 154 of the German Criminal Code). Since there is no obligation to disclose documents or information in German civil proceedings that is comparable to the discovery process of the British and American legal systems, there is no need to protect communications between claimants and their lawyers by privilege.

*Law stated - 26 October 2022*

## DISPUTES AND OTHER ISSUES

### Disputes with funders

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

Legal disputes between commercial funders and their clients are a rare occurrence, and limited attempts at challenging funding agreements have all been unsuccessful.

*Law stated - 26 October 2022*

### Other issues

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

The developments on collective redress, and any measures taken or proposed to regulate third-party funding, over the coming years within the European Union will be crucial for the future of commercial litigation funding in Germany. By resolution of 13 September 2022, the European Parliament made recommendations to the European Commission on 'Responsible private funding of litigation' (2020/2130(INL)). In this recommendation, the European Parliament argues that:

*'registration of all active funders should be mandatory, as a 'general rule' claimants have to receive at least 60 per cent of the total settlement or compensation amount, funders should bear the adverse costs in any case, and there should be an obligation to disclose litigation funding at the request of the court or the defendant.'*

Additionally, for those topics not on the agenda, it is unclear what could be an issue for litigation funders, and there also remains the possibility of new legal issues emerging. In Europe, and in Germany in particular, third-party funding will be an interesting field to watch over the coming years.

*Law stated - 26 October 2022*

## UPDATE AND TRENDS

### Current developments

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

More commercial litigation funders from the United Kingdom and the United States have entered the German third-party funding market, announcing their intention to invest hundreds of millions of euros. This development has stoked the old fear of bringing the 'American litigation style' to continental Europe, a development met with broad, almost

unanimous dismay in the legal sphere. In the autumn of 2018 and in the spring of 2019, the highest civil court in Germany, the Federal Court of Justice, ruled that the funding by a commercial litigation funder of a claim brought by a consumer organisation is unlawful. The decision was met almost exclusively with criticism by lower courts as well as by numerous scholars. What this ruling shows, however, is that Germany is not as easy to 'conquer' as some might have thought. Unfortunately, this decision turned into a trend in 2020 when various lower courts handed down negative decisions in follow-on cartel damages 'class actions' (which were, in fact, mostly single claims that were bundled and assigned to a special purpose vehicle).

If investment announcements locally are considered threats, those releases related to marketing and sales may have various negative effects – with regard to individual decisions as well as the reputation of the industry as a whole. Fortunately, this negative trend has come to an end. In its landmark decision of 13 July 2021 in *Airdeal*, the German Federal Court of Justice upheld a mass claims collection model that was aimed primarily at enforcing group claims in court rather than out of court. Overruling the lower courts, the German Federal Court of Justice held that the assignment of multiple claims to a special purpose vehicle does not violate the German Act on Out-of-Court Legal Services (RDG). This ruling is in line with the amended RDG, which entered into force on 1 October 2021. The German legislator has confirmed that debt collectors are entitled to enforce bundled claims in court, as well. In other decisions, the German Federal Court of Justice has further specified the requirements of the RDG with regard to mass claims collection models. In this context, especially the 'financial right' ruling of 13 June 2022 (VIa ZR 418/21) has to be mentioned, in which the German Federal Court of Justice ruled, that there is no conflict with admissibility under the RDG if the funder has a contractual right to re-examine the prospects of success of the case after each instance or if the funder must be consulted prior to concluding a settlement.

*Law stated - 26 October 2022*

## Jurisdictions

	<b>Australia</b>	Piper Alderman
	<b>Austria</b>	Nivalion AG
	<b>Belgium</b>	Nivalion AG
	<b>British Virgin Islands</b>	Martin Kenney & Co
	<b>Canada</b>	Omni Bridgeway
	<b>France</b>	Nivalion AG
	<b>Germany</b>	Omni Bridgeway
	<b>India</b>	Khaitan & Co
	<b>Israel</b>	Woodsford
	<b>Italy</b>	Fideal S.R.L
	<b>Japan</b>	Miura & Partners
	<b>Luxembourg</b>	Nivalion AG
	<b>Netherlands</b>	De Brauw Blackstone Westbroek
	<b>Spain</b>	PLA Litigation Funding
	<b>Sweden</b>	Nivalion AG
	<b>Switzerland</b>	Nivalion AG
	<b>Thailand</b>	Rajah & Tann Asia
	<b>United Kingdom - England &amp; Wales</b>	Woodsford
	<b>USA - New York</b>	Liston Abramson LLP