

Third party litigation funding

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THIRD PARTY LITIGATION FUNDING
A COMPARATIVE LEGAL AND ECONOMIC ANALYSIS AND THE
EUROPEAN PERSPECTIVE



**THIRD PARTY LITIGATION FUNDING
A COMPARATIVE LEGAL AND ECONOMIC ANALYSIS AND
THE EUROPEAN PERSPECTIVE**

Dissertation

To obtain the double degree of
“Dottore di Ricerca in Diritto dei Contratti” at the University of Cagliari

and Doctor at Maastricht University

On the authority of the Rectores Magnifici,

Prof. Maria Del Zompo and Prof. dr. Rianne M. Letschert
in accordance with the decision of the Board of Deans,
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by Gian Marco Solas

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*To my family, girlfriend and friends
For their irreplaceable love and support*

Contents

List of abbreviations ... 15

Acknowledgements ... 17

Chapter 1

Introduction ... 21

1. Background ... 21
2. Problem definition and basic terminology ... 25
 - 2.1. Third Party Litigation Funding ... 25
 - 2.2. Funding litigation in the civil law and in the common law jurisdictions: limits and possibilities ... 26
 - 2.3. Alternative Litigation Funding ... 28
 - 2.4. The litigation market and the litigious rights as property ... 30
 - 2.5. TPLF in relation to a market failure in access to justice and to externalities ... 32
3. Structure, research questions and methodology ... 34
 - 3.1. Part I - Is there a TPLF market phenomenon? Is TPLF legal? The need for a comparative legal and factual analysis ... 34
 - 3.2. Part II - If there is a TPLF market phenomenon, why and how has it emerged? How does/could it work in the private and societal dimensions? The need for a legal and economic analysis ... 35
 - 3.3. Part III - If TPLF would be legal and desirable, why is it not largely used? The need for a legal and economic assessment of TPLF in a specific legal context ... 37

PART I

THIRD PARTY LITIGATION FUNDING: A COMPARATIVE LEGAL ASSESSMENT ... 41

Chapter 2

An Historical Overview ... 41

1.	Meddling in litigation in the early civil law and common law jurisdictions ...	42
1.1.	Ancient Greece ...	43
1.2.	Ancient Rome ...	43
1.2.1.	The institutionalisation of the legal profession and the prohibition on the pactum de quota litis ...	44
1.2.2.	Claim purveyors and the limits to the redemptio litis ...	45
1.3.	Meddling in litigation in medieval England. Maintenance and champerty ...	49
2.	From the establishment of the rule of law to the recent financial crisis ...	51
2.1.	Judicial independence and the rule of law in common law jurisdictions ...	52
2.2.	The age of codifications: reiteration of the prohibitions of Roman origin ...	53
2.3.	Access to justice in the United States and the first concerns regarding the prohibitions to fund litigation ...	56
2.4.	Legal aid and the first waivers to the prohibitions to fund litigation ...	57
2.5.	The impact of globalization and of the financial crisis on access to justice and dispute resolution ...	60
3.	Concluding remarks: a fast growing TPLF (and litigation) market ...	64

Chapter 3

Third Party Litigation Funding: A Comparative Legal Analysis ... 67

1.	TPLF in the common law jurisdictions ...	68
1.1.	Australia ...	68
1.1.1.	Champerty, maintenance and the Fostif case ...	69
1.1.2.	Local regulation and TPLF ...	71
1.2.	Canada ...	73
1.2.1.	Common law vs. civil law and the institutional debate ...	74
1.2.2.	TPLF and Canadian class actions ...	76
1.3.	England and wales ...	80
1.3.1.	From the Criminal Law Act of 1967 to the reforms of justice of the 1990's and 2000's. Paving the way for TPLF ...	81

1.3.2. Arkin and other case law shaping the practice of TPLF ...	83
1.3.3. Some regulatory indications from the Jackson report and the association of litigation funders' voluntary code of conduct ...	86
1.3.4. Post-Jackson reforms and their impact on TPLF ...	88
1.4. The United States ...	90
1.4.1. The US legal and litigation finance market ...	92
1.4.1.1. Consumer legal funding ...	95
1.4.1.2. Finance for law firms ...	98
1.4.1.3. Commercial TPLF ...	98
1.4.2. TPLF vs contingency fees in US mass claims ...	101
2. TPLF in (European continental) civil law jurisdictions ...	103
2.1. Germany ...	104
2.2. Switzerland ...	106
2.3. Austria ...	107
2.4. Belgium ...	107
2.5. The Netherlands ...	108
2.6. France ...	110
2.7. Other (European continental) civil law jurisdictions ...	111
3. Concluding remarks. Legality of TPLF ...	111
3.1. Legality of TPLF in the common law jurisdictions ...	112
3.2. Legality of TPLF in the civil law jurisdictions ...	113

PART II

A LEGAL AND ECONOMIC ANALYSIS OF THIRD PARTY LITIGATION FUNDING IN THE LITIGATION MARKET ... 115

Chapter 4

The Emergence of the Litigation Market and Third Party Litigation Funding ... 117

1. Property rights and litigation ...	118
1.1. Property rights and litigation in the liberal states ...	119
1.2. Property rights and litigation in the welfare states ...	122
1.3. Property rights and litigation in the post-welfare states ...	124
1.3.1. The liberalisation of the litigation market. Litigious rights as property ...	126

1.3.2. Other global trends affecting access to justice and dispute resolution ...	130
1.3.3. The financial crisis and the market failure in access to justice ...	134
1.3.4. The sharing economy and TPLF ...	136
2. The actors in the litigation market and their modus operandi ...	137
2.1. Third party litigation funders ...	138
2.1.1. Passive vs active TPLF ...	140
2.1.1.1. Passive TPLF schemes ...	142
2.1.1.1.1. One-off claim funding ...	143
2.1.1.1.2. Claim portfolio funding ...	144
2.1.1.1.3. Law firms' funding ...	145
2.1.1.1.4. Insurance type funding ...	146
2.1.1.2. Active TPLF schemes ...	146
2.1.1.2.1. Transfer of claims for consideration or purchase ...	150
2.1.1.2.2. Partial transfer of claims ...	151
2.1.1.2.3. Conditional transfer of claims ...	151
2.1.1.2.4. Transfer of a potential claim ...	152
2.1.1.2.5. Claims' transfer and aggregation ...	152
2.1.1.2.6. Claims' securitisation ...	153
2.1.1.3. Potential conflicts in the control over litigation ...	154
2.1.1.3.1. Conflicts related to the strategies employed to pursue the claim ...	156
2.1.1.3.2. Conflicts related to offers of settlement ...	156
2.1.1.3.3. Conflicts related to offers of settlement other than by way of cash ...	157
2.1.1.3.4. Conflicts related to the withdrawal of proceedings ...	157
2.1.1.3.5. Conflicts related to the access and use of confidential information ...	157
2.1.1.4. Other contractual issues concerning TPLF ...	158
2.1.1.4.1. A glance to a specific case: the Chevron/Ecuador dispute ...	158
2.1.1.4.2. The client-lawyer-funder-insurer relationship ...	160
2.2. Lawyers' funding ...	162
2.2.1. Arrangements on the lawyers' fees based on success ...	163
2.2.2. Other lawyers' funding transactions ...	165
2.2.3. Lawyers' funding vs TPLF ...	167
2.3. Legal expenses insurances ...	169
2.3.1. Legal expenses insurances vs TPLF ...	172
3. Concluding remarks. 'One shotters' vs. Repeated players in litigation ...	173

3.1. TPLF as a stand-alone industry ... 176

Chapter 5

An Economic Analysis of Third Party Litigation Funding ... 179

- 1. The private dimension of TPLF ... 180
 - 1.1. An economic model ... 180
 - 1.1.1. American rule ... 181
 - 1.1.1.1. The third party litigation funder ... 181
 - 1.1.1.2. The claimant ... 182
 - 1.1.2. English rule ... 184
 - 1.1.2.1. The third party litigation funder ... 184
 - 1.1.2.2. The claimant ... 185
 - 1.1.3. Lessons from the economic model ... 187
 - 1.1.3.1. Why the parties enter into a TPLF agreement ... 187
 - 1.1.3.1.1. American rule ... 188
 - 1.1.3.1.2. English rule ... 189
 - 1.1.3.2. Different perceptions and attitudes towards risk ... 190
 - 1.2. The economic model in practice ... 191
 - 1.2.1. The impecunious parties' perspective ... 192
 - 1.2.1.1. American rule: a practical case in the United States ... 193
 - 1.2.1.2. English rule: a practical case in the European Union ... 194
 - 1.2.2. The other parties' perspective ... 197
 - 1.2.3. The third-party funders' perspective ... 199
 - 1.2.3.1. Covering and/or optimising the litigation costs ... 200
 - 1.2.3.1.1. The court or arbitration tribunal costs. The impact of TPLF on settlements ... 201
 - 1.2.3.1.2. The cost of legal fees ... 203
 - 1.2.3.1.3. The cost of experts' fees ... 204
 - 1.2.3.1.4. The transaction and/or organisational costs ... 205
 - 1.2.3.2. Assessing and/or mitigating the litigation risks ... 205
 - 1.2.3.2.1. The solvency risk ... 205
 - 1.2.3.2.2. The risk related to the substantial merit of the claim ... 206
 - 1.2.3.2.3. The risk related to the enforcement of the claim ... 206

1.2.3.2.4. The risk for adverse costs ...	207
1.3. Private desirability of TPLF ...	207
1.3.1. Equity vs(?) efficiency ...	209
2. The societal dimension of TPLF ...	212
2.1. The positive externalities of TPLF ...	216
2.1.1. Positive externalities on claimants/potential victims of wrongs ...	218
2.1.1.1. Redistribution ...	218
2.1.1.2. Deterrence ...	220
2.1.2. Positive externalities on legal systems...	221
2.1.2.1. Cost-effective regulatory and enforcement systems ...	222
2.1.2.2. Price-performance of dispute resolution ...	225
2.2. The negative externalities of TPLF ...	227
2.2.1. The abuse of litigation and the misuse of the legal system ...	228
2.2.2. The increase of the disputes' volume and of frivolous litigation ...	231
2.3. Societal desirability of TPLF ...	233
2.3.1. Claimants/potential victims of wrongs ...	234
2.3.2. Defendants/potential injurers ...	238
2.3.3. Legal systems ...	239
3. Concluding remarks. TPLF and social justice ...	242

Chapter 6

Promoting a Desirable Third Party Litigation Funding (and Litigation) Market ... 247

1. State intervention ...	248
1.1. General substantial legal principles ...	248
1.2. Specific consumer legislation on fairness and transparency in contractual terms ...	250
1.3. Lawyers' regulations ...	251
1.4. Financial regulation ...	252
1.5. Soft regulation ...	253
1.6. Self-regulation ...	254
1.7. Procedural controls and other forms of public intervention ...	255
2. Private bargaining ...	257
3. Concluding remarks. The TPLF market perspective(s) ...	259

PART III

THIRD PARTY LITIGATION FUNDING AND THE EUROPEAN PERSPECTIVE ... 263

Chapter 7

Legality of TPLF in the European (and civil law) perspective ... 266

- 1. The French debate ... 266
 - 1.1. Qualification of the TPLF contract ... 267
 - 1.2. Problematic clauses and other issues ... 269
 - 1.3. TPLF and financial regulation ... 272
 - 1.4. TPLF and the lawyers' rules of professional conduct ... 273
 - 1.5. TPLF and arbitration ... 274
- 2. The German debate ... 275
 - 2.1. TPLF the lawyers' independence and the control over litigation ... 276
 - 2.2. Over-compensation for third party funders ... 281
 - 2.3. TPLF and the equal procedural powers ... 282
- 3. Concluding remarks. No particular concerns on the legality of TPLF ... 285

Chapter 8

Desirability of Third Party Litigation Funding in the Post Lisbon European Union Legal System ... 287

- 1. TPLF and the right of access to justice and equality of arms under European union law ... 288
 - 1.1. TPLF and the European private enforcement of competition law ... 290
 - 1.1.1. The current European framework and the courts' interpretation: a market failure in access to justice? ... 290
 - 1.1.2. Addressing the market failure in the European private enforcement of competition law ... 294
 - 1.1.3. Repercussions at a societal level ... 296
 - 1.2. TPLF and the European collective redress mechanisms ... 296
 - 1.2.1. The current European framework: a market failure in access to justice? ... 297
 - 1.2.2. Addressing the market failure in the European collective redress ... 299
 - 1.2.3. Repercussions at a societal level ... 300
 - 1.3. TPLF and the European cross border litigation ... 301

1.3.1.	The current European framework: a market failure in access to justice? ...	301
1.3.2.	Addressing the market failure in the European cross border litigation ...	302
1.3.3.	Repercussions at a societal level ...	303
2.	TPLF and the European social market economy ...	304
2.1.	The current European social scenario...	306
2.1.1.	TPLF in the European social sphere ...	309
2.1.2.	Repercussions at a private level ...	310
2.2.	TPLF and the European integration ...	311
2.2.1.	The current European integration scenario...	313
2.2.2.	Repercussions at a private level ...	314
3.	Concluding remarks. What future for TPLF in the European Union? ...	315
3.1.	A European private perspective ...	316
3.2.	A European societal perspective ...	317

Chapter 9

Conclusions ... 319

1.	Introduction ...	319
2.	Answers to the research questions ...	320
2.1.	There is a fast growing litigation market where TPLF is playing a pivotal role, and its legality does not raise particular concerns ...	320
2.2.	TPLF has emerged after the liberalization of the litigation market because it is efficient, and it could work in a way that can be both privately and socially beneficial ...	323
2.3.	TPLF is basically legal and desirable in the European context, and its use is likely to increase in the coming years ...	327
3.	Policy recommendations ...	328
4.	Limitations & further research ...	330
5.	Concluding remarks. TPLF, the litigation market and the Jack Ma's '30-30-30' indication for the future of the global economy ...	333

Bibliography ... 337

Valorisation Addendum ... 364

Curriculum ... 369

List of Abbreviations

- ABA: American Bar Association
ADR: Alternative Dispute Resolution
ALF: Alternative Litigation Funding
ALFA: American Legal Finance Association
ASIC: Australian Securities Investment Commission
ATE (LEI): After the Event Legal Expenses Insurance
ATRA: American Tort Reform Association
BGB: German Civil Code
BGH: German Federal Supreme Court
BTE (LEI): Before the Event Legal Expenses Insurance
CDC: Cartel Damage Claims
CFA: Conditional Fee Agreement
CJEU: European Union Court of Justice
DBA: Damages Based Agreements
ECHR: European Convention on Human Rights
EFSF: European System of Financial Supervision
EU: European Union
EUCFR: European Union Charter on Human Rights
FSA: UK Financial Services Authority
ICA: International Court of Arbitration
ICC: International Chamber of Commerce
IPO: Initial Public Offering
IT: Internet and Technology
LASPO: Legal Aid, Sentencing and Punishment of Offenders
LEI: Legal Expenses Insurance
LFA: Litigation Funding Agreement
ODR: On-line Dispute Resolution
PQL: Pactum de Quota Litis
RIAD: Rencontres Internationales des Assureurs Défense
RL: Redemptio Litis
TEU: Treaty on European Union
TFEU: Treaty on the Functioning of the European Union

TPLF: Third Party Litigation Funding

UK: United Kingdom

US: United States

WTO: World Trade Organisation

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Chapter 1

Introduction

1. Background

Dispute resolution methods serve the noble idea of a harmonious society based on the rule of law, where problems are solved according to certain rules applied equally to every citizen and corporate entity. As such, they accomplish one of the most important social and civic objectives - that all those that are unlawfully harmed are entitled to access justice in order to recover damages from those liable for the harmful conduct. Traditionally, the party that wants to bring a lawsuit (or defend from it) bears the costs and faces the risks of the related litigation. For all those that have no resources to begin a formal dispute, all of the modern jurisdictions provide for a more or less functional legal aid system aimed at maintaining the legal fees and court expenses. The underlying consideration is that the lack of economic resources and the consequent impossibility to pay for legal costs and/or to face the litigation risks are the first and major barriers to access justice and solve disputes¹. It is however a few years since access to justice seemed to be an issue not only for those that are regarded as impecunious claimants by the legislations defining the thresholds of legal aid. The increases in the costs and complexities of litigation, and the economic constraints exacerbated by the recent financial crisis, are effectively making the resolution of disputes more difficult also for those entities with apparently sufficient resources².

¹ A particular mention in this regard should be made to Mauro Cappelletti, whose studies on access to

² It has indeed been argued that the crisis has had a direct impact on the demand for external finances to fund litigation: companies (and individuals) are now more risk averse; the crisis itself has engendered a series of disputes that wouldn't have been filed before; the investors are also trying to find different and more profitable asset classes and are thus pushing this market. See J CROFT, 'Litigation Finance Follows Credit Crunch', Jan. 27, 2010, Financial Times, available at <http://www.ft.com/cms/s/0/7c98c38a-0ab1-11df-b35f-00144feabdc0.html> (last vis. 6.2.2017). M STEINITZ, 'Whose Claim Is This Anyway? Third Party Litigation Funding', (2011) *Minnesota Law Review*, Vol 95, n 4, 1268, 1283. These competitive constraints are also affecting the way in which lawyers are working, since they are more and more required to have a major involvement in disputes they are endorsed with. In practice this entails applying for fees as an alternative to the more common hourly-based fees, very often based on success in disputes. GEORGETOWN LAW – CENTRE FOR THE STUDY OF THE LEGAL PROFESSION, *Report on the State*

There is reason to think that the intertwinement of these trends has affected the individuals' and companies' aversion to (litigation) costs and risks, stimulating a demand for alternative ways to access justice and solve disputes. This situation has moreover been paralleled by a series of changes in legislation and case law aimed at allowing – or at least easing – the possibility to maintain litigation by means other than those of the parties involved. These changes have very often (if not always) been justified with the possibility of guaranteeing the right of access to justice and equality of arms of impecunious parties. They have nevertheless paved the way for the emergence of a series of methods to maintain disputes alternative to the parties' own funds or to legal aid. Among these, it was decided to focus attention on a new business practice that is thrilling for its capability of changing the equilibrium of access to justice and dispute resolution at a global level. In recent years a series of financially endowed and legally sophisticated entities purport to relieve the parties to a dispute from the costs and risks of litigation in exchange for a percentage of the recovery, only in case of victory, sometimes even transferring the claim. This new business practice is

of the Legal Market, 2017, available at <http://legalsolutions.thomsonreuters.com/law-products/solutions/peer-monitor/complimentary-reports> (last vis. 7.2.2017).

now commonly referred to as ‘Third Party Litigation Funding’ (TPLF)³, and it is often mentioned in relation to the emergence of a market in litigation⁴. TPLF has emerged

³ This definition, while being the most commonly used, is however not settled at a global level. It has been noted that ‘[t]he nomenclature to describe this kind of third-party capital investment in arbitration or litigation claims is all over the map and woefully undescriptive. It has been referred to as “third-party funding”, “third-party litigation funding or financing”, or most commonly “alternative litigation funding or financing”.’ MB DE STEFANO BEARDSLEE, ‘Non-Lawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup’ (2012) *Fordham Law Review*, Vol 80, Issue 6, Article 16, 2791, 2796, footnote 22. Garber, referring only to the United States’ context, proposes the term ‘Alternative Litigation Financing’ to describe the ‘phenomenon of . . . provision of capital . . . by non-traditional sources to civil plaintiffs, defendants, or their lawyers to support litigation-related activities’. In particular, he refers to ‘entities other than plaintiffs, defendants, their lawyers, and defendants’ insurers’. See S GARBER, ‘Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns’ (2010) *Rand Corporation occasional paper*, 1, 1. Available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf (last vis. 6.2.2017). This definition has been somehow endorsed by the AMERICAN BAR ASSOCIATION - COMMISSION ON ETHICS 20/20, White Paper on Alternative Litigation Finance, 1, 1. Available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf (last vis. 6.2.2017). In this White Paper it is stated that: ‘Alternative litigation finance (“ALF”) refers to the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a pre-existing contractual relationship with one of the parties, such as an indemnitor or a liability insurer’. We want however to note that in one of the first monographic publications on the matter, which analysed TPLF mainly in relation to common law (English speaking) jurisdictions, the chosen nomenclature was ‘Third Party Litigation Funding’. See N ROWLES-DAVIES and J COUSINS QC, *Third Party Litigation Funding*, Oxford University Press, 2014, 320 p. An equivalent definition was however also chosen in the civil law French context (and language), in a book edited by Professor Kessedjian of the University of Panthéon-Assas in Paris. See C KESSEDJIAN (ed.), *Le financement de contentieux par un tiers*, Paris, Panthéon-Assas Paris II, 2012, and in another book focusing on shareholders’ litigation funding, see W CHEN, *A Comparative Study of Funding Shareholder Litigation*, Springer Singapore, 2017, 264 p. In another book the chosen nomenclature was instead ‘third-party funding’, see L BENCH NIEUWVELD and V SHANNON, *Third-Party Funding in International Arbitration*, Alphen Aan Den Rijn: Kluwer Law International, 2012. The same definition was chosen in a very recent book edited by Professor Van Boom of the University of Leiden (in English). See VAN BOOM WH, ‘Litigation costs and third-party funding’, in VAN BOOM WH (ed), *Litigation, Costs, Funding and Behaviour. Implications for the Law*, Routledge, 2017, 9 (and related footnote 23).

⁴ D ABRAMS and DL CHEN, ‘A Market for Justice: A First Empirical Look at Third Party Litigation Funding’ (2013) *University of Pennsylvania Journal of Business Law*, Vol 15, 1075. V WAYE, ‘Trading In Legal Claims: Law, Policy & Future Directions in Australia, UK & US’, 2nd ed, Presidian Legal

recently in the aftermath of the financial crisis mainly in some common law jurisdictions, although it is slowly expanding also in the civil law ones. For these reasons this practice has so far not yet received wide attention from the literature and, probably also because of the confidentiality that covers such transactions, in the professional sphere. While moreover there have been some significant scholarly contributions in both the legal and the economic terms of TPLF, there haven't been so far many authors that have provided a systematic view on this practice and its private and societal repercussions. For this reason it was decided to write this thesis on TPLF, using the legal and economic instruments to understand both its private and its societal dimension, and then to frame it within a specific legal system, the European Union.

This thesis therefore aims, without claiming to be exhaustive or otherwise, to provide a static vision of the problem, to be the first attempt to define a systemic view on the law and economics of TPLF, and to frame it in the European legal context. The choice of the European Union as a benchmark to test this new practice is not casual. This is indeed a legal system where, on the one hand, the claims for effective access to justice and equality of arms have multiplied in the recent years⁵ and, on the other, certain alleged wrongs are not effectively prosecuted⁶, probably due also to a non-fully-effective hybrid constitutional structure. In this context, it is possible that the increase in the probability to access to justice and to solve meritorious disputes potentially brought by TPLF would not only be a way to solve single disputes, but could also help to achieve more general policy goals. For this reason this thesis is intended to provide a

Publications, Adelaide 2008; M ABRAMOWICZ, 'On the Alienability of Legal Claims' (2005) *Yale Law Journal*, Vol 114, n 4.

⁵ ME MÉNDEZ PINEDO, 'Access to justice as hope in the dark in search for a new concept in European law (2011) *International Journal of Humanities and Social Science*, Vol 1, n 19, 11 9. For a recent more general overview on access to justice in the European Union see the *Handbook on European law relating to access to justice*, European Union Agency for Fundamental Rights and Council of Europe, 2016, available at http://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf. (last vis. 25.3.2017). See then more in detail in Chapter 8, par 1.

⁶ Think, for example, of the difference between the United States and European approaches in the recent Volkswagen emission scandal. J EWING, 'In the U.S., VW Owners Get Cash. In Europe, They Get Plastic Tubes', *New York Times*, Aug. 15, 2016, available at https://www.nytimes.com/2016/08/16/business/international/vw-volkswagen-europe-us-lawsuit-settlement.html?_r=0 (last vis. 10.2.2017).

first comprehensive and ideally ordered series of elements that will certainly be (and already are) at the core of the current European Union debates. It is however not excluded that the arguments that will be discussed throughout this work could be applicable – mutatis mutandis – to other similar or more specific legal contexts.

2. Problem definition and basic terminology

It is appropriate to introduce this thesis with the definition of the main problems at stake, providing an initial insight into the status of the literature and how this work attempts to develop it. Considering that it will be dealing with a series of new legal and economic problems, the definitions that follow aim initially (and, therefore, in general terms) at explaining what are the main issues discussed throughout this thesis. This paragraph moreover gives a good understanding on how to attempt to ‘connect the dots’ in the existing academic, institutional and professional debates on TPLF, especially by making use of the mainstream legal and economic literature.

2.1. *Third Party Litigation Funding*

Defining the features of TPLF is not an easy task, especially if we consider that this business practice is at an embryonic stage, and professional investors have only recently stepped into this market. In the introduction to these paragraphs TPLF has been described as the professional practice of funding the dispute costs in exchange for a percentage of the sum recovered, only in case of victory, sometimes entailing the transfer of the claim. For this reason, it is proposed to provide quite an extensive definition of ‘Third Party Litigation Funders’ (or ‘Third Party Funders’ or ‘Litigation Financiers’ or ‘Litigation Funders’ or ‘Litigation Funds’ or ‘Funders’), as any entity not a party to a dispute, which is neither a lawyer nor an insurer of that party, that professionally maintains the disputes’ costs in exchange for a share of the sum recovered, only in case of victory, eventually transferring the claim⁷. This definition evidently entails a number of issues that will be addressed throughout the course of this work, and especially in Part I and II. In the first, in particular, there will be an attempt

⁷ This definition appears to be a decent ‘summary’ of the existing academic definitions and description of the practice. See moreover above at footnote 3 a series of doctrinal indications in this regard.

to see how this ‘professional’ practice has emerged in the recent years, and what are the regulatory conditions that have shaped its application. In the second, instead, with a more legal and economic approach, there will be an attempt to provide a rational explanation on this emergence and define, in the light of the existing legal and economic categories, what could be the applicable models. It is not difficult to see already in the above definition two main distinct groups of practices: the first model (maintaining the claims’ costs in exchange for a share of the sum recovered) will be referred to as ‘Passive TPLF’, while the second (entailing more control and very often the transfer of the claim - with related powers to control and settle litigation – to the funder) as ‘Active TPLF’. In this regard, it should be noted since the beginning that the existing literature and practice do not often juxtapose these two models, while they seem to aim at solving similar problems and/or contend the same market for litigation.

TPLF will be referred to as single practice or also, more generally, as a finance field; in this latter case, it can also be used as ‘Litigation finance’. For explanatory purposes it is worth clarifying that TPLF is encompassed within the main ‘Legal Finance’ field, which concerns any type of financing for legal activities. This may range for example from the loans granted to law firms for purposes other than their clients’ litigation to the venture capital provided to legal tech companies. In this regard, it is worth anticipating that it will attempt to define how TPLF would distinguish itself from other legal finance instruments, using as its main criteria the analysis of the collateral applied to the transaction: if this is represented only by (part of) the eventual recovery from disputes, then it would be likely that this would be qualified as TPLF. While this definition is not new in the literature, this thesis it will define it in more specific terms, also making reference to the current practice(s).

2.2. Funding litigation in the civil law and in the common law jurisdictions: Limits and possibilities

Funding or otherwise maintaining litigation for profit is not a novelty in the global legal history, both in the ‘civil law’ and in the ‘common law’ jurisdictions. The first are those jurisdictions of Roman traditions that now – after the ‘Era of Codifications’ started with the French Code ‘Napoleon’ – have mainly codified legal systems. Common law jurisdictions are instead those of Anglo-Saxon origin, mainly based on

the legal precedent (the ‘stare decisis’ rule). In this regard, it is interesting to note that the prohibitions and/or limits to maintain litigation devised in these early jurisdictions are still present, in one way or another, in all of the modern civil law codes and/or bar regulations, in the civil law, and in the common law jurisprudence and legislation. The beginning of this thesis will analyse how these prohibitions and/or limits have emerged, how they have then been abolished and/or relaxed and then what would be their impact on the TPLF contracts and on the litigation market. The existing literature on TPLF has indeed not much discussed the historical roots of these practices, while their understanding is pivotal to the modern debate and practice. For this reason, it is now possible to initially define what are the main prohibitions and/or limits to fund or otherwise maintain litigation in both civil law and common law jurisdictions. As with regard to the first, we will use the term ‘Pactum de Quota Litis’ (or ‘PQL’) to refer to those fees totally or partially based on a fraction of the sum recovered, ideally charged by lawyers or other personnel involved in the Judiciary. ‘Pactum de quota litis’ was a term used first in medieval times as way to refer to the prohibition for lawyers and other personnel involved in the Judiciary to enter into such agreement devised in the ancient Rome times. This prohibition has then been reiterated in basically all of the civil law jurisdictions, either in the civil codes and/or in the bar regulations. Moreover the term ‘Redemptio Litis (or ‘RL’) will be used to refer to the practice of assigning and/or selling claims, which was then severely limited by the Roman Emperor Anastasius I. The Lex Anastasiana prohibited anyone who professionally purchased claims to get from the dispute more than the price they had paid for the purchase, plus interest, or to get nothing if they simulated a donation. This prohibition/limit has then been reiterated in some modern civil codes while in others it has been repealed as a way to favour business transactions.

As with regard to the common law jurisdictions’ prohibitions and/or limits, we will mainly make reference to the figures of champerty and maintenance. Maintenance is the support of lawsuits, including but not limitedly to from a financial point of view, and it is directly linked to champerty, when the maintenance of a claim is provided for in exchange for a share of the recovery from the lawsuits. In this regard, it will be interesting to note how the third party litigation funders have found a fertile terrain in the abolition and/or relaxation of such prohibitions that have occurred (at least) in the

last few decades in some common law jurisdictions⁸, where TPLF has for the moment developed more. In this context, the comparison will be a useful instrument also to understand why TPLF in civil law jurisdictions has developed less, but also the modalities in which it is likely that it will develop. In this regard, the specific analysis of the European legal system(s), whose member states have a mainly civil law background, will be a good benchmark to answer the above questions.

2.3. Alternative Litigation Funding

The definition of TPLF presented above also excludes that third party litigation funders could be lawyers or (legal expenses) insurers. Indeed, also these actors are capable of professionally offering litigation cost and risk hedging services for a reward, depending on how the different regulatory frameworks impact on their capability of doing so. In this regard, any possibility of maintaining litigation for profit would be referred to as the Alternative Litigation Funding ('ALF') method. This definition is intended indeed to refer to all those cases where a claim is maintained with resources (economic, human, or otherwise) alternative to those of the parties involved in a dispute, and that due to their professional nature are capable of competing one with the other. In particular, apart from TPLF, at this stage one can anticipate that the main (but not only) ALF would be: 1) any insurance contract aimed at covering the litigation expenses and/or hedging its risks; 2) any manner in which lawyers commit to bear all or part of the financial risk of the cases that they are engaged in, in exchange for a share of the expected sum recovered. We will refer to the first group as 'Legal Expenses Insurance' (or 'LEI'), which thus refer to all those contracts where an insurer commits to pay all or part of the legal expenses of the client, in exchange for a premium. It is moreover worth anticipating that the LEI can be either 'Before the Event' ('BTE') or 'After the Event' ('ATE'), depending on the time at which the insurance is taken out in relation to the event that has given rise to litigation. We will instead refer to the second group as 'Lawyers' Funding', recalling a definition of some authoritative academics⁹, although it should be made clear that this generally does not entail a direct funding of the costs but just a waiver of them on a risk sharing basis. It is

⁸ I will give an account of this process throughout Part I and Chapter 4.

⁹ C HODGES, J PEYSNER and A NURSE, 'Litigation Funding: Status and Issues' (2012) *Oxford Legal Studies Research Paper*, n 55, 136, available at SSRN: <https://ssrn.com/abstract=2126506>.

moreover worth noting that we will use the term ‘Contingency Fees’ (or, also, ‘No-Win-No-Fee’ or ‘Fees Totally Based on Success’) to refer to those fees totally based on a fraction of the potential recovery. I will instead use the term ‘Conditional Fees’ (or, also, ‘Fees Partially Based on Success’) to refer to those fees partially based on a fraction of the potential sums recovered from the claim. It is moreover worth anticipating that, as a way to distinguish between the different ALF (but also to see how these may complement each other) attention will be paid to who is backing the claim and how, to see which is the entity that is ultimately bearing the litigation costs and risks. An interesting way to look at it is to see what collateral is applied to the transaction, although it should never be forgotten that substantially the various ALF may differ very much and/or complement each other.

For reasons of comprehensiveness, it should be moreover recalled that litigation could also be funded or otherwise maintained by means of other ALF, such as states' legal aid or other (foundations, trade unions or professional funds). In specific circumstances (i.e. market analysis) therefore it is likely that these factors should also be taken into consideration. In this regard, it is worth anticipating that there is already some literature that has discussed the similarities and differences between TPLF and other ALF¹⁰. This thesis will start from this literature and the related categorisations, to

¹⁰ For example, it has been argued that defence funding is the equivalent of after the event insurance, as it would serve the same market function. Instead, it has been highlighted that there is a conceptual difference between lawyers' funding and TPLF, since the first is supposed to be a small part of the main legal service, while the third party funders' main function would be the investment in lawsuits. M STEINITZ, above at footnote 2, 1302. As with regard to the relationships between TPLF and legal aid, it has been argued that a major or minor presence of the latter impacts on the use of the first (and LEI). Certain states, like the United Kingdom and Sweden, are moreover considering pushing LEI as a way to compensate the cuts in legal aid. See MG FAURE and JPB DE MOT, ‘Comparing Third Party Financing of Litigation and Legal Expenses Insurance’ (2012) *Journal of Law, Economics and Policy*, Vol 8, n 3, p 11 and 19, available at SSRN: <http://ssrn.com/abstract=2168438>. In the United Kingdom, moreover, the Conditional Fee Agreements Order of 1995 introduced conditional fee agreements for personal injury cases to replace the legal aid, which was removed by the Access to Justice Act of 1999. In this regard, see also some empirical evidence, at least with regard to the Dutch context, in MG FAURE, T HARTLIEF, NJ PHILIPSEN, ‘Funding of Personal Injury Litigation and Claims Culture: Evidence from the Netherlands’ (2006) *Utrecht Law Review*, Vol 2, n 2, available at SSRN: <http://ssrn.com/abstract=984182>. This article shows a certain amount of substitutability between LEI and legal aid and, more importantly, the fact that a wider presence of LEI does not increase the number of tort cases.

develop it further and try to give a systemic perspective. In this context, but also in the light of the discussions that will be made with regard to the specific European context, it will be interesting to see how and to what extent TPLF could be ‘a market solution for a procedural problem’¹¹, and in what circumstances it could be more efficient than other ALF. The first step in this regard would be to start defining them in the context of the market for litigation.

2.4. The liberalisation of the litigation market and the litigious rights as property

The previous paragraph described a series of professional ALF services that would be potentially capable, in one way or another, to provide an alternative opportunity to access to justice to the parties’ own funds. For this reason we will take this as starting point to define the ‘Litigation Market’ with regard to the subjects that would be capable to compete in it. In this regard, it is not difficult to see how this market would encompass all those actors that professionally (thus, for profit), directly or indirectly, cover and/or manage the litigation costs, and/or assess and/or hedge the litigation risks. This initial (and partial) definition of the litigation market attempts to build on to the existing literature on the matter, which has however already attempted to provide some interesting (although sometimes partial) indications¹². This definition moreover gives the chance to identify what are the three litigation sub-markets: 1) ‘TPLF Market’, as the market composed by third party litigation funders; 2) ‘LEI Market’, as the market composed by legal expenses insurers as defined in their specific jurisdictions; 3) ‘Legal Market’, as the market of legal professionals, identified as those who according to their national rules are entitled to provide legal services. It is however to be noted, on the one hand, that only those lawyers who offer litigation related services can be identified as actors in the litigation market and that, on the other, that this market may also encompass professionals other than lawyers but that are nevertheless providing services related to litigation (experts, bailiffs, etc.).

As a way to define the litigation market, and therefore to develop the existing literature on the matter, we will also define what the mentioned actors are competing for. In

¹¹ JT MOLOT, ‘Litigation Finance: A Market Solution to a Procedural Problem’, (2010) *Georgetown Law Journal*, Vol 99, 65.

¹² See inter alia, D ABRAMS and DL CHEN and V WAYE; and M ABRAMOWICZ, above at footnote 4.

other words, to describe what could be object of a TPLF transaction and why this has not been bargained before. While there are indeed already a few academic contributions explaining what the asset at stake would be¹³, none seems to have really well clarified – in legal and economic terms – why this asset has been bargained upon only recently. For this reason, this will try to develop the existing law and economics literature explaining how property can be ‘created’¹⁴, to see whether similar considerations can be made for litigious rights. To do so, it will start by analysing the series of changes (abolition and/or relaxation) to the prohibitions and/or limits to bargain over litigation to discuss whether we can talk about a ‘Liberalisation of the Litigation Market’. We will then attempt to argue that this liberalisation has allowed the emergence of a new form of property, i.e. ‘Litigious Rights’, representing any disputed right that could be the object of economic assessment and of transaction, and for which it is likely that there would be a demand¹⁵.

In more general terms, we will also attempt to show how TPLF would be part of a more general economic trend affecting property rights at a global level, based on the optimisation of property by sharing it with other individuals. Many successful businesses have been created out of this idea, also making use of modern technology, in the hotel, car and other industries, also in partnership with public entities. As known, this phenomenon has been referred to as the ‘Sharing Economy’¹⁶. TPLF is also, de facto, a litigation cost and risk sharing service in exchange for a share of litigious

¹³ M DE MORPURGO, ‘A Comparative Legal and Economic Approach to Third-party Litigation Funding’ (2011), in *Cardozo Journal of International and Comparative Law*, Vol 19, 343, 349. See also AJ SEBOK ‘The Inauthentic Claim’ (2011) *Vanderbilt Law Review*, Vol. 64, n 1, 61, 63.

¹⁴ In particular S SHAVELL, *Foundations of Economic Analysis of Law*, Harvard University Press, 2004.

¹⁵ For explanatory purposes, it is worth noting that an asset to be disputed needs a claim to have been filed before a state tribunal, arbitral tribunal or any other entity appointed to deliver an enforceable order; or, at least, a formal request for payment should be made to the defendant, and the latter denies (in full or in part) liability; it may also encompass those ‘dormant’ or ‘conditional’ claims’, subject though to the fact that the claim has actually arisen and/or the condition has happened.

¹⁶ A SUNDARARAJAN, ‘From Zipcar to the Sharing Economy’, *Harvard Business Review*, January 3, 2013. Available at <https://hbr.org/2013/01/from-zipcar-to-the-sharing-eco> (last vis. 7.2.2017); G ZERVAS, D PROSERPIO, J BYERS, ‘The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry’, *Boston University School of Management Research Papers*, n 2013-16. Available at SSRN: <http://ssrn.com/abstract=2366898> (last vis. 7.2.2017). Z KELLEN, ‘Sharing Property’ (2016) *University of Colorado Law Review*, Vol 87, n 2.

rights only in the case of success. It will thus be interesting to discuss whether and how this phenomenon can be framed in the more general sharing economy trend.

2.5. TPLF in relation to a market failure in access to justice and externalities

The emergence of a new asset class alone however might not explain why TPLF would work as a practice; otherwise, it would be difficult to understand why, for example, lawyers and insurers are not doing this business alone. As a way to justify the emergence of this business phenomenon, we will explore how a series of other interrelated global trends (economic globalisation, privatisation of civil and commercial justice, the ‘enlargement of the legal world’, etc.) have increased the barriers to access justice or, from another point of view, the individuals and companies’ aversion to (litigation) costs and risks. In general, it will discuss how these trends have created a ‘Market Failure in Access to Justice’¹⁷, where property rights are not allocated efficiently because they are disputed, and the legitimate owners cannot (or prefer not to) bear the disputes’ costs and risks. In this context, it will discuss how TPLF would be capable to do so instead of the parties, and how it may prove to be more efficient than other ALF in overcoming the mentioned barriers to access justice and solve disputes. By market failure in access to justice it will thus refer to the situation in which certain owners of litigious rights cannot enforce them due to lack of economic resources to pay for litigation costs and/or to bear the litigation risks. Market failures indeed happen when property is not allocated efficiently (also) due to certain barriers to specific transactions, which do not allow allocating it in a way that someone would be made better off, without anyone being made worse off. In the context of the litigation market this failure has especially increased in the post-crisis scenario, which has made individuals and corporations more cost and risk averse. We will moreover discuss how this failure has been exacerbated by a series of interrelated trends, such as: the withdrawal of the states from certain functions related to (civil and commercial) justice and dispute resolution; the always more complex and sophisticated legislation; the general cuts to spending in the judicial structures, including for legal aid; the increases in court costs and any other action or omission of the states that has resulted

¹⁷ The idea of a market failure has initially been discussed by M STEINITZ, above at footnote 2, 1311, and by JT MOLOT, above at footnote 11, 83, who has also discussed it as a failure of the procedure.

in an increase in the barriers to access justice or anyhow to provide for an adequate legal framework that guarantees this right to anyone. It will moreover discuss how certain legal limitations or otherwise opportunity conditions prevent lawyers and insurers from maintaining litigation for profit in scale or, from another point of view, helping parties to overcome certain barriers to access justice and solve disputes. It is moreover worth noting that these barriers can be more or less high depending also on the applicable rule on the allocation of legal costs, which consist of two main groups: 1) the ‘American Rule’, according to which each party to a dispute pays for its own legal expenses, disregarding who wins or loses; 2) the ‘English Rule’ (or ‘Cost-Shifting Rule’), whereby the party who loses a dispute has to reimburse the legal expenses to the winner. In those contexts where the English rule on costs applies, also the ‘Adverse Cost Risk’¹⁸, i.e. the risk of paying the expenses of the counter-party in the case where the dispute is lost, will have to be taken into account.

In the context of a market failure in access to justice, and as a way to develop the existing literature on the matter, we will also discuss the issue of TPLF in relation to externalities. Externalities indeed happen when there are market failures, and prevent property from being allocated efficiently, i.e. in a way that it would be possible to do further transactions that would make someone else better off without making no-one else worse off. The scholarly debate on the externalities in relation to TPLF is to date quite varied: some consider that the market failure in access to justice has per se been created by the externalities that have engendered the recent financial crisis¹⁹. Others highlight how TPLF would be capable of internalising certain existing negative externalities, for example deterring potential wrongdoers²⁰. Others instead argue that TPLF may as well create externalities that are undesirable from a societal point of

¹⁸ Note that this definition has not much been used in the academic literature on TPLF, but is instead a term applied in the practice. Litigation funders offer coverage for this risk with insurance-type products. See in the website of one of the main litigation funders, Burford, the specific product offered (and the terminology used) http://www.burfordcapital.com/wp-content/uploads/2014/12/6_Burford_ATE_Insurance.pdf (last vis. 15.3.2017). See moreover more in detail below Part II, par 1.2.1.1.4.

¹⁹ See M STEINITZ, above footnote 2.

²⁰ See below Chapter 5, Par 2.1. the positive externalities are meant as those benefits of an activity indirectly granted to individuals or to society in general that did not pay for them.

view. For example, it is often claimed that TPLF would impose additional costs on the legal system due to an increase in use, or to defendants in terms of vexatious litigation²¹. This thesis will attempt to report these discussions to see what could be the societal dimension of TPLF. It will moreover discuss whether some of the societal effects of TPLF can be regarded as (positive or negative) externalities, or other.

3. Structure, research questions and methodology

The previous paragraph introduced a series of legal and economic concepts that have required a wide work of research and theoretical speculation, sometimes leading far (at least, apparently) from the specific issue of TPLF. It is for this reason that this paragraph defines the structure of this thesis with a view to guiding the reader through these concepts. More in particular, Part I starts with a factual and legal analysis aimed at describing the current status of TPLF (and the litigation market). Part II will instead attempt to ‘make order’ of the legal and factual data gathered in Part I, using some existing legal and economic theories. It will then readapt these theories to the actual European context in Part III. These Parts will try to answer some specific research questions that are presented in the headings of the sub-paragraphs that follow. Each of them will also define the specific methodology applied and the reasons why they are used, rather than other methodologies. Finally it indicates some limitations of the research contained in each Part, which at the same time constitutes interesting indications for future scholars and practitioners willing to focus on the matter.

3.1. Is there a TPLF market phenomenon? Is TPLF legal? The need for a comparative legal and factual analysis

The previous Paragraph has briefly introduced how a new litigation market would have emerged, where different actors would be competing for litigious rights. In this context, I mentioned that TPLF - in certain circumstances - would have emerged as a potentially more efficient method to guarantee access to justice than other more or less traditional ways. This assumption however implies that there would be a new TPLF market phenomenon, which has not emerged before, at least to this extent. This is the

²¹ See below Chapter 5, Par 2.2. the negative externalities are meant as those costs of an activity that are imposed externally to individuals or the society that do not otherwise benefit from the main activity.

reason why this work starts in Part I with an historical (Chapter 2) and comparative (Chapter 3) overview of the various practices, legislation, case law and literature regarding the ways in which third parties have maintained other people's disputes for profit. This analysis will focus on a series of jurisdictions of common law and of civil law where TPLF has emerged as practice (after having been prohibited in their early phases) and at the same time received attention from courts, legislators, practitioners and other commentators. For this reason, this Part will offer also the opportunity to discuss the legality of TPLF. All of these jurisdictions moreover guarantee access to justice as a fundamental value (in different ways, depending on their constitutional system) and it is therefore less likely that TPLF will ever be totally banned (again) therein. Instead, it is more likely that in these jurisdictions TPLF will be (eventually) regulated in a way to embed it in the legal system as an alternative tool to guarantee this fundamental right. The goal of the comparison is therefore to see how it has emerged in the different jurisdictions and in particular how the existing legislation had influenced this phenomenon so far, which will ultimately help to understand its legality. In this regard, the comparative legal and factual analysis seems to be the most appropriate method of research, although of course with TPLF being in an early stage, the legal and factual elements could be limited.

3.2. If there is a TPLF market phenomenon, why and how has it emerged? How does/could it work in the private and societal dimensions? The need for a legal and economic analysis

If Part I will confirm the 'thesis' that there is a TPLF market phenomenon, Part II will provide some 'rational' legal and economic arguments to explain why has this happened and how it is likely to develop. This discussion will be done through a general legal and economic analysis, aimed at explaining in simple terms the conditions under which TPLF is working (or is likely to work) in the private sphere and its potential societal repercussions. In this regard, while there have been several contributions that have addressed some specific issues related to TPLF with a law and economics approach, this Part aims for the first time at providing a systemic overview of these problems. The legal and economic analysis seems the most appropriate research methodology for this purpose because it helps understanding the (private and

social) incentives to litigate, and the impact that TPLF may have on them in the light of the existing (or potentially applicable) legal framework.

The answer to these research questions will initially require analysing the relationships between property rights and litigation. For this reason Chapter 4 starts by describing how the evolution in legislation and case law described in Part I can be regarded as a liberalisation of the litigation market that, together with other interrelated global trends, has allowed the emergence of a new asset class. In this regard, also in the light of the historical and comparative analysis provided for in Part I, it will define what is the asset class at stake, and why and how it has emerged, depending on various mainly regulatory reasons. After having defined this new asset class and how has it emerged, it will be the case to define who the potential actors of this market are, and in particular the modalities in which TPLF would be capable of operating. These discussions will potentially help understanding what would be the concrete applicable optimal TPLF schemes, also in relation to other ALF. All of this analysis will be made in Chapter 4 with a mainly (but not only) positive law and economics approach, as it seems the most appropriate to see how the regulatory framework impacting on litigation has shaped the emergence of this market, and will shape its evolution.

The Chapter 5 will instead present an economic analysis of TPLF in the litigation market. The first paragraph related to the private incentives to litigate will start considering the Shavell basic formula of litigation and the De Morpurgo basic economic model on TPLF. It will then develop them further as a way to better explain the incentives to litigate, and how TPLF may affect them. In other words, it will try to explain what are the conditions that bring parties and third party funders to enter into a transaction. It will then define in detail what the litigation costs and risks are, how these can be defined as barriers to access justice, and see how these could be (better?) managed with the use of TPLF. It will then assess the impact that TPLF may have at a societal level, comparing the private incentives to litigate with the social ones. This discussion will start with Shavell's social versus private theory on litigation, whose main finding is represented by the fact that the private and social incentives to litigate diverge, if not contrast. It will address these discussions by describing what could be the positive and negative externalities of TPLF (or anyway its 'societal projection'), which will ultimately help to see whether this contrast exists, and if this could be

solved. More in general, these discussions will aim at analysing whether TPLF could be socially beneficial, or not.

Also to improve the potential societal desirability of TPLF, in Chapter 6 there will be discussion of some regulatory conditions that may be useful to align the private and social incentives to litigate. In other words, it will attempt to present – without claims of exhaustiveness – what could be suitable regulatory instruments to make a desirable litigation market where TPLF would play a role. It will do so not only by relying on the traditional law and economics discussions on how to address the externalities, but also recalling some instruments already in (limited) use for TPLF, and/or by adapting instruments that are commonly used for other similar practices. For these reasons, this Chapter will adopt a mainly normative legal and economic approach, which seems to be the most appropriate method – also in light of the comparative legal analysis - to address the regulatory matters mentioned.

3.3. If TPLF would be legal and desirable, why is it not largely used? The need for a legal and economic assessment of TPLF in a specific legal context

If the conclusions of the previous Part will be that TPLF could potentially be privately and socially desirable, we will attempt to discuss why it has not largely emerged in the European legal system, and what could be its perspective in this context²². This would be the chance to provide a more concrete ‘test’ regarding the alleged legality and desirability of TPLF in a specific legal context, and attempt to see whether this could potentially hold true not only in theory but also in practice. In other words, this Part

²² As it will be better explained at the beginning of Part II, it is here to be clarified, that from a European perspective this will first of all and mainly make reference to the European Union legal context concerning access to justice and dispute resolution, also in intertwinement with those of its member states. It is however to be considered that the European Union right of access to justice parallels that of the European Convention on Human Rights, which applies to the 47 members of the Council of Europe, and not only to the EU member states. It is moreover to be considered that 44 of these 47 members of the Council of Europe have mainly civil law traditions, which moreover are shared by most of the jurisdictions worldwide. For this reason, it is likely that the arguments contained in this Part could also work, at least to a certain extent, for those countries that belong to the Council of Europe and/or that share civil law traditions.

aims at validating the assumptions made in Part I, that TPLF is, in principle legal, and in Part II, that TPLF is, in principle, desirable in the private and societal dimension.

The answer to this research question implies first of all assessing the legality of this instrument in the European legal context, and also considering that the legal certainty regarding the use of TPLF could help the emergence of this instrument. For this reason there will be a report on the main academic and professional debates on the legality of TPLF occurring in the European jurisdictions. Considering that 26 out of 28 European Union member states have mainly civil law traditions, Chapter 7 will focus on the debates already in place in some of them (France and Germany), also as a way to potentially address the future debates in the others. More in particular, it will recall some debates of these jurisdictions concerning for example the legality of this instrument under the main civil law principles, deontological rules and other regulation. Most importantly, following a typical civil lawyer approach, we will discuss the contractual issues related to TPLF, which would ultimately help understanding its legality within the more general codified legal system. It will obviously also recall some case law already existing in such jurisdictions, also to see what has been the specific interpretation of the national courts, and other provisions, such as those contained in the bar regulations.

Chapter 8 will instead assess the desirability of TPLF in the European private and societal perspective, recalling the legal and economic analysis carried out in Part II. This Chapter will try to look a bit more carefully at the legal issues underlying TPLF in the light of the European Union primary, secondary and even soft legislation potentially having an impact on this practice. To do so, it will first of all discuss TPLF in light of the primary legal framework, i.e. the right of access to justice and equality of arms under EU law, especially as resulting from the entrance into force of the Lisbon Treaty. This discussion will also help to answer those claims that in such a legal system the right of access to justice (and equality of arms) needs a re-thinking in the light of the recent change in constitutional structure²³. For this reason, it will then – without claims of exhaustiveness – address those areas of European Union legislation where it is commonly claimed that there are concerns regarding access to justice, to see whether TPLF may improve this situation. It will moreover discuss these situations in

²³ See ME MÉNDEZ PINEDO above footnote 5.

relation to the concepts of market failure in access to justice, to see whether TPLF may potentially bring some improvements. It will then assess how the externalities of TPLF could also potentially affect some more public policy goals of the European Union as resulting from the adoption of a social market economy, such as the social policies and EU integration. As with regard to the first, in particular, it will discuss whether TPLF may contribute to more redistribution and correction of wrongs, something that – especially in certain areas of the EU dimension – seem to lack effective solutions. It will then discuss whether this instrument may contribute somehow to the EU integration process, namely by removing/taking charge of certain barriers to intra-EU trade, i.e the litigation costs and risks.

PART I

**THIRD PARTY LITIGATION FUNDING: A COMPARATIVE LEGAL
ASSESSMENT**

Chapter 2

A Historical Overview

Meddling in other people's disputes, for profit or other reasons, is not a novelty in legal history, neither in the civil law nor in the common law jurisdictions. Maintenance, barratry and champerty doctrines, and the provisions limiting certain assignments of litigious assets (the prohibition on the PQL, but not only), are today's symbols of the historical cultural aversion towards the idea of mingling in other people's litigation. There is evidence that third parties have funded or otherwise maintained litigation at least since the ancient Greek and Roman times, although they seem to have been motivated more by socio-political reasons, rather than (or, at least, not only by) economic ones. Profit was certainly an important motivation for upper class members to get involved in other people's disputes, but this was mostly a way to display their social position and gain political support, although direct profit was also a common motivation. The advent of Christianity changed the overall vision of Justice: disputes were seen as an evil per se, even if well-grounded; these were like an attempt to undermine peace and harmony in society, and thus these practices were prohibited and/or limited. In the middle ages in England, meddling in litigation was instead more of a means of private (economic) war between wealthy landowners. It is in this period that the aversion towards such practices reached the highest level, and they largely disappeared.

When the Judiciary became independent from the executive and legislative powers bound by the rule of law, some doubts on whether the prohibitions mentioned could not be instead a barrier to access justice for impecunious claimants began to spread. However, it is only with the advent of the Welfare State that the idea of funding other people's disputes as a way to make them enforce legitimate rights started to gain ground. The lack of economic resources was soon recognized as a hurdle to access justice, and legal aid became a fundamental pillar in all modern western states'

constitutions. Litigation, especially in the US, came to be used also as a means to achieve public policy objectives, and the view that it was a societal evil started fading. Legislators around the world, in one way or another, began to loosen the strict legislation prohibiting third parties from funding or otherwise maintaining litigation, also as way to enhance access to justice.

In recent years, especially after globalization and the recent financial crisis²⁴, the possibility for third parties to fund or otherwise maintain litigation seemed to be gaining another dimension. Indeed, the cuts in public spending in Justice, the general increases in court costs', and the lack of capital in the market, seem to have determined a demand for external finances to fund litigation as never before. In this scenario, individuals and companies more and more often require the support of professional litigation funders to sustain their costly and lengthy disputes, and/or to valorise their claims. New challenges will be soon posed (and have somehow already been posed) to the western states' courts and legislators; these challenges, however, seem to be not entirely new in legal history, neither in the civil law nor in the common law jurisdictions.

1. Meddling in litigation (and the relative prohibitions) in the early civil law and common law jurisdictions

This paragraph describes some early phenomena of disputes' funding for profit or other reasons. It focuses in particular on Ancient Greece and Rome, as the 'cradles' of the classical culture and more in particular of the civil law legal tradition, and then on medieval England, as the 'cradle' of the common law legal tradition. Apart of course from providing an historical overview of such practices, this paragraph wants to show how and for what reason the prohibitions in both civil law and common law jurisdictions have been devised. The goal would be to provide the reader with the tools to understand whether the rationale of such limits and/or prohibitions would still be justified in the modern civil law and common law jurisdictions but also, more in general, to understand the historical cycle that they have followed.

²⁴ See J CROFT and M STEINITZ, above at footnote 2.

1.1. Ancient Greece

Appearing in courts with the support of other people has been a sign of dignity and power since the ancient Greek times; he who could not enjoy such support was regarded as a ‘miserable wretch in the literal sense of both words’²⁵. The reform of Solon in Athens, that allowed kind men to accompany in court such wretched friendless people²⁶, is therefore probably to be regarded as the first legal innovation in terms of enhancing access to justice through the support of third parties. This practice was referred to as ‘sykophanteia’, sycophancy, while the practitioners were known as ‘sykopantes’, sycophants. However, the complete disinterest in a case was already regarded negatively also at the time, as it became not uncommon that sycophants alleged or even invented the cases they maintained for personal, economic or political reasons²⁷.

1.2. Ancient Rome

It was during the ancient Rome period that the foundations of the modern system of access to justice and dispute resolution were laid down. For this reason an introductory analysis of this period is of the utmost importance not only for the study focused on the funding of litigation, but more in general because it has been the cradle of all the civil law jurisdictions. Indeed, as known, all the modern civil law codes draw - more or less - from the Roman law and, as we are going to mention more in detail in paragraph 2.2., the ancient Roman provisions which potentially impacted on the funding of litigation are still present in all modern civil codes, in one way or another. As a way to start the analysis of this evolutionary path, we will therefore now focus on the role played by legal counsels and by the ‘claim purveyors’ in the ancient Roman period. While this analysis will obviously focus on some practices to fund or otherwise maintain litigation, it will also be a chance to see how their evolution has gone in

²⁵ M RADIN, ‘Maintenance by Champerty’ (1935) *California Law Review*, Vol. 24, Issue 1, Art 6, 48 – 52.

²⁶ GM CALHOUN, *The Growth Of The Criminal Law In Greece*, Berkeley, 1927, 72.

²⁷ See C HODGES, J PEYSNER and A NURSE, above footnote 9.

parallel with the evolution of the whole administration of justice and of the legal systems analysed.

1.2.1. The institutionalisation of the legal profession and the prohibition on the pactum de quota litis

It is in the ancient Rome period that the role of legal counsels, as those who ensured access to justice and advised on the resolution of disputes through their knowledge of the law, has been institutionalised. People of high social rank – generally referred to as ‘advocati’, ‘scholastici’, ‘causidici’ or ‘patroni causarum’²⁸ - used to offer legal advice gratuitously to those in need. It became however not uncommon that they drew on this prerogative to acquire political prominence and support. Once the commercial activities proliferated in the III and II centuries BC, they began requiring also an ‘honorarium’, an upfront fee from their clients. The honorarium was however not regarded positively in society; it was seen as an abuse towards those that needed legal advice, often of lower social classes. For this reason, the Lex Cincia de Donis et Muneribus (‘Lex de Cincia’) in 204 BC prohibited any fee ‘ante causam’ for legal advice, though it was left to the discretion of the party to a dispute to do any spontaneous largesse ‘post causam’²⁹. However, this law did not foresee any sanction, not even the nullity of the fee agreement, and the legal experts mentioned continued charging onerous fees for their advice³⁰. For this reason the Emperor Augustus edited the Lex de Cincia so as to prohibit them from charging any fee for their activity, condemning the transgressors to pay four times what was required to clients³¹. Nevertheless, the debate on the gratuity (or not) of the legal profession certainly did not stop at this point, and the Emperor Claudius finally recognized the possibility for lawyers to charge fees for their work, though only post causam and limited to a

²⁸ V MAROTTA, ‘Una nota sui causarum concinnatores’ (2006) *Rivista Storica dell’Antichità*, Vol 36.

²⁹ P PESCANI, *Honorarium. Studi sul Lavoro nel Diritto romano*, Trieste, 1961.

³⁰ A BERNARD, *La rémunération des professions libérales en droit romain classique*, Domat-Montchrestien, Paris 1936, 91.

³¹ V ANGELINI, ““Metuendus ingratus” (Avvocato e cliente in una pagina di Quintiliano)” (1989) *Studi de Sarlo*, Milano.

maximum of 10.000 sestertii³². Providing legal advice became a normal working activity, which responded to both public and private interests and, as such, was remunerated by the clients within the limits of the law. This law, though, did not address the issue of payments measured by the results of the dispute or, even, represented by a share of its proceeds ('quota litis'). The first reference to the payment by quota litis seems to be detectable in a passage of Ulpianus³³, which has been interpreted as that the lawyers could not agree with their clients 'suspensa lite' (before the dispute was settled) to do a 'societatem futuri emolumenti' (share and assign the future proceeds of the dispute). It was however possible adding a 'palmarium' at the end of the dispute, meant as fee payable only in case of success. Some commentators assimilate this figure to a certain extent with the modern PQL³⁴, though it is likely that – considering the extent of the previous prohibition – the palmarium was more of an uplift success fee, not representing a quota litis. This would be confirmed by the distinction with societatem futuri emolumenti contained in the text of Ulpianus, and from a following constitution of the emperor Constantinus of 325 AD, that explicitly mentioned the prohibition for lawyers to be paid by part of the dispute proceeds³⁵.

1.2.2. *Claim purveyors and the limits to the redemptio litis*

The prohibition for legal counsels to be paid with a share of the case proceeds is not the only limit to the meddling of third parties in disputes in the Roman period. Apparently there was another quite well known practice referred to as redemptio litis, the transfer of claims by assignment or purchase, which at a certain point had drawn the attention of the Emperor for the potential abuses that it was entailing. In this regard, a general distinction should be made between the transfer of the 'res litigiosa pendente lite', the assignment of a legal action already begun, and the transfer of

³² The lawyers that violated this provision were sanctioned to pay four times the sum that they charged illegally. A BERNARD, above at footnote 30, 92.

³³ Digest 50.13.1.12.

³⁴ V ARANGIO - RUIZ, *Il mandato in diritto romano*, Napoli, 1949, p 116.

³⁵ C. 2.6.5. See G COPPOLA, *Cultura e potere, Il lavoro intellettuale nel mondo romano*, Giuffrè, Milano, 1994.

claims before the legal action was filed, referred to as ‘cessio actionis’. The transaction of the first type was void³⁶, and the defendant could require the staying of the proceedings using this argument as a defence³⁷. The cessio actionis was instead quite common during the Empire: people used to transfer claims to the most powerful persons, the so-called ‘potentiores’ or ‘honoratores’, also to draw on their social position and their power to influence the courts (which were usually composed of lower social rank officers)³⁸. The Emperor Anastasius I explicitly contrasted this practice in the 506 AD. The Lex Anastasiana indeed prohibited the ‘redemptores litium’, those who professionally purchased claims, to get from the dispute more than the price they had paid for the purchase, plus interests, or to get nothing if they simulated a donation³⁹.

The interpretation of the RL, and the distinction with the PQL, has not found a unanimous interpretation among legal historians yet, and the reasons vary from the fear of an increase in disputes, to abuses to the detriment of the parties involved⁴⁰. More particularly, some early commentators believed that the rationale of this figure was the protection of the assignor from the potential abuses of their lawyers and procurators; in so doing, these authors describe a contiguity between the PQL and the RL⁴¹. Others, more recently, believed that the sole scope of this rule was to protect the debtor from

³⁶ The first prohibition seems to be detectable in a constitution of the emperor Costantinus of the 331 AD (C.8.36.2). This provision aimed at prohibiting to both parties in a dispute the assignment of the ‘res litigiosa’ once the ‘denuntiatio’ was brought. The term ‘res litigiosa’ has both substantial and procedural nuances; it refers to any ‘res’ (thing) that is contested formally before a judge (with the ‘denuntiatio’). Therefore, it seems to include also the future proceeds of a dispute; the wording ‘redemptores litis’, i.e. the ‘purveyors of disputes’, would therefore identify those who professionally purchased ‘res litigiosae’. F DE MARINI AVONZO, *I limiti alla disponibilità della “res litigiosa” nel diritto romano*, Giuffrè, Milano, 1967, 352. In the Justinian Code (CJ.4.35.21) then, the scope of this prohibition was then specifically referred to the governors or arbiters that had to decide disputes falling into their jurisdiction.

³⁷ Digest 50, 13, 1, 12

³⁸ This practice was referred to as ‘cessio in potentiorem’, and prohibited in the constitutions of Honorius and Theodosium (C. Th. 2.13.1 and C. 2. 13. 2) of the 422 AD.

³⁹ C.4.35.22.

⁴⁰ M RENNPFERDT, ‘Lex Anastasiana’. *Schuldnerschutz im Wandel der Zeiten*, Göttingen, 1991, 37 - 41.

⁴¹ Ibid., 34, footnote 226 reporting the most authoritative authors supporting this opinion.

the vexations of the redemptores litium, for the sake of the more general feeling of 'favor debitoris'⁴² that characterised the Roman legislation on obligations at those times⁴³. While it is uncertain what was the real purpose of the Lex Anastasiana, it should be noted that the fact that it targeted a category which apparently was well known at those times⁴⁴ - the redemptores litium – shows that the RL was autonomous from the practice of legal counselling (and the related abuses of the clients)⁴⁵. As the Lex Anastasiana states, these were purchases of claims through 'cessiones' (assignments). It seems therefore that the two figures of PQL and the figure of RL were distinct in the ancient Roman times, though these might have certainly been confused and/or interchanged. The literature on this topic is not of much of help, and might have been influenced by interpolations made by the medieval 'glossatores'. In this regard, a terminological question should be highlighted, that apparently only in the XIV century, when Bartolus used it in a 'glossa'⁴⁶, the term PQL seems to have acquired the symbolic dimension that we all attribute to it today. In his passage, Bartolus explains the reasons why the PQL had to be prohibited, as this agreement could lead lawyers to 'calumniose advocabit'. In other words, this rule would avoid lawyers beginning vexatious legal actions and, also by relying on their high social rank, bringing these forward eventually with the aim to criticise someone, or otherwise obtain an undue profit. It is interesting to note also that the figure of 'calumnia' is in this passage approached to the PQL. Calumnia, calumny, referred to the fomentation of

⁴² In particular, see B BIONDI, *Il diritto romano cristiano*, Vol III, Milano 1954, 216.

⁴³ M RENNPFERDT, above at footnote 40, 34 footnote 226 and 49 footnote 298, reporting the most authoritative opinions in this regard, to which this author seems to adhere. See, also, G SANTUCCI, 'In tema di Lex Anastasiana' (1992) *Studia et Documenta Historiae et Iuris*, Vol 58, n 58, 325, 343-345.

⁴⁴ The Lex Anastasiana begins with '[p]er diversas interpellationes'; it then describes the 'redemptores litium' as 'nec enim dubium est ... qui tales cessiones in se confici cupiunt'. This would demonstrate that the 'redemptio litis' was a common and quite well identified practice in those times and, as such, distinguished by lawyers or procurators.

⁴⁵ M RENNPFERDT, above at footnote 40, 42 footnote 266-267. The Author recalls the opinion of other authors that argue that as the 'redemptores litium alienarum' have nothing to do with the procurators who bargained the sharing in the disputes' proceeds. The 'redemptores anastasiani', in this perspective, would be only the 'Käufer fremder Prozesse' (purveyors of other people's claims).

⁴⁶ Glossa *Immensa* ad C.2.6.5 (fol. 379)

actions in criminal and public affairs; ‘calumniatores’, instead, as those who used to bring baseless criminal actions aimed at discrediting public people, which were often political adversaries⁴⁷. In another passage the ‘redemptores causarum’ were linked to the ‘concinnatores (causarum)’, those who unjustifiably foment disputes, to state that both could be admitted to ‘postulare’ in court only to the extent that the edict permitted it⁴⁸. The fomentation of disputes had therefore some relevance in Ancient Rome and, together with the RL, was regarded with suspicion and sanctioned. However, these two figures seem to be distinguished to the extent that the RL, unlike the first, was aimed also at sharing the proceeds of the dispute. Moreover, the baseless and unmeritorious claims were sanctioned also with the torts of abuse of process and temerity⁴⁹.

The advent of Christianity then certainly influenced the way in which justice was administered up to the middle ages. Trials were in themselves dangerous threats to the peaceful society foreseen in the Bible, and litigation was regarded as vexatious not only if unjustified, but also when it was excessive or inopportune, even for well-grounded claims. Moreover, justice became more and more a public affair, managed by the Emperor or his officers. The possibility to interfere in other peoples’ disputes, for profit or otherwise, was therefore very much limited in those times⁵⁰.

⁴⁷ Radin assimilates the ‘calumniatores’ to the Ancient Greece ‘sykophants’. M RADIN, above footnote 25, 53.

⁴⁸ D.1.16.9.2. For a comment on this matter, see V MAROTTA, above at footnote 28.

⁴⁹ F CORDOPATRI, *L'abuso del processo*, I, CEDAM, 2000.

⁵⁰ An exception can be found in trial by battle, which was quite a common method to settle disputes in Western Europe during the early Middle Ages, when the Church did not consolidate its influence yet due to the Gregorian reforms of the 11th century. In this case, accusers where required to prove a fact by their own body and in the four ‘essoins’ (age, sex, infirmity and feudal rank) could eventually call a ‘campio’, a ‘champion’, to represent them in the battle and offer their body. See M RADIN, above footnote 24, 58-59. For some discussions on the meddling in litigation in the middle-age continental Europe see, also, A BRUNS, ‘Third-Party Financing in the Perspective of German Law—Useful Instrument for Improvement of the Civil Justice System or Speculative Immoral Investment?’ (2012) *Journal Of Law, Economics And & Policy*, Vol 8, n 3, 525, 531.

1.3. Meddling in litigation in medieval England. Maintenance and champerty

The middle ages were instead a period of more legal development for the common law. When the judiciary machinery became somehow more complex and sophisticated, a new class of legal experts developed, composed basically by the two figures of ‘attorneys’ and ‘narratores’. They were not regarded sympathetically for their capability of resorting to the law, which was discouraged by Christian ethics. While the narratores became King’s judges and counsellors, and were named ‘serjeants-at-law’, the attorneys continued performing their role of providing legal advice and eventually promoting lawsuits. For this reason they were sometimes accosted to the ‘calumniatores’ of Roman origins (or ‘sycophants’ in ancient Greece), and unsuccessful actions were regarded with high suspicion. However, what clearly distinguished attorneys from ‘calumniatores’ it is that the former had the royal consent (writ) that permitted their appearance at court. It is in this period that the common law prohibitions to fund or otherwise maintain litigation started to develop. It seems that the origins of champerty can be traced back in the wording ‘champart’, which came from ‘campi pars’ or maybe ‘campi partus’, a definite species of feudal tenure, well known at those times, especially in the customary law of northern France⁵¹. The first reference to the tort of champerty, though, has been found in the Statute of Westminster I, where it is possible to recognize the embryo of today’s figure⁵². The Statute of Westminster II, then, was enlarged also to the figure of ‘maintenance’, which instead referred more precisely to the practice of feudal lords to maintain their retainers’ lawsuits for profit⁵³. Indeed, English wealthy landowners used to support other parties’ land ownership claims’ by providing financial means to the claimants, and receiving part of the land as reward. This practice became a means to conduct a

⁵¹ It referred to a grant in which the reddendum was a specified ‘quota’ of the actual produce of the land granted, and probably this sharing of the production was reflected also in the disputes arising from that land. See M RADIN, above at footnote 25, 59 – 61, also for the evolution of the roles of attorneys and narratores.

⁵² Statute of Westminster of 1275 (3 Edw. I), Ch. 25: ‘None shall commit Champerty, to have Part of the Thing in Question’.

⁵³ See M RADIN, above at footnote 25, 62.

sort of private war between landowners, who used it as a way to increase their estates. As such, maintenance embraced champerty, and so was prohibited⁵⁴.

The analysis of the prohibitions of meddling in litigation for profit in the early common law must also take into account the figure of ‘barratry’, which was then defined by Blackstone as the ‘frequently exciting and stirring up [of] law suits’⁵⁵. This definition assimilates barratry to maintenance and champerty if the frequent incitement of lawsuits was repeatedly done for making a profit out of the disputes’ proceeds. Blackstone noted also that the Romans deemed the support to ‘another’s lawsuit by money, witnesses or patronage’ as crime⁵⁶. This argument was however challenged to the extent that, for the Romans, litigation was seen not as much as an evil, and that this perception was more of a Christian heritage⁵⁷. It seems therefore that the figure of barratry itself did not belong to the Roman tradition, unless it trespassed to ‘calumnia’, which as mentioned, referred more to the support of fraudulent, groundless, or frivolous litigation. In Rome ‘the maintenance of a vexatious lawsuit for profit’ would not have been meant as calumnia ‘because it was not clearly the maintenance of a wrongful action’⁵⁸.

Finally, the common law historical prohibitions to certain assignments of ‘choses in action’, as the main category encompassing also any right that could give rise to claims, have to be considered. The concept of choses in action is very wide, and reconstructing its history and the related prohibitions is certainly not an easy task⁵⁹. For

⁵⁴ M RADIN, *Ibid.*, 63. Moreover, it is to be noted that the practices of champerty and manteinance were often accompanied by embracery, which represents the direct intimidation of justice. See W HOLDSWORTH, *History of English Law*, 18 vols (5th ed, 1942) at 3:395.

⁵⁵ W BLACKSTONE, *Commentaries*, Book IV, Ch. 10, par 11. Available at <http://lonang.com/library/reference/blackstone-commentaries-law-england/> (last vis. 6.2.2017) Barratry, as maintenance and champerty, was an offence against public justice and, as such, punished by imprisonment and monetary sanctions including treble damages.

⁵⁶ W BLACKSTONE, *Ibid.*, par 12 on maintenance.

⁵⁷ Radin, in fact, pointed out that the view that ‘litigation was itself something to be discouraged, even if the claim was well founded’ was against the Roman law. M RADIN, above at footnote 25, 56.

⁵⁸ M. RADIN, above at footnote 25, 59

⁵⁹ One of the most important works of research on the story of ‘choses in action’ describes them as: ‘all rights which are enforceable by action - rights to debts of all kinds, and rights of action on a contract or a

the purposes of our work, it is at this stage important to note that the prohibitions to the assignment of choses in action in the early common law were the rule, if not absolute. The reasons for this prohibition were different, and are still of relevance for today's debate. Assignment of choses in action would have indeed facilitated champerty and maintenance; moreover, choses in action were considered personal, and so the exercise of an action was not detachable from the exercise of the ownership of the right encompassed in them⁶⁰. In this regard, another principle of law, applicable to all assignments, was that a 'claim to damages for a personal tort, before it is established by agreement or adjudication has no value that can be so estimated as to form a proper consideration for a sale . . . until it is thus established, it has no elements of property sufficient to make it the subject of a grant or assignment'⁶¹.

2. From the establishment of the rule of law to the recent financial crisis

This paragraph describes the evolutionary path that the litigation funding practices and the related prohibitions have followed in modern states, and with it the justice administration system. With the establishment of the rule of law and the independence of the judiciary from the other powers, the fear that justice could be tainted by

right to damages for its breach; rights arising by reason of the commission of tort or other wrong; and rights to recover the ownership or possession of property real or personal. It was extended to cover the documents, such as bonds, which evidenced or proved the existence of such rights of action. This led to the inclusion in this class of things of such instruments as bills, notes, cheques, shares in companies, stock in the public funds, bills of lading, and policies of insurance. But many of these documents were in effect documents of title to what was in substance an incorporeal right of property. Hence it was not difficult to include in this category things which were even more obviously property of an incorporeal type, such as patent rights and copyrights. Further accessions to this long list were made by the peculiar division of English law into common law and equity. Uses, trusts, and other equitable interests in property, though regarded by equity as conferring proprietary rights analogous to the rights recognized by law in hereditaments or in chattels, were regarded by the common law as being merely choses in action.' WS HOLDSWORTH, 'The History of the Treatment of Choses in Action by the Common law' (1920) *Harvard Law Review*, Vol 33, 997 - 998.

⁶⁰ Ibid, 1018.

⁶¹ AJ SEBOK, above at footnote 13, 80, citing an historical argument reported in MNC Credit Corp. v. Sickles, 497 S.E.2d 331, 333–34 (Va. 1998), 569–70

speculative practices and/or corrupted became less of a concern. The rationale of the prohibitions to fund or otherwise maintain litigation started to be questioned, especially for their feature of preventing access to justice for the poor. It is however only in the second half of the XX century and then in the beginning of the XXI that the possibility to fund litigation as a way to guarantee access to justice and equality of arms has been cleared.

2.1. Judicial independence and the rule of law in common law jurisdictions

Even if different mechanisms were devised to circumvent the prohibitions to fund or otherwise maintain litigation, especially in the world of merchants, courts of common law constantly continued to overturn the funding agreements between the 14th and 17th centuries⁶². The function of these prohibitions was still to repress those powerful people who exercised their influence over the administration of justice; parties could therefore apply for the stay of proceedings relying on these grounds. However, generally it was something of a paradox that the stronger party was able to invoke this argument against the ‘weaker-though-funded’ one, who was clearly unable to bring his lawsuit otherwise. Things started to change later on with the gradual establishment of the rule of law, which somehow entailed more judicial independence and diminishing of feudal powers. Funding litigation does not represent anymore a ‘disturbance or hindrance of common right’, to the extent that judges are now not afraid of countering feudal lords’ positions. This is well described in Bentham’s words:

‘A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal

⁶² V MORABITO and VC WAYE, ‘The Dawning of the Age of the Litigation Entrepreneur’ (2009) *Civil Justice Quarterly*, Vol 28, n 3, 389, 392. The contrariety to such practices still in the early seventeenth century can be deduced from Lord Chief Justice Coke’s words: ‘Maintenance, manutenentia, is derived from the verb manutene, and signifieth in law a taking in hand, bearing up, or upholding of quarrels and sides, to the disturbance or hindrance of common right’. 1 Coke Litt 368b cited in M FRISTON, *Civil Costs Law and Practice* (2nd ed), Jordans.

phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands’⁶³.

With regard to the assignment of chose in action, as the recourse to common law courts was unsuccessful, assignees began to resort to courts of equity, which started to approve such agreements⁶⁴. The prohibitions to assignments of choses in action were indeed soon recognized as too stringent, and somehow ‘peeled off like the layers of an onion’⁶⁵; a series of statutory provisions were enacted in order to allow the assignment of patents, bonds or bills for debt⁶⁶.

2.2. *The age of codifications: re-iteration of the prohibitions of Roman origin*

After the dissolution of the Roman Empire, what was left in the European continent was a multitude of legal systems which continued to apply the Roman law as interpreted by the times’ sovereigns and courts, without bringing significant changes. Also the perception towards the possibility for lawyers to enter into PQL and other similar practices did not change much. It seems that there would be evidence that Frederick II of Swabia and then the French sovereigns adopted the prohibition to the PQL respectively in 1345 and 1560⁶⁷. The most significant change in the legal history concerning the meddling of third parties in litigation – but also, more in general, of the civil law jurisdictions - is certainly the enactment of the ‘Code Napoléon’. In this

⁶³ J BENTHAM, *Defense of Usury* (1818) London: Payne and Foss, available at <http://www.econlib.org/library/Bentham/bnthUs2.html> (last vis. 6.2.2017). See in particular Letter XII, Maintenance and Champerty, 7.

⁶⁴ See W S HOLDSWORTH, above at footnote 59, 1020.

⁶⁵ AJ SEBOK, above at footnote 13, 79. Sebok cites *Rice v. Stone*, where the Massachusetts Supreme Judicial Court stated: ‘[At one time a] thing in action, cause of suit or title for condition broken, could not be granted or assigned over at common law. . . . But this ancient doctrine has been greatly relaxed. Commercial paper was first made assignable to meet the necessities of commerce and trade. Courts of equity also interfered to protect assignments of various choses in action And at the present day claims for property and for torts done to property are generally to be regarded as assignable . . . ’ See *Rice v. Stone* 83 Mass. 566, 568 (1861).

⁶⁶ Supreme Court of Judicature Act 1873 s. 25(6). Later updated by s.136 of Law of Property Act 1925.

⁶⁷ R DANOVY, *Compenso professionale e Patto di quota lite*, Giuffrè, Milano, 2009, at 12-21. See, also, A BRUNS, above at footnote 50, 531-533.

Code the prohibition for lawyers to be paid on a PQL basis was for the first time codified at article 1597, which re-iterated the prohibition and extended it also to other personnel somehow involved in the Judiciary⁶⁸. This enlargement of the field of application ‘ratione personae’ of this figure aimed at preventing the people who administered justice from committing abuses, and certainly followed the institutional evolution of those times. The separation of powers (inspired by the Enlightenment) has indeed entailed the necessity of more limits to single powers, and more accountability for those involved in all of them. In this particular case, if the executive power could not anymore control the judiciary, a general and abstract rule aimed at preventing those involved in the judiciary from relying on their public function to meddle abusively in private affairs was a guarantee of the impartiality and independence of the judiciary machine.

The Code Napoléon moreover addressed the abuses to justice that might occur at the end of any individual, by re-iterating the RL as the ‘retrait litigieux’, codified in the article 1699⁶⁹. There is not much evidence that in this period the purchase of claims by assignment was commonly and professionally practiced. However, the legislator of the Napoleon Code recovered this rule as it certainly aimed at protecting a legitimate public interest objective also in those times. As it is known, the code Napoleon then – in one way or another⁷⁰ - influenced the civil codes around Europe and the world, and similar provisions exists in most of them. However, while the prohibition for lawyers to enter into a PQL is somehow present in all (at least European) civil law jurisdictions⁷¹, the same cannot be said for the RL. Indeed, this provision is present in

⁶⁸ ‘Les juges, leurs suppléants, les magistrats remplissant le ministère public, les greffiers, huissiers, avocats, défenseurs officieux et notaires’.

⁶⁹ ‘Celui contre lequel on a cédé un droit litigieux peut s'en faire tenir quitte par le cessionnaire, en lui remboursant le prix réel de la cession avec les frais et loyaux coûts, et avec les intérêts à compter du jour où le cessionnaire a payé le prix de la cession à lui faite’. With regard to the RL and the Lex Anastasiana see above par 1.2.2.

⁷⁰ X BLANC-JOUVAN, ‘Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration’ (2004) *Cornell Law School Berger International Speaker Papers*. Paper 3, available at http://scholarship.law.cornell.edu/biss_papers/3.

⁷¹ See, for example, art. 3.3 of the European Code of Conduct for lawyers,

some civil codes, such as for example the French and in the Spanish⁷², while in others it has been repealed for the sake of the freedom of commerce. For example, the Italian legislator abrogated the ‘retratto litigioso’ in the Commercial Code of 1882 as a way to facilitate business transactions⁷³. Moreover, even if it was present in the civil codes entered into force before the reunification of Italy⁷⁴, it was not proposed in the Italian Civil Code enacted in 1942 and still in force⁷⁵. Another example can be found in the Netherlands, where this provision was abolished in the civil code of 1838 for the same

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf, or art. 1261 of the Italian Civil Code, that nevertheless refers to ‘creditit litigiosi’, and not to ‘procès, droits et actions litigieux’, or art. 1459 of the Spanish Civil Code: ‘No podrán adquirir por compra, aunque sea en subasta pública o judicial, por sí ni por persona alguna intermedia: ... 5.º Los Magistrados, Jueces, individuos del Ministerio Fiscal, Secretarios de Tribunales y Juzgados y Oficiales de Justicia, los bienes y derechos que estuviesen en litigio ante el Tribunal, en cuya jurisdicción o territorio ejercieran sus respectivas funciones, extendiéndose esta prohibición al acto de adquirir por cesión. (...) La prohibición contenida en este número 5.º comprenderá a los Abogados y Procuradores respecto a los bienes y derechos que fueren objeto de un litigio en que intervengan por su profesión y oficio.’ This does not mean that, also in those times, the rationale of this rule was not discussed in civil law jurisdictions. Certain commentators, already in the end of the XIX century, recognised that the PQL could have been, in certain situations, a ‘compassionate, noble and good act made by lawyers to impecunious claimants. See D GIURATI, *Come si fa l'avvocato*, Livorno, 1897. Others even noted that the PQL wouldn’t have been against any moral or law. See MD KORNÈ, *Pactul de quota litis e valabil*, Bucarest, 1897.

⁷² The ‘heir’ of the Lex Anastasiana still exists also for example in Article 1535 of the Spanish Código Civil, which states: ‘Vendiéndose un crédito litigioso, el deudor tendrá derecho a extinguirlo, reembolsando al cesionario el precio que pagó, las costas que se le hubiesen ocasionado y los intereses del precio desde el día en que éste fue satisfecho. Se tendrá por litigioso un crédito desde que se conteste a la demanda relativa al mismo. El deudor podrá usar de su derecho dentro de nueve días, contados desde que el cesionario le reclame el pago’. C MARTINEZ DE AGUIRRE, ‘La Transmisión Activa y Pasiva de Obligaciones en el Derecho Navarro’ (1997) *Revista Jurídica de Navarra*, Vol 27, n 9, 12-17. For the equivalent provision in the French Code Civil, see above, footnote 68.

⁷³ R ALESSI and V. MANNINO, ‘La circolazione del credito: Cessione, factoring, cartolarizzazione’, Vol I, in *Trattato delle Obbligazioni*, L GAROFALO and M TALAMANCA eds, Padova: Cedam, 2008, 234.

⁷⁴ For example, art. 1705 of the Codice Albertino, art. 1600 of the Codice Estense, art. 1514 of the Codice Parmense, art. 1454 Codice of the Due Sicilie, art. 1546 of the Codice Civile italiano of 1865.

⁷⁵ As confirmed by the early Italian republican jurisprudence. See Corte d’Appello di Napoli, 22 of July 1946, in Dir. Giur. 1947, 75 (maxim).

reason⁷⁶.

2.3. Access to justice in the United States and the first concerns regarding the prohibitions to fund litigation

In the US the discussions regarding the possibility for third parties to maintain litigation draws from the English experience, but at the same time it sharply differentiates from it. Maintenance, barratry, champerty and the prohibitions to certain assignments existed (and, to a certain extent, still exist), but the total opposition to funding or otherwise maintaining litigation was early rejected. The background of these figures had indeed considerably changed, and so did public conscience, so that the possibility for third parties to meddle in litigation started being permitted⁷⁷. Courts in fact soon recognised that these offences were a reminder of the English feudal regime, which of course was not a problem of the US⁷⁸, and began loosening the field of application of maintenance and champerty so as to allow lawyers to charge contingency fees⁷⁹. The ethics and the opportunity of charging contingency fees (and,

⁷⁶ C ASSER, *Het Nederlands Burgerlijk Wetboek Vergeleken met het Wetboek Napoleon*, 2nd ed., Van Cleef, 1838, 520.

⁷⁷ See discussion reported in *Sprint Communications Co v APCC Services Inc* 128 S Ct 2531 (2008), 2538.

⁷⁸ See, in particular, the New York Court of Errors' 1824 case *Thallhimer v. Brinckerhoff*, where the Court reviewed the unjust and flawed legal context of Medieval England that engendered these doctrines: '[T]he English doctrines of maintenance and champerty arose from causes unique to English life. The [New York Court of Errors in Thallhimer] especially pointed to a statute from the 32nd year of Henry VIII, "to repress the practices of many who when they thought they had title or right to any land, for the furtherance of their pretended right, conveyed their interest in some part thereof to great persons, and with their countenance, did oppress the possessors." . . . What had happened was that "small men" transferred their rights of action in property disputes to "great men" in order to get the great men's support at law. Because the legal establishment was weak at the time, the great men could overwhelm the court, thus enabling the little man to get his land claim and the great men to get their share. In other words, champerty was a means by which great men increased their power at the expense of the courts of justice.'

⁷⁹ See *Stanton v. Embrey* (1877) 93 U. S. 548, 'The proposition (i.e. that contingent fees are legal) is one beyond legitimate controversy.'

more in general, to finance litigation) has long been discussed also at those times⁸⁰. While in England and Wales, due to the background mentioned, opposition to contingency fees was very strong until the 2000's, in the US the possibility of supporting access to justice by means of contingency fees overcame these concerns, especially if the claimant had no property or money, but a valuable case in action. Perceptions towards the prohibitions on funding litigation were definitely changing. Judge Cardozo, in a decision of the New York Court of Appeals, considered 'maintenance inspired by charity or benevolence' as lawful, while 'maintenance for spite or envy or the promise or hope of gain', unlawful⁸¹. The Court stated '[I]t seems to be agreed that anyone may lawfully give money to a poor man to enable him to carry on his suit. . . . What is feared and forbidden is the oppressive meddling of wealth or officialdom for publicity or profit'⁸². The conception that the scarcity of economic resources was a hurdle for access to justice started to gain ground in mid-nineteenth century, when movements for the institutionalisation of Legal Aid started to appear in the US. The Colorado Court of Appeals symbolically expressed the frustration of many tort victims unable to claim for compensation because of a lack of the resources necessary to file and maintain their claims: 'A poor man may have the right upon his side, but be without means to enforce such rights in the courts, and possibly against some powerful adversary'⁸³.

2.4. Legal aid movements and the first waivers to the prohibitions to fund litigation

Access to justice for impecunious claimants in the mid-twentieth century became more and more of a concern, especially because this was starting to be treated as a 'door-key' for obtaining any other right, including those of a social nature. It is for this reason that in this period, Welfare state theorists addressed the issue of funding indigent claimants' disputes as a way to guarantee an effective enforcement of rights,

⁸⁰ GP COSTIGAN, *Cases and other authorities on the legal profession and its ethics*, 2d ed., 1933, 643-649; JH COHEN, *The law: business or profession?*, New York: Banks Law Publishing Co., 1916, 205.

⁸¹ *In re Gilman's Adm 'x*, 167 N.E. 437, 439 (N.Y. 1929).

⁸² *Gilman's*, 167 N.E. at 439-40.

⁸³ *Casserleigh v. Wood*, 59 P. 1024, 1026 (Colo. App. 1900).

although with different approaches in common law and civil law jurisdictions⁸⁴. Legal aid was seen as necessary tool to implement not only the right to access state justice, equality before the law, the right to a fair trial, but also a whole series of social rights⁸⁵. As such, it was meant as a means to stimulate a fairer redistribution of resources: without the possibility of accessing courts to enforce legitimate legal positions, the rights to housing, social assistance, education, labour, and social care rights could have remained a dead letter. Legal aid movements, foundations and associations mushroomed throughout the western world, and the right of access to justice became a fundamental pillar in all of the modern constitutions. These theories on access to justice not only helped to achieve the previously-mentioned social goals, but also finally changed the vision that people had of litigation, no longer ‘a social evil but a form of political expression and, in particular, an avenue for plaintiffs (the “aggrieved”) to learn of and to “effectuate” “legal rights”⁸⁶. In the UK, for example, the introduction of legal aid – which was recommended in the 1945 Rushcliffe Report⁸⁷ – had been interpreted indeed as the first statutory breach to maintenance, justified by the fact that it served to grant access to justice to ‘have-nots’. Further exceptions were made as insurance and trade union funded litigation were growing⁸⁸. In 1964, in a document study undertaken by the American Bar Foundation, the research affiliate of the American Bar Association (‘ABA’), it was stated that ‘the belief that litigation, per se, is bad has been replaced by the view that litigation is a

⁸⁴ F REGAN, ‘Why Do Legal Aid Services Between Societies? Re-examining the Impact of Welfare States and Legal Families’, in F REGAN, A PATERSON, T GORIELY and D FLEMING (ed.), *The Transformation of Legal Aid: Comparative and Historical Studies*, Oxford University Press, 1999, 179. See, more in general, the overall content of this book, which not only discusses the different regimes, but also their evolution.

⁸⁵ M CAPPELLETTI, above at footnote 1.

⁸⁶ SC YEAZELLE, ‘Brown, the Civil Rights Movement, and the Silent Litigation Revolution’ (2004) *Vanderbilt Law Review*, Vol 57, 1975, 1990-97.

⁸⁷ RUSHCLIFFE COMMITTEE, *Report of the Committee on Legal Aid and Legal Advice in England and Wales* (1945) (CMD 6641), London: H.M.S.O.

⁸⁸ D NEUBERGER, *From Barretry, Maintenance and Champerty to Litigation Funding*, Harbour Litigation Funding First Annual Lecture, Gray’s Inn, 8 May 2013, 37, available at <https://www.supremecourt.uk/docs/speech-130508.pdf> (last vis. 27.8.2017).

socially useful way to resolve disputes, particularly the injury claims arising from our mechanized society⁸⁹. Moreover, the prohibitions on assignment have been gradually repealed or abandoned, though some exceptions survive⁹⁰. In the same years, in England and Wales, the criminal provisions attached to the torts of champerty and maintenance have been abolished by the Criminal Law Act⁹¹, which nevertheless kept champertous agreements invalid. In so doing, champerty survived as rule of public policy, and contracts could be ruled unenforceable if champerty is not justifiable⁹². In Australia, the first derogation to the doctrines of champerty and maintenance by means of law was introduced in 1995⁹³. Similar discussions have taken place in Canada during the early 2000's⁹⁴. On the other side, in the EU's Civil law jurisdictions the prohibition for lawyers and other personnel involved in the judiciary to enter into PQL still survives, in one way or another⁹⁵. However, the legal profession has undergone a process of liberalisation that has somehow eroded the scope of these provisions⁹⁶,

⁸⁹ FB MACKINNON, *Contingent Fees for Legal Services: Professional Economics and Responsibilities*, Transaction Publishers, 1964, 210. As consequence of this change in mentality, in the US the encouragement of private litigation as a means to achieve public policy objectives became the rule in a series of fields of law. An important example is the treble damages in private enforcement of antitrust laws. This was meant to be a means to achieve the public policy objective of deterring potential wrongdoers from entering into agreements that would violate antitrust laws. Indeed, the state was aware that public enforcement could not have been enough to detect antitrust violators, and so gave an incentive to private actors to enforce privately such actions. The efficacy of these remedies has however been discussed for a long time. See ME WHEELER, 'Antitrust Treble-Damage Actions: Do They Work?' (1973) *California Law Review*, Vol 61, n 6.

⁹⁰ See AJ SEBOK, above at footnote 13.

⁹¹ C. 58, § 14.

⁹² § 13 and 14 of the Criminal Law Act.

⁹³ L AITKEN, 'Before the High Court: "Litigation Lending" After Fostif' (2006) *Sydney Law Review*, Vol 28, 171, 177.

⁹⁴ *McIntyre Estate v. Ontario (Attorney General)*, (2002) 61 OR (3d) 257 (CA). This case will be discussed more in detail in the par 2.2. of Chapter 3.

⁹⁵ See above subparagraph 2.2., and in particular footnote 71.

⁹⁶ As for the EU legislation on the liberalisation of the legal profession see the Directive 98/5/EC to facilitate the practice of the profession of a lawyer on a permanent basis in a member state other than that in which the qualification was obtained (the 'Establishment Directive'). On lawyers' fees see, for

allowing alternative lawyers' fees⁹⁷ that achieve – though more limitedly – the same scope.

2.5. The impact of globalization and of the financial crisis on access to justice and dispute resolution

The previously mentioned changes in regulatory frameworks have undoubtedly paved the way for the emergence of the modern practices for funding or at least supporting litigation, although *per se* might not explain why TPLF has emerged. There have been other factors that certainly may have facilitated this process, such as economic globalization⁹⁸, and the recent financial crisis⁹⁹. The policies that have favoured the economic globalisation, relied on the idea - developed first by Adam Smith¹⁰⁰ and Ricardo¹⁰¹ - that freer trade areas enhance the wealth of nations by stimulating a more

example, Case C-94/04 and C-201/94, *Cipolla and Others*, ECLI:EU:C:2006:758. In these cases the European Court of Justice deemed regulations on minimum lawyers' fees as inconsistent with the EU's principles on freedom to provide services.

⁹⁷ For an overview on member states' lawyers' fees, see BJ RODGER (ed.), *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU*, Kluwer Law International, 2014, Part I, Ch. 2, § 2.05 on funding mechanisms and costs.

⁹⁸ Economic globalization is here meant as the result of precise policy choices enacted at a global level to favour cross border business. In general, see J RAKESH MOHAN, *International Business*, Oxford University Press, New Delhi and New York, 2009. More in particular with regard to the World Trade Organisation ('WTO') legal framework, see JH BARTON, JL GOLDSTEIN, TE JOSLING and RH STEINBERG, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*, Princeton University Press, 2008, 256 p. The WTO was indeed created at the end of the XX century with the main purpose of abolishing or reducing the barriers to international trade. For the same reason, especially throughout the second half of the XX century, few other areas have been 'created' to make interstate trade free(r). In the European Union, tariff and non-tariff barriers have been abolished in the treaties, though these could be justified by overriding national public interest issues. See C BARNARD, *The Substantive Law of the EU - The Four Freedoms*, Oxford University Press, 2013, Fourth Edition, 800 p.

⁹⁹ J CROFT and M STEINITZ, above at footnote 2.

¹⁰⁰ A SMITH, *An Inquiry into the Nature and Causes of the Wealth of Nations*, London: Cannan (ed.), 1776

¹⁰¹ D RICARDO, *On the Principles of Political Economy and Taxation*, London: Murray (ed.), 1817

efficient allocation of goods, capitals, services and workforce. The assumption is that if companies operate across different jurisdictions, they may optimize their output by relying on the comparative advantage of working and trading in countries where the stated factors are cheaper. However, it seems to be a matter of fact that new transactions engender more disputes. The statistics of the International Chamber of Commerce ('ICC') show that the number of international requests has steadily increased in the last years¹⁰². Since the ICC was founded in 1923, its International Court of Arbitration handled more than 20.000 disputes with litigants from more than 200 jurisdictions. More than 10.000 requests for arbitration were filed only in the last 15 years. The numbers would be much higher if these data would be projected in a wider scale, encompassing both transnational litigation and Alternative Dispute Resolution methods (ADR) worldwide. It must be noted, however, that business operators lately have decidedly preferred arbitration or more in general any ADR, to solve international disputes, rather than litigating them in national courts¹⁰³. In this scenario, it seems that we are assisting at a sort of 'privatization' of civil and commercial Justice, which, from a state monopoly, in the last decades has become more of a private market-oriented affair. ADR has proliferated in the last years as more efficient tools to solve civil and commercial disputes, especially if cross-border. The increase in cross-border disputes generates also a higher demand for legal services and related, as it contributes to the 'enlargement of the legal world'¹⁰⁴. The 2014 Hogan Lovells report on trends in cross-border disputes clearly demonstrates how an increase

¹⁰² See at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/> (last vis. 7.2.2017).

¹⁰³ According to a 2013 PriceWaterhouseCoopers survey among 150 global in-house counsels of multinational companies, 73% of corporations prefer international arbitration to trans-national litigation. PRICEWATERHOUSECOOPERS, 2013 International Arbitration Survey, *Corporate choices in International Arbitration Industry perspective*, available at <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> (last vis. 7.2.2017).

¹⁰⁴ Galanter uses this wording to explain how in the last decades 'there has been a dramatic change in scale of many aspects of the legal world: the amount and complexity of legal regulation; the frequency of litigation; the amount and tenor of authoritative legal material; the number, coordination and productivity of lawyers; the number of legal actors and the resources they devote to legal activity; the amount of information about law'. M GALANTER, 'Law Abounding: Legalisation Around the North Atlantic' (1992) *Modern Law Review*, Vol 55, n 1, 1, 2. See more in detail Chapter 4, par 1.3.2.

in demand generates an increase in costs for these services¹⁰⁵. Economic globalisation affects also the law firms' management and organisations. For example, global law firms are 'outsourcing' the discovery activities related to countries where discovery entails high costs, such as the US and UK, to other countries where lawyers and paralegals have lower costs¹⁰⁶. More in general, it seems that the legal profession is going through some epochal changes: if the lawyers' role in society, as holders of the (legal) knowledge, has traditionally granted them the monopoly over access to courts and dispute resolution counselling, today this monopoly has been eroded from all sides. The complexity of global dispute resolution issues has indeed transformed many of the features that traditionally have characterised litigation. For example, it is now very common to recur to (non legal) experts to determine (sometimes the most) important features of litigation, such as the quantification of damages' amounts. This may shift (at least part of) the monopoly on the information necessary to solve a case to non lawyers and, most importantly, determine a further increase in dispute resolution's costs¹⁰⁷.

Apart from economic globalization, also the recent financial crisis seems to have played an important role in changing the global litigation scenario. The financial crisis, has indeed made individuals and companies more cost and risk averse, but also has constrained the states' budgets. More particularly, as a result of the recent financial crisis, in the judiciaries of western states there have been general cuts on spending, also in the legal aid¹⁰⁸, and parallel increases in court costs¹⁰⁹. These changes have

¹⁰⁵ HOGAN LOVELLS, *Global Currents: Trends in Complex Cross-Border Disputes*, 2014, available at <https://www.hoganlovells.com/en/events/global-currents-trends-in-complex-cross-border-disputes> (last vis. 7.2.2017).

¹⁰⁶ PA BERGIN, *Litigation and Globalisation*, Address by the Honourable Justice P A Bergin to the New Young Lawyers Litigation seminar, Sydney, 31 March 2007, available at http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2007.03.31.pdf (last vis. 7.8.2017).

¹⁰⁷ MG FAURE and LT VISSCHER, 'The Role of Experts in Assessing Damages - A Law and Economics Account' (2011) *European Journal of Risk Regulation*, Vol 3, 376. In particular, see S. IV.2.

¹⁰⁸ A FLYNN, N BYROM and J HODGSON, *Access to Justice: A Comparative Analysis of Cuts to Legal Aid*, Report of the Monash Warwick Legal Aid Workshop hosted by Monash University with the support of the University of Warwick, Monday 21 July 2014, available at

increased the barrier of access to justice, and so somehow pushed a market demand for instruments that allow sharing the risks and costs of litigation. Moreover, the financial crisis has also engendered an increase in the volume of disputes. A recent Price Waterhouse Coopers report shows that 35% of the 150 global in-house counsels of multinational companies reported that the 2008 financial crisis resulted in a noticeable increase in disputes¹¹⁰, although the demand for legal services has not gone in parallel and actually the legal market is suffering from fierce competitive constraints¹¹¹. In fact, a significant number of multi-national companies have even decided to withdraw from arbitration proceedings for lack of economic resources, while others more and more often resort to – in order of importance - alternative lawyers' fee schemes, TPLF or LEI¹¹². The situation of economic contingency increased risk aversion, and has resulted in further barriers to access to justice, or dispute resolution¹¹³. In this scenario, the individuals and companies that have survived the financial crisis have been experimenting with alternative ways to carry out their businesses with reduced financial risks. Rational managements more and more decide to enter into TPLF agreements to avoid the upfront costs and potential risks of litigation, or assign their claims for consideration to specialized companies in order to create value immediately¹¹⁴.

http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice/14385_monash_report_single_pages.pdf (last vis. 7.8.2017).

¹⁰⁹ HOGAN LOVELLS LLP, *At what cost? A Lovells multi jurisdictional guide to litigation*, 2010, available at <http://www.chrysostomides.com/assets/modules/chr/publications/16/docs/LitigationCostsReport.pdf> (last vis. 27.8.2017)

¹¹⁰ PRICEWATERHOUSECOOPERS, above at footnote 103.

¹¹¹ GEORGETOWN LAW – CENTRE FOR THE STUDY OF THE LEGAL PROFESSION, above at footnote 2.

¹¹² PRICEWATERHOUSECOOPERS, above at footnote 103.

¹¹³ M STEINITZ, above at footnote 2, 1283 – 1285.

¹¹⁴ J CROFT and M STEINITZ, above at footnote 2.

3. Concluding remarks: a fast growing TPLF (and litigation) market

The above discussions bring to the main consideration that TPLF seems to have emerged as a consequence of a fast growing new market demand. The situation of economic constraint that has followed the crisis has indeed made individuals and companies more cost and risk averse, and certain changes in economic policies have increased the demand for this service. As such, it is likely that ‘TPLF’ might open some interesting perspectives for access to justice and dispute resolution at a global level. ‘TPLF’ seems however to have found a fertile terrain in certain modern jurisdictions, especially after some changes in legislation and case law have allowed bargaining over litigation. As a way to confirm this assumption, the following Chapter will discuss – without claims of exhaustiveness - the legal and factual issues concerning TPLF in the jurisdictions where it has emerged more extensively so far. Particular attention will be paid to those jurisdictions of common law where ‘TPLF’ has already emerged with a certain impetus, and those European civil law countries where it is starting to appear day by day. Before beginning to analyse the single states’ experiences, it is however important to recall the main points of this brief and certainly not exhaustive historical overview, which may serve as a pathway for the future debate.

- a) The practices of conscious meddling in other peoples’ disputes have historically pursued different purposes, from political to economic to social, and have been done for direct financial profit, but not only that.
- b) These practices have at some point been prohibited both in the early civil law and common law jurisdictions by reason of similar public policy objectives: protecting the administration of justice and the weak parties from potential distortions deriving from the abusive meddling in disputes.
- c) The various prohibitions on meddling in litigation have started being questioned once modern liberal states were established, and fundamental rights granted more widely. These prohibitions were seen as a limit for impecunious parties to enjoy true equality via access to justice.
- d) Welfare states purported to grant more effective access to justice as a means to enjoy a wider array of rights, both of a liberal and of a social nature, and to pursue redistributive purposes. In this regard, legal aid represents the state’s attempt to fund litigation as means to implement other rights, but also the first

waiver to the prohibitions to meddle in litigation for profit.

- e) A series of global trends, and in particular the recent financial crisis, have posed new challenges to access to justice and dispute resolution. Not only impecunious individual claimants, but also companies have started seeking alternatives to face litigation without upfront costs and risks. In this context, TPLF seemed to have emerged as a consequence of a new market demand.

Chapter 3

TPLF: A Comparative Legal Analysis.

The historical overview has served the main purpose of showing the cycle that a series of practices to maintain or otherwise meddle in litigation (for profit or otherwise) have followed, and with it the applicable limits and/or prohibitions. It has been interesting to see that the prohibitions to such practices started being discussed once the modern liberal states and the rule of law were established in both common law and civil law jurisdictions, and with it the separation of the Judiciary from other powers. It has finally been interesting to see that the recent TPLF phenomenon seems to have emerged to respond to a definite market demand for access to justice coming mainly from the corporate world¹¹⁵. This demand has been triggered mostly by the recent financial crisis, which has increased the cost and risk aversion of companies and individuals, but also affected the states' policies in the field of civil and commercial justice. The entities that have decided to professionally deploy capital to fund litigation have moreover found a fertile terrain in the changes in legislation that have occurred (at least) in the last four or five decades, and especially in the last part of them. It is a fact that in recent years TPLF is being experienced with some success in certain common law jurisdictions¹¹⁶, and in some (mostly the European Union's) civil law countries¹¹⁷. For this reason, this analysis now goes on focusing on those countries where TPLF has developed more significantly in the last years. In particular, Australia, Canada, England and Wales, the US, and some of the European civil law jurisdictions will be put under scrutiny. The work aims to be an analysis that combines the regulatory and factual issues regarding TPLF, together with the professional and

¹¹⁵ This is well explained in the letter sent from Burford, one of the most prominent litigation funders, to Chairman Grassley and Senator Cornyn, 25th of September 2015. See more in detail below in Section 2.4.

¹¹⁶ See C HODGES, J PEYSNER and A NURSE, above at footnote 9; G McGOVERN, N RICKMAN, J DOHERTY, F KIPPERMAN, J MORIKAWA and K GIGLIO, *Third-Party Litigation Funding And Claim Transfer: Trends And Implications For The Civil Justice System*, Rand - Institute For Civil Justice Program, Conference Proceedings, 2010, 11. Available at http://www.rand.org/pubs/conf_proceedings/CF272.html, where TPLF was described as one of the 'biggest and most influential trends in civil justice' (last vis. 7.2.2017).

¹¹⁷ See below par 2.

academic debate surrounding it. The goal of the comparison would be to analyse how this practice has developed in the different jurisdictions, also as a way to understanding what are the factors that have determined its emergence.

1. TPLF in the common law jurisdictions

TPLF has initially emerged in a series of common law jurisdictions, namely Australia, Canada, England and Wales and the US. The historical overview has shown that this emergence has been preceded by a series of changes in legislation and case law aimed at abolishing and/or loosening the prohibitions to fund or otherwise maintain litigation for profit. This Paragraph therefore aims at analysing in more detail the changes in legislation and/or case law that have been mentioned, and the institutional and doctrinal discussions surrounding them. It will moreover give the chance, where possible, to discuss a series of regulatory issues related to TPLF already enacted in these jurisdictions.

1.1. Australia

TPLF in Australia has developed earlier than anywhere else, and the related industry nowadays is quite mature and sophisticated¹¹⁸. The factor that has determined its emergence is seemingly the entry into force of certain statutory powers that allow insolvency practitioners to contract for the funding of lawsuits in 1995¹¹⁹. For this

¹¹⁸ A comprehensive description of the Australian scenario can be found in M LEGG, L TRAVERS, E PARK and N TURNER, ‘Litigation Funding in Australia’, *UNSW Law Research Paper*, 2010, n 12. Available at SSRN: <http://ssrn.com/abstract=1579487> (last vis. 7.2.2017).

¹¹⁹ See for example the powers of disposal given to a receiver to dispose of a company's property under the *Corporations Act 2001* (Cth) s 420(2)(b) and (g) and the powers of disposal accorded to a liquidator by *Corporations Act 2001* (Cth) s 477(2)(c). These provisions have waived for the first time in history the doctrines of champerty and maintenance by means of federal law, and so created room for litigation funders to start with their business. In general, see L AITKEN, ‘Champerty, Statutory Assignment and the Liquidator or Trustee in Bankruptcy’ (1995) *Corporate & Business Law Journal*, Vol 8, 225. See, also, *Domson Pty Ltd v. Zhu* [2005] NSWSC 1070; *Movitor Pty Ltd (in liq) v. Sims* (1996) 64 FCR 380; *Re Tosich Construction Pty Ltd* (1997) 73 FCR 219; *Re William Felton & Co Pty Ltd* (1998) 145 FLR 211: ‘There is ... a long established exception [to champerty and maintenance] which allows trustees in bankruptcy, liquidators, administrators, and deed administrators, to exercise their statutory powers of sale by selling a cause of action, or the proceeds of a suit’.

reason, the third party litigation funders started with insolvency cases, but soon have spread to other markets, including class actions¹²⁰, also in security cases¹²¹. The Standing Committee of Attorneys-General's Litigation Funding Discussion Paper has described third party litigation funders as follows: 'A litigation-funding company (LFC) is a commercial entity that contracts with one or more potential litigants. The LFC pays the cost of the litigation and accepts the risk of paying the other party's costs if the case fails. In return, if the case succeeds, the LFC is paid a share of the proceeds (usually after re-imbursement of costs)'¹²². Some of the third party litigation funders are already listed on the Australian Securities Exchange, and they have already committed significant amounts of money to fund cases in Australia and abroad¹²³.

1.1.1. Champerty, maintenance and the Fostif Case

Australia being a common law jurisdiction¹²⁴, the figures of champerty and maintenance (and, eventually, barratry) are at the core of the legal discussions on this phenomenon. It was in the 1960's that the courts began deeming these figures

¹²⁰ J KALAJDZIC, PK CASHMAN, AM LONGMOORE, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding' (2013) *American Journal of Comparative Law*, Vol 61, n 2, 93, 96. For a more practical and empirical perspective see V VAYE AND V MORABITO, 'Financial arrangements with litigation funders and law firms in Australian class actions', in VAN BOOM WH, above at footnote 3, 155.

¹²¹ C CAMERON, 'Australia', in C HODGES, S VOGENAUER and M TULIBACKA, *The Costs and Funding of Civil Litigation. A Comparative Perspective*, Hart Publishing, 2010, 212.

¹²² Standing Committee of Attorneys-General, Litigation funding in Australia, Discussion Paper, May 2006, 4

¹²³ See GR BARKER, 'Third Party Litigation Funding in Australia and Europe', *Centre for Law and Economics - ANU College of Law, Working Paper* n. 2, 2011, 22. Claims Funding International, an Australian firm, has been established in Ireland in order to fund claims for damages deriving from a cartel sanctioned by the European Commission in 2010. Among the various Australian third party litigation funders it is possible to mention Bentham IMF, Hillcrest Litigation Services Ltd, LCM Litigation Fund Pty Ltd, Comprehensive Legal Funding LLC, Quantum Litigation Funding Pty Ltd and Litigation Lending Services.

¹²⁴ Due to the well-known historical origins, Australia has indeed inherited the English common law. The Australian Courts Act, at Section 24, provided that 'all Laws and Statutes in force within the Realm of England at the Time of passing of this Act ... shall be applied in the Administration of Justice in the Courts of New South Wales Van Diemen's land ...'. 1898, 9, Geo, 4, c, 83 (Imp).

‘obsolete’¹²⁵, although these prohibitions still survive in some Australian states¹²⁶. The Australian courts have already had some occasions to deal with TPLF and recognise its role in enhancing access to justice. In 2006, in the case of Campbell’s Cash and Carry Pty Limited v. Fostif Pty Ltd (‘Fostif’) the High Court – with regard to New South Wales - clearly stated that TPLF was not an abuse of process or contrary to public policy¹²⁷. The importance of this decision lies also in the complexity of the funding process, insofar as the third party funder actively looked for potential plaintiffs, chose the attorneys, decided with them the legal strategy, and settled with the defendants for 75 % of the sum claimed. After dismissing a series of arguments raised by the appellants¹²⁸, the Court stressed that the only reason to prohibit TPLF was to prevent corruption of court processes, but that TPLF does not per se entail such abuse¹²⁹. Therefore, courts should be allowed to stay the proceedings only insofar as any abuse of process has happened or it is likely to happen¹³⁰. Since Fostif the TPLF industry has grown steadily, and certainly the attitude of the courts and the local regulation has favoured the development of TPLF, also by permitting a fair intrusion of litigation funders in the claim strategy. After Fostif the Australian courts have tried, more or less clearly, to define the cases in which TPLF was deemed abusive¹³¹, pushing themselves even to interpreting the decision in Fostif to be a ban on any general rule against the funding of litigation for a pay back¹³², and have endorsed in different cases other types

¹²⁵ In *Clyne v NSW Bar Association*, (1960) 104 CLR 186, 28, the High Court stated that ‘that it may be necessary some day to consider whether maintenance as a crime at common law ought to be regarded as “obsolete”’.

¹²⁶ Queensland, Western Australia and Tasmania have not yet abolished the torts and crimes of maintenance and champerty, and the contracts affected by them remain unenforceable. Victoria, South Australia and New South Wales and the Australian Capital Territory have instead partially abolished them by statute. GR BARKER, above at footnote 123, 11.

¹²⁷ *Campbell’s Cash and Carry Pty Limited v. Fostif Pty Ltd* (2006) 229 CLR 386.

¹²⁸ *Ibid.*, from par 87.

¹²⁹ *Ibid.*, par 266.

¹³⁰ *Ibid.*

¹³¹ L AITKEN, ‘Before the High Court: ‘Litigation Lending’ After Fostif’ (2006) *Sydney Law Review*, Vol 28, 171.

¹³² *Jeffery & Katauskas Pty. Ltd. v SST Consulting Pty. Ltd.* (2009) 239 CLR 75.

of funding agreements on the grounds that it enhances access to justice and efficiency in litigation¹³³. They have moreover recognised that a wider control of litigation in the hands of litigation funders could enhance access to justice. In Project 28 Pty (formerly Narui Gold Coast Pty Ltd) Ltd v Barr¹³⁴ and Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd¹³⁵ the control of the claim prosecution was ceded to third party litigation funders that invested in the claim in exchange for a share in the claim proceeds. Australian courts moreover stated that these funders had the same obligations as the nominal claimholders and, as in Fostif, did not intervene with regard to this ‘meddling’.

1.1.2. Local regulation and TPLF

In the previous sub-paragraph it was mentioned that TPLF may have emerged to such a large extent in Australia because there would be some local regulation somehow barring claimants from enforcing certain legal actions, or at least making them more costly and risky. In this regard, the legal framework related to class actions represents an interesting point for discussion, which is easily imaginable as it is one of the main fields of application of TPLF. First of all, the Australian class action regime does not foresee a ‘certification stage’ prior to filing a class action in court¹³⁶; the claimholders are in fact free to file a lawsuit as class action. However, even though the burden of the proof of bringing the evidence necessary to ascertain that the group is not in fact a class lies on the defendant, the claimants still face the risk that their class is not

¹³³ *QPSX Ltd. v. Ericsson Australia Pty. Ltd.* (2005) 219 ALR 1.

¹³⁴ [2005] NSWCA 240. In this case the Court focused on the cases in which the funder profession would lead to an abuse. In par. 58 it stated: ‘Abuse of process is not restricted to defined and closed categories. In the context of arrangements that fund litigation, an abuse of process may occur on a number of bases. For example, the funder may be attempting to use the litigation as a business and not for the purpose of achieving justice in a genuine dispute between the parties. In these circumstances, it is possible that the funder would be seeking to use the proceedings otherwise than for the purpose for which they were intended. Other ways in which a particular instance of litigation funding might lead to abuse of process are where the funding results in the defendant being oppressed or prejudiced, or the procedures of the court subverted or improperly manipulated.’

¹³⁵ *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* (2007) 158 F.C.R. 417.

¹³⁶ J KALAJDZIC, PK CASHMAN, AM LONGMOORE, above at footnote 120, 93, 97.

recognized at a subsequent stage. This provision certainly makes the filing of class actions more difficult, as the claimants face also the risk of seeing their class not recognised as such. This factor evidently increases the claimants' risk aversion, and also the difficulties in beginning such claims. In the class action context, two further barriers to access justice are the fact that the class representative (and not the class) is potentially liable for the defendants' legal costs in the case of loss, and the lack of legal aid for class actions¹³⁷. TPLF, in this scenario, seem to play an important role in helping overcoming such difficulties. Moreover, Australia does have the opt-in model, where only a defined number of parties that decide to join the claim become actually party to the dispute. While this model may limit the potential number of claimants, it nevertheless offers more certainty to the funders with regard to the number of actual claimants that they are going to fund, and the returns that are potentially going to be made. There are moreover other factors that impact the market for TPLF in class actions, but not only. For example, Australia does not generally allow contingency fees, and so the lawyers cannot maintain the lawsuits on a champerty basis¹³⁸. A similar reasoning can be made for the ATE insurance products, which are nearly absent in this market¹³⁹. Another factor that makes claimants more risk averse is that in Australia the adversary's costs have to be borne by the losing party (the so-called English rule)¹⁴⁰. Finally, also the Australian financial regulation - and the related interpretation of the courts - seems to have played a significant role in favouring the emergence of TPLF. In *International Litigation Partners Pte Ltd v Chameleon Mining*

¹³⁷ Id.

¹³⁸ GR BARKER, above at footnote 123, 17. This issue is however being discussed thoroughly at the moment in which this thesis is being written. See, for example, a Financial Review's recent article on contingency fees, "Legal profession divided on banning success fees", 18 February 2016, at <http://www.afr.com/business/legal/legal-profession-divided-on-banning-success-fees-20160218-gmxk3d> (last vis. 21.8.2017).

¹³⁹ C CAMERON, above at footnote 121.

¹⁴⁰ In *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*, above at footnote 132, the Australian High Court has stated, by a majority, that the funder was not held liable to pay the adversary's costs, so allowing the possibility of leaving the risk to the claimholder.

NL¹⁴¹ the New South Wales Court of Appeal stated that TPLF agreements did not constitute a financial product under the Corporation Act; if they would have been qualified as such, instead, the litigation funder would have needed an Australian Financial Services Licence¹⁴². In *Brookfield Multiplex Ltd & Anor v International Litigation Funding Partners Pte Ltd & Ors*¹⁴³, instead, the Federal Court in full composition adopted a more restrictive approach. This court deemed that TPLF agreements between a law firm and the funders, in relation to a class action, constituted a ‘managed investment scheme’ under the Corporations Act. According to this interpretation, the litigation funders had to be registered at the Australian Securities Investment Commission (‘ASIC’), and so bear a wide series of obligations. Following this decision, the Minister for Financial Services, Superannuation and Corporate Law, noted that ‘there were serious concerns about impeding access to justice for small consumers’¹⁴⁴. The Federal Government therefore enacted the Corporations Amendment Regulation n. 6 of 2012 to exempt litigation funding from all forms of regulation, except for having adequate processes in place to manage conflicts of interest.

1.2 Canada

TPLF in Canada has already existed for more than one decade: it began in the form of non-recourse lending to individual plaintiffs, but it then spread into other legal fields, such as large commercial cases and class actions¹⁴⁵. The Canadian experience is very interesting because TPLF has adapted to two different legal systems: as known, most

¹⁴¹ *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45).

¹⁴² For a comment on the matter see GR BARKER, above at footnote 123, 21.

¹⁴³ (2009) 260 ALR 643 (*'Brookfield'*).

¹⁴⁴ GR BARKER, above at footnote 123, 19-21.

¹⁴⁵ A CEBALLOS, ‘Third party litigation funding: will it increase access to justice in Canada?’, *The Lawyer’s Weekly*, Ottawa/Toronto, 7 March 2008. P PURI, ‘Financing of Litigation by Third-Party Investors: A Share of Justice?’ (1998) *Osgoode Hall Law Journal*, Vol 36, n 3, 515. J KALAJDZIC, PK CASHMAN, AM LONGMOORE, above at footnote 120, 93, 113.

of the Canadian provinces and territories have common law traditions, while Quebec has mainly civil law ones¹⁴⁶.

1.2.1. Common law vs. civil law and the institutional debate

The differentiation in legal traditions that is mentioned, evidently concerns also the limits and/or potential prohibitions to TPLF: in the common law jurisdictions maintenance, champerty (and, eventually, barratry) would apply, while in Quebec potentially the PQL and the RL¹⁴⁷. However, all these territorial entities generally speaking share some common features: they all have the ‘loser-pays’ rule on cost; they allow – or at least do not extensively prohibit – lawyers’ fees based on success; while LEI are not commonly used¹⁴⁸. In this regard, both the common law and the civil law based jurisdictions seem to offer very interesting scenarios, and show some evolution in public policy intentions. In *McIntyre Estate v. Ontario (Attorney General)*¹⁴⁹, an Ontario court gave an account of how the rationale of the laws on maintenance and champerty were not anymore justified, and had instead to be adapted to the overriding modern public interest objectives. This case concerned the issue whether contingency fee arrangements (in relation to civil lawsuits in Ontario) were contrary to the laws on maintenance and champerty, and in particular, the court referred to *An Act Respecting Champerty* (the 'Champerty Act')¹⁵⁰. The court goes through the history of these

¹⁴⁶ In particular, civil procedural rules are of provincial derivation. The common law provinces apply the Rules of Civil Procedure, while in Quebec the Code of Civil Procedure. There is a Federal Court, with its Rules of Procedure, but they do not enjoy the role played, for example, by the US federal courts and rules of civil procedure. W TETLEY, ‘Mixed jurisdictions: common law vs civil law (codified and uncodified)’ (2000) *Revue de droit uniforme*, Vol 3, 605.

¹⁴⁷ HP GLENN, ‘Costs and Fees in Common law Canada and Quebec’, available at http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf (Last vis. 27.8.2017). The PQL is codified at article 1783, while the RL at article 1748 (of the Quebec Civil Code).

¹⁴⁸ *Ibid.*, 7, par 2.

¹⁴⁹ *McIntyre Estate v. Ontario (Attorney General)*, (2002) 61 OR (3d) 257 (CA).

¹⁵⁰ R.S.O. 1897, chapter 327, which states as follows: ‘1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains. 2. All champertous agreements are forbidden, and invalid.’ This law of the state of Ontario therefore seems to encompass both the figures

figures¹⁵¹, which was described as: ‘maintenance is directed against those who, for an improper motive, often described as wanton or officious meddling, become involved with the disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty’¹⁵². In particular, the court focuses on the ‘improper motive’, which retains a fundamental requisite to fall within the Champerty Act prohibitions, whose aim was mainly to protect the administration of justice from potential abuses. The court however notes how the approach towards these figures in all modern common law jurisdictions has changed in the recent years in order to promote access to justice¹⁵³.

With regard to the jurisdiction of Quebec not only have there not been significant claims against TPLF, but the province itself has established a public fund to finance class actions, which is proving to be very active and efficiently managed¹⁵⁴. The changes in public policy have evidently influenced also the overall perception towards TPLF. Indeed, it took not too much time until courts and other institutions became aware of this phenomenon. Some of them had shown criticisms and opposition¹⁵⁵, others have found it as beneficial for access to justice. In a recent case, a judge in Ontario, did not approve a funding arrangement in the first instance as it was deemed

of maintenance and champerty (and, eventually, barratry).

¹⁵¹ It also acknowledged that these prohibitions were inspired by an English statute entitled Statutum de Conspiratoribus or the Statute Concerning Conspirators, enacted in 1305, and cited as 33 Edw. 1, Stat. 2. In *McIntyre Estate v. Ontario (Attorney General)*, (2002) 61 OR (3d) 257 (CA), 18.

¹⁵² In *McIntyre Estate v. Ontario (Attorney General)*, (2002) 61 OR (3d) 257 (CA), 26.

¹⁵³ In *McIntyre Estate v. Ontario (Attorney General)*, (2002) 61 OR (3d) 257 (CA), 48. In these paragraphs the court refers to the changes related to contingency fees, but the reasoning concerns champerty and maintenance and, as such, it could be adapted to TPLF.

¹⁵⁴ See the following par. 1.2.2.

¹⁵⁵ See for example *Giuliani v. Region of Halton*, 2011 ONSC 5119, where the Ontario Superior Court of Justice dismissed the request for the recovery of interest on a loan financing the cost of disbursements.

champertous¹⁵⁶. The improper motive, in this case, was that the funding agreement might have over compensated the funder in an unreasonable way. The issue here was that, as per the judge's words, at that stage of the assessment it was not possible to know the final fee of the funders, as it was calculated in a percentage of any recovery, less legal fees and other costs¹⁵⁷. The same issue was however taken from the same lawyers before different judges in a different case¹⁵⁸. In this case, instead, the judge, after noting that in other common law countries TPLF was permitted, it approved the funding agreement (which nevertheless gave more certainty with regard to the final fee for the funder) calling it beneficial as it could promote access to justice¹⁵⁹.

1.2.2. TPLF and Canadian class actions

TPLF is playing an important role also in Canadian class actions, where it has been judicially approved ex ante since 2009¹⁶⁰. It has been reported that, unlike the Australian market, the funding agreements are mainly indemnity agreements, generally with minor disbursement for the funder¹⁶¹. The reason would be that in Australia class counsels are prohibited from acting on a contingency fee basis, and so they could not bring the case forward unless a third entity sustains at least its costs, if not the fees¹⁶². Therefore, the reason to recur to funding agreements, in Canada, is basically to cover the (high) potential adverse costs in the case of loss, and also because representative plaintiffs are responsible for these both in Quebec and Ontario¹⁶³, if the class action is

¹⁵⁶ *Metzler Investment GMBH v. Gildan Activewear Inc.* (2009), 81 C.P.C. (6th) 384 (SCJ).

¹⁵⁷ *Ibid.*, 12

¹⁵⁸ *Dugal v. Manulife Financial Corporation*, O.J. No. 1239 (S.C.J.) [2011].

¹⁵⁹ *Id.*, para 33. A similar reasoning was then made in *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937, 15.

¹⁶⁰ *Hobshaw v. Atco Gas and Pipelines Ltd.* (May 14, 2009), Action 0101-04999 (Alta. Q.B.) [unreported]. In this case an Alberta court approved a funding agreement between the representative plaintiffs and BridgePoint Financial. See, also, *Nova Scotia, MacQueen v. Sydney Steel Corporation* (Oct. 19, 2010), Action 218010 (N.S.S.C.).

¹⁶¹ J KALAJDZIC, PK CASHMAN, AM LONGMOORE, above at footnote 120, 93, 117.

¹⁶² *Ibid.*

¹⁶³ For example S. 31 (2) of the *Ontario Class Proceedings Act, 1992*.

unsuccessful, while class members are not¹⁶⁴. In this context it has moreover been found that generally funders tend not to influence at all the legal strategy of the lawyers¹⁶⁵. Funders certainly do the due diligence of the cases and meet the lawyers, but the common sense is that they rely on the lawyers' analysis and reputation, without trying to unduly influence their strategy. This might certainly be a consequence of the possibility, for lawyers, to charge significant success-based fees, and so bear part of the risk. A more active role of funders could more likely entail champerty by maintenance, meant as 'stirring up' litigation¹⁶⁶. This issue indeed brings to the fore the differences between active and passive investments. Nevertheless, it has been argued that, if the funders trust the lawyers, they would be happy to stay passive, even though a concrete involvement of the funders might anyhow be beneficial for the case strategy¹⁶⁷. Another very interesting case for assessing the evolution of TPLF in Canada is *Bayens v. Kinross Gold Corp.*¹⁶⁸, which concerns a funding agreement related to a misrepresentation claim in securities class actions. In this case the Ontario Superior Court of Justice, after approving the funding agreement, has set out a list of 12 principles to support this approval. The Court stated as follows:

- 1) 'Third party funding agreements are not categorically illegal on the grounds of champerty or maintenance, but a particular third party funding agreement might be illegal as champertous or on some other basis.'
- 2) Plaintiffs must obtain court approval in order to enter into a third party funding agreement.
- 3) A third party funding agreement must be promptly disclosed to the court, and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent, and it must be reviewed in order to ensure that there are no abuses or interference with the administration

¹⁶⁴ This seems to hold true unless they intervene formally in the action. See for example *Nadon c. Ville de Montréal*, 2010 QCCS 5734 (Que. Sup. Ct.).

¹⁶⁵ *Id.*

¹⁶⁶ J KALAJDZIC, PK CASHMAN, AM LONGMOORE, above at footnote 120, 93, 119.

¹⁶⁷ JP ROSSOS, 'Access to Justice: Using Third Party Financing to Fulfill the Promise of Class Action Litigation' (2009) *Canadian Class Action Review*, Vol 5, n 1, 100, 117.

¹⁶⁸ *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013.

of justice. The third party agreement is itself not a privileged document.

- 4) The court has the jurisdiction to make an approval order binding on the class pre-certification : *Fehr v. Sun Life Assurance Company of Canada* 2012 ONSC 2715; *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785; *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 3315 (S.C.J.), *contra*.
- 5) To be approved, the third party agreement must not compromise or impair the lawyer and client relationship and the lawyer's duties of loyalty and confidentiality or impair the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or the class members.
- 6) To be approved, the third party funding agreement must not diminish the representative plaintiff's rights to instruct and control the litigation.
- 7) Before approving a third party funding agreement, the court must be satisfied that the representative plaintiff will not become indifferent in giving instructions to Class Counsel in the best interests of the class members. (Or to put it more bluntly, the concern is that insulated from an adverse costs award and with a modest individual claim to compensation, the representative plaintiff will not have any "skin in the game" with a resultant diminished commitment to advance the class action on behalf of the class.)
- 8) Before approving a third party agreement, the court must be satisfied that the agreement is necessary in order to provide the plaintiff and the class members' with access to justice.
- 9) In seeking approval for a third party funding agreement, it is not necessary to have first applied to the Class Proceedings Fund for funding. If, however, approval from the Fund is sought and refused, nothing can be taken from the fact that the Class Proceedings Fund was not prepared to provide litigation funding.
- 10) Before approving a third party agreement, the court must be satisfied that the agreement is fair and reasonable to the class. The court must be satisfied that the access to justice facilitated by the third party funding agreement remains substantively meaningful and that the representative plaintiff has not agreed to over-compensate the third party funder for assuming the risks of an adverse costs award. (This will be a difficult determination for the court to make, but the comparable benchmark of the Class Proceedings Fund's percentage

uncapped levy may assist the court in determining whether the third party funding agreement is fair and reasonable.)

- 11) To be approved, the third party funding agreement must contain a term that the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information.
- 12) It is an acceptable term of a third party funding agreement to require the third party funder to pay into court security for the defendant's costs. (Whether this should be a necessary term in every case has not been determined in the case law)¹⁶⁹.

Building on these principles, it is important to note first of all that in Canada, as in Australia, the rule seems to be that TPLF contracts are valid, while the prohibitions are the exception. What seems to be different in Canada is the role that the courts could play, for example with regard to their power of approval of the TPLF agreement and the class pre-certification. It must be noted, however, that the case *Bayens v. Kinross Gold Corp.* concerned a consumer class action. In these cases, in fact, the bargaining positions of the consumers are much weaker than in corporate claims, and such control may prove to be a guarantee against potential abuses by the funders. In general, it is worth noting that class actions are certainly a legal field where TPLF will develop more than others in Canada (but the same holds true also for similar jurisdictions). The structural features of these claims, indeed, accentuate the flaws of the civil justice system; moreover, the high initial costs, rational apathy and organisational difficulties of the potential consumer class are indeed an unavoidable problem of class actions that only the intervention of a third entity, financially endowed and with highly skilled human resources can address. However, it must be noted that the Canadian experience demonstrates that TPLF is not the only solution to these problems. Although the purpose of this work is not to analyse the public solutions for funding litigation, the province of Quebec offers a very interesting example of an efficiently managed scheme of public financing for class actions, the Fonds d'aide aux recours collectifs (the 'Fonds'). The Fonds has been set up and is managed under the Ministry of Justice of Quebec, and it can finance both lawyers' fees and other costs. The provincial government annually capitalises the Fonds, and guarantees its payments. Most importantly, it retains a percentage of any recovery of class actions, not only those

¹⁶⁹ Id., par 41.

funded. It has been demonstrated how this possibility, from a public policy point of view, represents a great example of sustainable access to justice even though by public means¹⁷⁰. In fact, apparently the Fonds efficiently combines the guarantee of access to justice provided for by the state, and economic sustainability, generally peculiar to the private sector. Moreover, although indirectly, it serves also the important function of supervising the class action activities, providing analysis of all cases and so also statistics relevant for a better administration of justice in Quebec¹⁷¹. The Fonds in ten years has taken 776 decisions on applications for funding, and funded more than one third of these¹⁷².

1.3. England and Wales

TPLF in England and Wales has reached such a high level of sophistication and overall acceptance that Lord David Neuberger, the President of the Supreme Court of the UK, has recently described it as the ‘the life-blood of the justice system’¹⁷³. The modern history of TPLF in England and Wales dates back to 1967, when the Criminal Law Act abolished the crimes attached to the torts of maintenance and champerty. Since then, there has been an evolutionary path that started from the 2000’s, and somehow culminated in Jackson’s Review on Civil Costs, a report published by Sir Rupert Jackson in 2009. This report has inspired a series of reforms in the civil law system (‘the Jackson Reforms’)¹⁷⁴, making (also) the point regarding TPLF, promoting its use as a necessary tool to implement access to justice at proportionate costs. This holds

¹⁷⁰ C PICHÉ, ‘Public Financiers as Overseers of Class Proceedings’ (2016) *New York University Journal of Law & Business*, Vol 12, 779, § IV.

¹⁷¹ Ibid., § V.

¹⁷² See the Fonds’ website: <http://www.farc.justice.gouv.qc.ca/> (last vis. 26.8.2017)

¹⁷³ D NEUBERGER, above at footnote 88, 52.

¹⁷⁴ R JACKSON, *Review of Civil Litigation Costs: Final Report*, The Stationery Office, 2009. The Jackson Reforms represent the evolution of the Woolf Reforms of the civil Justice system in England and Wales, which however did not address in detail the issue of litigation funding. The Jackson Reforms moreover take into account the legislative and other measures enacted since the 1990’s and potentially having an impact on access to justice, to design an integrated system where this right is ensured also at proportionate costs for the state. R PIROZZOLO (ed), *Litigation Funding Handbook*, The Law Society, London, 2014, 2.

true especially in a country where the loser-pays rule is applied, although with many particularities.

Today many professional third party litigation funders are present on the scene; they have already set up an Association¹⁷⁵ and launched a Voluntary Code of Conduct to self-regulate their activity¹⁷⁶. TPLF and other litigation funding methods are officially part of the Justice administration, and co-exist in a way that access to justice would be ensured while not necessarily shifting its (potentially disproportionate and unpredictable)¹⁷⁷ costs to society¹⁷⁸.

1.3.1. From the Criminal Law Act of 1967 to the reforms of justice of the 1990's and 2000's. Paving the way for TPLF

While the first and most important signal of a change in legislation impacting on the possibility to maintain litigation for profit is the Criminal Law Act, there have been other legal acts that seem to have opened the door for TPLF. The first stated that 'any distinct offence under common law in England and Wales on maintenance (including champerty)' should be abolished¹⁷⁹. It then follows as: '(1) [n]o person shall, under the

¹⁷⁵ Association of Litigation Funders, see the website <http://associationoflitigationfunders.com> (last vis. 7.2.2017). The founding members of this Association are Burford Capital; Calunius Capital LLP; Harbour Litigation Funding Ltd; Redress Solutions LLP; Therium Capital Management Ltd; Vannin Capital PCC Ltd; and Woodsford Litigation Funding Ltd. However, according to Litigation Funding, a bi-monthly Law Society Gazette publication, published by the Council of the Law Society, the number of funders reported is higher.

¹⁷⁶ Code of Conduct for Litigation Funders, at <http://associationoflitigationfunders.com/code-of-conduct/> (last vis. 27.8.2017). It is important to note, in this regard, that Lord Jackson agreed that there would be no need to have further regulation, provided that all funders abide by this Code. See R JACKSON, above at footnote 174, Ch 11, 121.

¹⁷⁷ J PEYSNER, 'England and Wales', in C HODGES, S VOGENAUER and M TULIBACKA, above at footnote 121, 289.

¹⁷⁸ NH ANDREWS, 'Accessible, Affordable, and Accurate Civil Justice - Challenges Facing the English and Other Modern Systems' (2013) *University of Cambridge Faculty of Law Research Paper*, n 35. Available at SSRN: <http://ssrn.com/abstract=2330309> (last vis. 27.8.2017)

¹⁷⁹ The Criminal Law Act, 1967, c. 58, p. 13 (1).

law of England and Wales, be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect. (2) The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.¹⁸⁰ The entrance into force of these provisions therefore marks an historical turning point in the public policy regarding access to justice: the main traditional prohibitions to fund litigation for profit in common law, after centuries, are not anymore sanctioned on criminal grounds. However, while the Legislator repealed these crimes, the possibility of funding litigation for profit was in fact limited by a series of regulatory issues. Success-based lawyers' fees were in fact prohibited at the time, while the legal aid system was quite functional. Moreover, there was no significant demand for such financing, or at least it was much moderated. It took almost thirty years until TPLF began developing with a certain impetus, especially due to a series of measures aimed at rationalising the administration of justice and to balance access to courts and the economic sustainability of the legal system. Conditional Fee Arrangements ('CFA'), by which lawyers could agree with their clients to be paid only in case of success or also by a further uplift fee, were introduced starting from the 1990s¹⁸¹. After the 2000s their use has multiplied as it was stated that the CFAs success fees – but, also, the After-The-Event (ATE) legal

¹⁸⁰ Ibid., §14. It has been argued that contracts unenforceable due to maintenance and champerty entered to prior to this date have still to be considered unenforceable, even though the criminal provisions attached to these have been repealed. H BEALE, *Chitty on Contracts*, Sweet & Maxwell, London, 31st ed, Vol 1, 251. The possibility of repealing the point (2) in order to make the boundaries of champerty and maintenance clearer has been discussed in the Lord Jackson Report. It was however concluded that at this moment leaving this provision was a way to strike a fair balance between funders and clients. However, Lord Jackson stated that “[i]t should, however, be made clear either by statute or by judicial decision that if third party funders comply with whatever system of regulation emerges from the current consultation process, then the funding agreements will not be overturned on grounds of maintenance and champerty.” See, See R JACKSON, above at footnote 174, Ch 11, p 123-124.

¹⁸¹ The Courts and Legal Services Act 1990 (c. 41), s. 58 introduced the CFAs for the first time, although these were concretely implemented starting from 1995, when a series of orders and regulations expanded their field of application. D MARSHALL, ‘Conditional Fee Agreements’, in R PIROZZOLO (ed), see above at footnote 174, 61.

expenses insurance premiums - could be charged to the counter party, rather than to the lawyers' own client¹⁸². However, the introduction of such fees did not come without problems, and it particular gave rise to a 'cost war' with liability insurers that were concerned about the increases in their disbursements¹⁸³ (although the introduction of CFAs has certainly pushed the legal expenses insurance market). Nevertheless, these methods for funding litigation were more suited to a low value claims segment, and not for the complex corporate claims. It is probably for this reason that in these years TPLF began developing in England and Wales. It is not a case that this phenomenon has developed significantly in London, which is at the same time one of the global capitals for international dispute resolution and for finance. The common feeling that the costs of justice were too high and the enactment of provisions limiting the expenditure in legal aid¹⁸⁴ have certainly helped the favourable perception towards the possibility to fund litigation¹⁸⁵, but also more in general¹⁸⁶.

1.3.2. Arkin and other case law shaping the practice of TPLF

The symbolic shift in the UK case law concerning TPLF is commonly represented by the Arkin¹⁸⁷ case, when the Court of Appeal explicitly considered and approved this

¹⁸² Access to Justice Act, § 27 and 29.

¹⁸³ D MARSHALL, above at footnote 181, 63.

¹⁸⁴ See above footnote 10.

¹⁸⁵ On conditional fees, see *R (Factortame) v Secretary of State for Transport (No 8)* [2003] QB 381. With regard to TPLF see, instead, *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292, Lord Phillips stated that the fact that third parties provide assistance to parties to a dispute is desirable from a public policy point of view (paragraphs 35 and 54).

¹⁸⁶ The overall perception was that '[a] legal framework for enforcing contracts and resolving disputes is not just an arcane process which allows professionals to earn vast fees, but an integral part of the infrastructure of a successful market economy'. Speech by Mervyn King (former Governor of the Bank of England) at the Lord Mayor's Banquet for Bankers and Merchants of the City of London at the Mansion House on 21st June 2006, 6. Available at <http://www.bankofengland.co.uk/archive/documents/historicpubs/speeches/2006/speech278.pdf> (last vis. 27.8.2017).

¹⁸⁷ *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 (26 May 2005).

access-to-justice oriented practice¹⁸⁸. In line with these findings, this court moreover took the chance to state a fundamental rule for the adverse cost risk, that a funder is liable to the other party only to the extent of its own funding, as in the terms that are briefly reported below.

‘39 If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above.

40 The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail. The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.

41 We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is

¹⁸⁸ As mentioned, this case has been preceded by an evolution in public policy regarding access to justice, aimed at incentivising alternative funding arrangements as a way to promote a cost efficient justice system. A recent and detailed description of the evolution of the legislation in this field is contained in R PIROZZOLO, see above at footnote, 174. In this handbook the single litigation funding methods and all the measures having an impact on litigation funding enacted in the last decades were described.

unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.

42 If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate. In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.'

In Arkin, the court approach was so aimed at catering 'for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable', this being the claimant 'primarily interested in the result of the litigation and the party in control of the conduct of the litigation'. Meanwhile, other courts have kept shaping the role of TPLF in the legal system. In London & Regional (St George's Court) Ltd v Ministry of Defence¹⁸⁹, the case law related to TPLF was reported as follows:

'a) the mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable: see R (Factortame) Ltd v Secretary of State for Transport (No.8) [2003] QB 381; b) in considering whether an agreement is unlawful on the grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement: see Giles v Thompson; c) the modern authorities demonstrated a flexible approach where courts have generally declined to hold that an agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable: see, for example, Papera Traders Co Ltd v Hyundai (Merchant) Marine Co Ltd (No.2)

¹⁸⁹ [2008] EWHC 526 TCC at [103] (following *Underhill J in Mansell v Robinson* [2007] EWHC 101)

[2002] 2 Lloyd's Rep 692; d) the rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction: see Papera.'

1.3.3. Some regulatory indications from the Jackson Report and the Association of Litigation Funders' Voluntary Code of Conduct

The institutional discussions concerning TPLF were not only limited to this case law. It is actually with the Jackson Report on Civil Costs, enacted in January 2010, that TPLF was officially considered in a broader discussion on the rules and principles governing the costs of civil litigation. In this Report TPLF was explicitly recognized as a beneficial integral part of the civil justice system, as it '(i) ... provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus third party funding promotes access to justice. (ii) Although a successful claimant with third party funding foregoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all. (iii) The use of third party funding (unlike the use of conditional fee agreements (CFAs) does not impose additional financial burdens upon opposing parties. (iv) Third party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable. (v) Third party funding tends to filter out non-meritorious cases, because funders will not take on the risk of such cases. This benefits opposing parties'. Moreover, a wide series of subjects related to TPLF are discussed, with the contribution of the Law Society and of the Association of Litigation Funders, and still are. An important issue concerns, for example, the possibility for the funders of withdrawing from the funding. While the Law Society expressed its concerns related to the possibility of withdraw contrary to the client interests' or unreasonably¹⁹⁰, Lord Jackson stressed that 'the funder should be obliged to continue to provide whatever funding it originally contracted to provide, unless there are proper grounds to withdraw. The precise definition of proper grounds for withdrawal will require some careful drafting¹⁹¹'. In this regard, some elements to the discussion can be found in the recently enacted Association of Litigation Funders' Code of Conduct,

¹⁹⁰ R JACKSON, above at footnote 174, Ch 11, 118.

¹⁹¹ Ibid., 119.

which states that in the litigation funding agreements ('LFA') it will have to be defined whether the funders can '... 11.2 terminate the LFA in the event that the Funder or Funder's Subsidiary or Associated Entity: 11.2.1 reasonably ceases to be satisfied about the merits of the dispute; 11.2.2 reasonably believes that the dispute is no longer commercially viable; or 11.2.3 reasonably believes that there has been a material breach of the LFA by the Funded Party'¹⁹², even though this decision will not have to be 'discretionary'.

Another important issue concerns the capital adequacy of litigation funders, and (also, as consequence) the possibility of meeting the obligations deriving from the LFA. Capital adequacy is generally a requirement in order to protect the public from potential unscrupulous money managers, and therefore regulated – generally – by the Financial Service Authority ('FSA'). Lord Jackson discussed this issue with the FSA and, considering that TPLF is a recent phenomenon, mostly addressed to sophisticated corporate claimholders, they concluded that at the moment there was no need for regulation, but this necessity might arise when the industry will mature, and be addressed to consumers¹⁹³. However, in the Association of Litigation Funders' Code of Conduct the funders stressed the importance of having adequate financial resources to meet their obligations, to abide by disclosure obligations regarding their capital adequacy, and undertake to be audited by a specialized firm¹⁹⁴. With specific regard to the capability of meeting the adverse costs, Lord Jackson criticizes the Arkin decision, contending that '[t]here is no evidence that full liability for adverse costs would stifle third party funding or inhibit access to justice.' If a litigation funder would not be held liable for all the counterparty's costs, this could create problems both to the counterparty (that may have to cover some of his costs, even if he was entitled to see them all covered) and the client (that may be called to cover the counterparty's costs)¹⁹⁵. He then recommends that 'either by rule change or by legislation third party funders should be exposed to liability for adverse costs in respect of the litigation which they fund. The extent of the funder's liability should be a matter for the

¹⁹² Code of Conduct for Litigation Funders, above at footnote 176.

¹⁹³ R JACKSON, above at footnote 174, Ch 11, 121.

¹⁹⁴ Code of Conduct for Litigation Funders, above at footnote 176, par 9.

¹⁹⁵ R JACKSON, above at footnote 174, Ch 11, 122-123.

discretion of the judge in the individual case. The funder's potential liability should not be limited by the extent of its investment in the case'¹⁹⁶.

The Association of Litigation Funders' Code of Conduct also addresses another important question, the relationships with the lawyers and the clients. It states that the funders will 'take reasonable steps to ensure that the funded party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the funded party confirms in writing to the funder that the funded party has taken advice from the solicitor or barrister instructed in the dispute; 9.2 not take any steps that cause or are likely to cause the funded party's solicitor or barrister to act in breach of their professional duties; 9.3 not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder; ...'¹⁹⁷. In the TPLF scheme, especially when it is devised as passive funding, the clients choose their own lawyer and receive independent consulting from him, also with regard to the LFA. Any attempt to influence this consulting will inevitably raise serious concerns with regard to the fiduciary duties between the lawyer and the client.

1.3.4. Post-Jackson reforms and their impact on TPLF

I mentioned that the Jackson report has addressed a series of recommendations to potentially enhance the civil justice system, which have then been transposed in actual reforms, of which the implementation is still on going. While it is not an object of this thesis to discuss the content of these reforms, it is worth assessing what would be their potential impact on the TPLF industry. From a general point of view, it is for example interesting to note that the overriding objectives of civil procedure regarding the role of courts have been modified so that cases will have to be dealt with 'justly and at proportionate costs'¹⁹⁸. Courts will then have to try to strike the fair balance between just and proportionate costs, and do so by a specific cost management activity, which

¹⁹⁶ Ibid.

¹⁹⁷ Code of Conduct for Litigation Funders, above at footnote 176.

¹⁹⁸ Civil Procedure Rules 1998, SI 1998/3132, rule 1 (effective from 1 April 2013). On proportionality see G COX, 'Proportionality', in R PIROZZOLO (ed), see above at footnote 174, Ch 2, 12-23. See, also, R JACKSON, above at footnote 174, Ch 4.

includes also a budgetary control¹⁹⁹. Another fundamental change that has followed the Lord Jackson recommendations is the re-introduction of the principle that success fees and ATE LEI premiums are not recoverable as costs from the counterparty, but have to be paid by the winning client²⁰⁰, thus making the case potentially costlier. The post Jackson reforms instead did not address any specific issue related to the BTE LEI²⁰¹, which has been a method for funding litigation since 1974 in England and Wales²⁰². BTE LEI differs from ATE with regard to the moment in which these are entered in to, if before or after the event that has given rise to the claim of which the legal expenses need to be insured. At the moment in which this work is being written it seems too early to assess the impact that the post-Jackson reforms, and in particular the impact that the end to the recoverability of ATE premiums and conditional fees' success fees will have on the TPLF market. However, it must be noted that the TPLF market seems to differ from these other methods to fund litigation, as for the moment professional third party litigation funders are mainly targeting high value corporate claims²⁰³. With this regard, it is moreover worth noting that it added another possibility for lawyers to maintain their cases, by allowing them to charge fees in proportion to the amount of

¹⁹⁹ The Court ‘must further the overriding objective by actively managing cases’ (CPR 1.4) and ‘encouraging the parties to co-operate with each other in the conduct of the proceedings’. See G COX, ‘Cost Management’, in R PIROZZOLO, see above at footnote, 174, Ch 4, 43-60.

²⁰⁰ D MARSHALL, see above at footnote 181, 61; R PIROZZOLO, ‘After-The-Event insurance’, in R PIROZZOLO, see above at footnote 174, 91, discussing the changes brought by the Legal Aid, Sentencing and Punishment of offenders Act (‘LASPO’), 2012, s. 46. It must be noted that this section is not retroactive and therefore does not apply to ATE entered to before 1 April 2013.

²⁰¹ Lord Jackson, after acknowledging the diminished state of the eligibility field for legal aid, has encouraged the use of such policies for small businesses and householders, although he did not make any specific recommendation. See, R JACKSON, above at footnote 174, 66-79. However, it has been argued that the mentioned (and other) post-Jackson’s reforms have nevertheless had an impact on the use of BTE. L ATTU, ‘Before-the-event legal expenses insurances’, in R PIROZZOLO (ed), see above at footnote 174, 169. See, also, R LEWIS, ‘Jackson and Before-the-Event Insurance: A Missed Opportunity or a Pitfall Avoided?’ (2010). Available at SSRN: <https://ssrn.com/abstract=1695084> or <http://dx.doi.org/10.2139/ssrn.1695084> (last vis. 7.2.2017).

²⁰² A E HOLDSWORTH, ‘The Experience in England’, in W. PFENNINGSTORF, A M SCHWARTZ (eds), *Legal Protection Insurance*, American Bar Foundation, Chicago, 1986, 14.

²⁰³ CFA, ATE and DBA are moreover further limited also with regard to the type of claims.

damages recovered (Damages Based Agreement, DBA)²⁰⁴. DBA and CFA seem thus to leave room for lawyers to compete – at least to a certain extent – with TPLF.

1.4. The United States

TPLF in the US has emerged relatively later than in some other common law jurisdictions, especially in the corporate segment, but it has soon developed significantly²⁰⁵. Some argue that the reason for this relative delay could be the uncertainty concerning the legislation potentially impacting on TPLF, considering that the relative prohibitions and/or limits are not regulated at a federal level and differ significantly from one state to another²⁰⁶. In the ABA Commission on Ethics 20/20 ‘White Paper on Alternative Litigation Finance’ it is shown that twenty-nine out of fifty-one states allow some form of maintenance and champerty in funding contracts²⁰⁷, while 11 states prohibit barratry by statute²⁰⁸. This might certainly have discouraged the funders from entering the market, especially with regard to internal

²⁰⁴ R MULHERON, ‘Damages-based Agreements’, in R PIROZZOLO (ed), see above at footnote 174, 108. See moreover above footnote 181 with regard to the CFA.

²⁰⁵ See R LINDEMAN, ‘Third-Party Investors Offer New Funding Source for Major Commercial Lawsuits’ (March 5, 2010) *Daily Report For Executives - Bureau Of National Affairs*, 3. JT MOLOT, ‘A Market in Litigation Risk’ (2009) *University of Chicago Law Review*, Vol 76, 367.

²⁰⁶ V SHANNON, ‘Harmonizing Third-Party Litigation Funding Regulation’ (2015) *Cardozo Law Review*, Vol 36. Available at SSRN: <http://ssrn.com/abstract=2419686>; M STEINITZ, above at footnote 2, 1327.

²⁰⁷ AMERICAN BAR ASSOCIATION - COMMISSION ON ETHICS 20/20, footnote 3, 10-13. Sixteen states explicitly allow champerty: Colorado, Connecticut, Florida, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Washington, and West Virginia.

²⁰⁸ T CAIN, ‘Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater’ (2014) *Chicago-Kent Law Review*, Vol 89, n 11, footnote 80: ‘Cal. Penal Code § 158 (West 2012); Idaho Code Ann. § 18-1001 (West 2013); 720 Ill. Comp. Stat. Ann. 5/32-11 (West 2012); N.M. Stat. Ann. § 30-27-3 (West 2012); Okla. Stat. Tit. 21, § 550 (2012); 18 Pa. Cons. Stat. Ann. § 5109 (West 2013); S.C. Code Ann. § 16-17-10 (2011); Tex. Penal Code Ann. § 38.12 (2013); Vt. Stat. Ann. Tit. 13, § 701 (West 2007); Va. Code Ann. § 18.2-452 (West 2013); Wash. Rev. Code § 9.12.010 (2010)’ More in general, it has been argued that the legislations of the states, in this regard, seem to have changed to allow contingency fees. DR RICHMOND, ‘Other People’s Money: The Ethics of Litigation Funding’ (2004-2005) *Mercer Law Review*, Vol 56, 649, 655.

dispute resolution. However, as the US forum attracts litigation from anywhere in the world, it would be too simplistic to relegate this slow start only to the absence of federal regulation. An obstacle to the delay in the development of TPLF could be the prohibition on fee sharing with non-lawyers²⁰⁹ as stated in Rule 5.4 of the ABA Model Rules of Professional Responsibility²¹⁰. As the rule itself states, this prohibition aims at protecting lawyers' independence, but also to preventing non-lawyers from practising law somehow²¹¹, or soliciting clients on behalf of lawyers²¹². There is however a probably more important factor that has determined the delay for TPLF in the US, that lawyers themselves maintain the lawsuits by means of contingency fees (eventually getting loans and backing them with the outcome of their cases and/or with other collateral)²¹³. The large use of contingency fees in the US seems to be also the reason

²⁰⁹ M STEINITZ, above at footnote 10, 1291. See, also, JS DZIENKOWSKI, RJ PERONI, 'Conflicts of Interest in Lawyer Referral Arrangements with Non-lawyer Professionals' (2008) *Georgetown Journal of Legal Ethics*, Vol 21, 197, 205.

²¹⁰ Model Rules of Professional Conduct R. 5.4 (2003), where it is stated that: '[a] lawyer or law firm shall not share legal fees with a non lawyer'. Almost every US State has then adopted this rule. See http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html (last vis. 27.8.2017). For a comment on this matter, see RS CHRISTENSEN, 'Roosters in the Henhouse? How Attorney-Accountant Partnerships Would Benefit Consumers and Corporate Clients', (2012) *Journal of Corporate Law*, Vol 21, 911, 913 (discussing Model Rule 5.4).

²¹¹ On the historical reasons of these provisions, see BA GREEN, 'The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate' (2000) *Minnesota Law Review*, Vol 84, 1115, 1117. See, also, MB DE STEFANO, above at footnote 3, 2791, 2794. This author also argues that a motivation of this prohibition also lies in protecting the lawyers' monopoly on the exercise of the legal profession.

²¹² Model Rules of Professional Conduct R. 7.3 (2003) (prohibiting direct solicitation of clients). See, also, *O'Hara v Ahlgren, Blumenfeld & Kempster*, 537 N.E.2d 730, 734 (Ill. 1989), where the Court stated that 'fee-splitting arrangements promote solicitation of clients'.

²¹³ S GARBER, above at footnote 3, 36-37. As with regard to class actions see, DR HENSLER, 'Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?' (2014) *De Paul Law Review* Vol 63, 499; DR HENSLER, 'The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding' (2011) *George Washington Law Review*, Vol 79, 306.

why the LEI market is not very much developed²¹⁴, but also because with the American rule on costs an insurance agreement to hedge the adverse costs in the case of loss would have no sense²¹⁵.

1.4.1. The US legal and litigation finance market

While commercial TPLF in the US has developed only recently, it is some time since a series of external financing solutions for litigation has developed, and the market is now quite variegated. The possibility for lawyers to resort to external financing has traditionally been quite controversial in US legal scholarship and jurisprudence, and has been deeply influenced by the regulatory framework(s) impacting on the lawyers. All of the states bar regulations indeed address a large series of issues related to this; a long standing discussion has concerned for example the possibility of advancing the litigation expenses²¹⁶. In this regard, the possibility of foreseeing a complete ban on advancing such sums seems to be not realistic²¹⁷, as the lawyers may indeed have to advance such expenses for reasons of practicality. In re-making the Canons of Professional Ethics, this concern is explicitly taken into account; it is stated that '[a] lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to re-imbursement²¹⁸'. This provision evidently responds to reasons of practicality, but it is said also to have the effect of preventing lawyers from

²¹⁴ MG FAURE and JPB DE MOT, above at footnote 10, 12.

²¹⁵ This is probably why in the US' market for LEI, prepaid legal service plans and group legal service plans are more common. MG FAURE and JPB DE MOT, *Ibid*. Prepaid legal services are those arrangements whereby a person pre-pays, or an employer pays on behalf of employees, for legal services that they may require in the future. Group legal service plans, instead, apply when a person, or an employee together with the employer, pay a periodic premium for access to the covered legal services when the need arises.

²¹⁶ JA KREDER and BA BAUER, 'Litigation Finance Ethics: Paying Interest' (2013) *Journal of the Professional Lawyer*, Vol 1, 9.

²¹⁷ GP MILLER, 'Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent' (2003) *The Review of Litigation*, Vol 22, 557.

²¹⁸ ABA CANONS OF PROFESSIONAL ETHICS, 'Canon 42' (1908)

encouraging frivolous litigation²¹⁹. However, it can be argued that the possibility of advancing sums for the expenses evidently puts the lawyer in a conflict of interest position, insofar as he would become the creditor of his client and may conduct the litigation in his own interests rather than the client's. It must be however noted that this scenario, practically, might not be too different from the case in which the lawyer charges a contingency fee. The situation would be different when the lawyer takes loans for the purpose of maintaining lawsuits (or, also, to expand their activities), and secure them with their own or their law firms' assets, including future incomes²²⁰. This possibility evidently may have ethical impacts with regard to personal conflicts of interest, client confidentiality, and the lawyer's independent judgment²²¹, as the loan provider, in order to assess the applicant lawyer's future incomes, might want to know the details of the cases that he is dealing with. This possibility may moreover clash with the Model Rules on Professional Conduct, which prevent lawyers from 'acquir[ing] a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for [the] client'²²². The concern in this case would be that if the lawyer keeps an interest in the dispute, the client could not terminate his relationship with him if there is a problem. For this reason, the lawyers generally cannot pledge any client's recovery fraction as collateral for the loans or in any way

²¹⁹ GP MILLER, above at footnote 217, 557, 569. This position is supported also by case law of those years. In particular, see the Justice Benjamin Cardozo's opinion, when serving as Chief Judge of the New York Court of Appeals: 'The law does not say that an attorney is guilty of misconduct by the voluntary advance of the expenses of a lawsuit to a client too poor to pay the cost of justice. It does say that there is misconduct if he makes or promises the payment to discharge an obligation assumed in return for his retainer. He shall not "by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof.' In re Gilman's Adm'x, 167 N.E. 437, 439 (N.Y. 1929).

²²⁰ Utah State Bar Ethics Advisory Opinion Committee, Opinion n. 97-11 (1997): 'Many attorneys and firms borrow money and grant security interests in their accounts receivable generally as collateral for the loan.'

²²¹ Kentucky Bar Association, Ethics Op. KBA E-420, I (2002)

²²² Model Rules Of Professional Conduct Remaking 1.8(i) (2012)

jeopardise the sum deriving from the award or settlement, although there might be exceptions²²³.

There is moreover another problematic issue that concerns the passing of loan interest through as litigation expenses in the case where a lawyer applies for a loan to deal with certain cases²²⁴. The problem arises as in this case the client would be directly involved in the loan transaction, even though he did not want to (or, even, did not know about it). For this reason, almost all US jurisdictions that have addressed this problem impose a substantial disclosure obligation on the lawyers who take the loans in the interests of their clients²²⁵. Even if there is the client's consent, the agreement should nevertheless be 'fair, reasonable, customary, and at a lawful [interest] rate'²²⁶. Finally, another provision aimed at preventing the lender from influencing the lawyers' professional judgement is the previously mentioned prohibition on fee-sharing with non-lawyers²²⁷, although it seems that practically funders 'circumvent' this prohibition by directly

²²³ See, for example, North Carolina State Bar, 2006 Formal Ethics Op. 2 (2006): '[A l]awyer may never put a client's funds at risk to obtain a loan.' However, some jurisdictions allow an attorney to pledge his portion of the eventual winning fee (which corresponds to his fee) as collateral for a loan. See Kentucky Bar Association, Ethics Op. KBA E-420 (2002).

²²⁴ JA KREDER and BA BAUER, above at footnote 216, 21

²²⁵ See, for example, The Association of the Bar of the City of N.Y. Comm. on Prof'l and Jud. Ethics, Formal Op. 1997-1 (1997) '[T]he provision must be explained clearly to the client in advance and agreed upon by the client.'; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 603 (1987) ('... appropriate and reasonable interest charges or credits in various situations are not unethical as long as they are made clear to the client at the outset of the retention and the client agrees to the same.); Me. Bd. of Overseers of the Bar, Op. 177 (2001) ('... the financing arrangement must have the informed consent of the client. At a minimum, the client should be advised of how and when the attorney will finance advances, the name of the lending institution, and the expected costs associated with financing, including rate of interest.); State Bar of Ariz., Op. 01-07 (2001) ('... before passing on any interest charges to the client, the arrangement must be explained clearly to the client in writing and be agreed upon by the client in writing.); The Sup. Ct. of Ohio Bd. Of Comm'r's on Grievances and Discipline, Op. 2001-3 (2001) ('... a lawyer should inform the client that the law firm is obtaining a loan for use in advancing the expenses of the litigation and obtain client consent.').

²²⁶ The Sup. Court of Tex. Prof'l Ethics Comm., Op. 465 (1991) (g)

²²⁷ Model Rules Of Prof'l Conduct R. 5.4(a) (2012).

funding the claimant²²⁸. These (and other provisions have given room for the creation of an interesting litigation finance market, within which three different segments were identified: consumer legal funding; lines of credit and/or loans for law firms; investment in commercial lawsuits²²⁹.

1.4.1.1. Consumer legal funding

Consumer legal loans are usually granted to plaintiffs in personal injury, or similar cases, on a non-recourse basis²³⁰. This market has emerged due to some structural (and, probably, unavoidable) flaws of tort litigation, i.e. delay and uncertainty regarding the outcome of the dispute. Impecunious claimants affected by other peoples' negligence could indeed have had to face not only the expenses of litigation, but also the living expenses due to this negligence, such as medical bills, transportation, etc. In a scenario where external finance or legal aid would not be available, these claimants would probably not enforce their rights, and also because traditional lenders – due to high risks and (eventually) lack of collateral – would not lend money for such expenses. In this context, many litigation funding firms have appeared since the 1990's to provide funding for such expenses²³¹, and also have reunited into an association, the American Legal Finance Association ('ALFA'), which sets forth the industry's best practices and

²²⁸ M STEINITZ, above at footnote 2, 1292. In particular, at footnote 86 it states This topic was discussed at the District of Columbia Bar seminar titled "Third-Party Funding in Arbitration" held on June 30, 2009. Funding firms also appear to be partly mitigating the effects of the rule of prohibition by being "offshore," incorporating and listing overseas (though, operating in the United States as well). The uncertainty as to whether courts will uphold litigation funding if challenged arguably contributes to the speculative nature of the investment and therefore to its price (both the price to the client and the price of publicly traded shares of litigation-funding firms).

²²⁹ S GARBER, above at footnote 3. AMERICAN BAR ASSOCIATION - COMMISSION ON ETHICS 20/20, footnote 3, 6.

²³⁰ S GARBER, Ibid., 9. B BAPPELBAUM, 'Lawsuit Loans Add New Risk for the Injured', *New York Times* (Jan. 16, 2011), <http://www.nytimes.com/2011/01/17/business/17lawsuit.html?pagewanted=all&r=0> (last vis. 27.8.2017)

²³¹ JW HASHWAY, 'Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws' (2012) *Roger Williams University Law Review*, Vol 17, 753.

represents the funders before government and other authorities²³². The investment firm that agrees to provide such financing will ask the consumer to pay back the loan, plus an additional contracted fee that does not depend on the amount on the recovery, though it increases with the time passed. These being these non-recourse loans backed by the potential recovery of the dispute, the consumer never has to pay more than the proceeds of the funded lawsuit, though interest is usually higher than that charged by banks in normal consumer loans²³³. Indeed, consumers might want to apply for such loans when they encounter difficulties in obtaining funds from other sources, or for the amount they have to pay in such loans to be limited to the proceeds of the lawsuit.

This litigation funding market differs from others also with regard to the type of entities involved. Indeed, the firms that provide such funding only grant small sums (usually a maximum of 20,000 \$), and this financing is backed by the claim, certainly not a traditional collateral²³⁴. These firms usually pay ‘up-front’ expenses²³⁵, i.e. those costs that have to be borne before the lawsuit is filed, or even while the case is pending, as response to the prohibition for lawyers to provide financial assistance to their clients, other than basic litigation and court costs²³⁶. Nevertheless, in practice they offer very similar services to corporate litigation funders, and their markets often overlap. Most importantly, for the investor it does not change much if the cash is provided for up-front expenses, for example, as he will be only interested in a share of

²³² See the website <http://www.americanlegalfin.com> (last vis. 28.8.2017)

²³³ S GARBER, above at footnote 3, 9.

²³⁴ S GARBER, above at footnote 3, 13; DR RICHMOND, above at footnote 208, 650; SL MARTIN, ‘Financing Litigation On-Line: Usury and Other Obstacles’ (2002) *DePaul Business Law Journal*, Vol 1, 85.

²³⁵ T CARTER, ‘Cash Up Front: New Funding Sources Ease Financial Strains on Plaintiffs Lawyers’, (2004) *American Bar Association Journal*, Vol 90, 34.

²³⁶ Model Rules of Professional Conduct, Rule 1.8(e) reads as follows: ‘A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client’. See JT MOLITERNO, ‘Broad Prohibition, Thin Rationale: The “Acquisition of an Interest and Financial Assistance in Litigation” Rules’ (2003) *Georgetown Journal of Legal Ethics*, Vol 16, 223.

the compensation deriving from the case. It has been argued, though, that the main difference remains with regard to the incentives to litigation that the two funding methods give: while consumer legal loans aim at covering vital expenses that the plaintiffs need while waiting for the end of the case, commercial litigation funding does not²³⁷. The main issue concerning consumer loans is probably that funders might rely on their strong contractual position to impose unfair conditions on consumers²³⁸. It has been argued, in this regard, that imposing proper federal regulation on these firms, like for banks and other financial institutions, could address this concern²³⁹. In particular, as these entities target basically consumers unable to pay for their legal (and other related) expenses, the legal scholarship often proposes regulation of the aspects deriving from asymmetry of information between consumers and loan grantors. In particular it is argued that this regulation does have to address the difference in respective bargaining positions, the (consequent) financial restrictions leading to sign the loan agreements, and the various ethical reasons deriving from the client-lawyer relationship²⁴⁰. The lack of federal regulation also engenders diverging jurisprudence: some courts have already held consumer loans contracts valid and enforceable²⁴¹, while others did not, usually for violation of doctrines of maintenance and champerty²⁴².

²³⁷ It has been argued, in this regard, that this changes very much the economics of litigation. Corporate TPLF is likely to impact on the decision to bring or not certain lawsuits, while consumer loans do not seem to do so. Therefore, from a macro-economic perspective, corporate litigation funding is much more likely to impact on the quality and quantity of litigation. M DE MORPURGO, above at footnote 13, 359.

²³⁸ Consumer loans for funding litigation have been often criticized for their potential usurious interests, even up to 280 % of the total loan amount. SL MARTIN, above at footnote 234.

²³⁹ T CAIN, above at footnote 208.

²⁴⁰ JH McLAUGHLIN, ‘Litigation Funding: Charting a Legal and Ethical Course’ (2007) *Vermont Law Review*, Vol 31, 646.

²⁴¹ See, for example, *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997); *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269 (S.C. 2000).

²⁴² In *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 219-221 (Ohio 2003), p. 18, the court did not enforce a consumer litigation loan agreement because 'a lawsuit is not an investment vehicle. Speculating in lawsuits is prohibited by Ohio law. An intermeddler is not permitted to gorge

1.4.1.2. Finance for law firms

The second segment, which has been in place since some time, encompasses a series of funding instruments (as lines of credit and/or loans) for law firms²⁴³. The common feature of this segment is that all the funding instruments are provided to law firms, whatever the activity (including litigation), and are backed with the same law firms' assets or other similar collateral. Therefore, the main difference with the TPLF models that we have analysed so far is that this type of financing is not non-recourse. Considering that the risk is ultimately borne by the lawyers, this sort of financing would probably fall within the category of Lawyers' Funding. In fact, this categorization would depend on the collateral applied to such loans. If the collateral is represented only by the claim (and its merit), the risks would still be borne by the lender, and this would make it not too different from the normal TPLF scheme. If, instead, the collateral were to be represented, for example, by the law firms' assets, then the risk would be borne by the lawyer (or anyway by the law firm) and it would be more likely to be encompassed in the Lawyers' Funding category.

1.4.1.3. Commercial TPLF

Commercial TPLF in the US is a relatively new industry, and is considered as 'the outside funding of sophisticated players who pursue business disputes'²⁴⁴. Even though it started a little later than the common law jurisdictions, commercial TPLF is developing at a very fast pace in the US. The firms that run such business provide capital in exchange for a share in the profits deriving from the case, while the clients are basically companies that consider this type of funding for hedging the cost of litigation, and anyway to have an external assessment of their cases. They also use it as strategy towards their counterpart, insofar as the presence of external funding would demonstrate the high merits of the case. This industry being addressed to companies, the funding contracts are often not disclosed and therefore the information on such

upon the fruits of litigation.').

²⁴³ S GARBER, above at footnote 3, 13.

²⁴⁴ MB DE STEFANO BEARDSLEE, 'Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?' (2014) *DePaul Law Review* Vol 63, 305.

transactions is not easily available. The main players in this market in the US are Burford Capital, Juridica Investments Ltd. and Bentham IMF, all publicly traded in foreign exchanges. On the 27th of August 2015 Charles E. Grassley, Chairman of the United States Senate Judiciary Committee, and John Cornyn, Chairman of the Subcommittee on the Constitution, sent a request for information to these three funders. After acknowledging the fast growth of this industry, though in a non-regulated context, the two senators complained about the lack of transparency they work in, and the potential concerns that this practice raises. They then addressed a series of twelve questions aimed at better understanding the market. In particular, they asked about the type of disputes they have funded, the law firms they have dealt with, some contractual issues and some financial figures of their business²⁴⁵. Burford, represented by Sir Peter Middleton, Chairman, Christopher Bogart, CEO, and Professor Jonathan Molot, CIO, promptly replied providing an interesting insight into this industry²⁴⁶. They describe corporate TPLF as ‘simply conventional commercial financing for participants in the legal system—both law firms and the business clients’. Burford then provides the economic explanation of this phenomenon: ‘as with any other form of commercial finance, litigation finance only exists because there is demand for it from its users That demand exists for various commercial reasons, but a common theme underlying all those reasons is that litigation is very expensive and can be financially burdensome even for our very largest companies’²⁴⁷. As such, commercial TPLF is an industry not much different from others, and what changes is eventually the professionalism that

²⁴⁵ See the letters sent by Charles E. Grassley, Chairman of the United States Senate Judiciary Committee, and John Cornyn, Chairman of the Subcommittee on the Constitution to Burford Capital, Juridica Investments Ltd. and Bentham IMF, on the 27th of August 2015.

²⁴⁶ See the letter sent by Sir Peter Middleton, Chairman, Christopher Bogart, CEO, and Professor Jonathan Molot, CIO, to Charles E. Grassley, Chairman of the United States Senate Judiciary Committee, and John Cornyn, Chairman of the Subcommittee on the Constitution, on September 25th 2015, available in <http://www.burfordcapital.com/burford-submits-response-to-us-senators/> (last vis. 28.7.2017)

²⁴⁷ Ibid. At page 8 they clearly state that ‘litigation is a necessary and inevitable reality of doing business—and yet it has never been more expensive. The costs of pursuing as well as defending claims can be extraordinary, functioning as a barrier to justice and an economic burden for companies of all sizes. As a result, business leaders have faced a difficult choice: diverting cash from business growth and hiring, or forgoing the legal counsel they need.’

entities such as Burford pour in, and its capacity to meet a growing demand of the market. Burford then focuses on the legality of its operations, and goes on to report also some of the debate concerning commercial TPLF. In particular, it states that most of the criticisms derive from the US Chamber of Commerce report ‘Selling Lawsuits, Buying Trouble: Third Party Litigation Funding in the United States’, where they indeed expressed deep concerns regarding this phenomenon²⁴⁸. Burford does not omit to denote that in this report the Chamber of Commerce ‘stands in stark contrast to the fact that its members are the users of litigation finance’. This position would indeed be only that of the Chamber, and not representative of its members’ view, who instead make large use of TPLF. This report has then been taken as the landmark piece for all criticism to TPLF, but others have followed. The American Tort Reform Association (‘ATRA’), for example, has also made some harsh criticisms, stating that TPLF would transform courtrooms into a stock exchange, and litigation into a commodity²⁴⁹. The ABA has instead adopted a more ‘wait-and-see’ approach²⁵⁰, while academics and practitioners, in one way or another, generally focus more on its potential in terms of enhancing access to justice and balancing lawyers’ and clients’ interests²⁵¹. Also the

²⁴⁸ U.S. CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, ‘Selling Lawsuits, Buying Trouble: Third Party Litigation Funding In The United States’, October 2009.

²⁴⁹ See letter (dated Mar. 7, 2011) from the AMERICAN TORT REFORM ASSOCIATION (‘ATRA’), Comments, Alternative Litigation Financing Working Group, Issues Paper ‘Issues Paper Concerning Lawyer’s Involvement in Alternative Litigation Financing’ available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/comments_on_alternative_litigation_financing_issues_paper.authcheckdam.pdf, 13. (last vis. 8.2.2017)

²⁵⁰ ABA COMMISSION ON ETHICS 20/20, ‘Informational Report To The House Of Delegates’, 2 (2012), available at

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_litigation_funding_white_paper_final_hod_informational_report.authcheckdam.pdf. (last vis. 8.2.2017).

²⁵¹ Inter alia, see S LORDE MARTIN, ‘The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed’ (2004) *Fordham Journal of Corporate & Financial Law*, Vol 10, Issue 1, Article 3; J LYON, ‘Revolution in Progress: Third-Party Funding of American Litigation’ (2010) *UCLA Law Review*, Vol 58, 571; J LEIGH, ‘Litigation Funding Begins to Take Off’ (2009) *National Law Journal*, available at <http://www.therecorder.com/id=1202435963894/Thirdparty-Litigation-Funding-Begins-to-Take-Off?slreturn=20170108063958> (last vis 8.2.2017); M STEINITZ, above at footnote 2; AJ SEBOK, above at footnote 13.

US courts are more and more adopting an elastic approach, and have ‘held that the risk that third parties would engage in what is today known as abuse of process had disappeared with the advent of modern reforms’²⁵².

1.4.2. TPLF vs contingency fees in US mass claims

TPLF in the US is also being used in collective actions, also in a more active form (with the transfer of claims to a third party funder). This mechanism has been the object of a specific assessment in the case of *Sprint Communications Co v APCC Services Inc*²⁵³. The case arose because the company APCC Services Inc collected claims from 1,400 payphone operators, and filed them in its name, while the original claimholders had still equitable ownership. In this case a distinction between equitable ownership and legal ownership of a claim was somehow created, so that there could be a sort of fiduciary relationship (besides a contractual one) between the original claimholders and the assignee. The petitioners asked for APCC Services Inc to be rejected, as, being only a collector it lacked the necessary personal stake in the case as required by art. III (2) of the US Constitution, or anyway because the damages suffered did not affect it. A majority of the Supreme Court judges, however, dismissed this argument and retained the collection, and the subsequent pursuit of the case, valid. Another issue concerned the possibility of a joinder of different cases. The counsel for APCC Services Inc., required by the Supreme Court judges, stated that 1,400 claims were merged onto a single cause of action. The basic principle is that, while the limitations on joinder can be overcome by assigning the claims²⁵⁴, disparate causes of action cannot be merged into one even if purchased by a single assignee. Even if in the US there are no explicit prohibitions in this regard²⁵⁵, much depends on the court

²⁵² AMERICAN BAR ASSOCIATION - COMMISSION ON ETHICS 20/20, above at footnote 3, 10.

²⁵³ *Sprint Communications Com v APCC Services Inc* 128 S Ct 2531 (2008).

²⁵⁴ *Benedict v Guardian Trust Co* 58 AD 302; 68 NYS 1082 (1901).

²⁵⁵ See for example r.18(a) of the Federal Rules Civil Procedure; s.427.10 of the Cal Civil Procedure Code; r.24A of the Oregon Rules of Civil Procedure; r.18(a) of the Kentucky Rules of Civil Procedure; r.18(a) of the Arkansas Rules of Civil Procedure; r.18(a) of the Idaho Rules of Civil Procedure; r.18(a) of the Mass Rules of Civil Procedure; r.18(a) of the Mississippi Rules of Civil Procedure; r.18.01 of the Minnesota Rules of Civil Procedure.

where the claims are filed, so that the judges retain ample discretion in assessing whether to dismiss them on these grounds. The transfer of claims by assignment is however not universally admitted in the US, and many prohibitions and/or limits still survive in the single state's legislations. The rationale of these limits has been explained together with the other traditional prohibitions of litigation funding through the 'Inauthentic Claim' theory of Professor Anthony Sebok²⁵⁶. He argues that '[t]he focus of any study of the law of assignment must shift, therefore, from who brought a claim (which was always the ground for challenging an assignment) to *why* a claim was brought. The former question provided the form of the doctrine of non-assignability, while the latter question provided its rationale—which in turn was based on the more basic concern with maintenance.' The link between the two would therefore lie on the fact that these were the two faces of the same medal, i.e. prohibiting a non-party to take control of another persons' private claim. However, he continues, the focus should not be on the figure of assignment per se, but in its inter-relations with maintenance, champerty and barratry on a case-by-case analysis²⁵⁷.

The case Sprint Communications Co v APCC Services Inc is interesting also because it allows us to note that TPLF is stepping into a sector that in the US has traditionally been dealt with by means of lawyers' contingency fees²⁵⁸. In this regard, it is first to be noted that the use of contingency fees does not exclude the use of TPLF and, at least theoretically, they may complement each other from a substantial point of view: for example when the non-legal expenses are very high and lawyers do not want to or cannot advance them. From a formal point of view, however, it must be noted that contingency fees differ from TPLF as they are part of lawyers' services that turn around the main service of legal advice, while the latter would be nothing but an investment²⁵⁹. As such, the specific regulatory provisions that bind the lawyers should not be meant to apply to funders.

²⁵⁶ AJ SEBOK, above at footnote 13.

²⁵⁷ Ibid.

²⁵⁸ Some literature on the matter can be found in Chapter 4, par 2.2.1.

²⁵⁹ In M STEINITZ, above at footnote 2, 1293. It is possible to have a concrete example of these activities in the Burford's Document for Placing of 80,000,000 Ordinary Shares at a price of 100 pence per Ordinary Share

2. TPLF in the (European continental) civil law jurisdictions

TPLF has started to be experienced in the European continental jurisdictions, although not as extensively as in the common law ones analysed. It has been experienced already with relatively some success in Germany, Austria, Switzerland, the Netherlands, France and Belgium, and it is moreover very likely that the funders established elsewhere also assess (and eventually fund) cases in other countries. While it is probable that TPLF will soon expand more significantly also in the European

and Admission to Trading on AIM, Part II, par 4, available at <http://www.burfordcapital.com/wp-content/uploads/2016/09/burford-admission-document.pdf> (last vis. 10.2.2017): ‘The Company intends to make use of a wide variety of investment structures, with each investment using an individually tailored structure that is most appropriate for that investment. The Investment Adviser will structure proposed investments based on a variety of factors including, but not limited to, the size of the case, the cost involved, the anticipated timeframe of the case, the returns anticipated, the nature of the dispute, the nature of the parties to and participants in the dispute, the permissible legal and ethical structures in the jurisdiction(s) in question and tax mitigation. Examples of possible structures include, inter alia:

- funding the legal expenses associated with pursuing or defending a claim in exchange for a payment based on the claim’s outcome;
- acquiring an interest in all or a part of a claim or claimant at various stages during the adjudication process, including after a judgement or award has been rendered;
- lending money, either directly or through a law firm established by the Principals, to fund the activities of a law firm, the litigation of a portfolio of cases, or the litigation of a single case;
- arranging and participating in structures that remove the risk of liability from companies’ balance sheets;
- acquiring interests in intellectual property that is the subject of claimed infringement; and
- participating in post-insolvency litigation trust structures.

In certain instances, the Company will enter into agreements to fund investments over a period of time (for example, by paying their costs in instalments as they arise over the life of a litigation matter). In the event that the Company has committed cash to cases which have a period of time still to run, it could be that the Company is faced with a situation where it could have committed its entire fund but the cash remains on the balance sheet until such time as further instalments are due to be paid. In such instances, the Directors of the Company may decide to commit additional funding into attractive investments in the expectation that some matters will reach resolution before all commitments are called.’ See moreover below Part II, par 1.2.2.3.

continent, the uncertainty remains with regard to the reaction that the local legal practitioners and policymakers will have, and therefore on the modalities how TPLF will develop. The historical overview has highlighted at least two figures which could influence the way in which TPLF will be conducted in civil law jurisdictions: the prohibition to the PQL, applied more or less extensively in all European jurisdictions to lawyers and/or other personnel involved in the administration of justice; and the RL, applied only in some of them. Moreover, certain EU legislation and case law have contributed to harmonising some the national member states' legislation potentially having an impact on TPLF, like that concerning civil and commercial dispute resolution²⁶⁰. While these issues will be object of analysis in Part III, it is important to note at this stage that it is likely that the development of TPLF will share some common features in the European civil law jurisdictions, as the market phenomenon lies and will continue to lie on common historical legal traditions.

2.1. Germany

Germany is one of the European civil law jurisdictions where TPLF has developed earlier than others, although litigation has also been largely funded by legal expenses insurance during the last two decades²⁶¹. This is probably the reason why TPLF has grown as longa manus of existing insurers; Allianz, in particular, has funded cases in Germany, Austria and Switzerland since 2002 through its subsidiary Allianz Litigation Funding, until it decided to exit this business for reasons of conflict of interest with the

²⁶⁰ See Directive on Civil and Commercial Mediation, 2008/52/EC; Directive on consumer ADR, 2013/11/EU; Regulation (EU) on consumer ODR No 524/2013. More specifically, see in Chapter 8, par 1.3.

²⁶¹ See M KILIAN, 'Alternatives to Public Provision: The Rule of Legal Expenses Insurance in Broadening Access to Justice: The German Experience' (2003) *Journal of Law and Society*, Vol 30, N1, discussing the role that LEI have in funding litigation in Germany already in 2003, also as stand-alone contracts. As for the actual situation, a recent report of the Rencontres Internationales des Assureurs Défense ('RIAD'), the International Association of Legal Protection Insurance, Germany accounts for the 44 % of the LEI premiums in Europe, and more than 50 companies offer such services, for over 20 million contracts (collective or individual). See RIAD, *The Legal Protection Insurance Market in Europe*, October 2015.

parent company's insurance clients²⁶². Apart from this, many other independent companies have provided funds directly to claimants²⁶³, like FORIS Finanziert Processe²⁶⁴, Legial²⁶⁵, and Exactor AG²⁶⁶. In general, it seems that the overall civil procedural structure (and, in particular, the predictability of civil litigations costs, due to high regulation and proportionality between court costs and lawyers' fees)²⁶⁷, and the prohibition on PQL might have favoured the emergence of TPLF²⁶⁸. German legal scholars have already discussed the legal nature of TPLF contracts²⁶⁹, which is quite a controversial issue. Some consider that such contracts would be void and therefore

²⁶² S GREEN, 'Debate on the ethical issue of investing in lawsuits', *Financial Times*, 13.11.2011, available at <https://www.ft.com/content/a9eddb14-0bc6-11e1-9861-00144feabdc0> (last vis. 27.8.2017). On the decision of Allianz Prozessfinanzierung to exit this market, see C STUERWALD, *An Analysis of Allianz' decision to discontinue its litigation funding business*, at <http://www.calunius.com/media/2747/cs%20-%20calunius%20article%20on%20allianz%204%20january%202012.pdf> (last vis. 27.8.2017).

²⁶³ R KIRSTEIN and N RICKMAN, 'FORIS Contracts: Litigation Cost Shifting and Contingent Fees in Germany' (2001) CSLE Discussion Paper, n 4, available at <http://econpapers.repec.org/paper/zbwcsledp/200104.htm> (last vis. 7.2.2017).

²⁶⁴ <http://foris-prozessfinanzierung.de> (last vis. 7.2.2017).

²⁶⁵ <https://www.legial.de> (last vis. 7.2.2017).

²⁶⁶ <http://www.exactor.de> (last vis. 7.2.2017).

²⁶⁷ B HESS and R HUBNER, 'Germany', in C HODGES, S VOGENAUER and M TULIBACKA, above at footnote 121.

²⁶⁸ The same reasoning has been in fact done also with regard to LEI. See M DE MORPURGO above at footnote 13, 400. The highest German courts have repeatedly voided contingency fees on the grounds of immorality. See A BRUNS, above at footnote 50, 525, 531. M KILIAN, above at footnote 261, 43-44. First, government funds for legal aid are very limited, and even the party enjoying it, if she loses a case, has to pay the opponent's fees. Moreover, almost all forms of lawyers' result-based compensations are banned, and they enjoy monopoly also for out-of-court work, so creating a very stable and foreclosed market, with a formal and transparent fee regulation. Finally, the German Bar has no reason to oppose a shift from public legal aid to private insurance schemes, especially due to the little competition that the mentioned rules create. MG FAURE and JPB DE MOT, above at footnote 10, 14-15.

²⁶⁹ Here it is evident the difference in approach between civil law and common law scholars. Civil lawyers approach is to always try to encompass innovative contracts within the existing models already contained in their national civil codes. See M BUSSANI, *Libertà contrattuale e diritto europeo*, Torino, 2005, 28-35.

unenforceable as immoral and against public policy²⁷⁰. The negative approach has been somehow endorsed recently also by the Higher Regional Court ('Oberlandesgericht') of Düsseldorf, although on different public moral grounds²⁷¹. However, the majority of the authors consider such a contract valid, although there is uncertainty regarding its nature. The prevailing opinion is that the TPLF contract can neither be defined as a loan, nor as an insurance, but eventually as a 'silent partnership' ('innengesellschaft') between the third party funder and the claimant aimed at pursuing the joint goal of enforcing the claim in court²⁷².

2.2. Switzerland

TPLF in Switzerland has been practiced for more than a decade, though at the beginning it raised some concerns, so that the Canton of Zurich, in order to preserve the independence of lawyers, amended the Attorney Act to prohibit it²⁷³. However, even before this provision could take effect, the Federal Court repealed the provision deeming it a disproportionate obstacle to the freedom of commerce²⁷⁴, and so de facto

²⁷⁰ A BRUNS, above at footnote 50, 525, 534.

²⁷¹ This court so dismissed the appeal brought by Cartel Damage Claims SA, a vehicle established by the Belgian Cartel Damage Claims, in a claim for damages arising out of a cartel in the cement market. See the company's press release 'Higher Regional Court dismisses appeal in German cement cartel case', of 25 February 2015, available at <http://www.carteldamageclaims.com/wordpress/wp-content/uploads/2014/02/Press-release-cement-case-judgment-25-Feb-2015.pdf> (last vis. 4/2/2017). More specifically on this case, see STADLER A, 'Funding of mass claims in Germany Caught between a rock and a hard place?', in VAN BOOM WH (ed above at footnote 3, 202, and in particular par 2.1).

²⁷² See M COESTER and D NITZSCHE, 'Alternative Ways to Finance a Lawsuit in Germany' (2005) *Civil Justice Quarterly*, Vol 24, 94. More in detail in Chapter 7, par 2.

²⁷³ § 41 of the Attorney Act of the Canton of Zurich (*Anwaltsgegesetz des Kantons Zürich*), in force since January 1, 2005.

²⁷⁴ Federal Supreme Court Decision (*Bundesgerichtsentscheid* or 'BGE') 131 I 223.

promoted this practice. Since this decision TPLF has been commonly used in Switzerland, probably also because of the prohibition on contingency fees²⁷⁵.

2.3. Austria

Austria also is representing a growing market for TPLF, and some specialised litigation funding entities have already been funding cases for some years, also in the context of mass claims²⁷⁶. In this regard, the Supreme Court has recently dismissed the defendants' argument requiring standing to dispute a contingency fee agreement between a claimant and a litigation funding company. Instead, the prohibition of the PQL in § 879 Abs 2 Z 2 of the Austrian Civil Code was only meant to protect the claimant, not his adversary.²⁷⁷.

2.4. Belgium

In Belgium there has recently been a very interesting development concerning the transfer of claims, which has led to the introduction of some legislation that seems to have drawn inspiration from the Lex Anastasiana of Roman origin²⁷⁸. In order to avoid alleged speculations of the so called 'vulture funds', it has been prohibited to purchase sovereign debt at a high discount and then to sue the debtor state²⁷⁹. It must be noted, however, that the Belgian Legislator seems not to have repealed the RL entirely, but just for the entities that do such allegedly speculative activity against states. Apart from the particular legislation concerning the transfer of claims, Belgium is also the seat of

²⁷⁵ A FRISCHKNECHT and V SCHMIDT, 'Privilege and Confidentiality in Third Party Funder Due Diligence: the positions in the United States and Switzerland and the resulting expectations gap in international arbitration' (2011) *Transnational Dispute Management*, Vol 8, Issue 4.

²⁷⁶ For example LexDroit, <http://lexdroit.at> (last vis. 7.2.2017)

²⁷⁷ Austrian Supreme Court, 27 February 2013, 6 Ob 224/12b.

²⁷⁸ See Chapter 2, par 1.2.2.

²⁷⁹ 12 Juillet 2015 - Loi relative à la lutte contre les activités des fonds vautours, in www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2015-09-11&numac=2015003318&caller=summary (last vis. 7.2.2017). See G VAN CALSTER, 'Do not kick them while they are down. Vulture funds in private international law', in AP ANDRÉ-DUMONT, I DE MEULENEERE and AS PIJCKE (eds.) *The increasing impact of human rights law on the financial world pages*, Cahiers AEDBF /EVBFR Vol 28, 53-67.

Cartel Damage Claims (CDC), a company established in 2003 to fund (and purchase) cartel damage claims. The CDC modus operandi, according to information available on their website²⁸⁰, consists in purchasing and bundling cartel damage claims, and enforcing them in courts. In so doing, it is probably the litigation funder that has focused more on active TPLF, at least with regard to EU private enforcement of competition law. CDC has its main seat in Bruxelles but operates throughout Europe, and has enforced claims in Germany, in the Netherlands and in Finland.

2.5. The Netherlands

TPLF in the Netherlands has been experienced for a very long time²⁸¹, and it coexists efficiently with other methods for funding litigation, like state legal aid and legal expenses insurances²⁸². TPLF is widely accepted in the Netherlands, especially because the common feeling is that the costs for dispute resolution are very high, due to a public policy choice of the Dutch government aimed at encouraging settlement,

²⁸⁰ <http://www.carteldamageclaims.com/cdc-what-we-do/> (last vis. 7.2.2017)

²⁸¹ This is mainly due to the activities of the most experienced and main litigation funder Omni Bridgeway. See in its website <https://omnibridgeway.com/> (last vis. 28.8.2017), stating that the company has started operating in 1986. It is moreover worth noting that already in 1997 a claim had been funded by means of securitisation, and the relative interests in it traded in the Amsterdam Stock Exchange. Even though the court ruled against the claimholder, the legality of this funding method had not been challenged. M TUIL, 'The Netherlands', in C HODGES, S VOGENAUER and M TULIBACKA, above at footnote 121, 408, citing the case Hoge Raad HR 13 October 2006, LJN AV6956, NJ 2007. See moreover, in the context of intellectual property cases, VRENDBARG C, 'Legal costs awards and access to justice in Dutch intellectual property cases. How the IPR Enforcement Directive impacts on litigation and settlement behaviour in IP disputes', in VAN BOOM WH above at footnote 3, 80.

²⁸² IN TZANKOVA, 'Funding of Mass Disputes: Lessons From the Netherlands' (2012) *Journal of Law, Economics & Policy*, Vol 8, 549. Moreover, a recent empirical study has demonstrated that the market for LEI had paralleled state cuts in legal aid, in the Netherlands, so that a more or less wide use of LEI would depend on the availability of the state funding. C KLEIN HAARHUIS and B VAN VELTHOVEN, 'Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands' (2011) *Journal of Empirical Legal Studies*, Vol 8, Issue 3. Similar findings, though with different elements, can be found in the Swedish market, whereby the Government has reduced the funds for legal aid while LEI was required to be taken out to cover this 'gap'. F REGAN, 'The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expenses Insurance' (2003) *Journal of Law and Society*, Vol 30. It must be noted, though, that LEI is already included 'for free' in household insurance policies.

and deeming litigation only as *extrema ratio*²⁸³. Instead, contingency fees are generally not permitted to lawyers²⁸⁴, although especially in collective claims it happens that entrepreneurial lawyers or other organisations set up and run special purpose vehicles that incorporate individual claimants' rights, and enforce them in court²⁸⁵. The market therefore has already experienced different possibilities for funding litigation, and often these are combined to promote highly complex and costly cases. In a case against the bank Dexia, a series of funding models – personal contributions, legal aid, LEI and TPLF - have been combined in order to file a very large mass dispute relating to investment products, and involving over 300,000 claimants, of whom less than 10% opted out²⁸⁶. The possibility of opting out, indeed, is a peculiarity of the Netherlands, together with the fact that collective settlements can be declared binding on an entire class²⁸⁷. For these and more reasons the Dutch jurisdiction is being looked at with interest by foreign lawyers (and third party funders) willing to file mass lawsuits in international claims²⁸⁸. An interesting case in this regard is represented by a follow-on action related to an action for damages following a European Commission's Infringement Decision for a cartel in sodium chlorate paper bleach brought by CDC²⁸⁹.

²⁸³ M TUIL, above at footnote 121, 404.

²⁸⁴ It should be however noted that we are now in a period of experimentation for certain conditional fees, especially in personal injury claims. In this regard, see a very recent contribution analysing the law and economics of this 'experiment', VAN VELTHOVEN B and VAN WIJCK P, 'Experimenting with conditional fees in the Netherlands', in VAN BOOM WH above at footnote 3, 129.

²⁸⁵ MMP VAN DER GRINTEN, 'The Netherlands: Policy Observations', in C HODGES, S VOGENAUER and M TULIBACKA, above at footnote 121, 423. TILLEMA I, 'Entrepreneurial motives in Dutch collective redress. Adding fuel to a 'compensation culture'?' in VAN BOOM WH above at footnote 3, 222, and in particular par 4.

²⁸⁶ IN TZANKOVA, above at footnote 282, 578.

²⁸⁷ D HENSLER, C HODGES, N TULIBACKA, 'The Globalization of Class Actions' (2009) *Annals of the American Academy of Political and Social Science*, Vol 622, n 149. On the Dutch legal framework concerning collective redress, see TILLEMA I, above at footnote 285, and in particular par 2.

²⁸⁸ SOERJATIN E, 'Collective redress. Should we be going Dutch?' (2017) *Harbour View*, Summer 2017, available at <https://www.harbourlitigationfunding.com/wp-content/uploads/2017/06/HV-Summer-2017-Collective-redress-Going-dutch-E-Soerjatin.pdf> (last vis. 7.7.2017).

²⁸⁹ COMP/38695 — *Sodium Chlorate*.

The cartel involved eight companies from different countries, but the lawsuit was filed in the Netherlands also because of a more convenient forum.

2.6. France

TPLF has begun being practiced in France, too, especially in private arbitrations but not only²⁹⁰. Alter Litigation Funding is the first player in the market and, besides the ‘classical’ TPLF service, it has recently launched an online platform where the victims of anti-competitive behaviour or other abuses which require collective action can join and bring them forward to recover the damages occurring from such abuses²⁹¹. TPLF has moreover been discussed more widely in a report published in 2014 by Le Club des Juristes, a legal think tank, where some of the legal issues concerning TPLF in relation to French law have been addressed²⁹².

The report first of all excludes that the TPLF contract can be qualified as gambling, insurance, claim assignment or company contribution. It then goes on analysing the potential application of the contract for the provision of services (more in particular, enterprise contract) regime, in the light of a case involving TPLF and decided recently by the Cassation Court. In this case, while the Court did not expressly mention the contract for the provision of services, it seems to have nevertheless drawn on it to reduce the fee due to a funder in a family law case²⁹³. However, the report does not agree with this interpretation to the extent that such a reduction should not apply in the case where, like in TPLF, the fee is decided in advance. It then concludes that the TPLF contract is likely to be a composite contract under French law, encompassing obligations from different contracts (service/enterprise, mandate, aleatory contract, assignment, etc.). Therefore, in the light of the principle of contractual freedom stated at article 1107 of the French Civil Code, the parties should be free to conceive a

²⁹⁰ C DELZANNO, ‘Faire du contentieux un investissement financier’ (2013) *Droit & Patrimoine*, n 225, May 2013.

²⁹¹ <https://www.weclaim.com>

²⁹² LE CLUB DES JURISTES, *Financement du proces par les tiers*, Juin 2014. http://www.leclubdesjuristes.com/wp-content/uploads/2014/01/CDJ_Rapport_Financement-proc%C3%A8s-par-les-tiers_Juin-2014.pdf (last vis. 7.2.2017). More in detail in Part III, par. 1.1.

²⁹³ Civ. I, 23 nov. 2011, n° 10-16770, P+B.

contractual relationship that unifies the provisions of the different contracts applicable to the specific case²⁹⁴. The report goes on to analyse potential problematic clauses of the TPLF agreements. In particular, it is noteworthy reporting that according to this analysis TPLF contracts would not be considered as credit transactions, and so reserved to the banks' monopoly, and that they potentially do not clash with the provisions on the lawyers' deontology²⁹⁵.

2.7. Other (European continental) civil law jurisdictions

TPLF has not developed thoroughly as an industry in other European prominent civil law jurisdictions, such as for example Italy and Spain, although funders are certainly already exploring (and, perhaps, funding) opportunities in all of them²⁹⁶. While TPLF is expected to expand more decidedly also in continental Europe, it is however still uncertain how this will happen. In this regard, it seems likely that the common Roman (or, more generally, civil law) legal roots and the common legal framework provided for by some European Union legislation and case law²⁹⁷ will raise similar issues in all of the European civil law jurisdictions.

3. Concluding remarks: a fast growing TPLF (and litigation) market

The comparative analysis focusing on TPLF, although certainly non-exhaustive, has offered an interesting perspective on the existence of a market phenomenon in continuous and fast growth. Litigation has been funded or anyhow supported by third parties for a long time, but the modern TPLF practice has one feature that distinguishes it from the historical antecedents: it aims at responding to a fast growing market demand determined by a series of recent global trends affecting access to justice and dispute resolution. The increases in justice costs, the inefficiency of ordinary dispute

²⁹⁴ LE CLUB DES JURISTES, above at footnote 292, 18.

²⁹⁵ Ibid., p. 25, and p 32.

²⁹⁶ The prospects of TPLF in these jurisdictions has been described in MO COJO, 'Third-Party Litigation Funding: Current State of Affairs and Prospects for its Further Development in Spain' (2014) *European Review of Private Law*, Vol 22, Issue 3, and GM SOLAS, 'Alternative Litigation Funding: A Comparative Overview and the Italian perspective' (2016) *European Review of Private Law*, Vol 24, Issue 2.

²⁹⁷ See Part III.

resolution systems, and the growing aversion to litigation costs and risks seem to have in fact stimulated this industry. TPLF is imposing itself as a very useful alternative litigation funding instrument for parties that lack resources to pay for legal costs, but also for those that – while not impecunious - nevertheless prefer not to pay for these costs and decide to transfer the litigation risk to another party. The analysis concerning the legality of TPLF in the common law and civil law jurisdictions has moreover offered quite interesting scenarios for this business. Indeed, while this instrument has initially raised some concerns, the legislators, courts and commentators have often recognised, in most of the jurisdictions examined, that TPLF could play a fundamental role in ensuring and enhancing access to justice, at least for parties that lack resources to pay for the legal costs. The legal debate on TPLF, however, cannot be confined to access to justice (because it has also so far mainly emerged in the corporate segment) but involves various layers of regulation, from primary and secondary legislation to the lawyers' bar regulations. In this regard, it is worth summarising the main legal issues raised in Chapter 3 with regard to TPLF in common law and in civil law jurisdictions, with a caveat that each jurisdiction would present some more specific provision potentially shaping this practice.

3.1. Legality of TPLF in the common law jurisdictions

Paragraph 1 of Chapter 3 has shown that TPLF is, in principle, legal in all of the common law jurisdictions analysed. It has however shown that there may be some limits, basically consisting in the provisions and case law (still in place) mainly concerning:

- a) maintenance, the support to other people's disputes;
- b) champerty, the sharing of the dispute's proceeds.

In the case of TPLF these figures are most often interlinked to the extent that funders provide support to disputes in exchange for a share in the proceeds. The comparative analysis has helped showing that legislators and courts of common law have abolished and/or relaxed the field of application of these figures basically in all of the analysed jurisdictions, recognising that they are reminiscent of the English feudal system and that they are no longer justified on the grounds of public policy. It is however to be noted that these limits very often still remain in place as general rules aimed at

protecting the interests of the weak/funded party towards the funder and/or the sound administration of justice. In other words, the courts have generally recognised that TPLF does not necessarily entail an abuse under the meaning of maintenance and champerty, although there might be situations – in each jurisdiction – that may justify the application of these rules. It is however worth recalling that in some specific contexts (like some US states) these figures have been rejected by the courts, prohibiting parties from entering into TPLF agreements on these grounds. In such cases probably some effort of the legislators aimed at harmonising the legislation on this field could be needed²⁹⁸.

3.2. Legality of TPLF in the civil law jurisdictions

Paragraph 2 of Chapter 3 has shown that TPLF is, in principle, legal in all of the civil law jurisdictions analysed, although there are some uncertainties concerning the applicable contractual model and other regulation potentially applicable. While the contractual models and other regulation will be discussed more in detail in Chapter 7, it is worth recalling what seem to be the main limits to the bargaining over litigation in civil law jurisdictions:

- a) the prohibition to enter into PQL, preventing lawyers (and eventually other personnel involved in the judiciary) from getting shares of the proceeds from disputes as payment for their service or otherwise. This limit might not directly concern investment funds or similar entities, unless these were run by lawyers or else, the latter had shares in them. The PQL is basically present in all of the civil law jurisdictions analysed, either in the civil codes and/or in the Bar regulations. It is however worth recalling that, at least in the EU context, the possibility for lawyers to base at least partially their fees on success has been recognised (indirectly) by certain jurisprudence of the Court of Justice of the European Union²⁹⁹. This possibility, at least in claims concerning the payment of monetary sums, evidently reduces the field of application of the said prohibition on the PQL;
- b) the limit on the RL that, as mentioned, limits the possibility for anyone (and not only lawyers) to purchase and enforce claims, by prohibiting them to get more than the

²⁹⁸ See for example V SHANNON, above at footnote 206.

²⁹⁹ See above at footnote 96, the cases *Cipolla*.

price they paid for the claim plus interest. In this regard, it is worth recalling that this limit, unlike the PQL, is present only in some jurisdictions (i.e. France and Spain), while in others it has been repealed as a way to favour business transactions (i.e. Italy and the Netherlands)³⁰⁰.

As final remarks for these conclusions it is worth recalling that the legality of TPLF (in both common law and civil law jurisdictions) should not only encompass the main rules mentioned, but obviously also others that may be typical of each jurisdiction. As an example, it is possible to recall Rule 5.4 of the ABA Model Rules of Professional Responsibility in the US, preventing lawyers from sharing their fees with other parties³⁰¹, or the law proposal submitted in Switzerland with regard to the potential introduction of a similar rule, then abandoned because of the intervention of the Federal Court³⁰². Moreover, it is finally worth noting how this first Part has given the idea that there is a brand new market for litigation and/or for 'litigious rights' ('litigation market'), and the main players are third party funders, (litigation) lawyers and insurers. However, their role in this market seems to change according to the jurisdiction where they operate: the functions of the lawyers and insurers are indeed well defined and restrained by the regulation already binding on them, also with regard to their compensation and capability to support the cases' costs. Another issue that may shape this business is that litigation lawyers and legal expenses insurers may find themselves in situations of conflict of interest with existing clients (it could be the case of insurers, as in the case Allianz described in par 2.1., but also of typical defendant lawyers). For these reasons it is certainly worth exploring, on the one hand, how this market has emerged and, on the other, what could be the possibilities and limits for these actors (and, in particular, for third party funders) to compete in the litigation market.

³⁰⁰ See above at par 2.2. of the Chapter 2.

³⁰¹ Par 1.4.

³⁰² Par 2.2.

PART II

A LEGAL AND ECONOMIC ANALYSIS OF THIRD PARTY LITIGATION

FUNDING IN/AND THE LITIGATION MARKET

The historical and comparative overview has shown that the TPLF industry seems to have emerged as a response to a fast growing demand, which would have been stimulated somehow by the recent financial crisis and other inter-related trends. TPLF has however found a fertile terrain in the legislative changes and in the interpretation of the courts involved in the jurisdictions analysed, which have decriminalised and/or restricted the field of application of the prohibitions and/or limits to fund or otherwise maintain litigation, as a way to enhance access to justice. To justify these assumptions, the task is now to provide a legal and economic analysis of TPLF in the context of the litigation market. This analysis will ultimately help to explain the reasons why TPLF has emerged, and possibly the modalities in which it will develop. It will moreover give the chance to predict potential legal issues concerning this new instrument, and eventually put forward some policy recommendations on how to address them. To do this, the following Chapter 4 will commence by defining the object of this market. After a brief analysis of the historical relationships between property rights and litigation, it will attempt to theorise how the previously mentioned evolution in legislation and case law, allowing the bargaining over litigious rights, can be defined as a process of liberalisation of the litigation market. Relying on the mainstream economic theories on how property can be 'created', it will then explain how a new form of property made of litigious rights has emerged. After this explanation, it will then attempt to discuss how the series of interrelated trends affecting access to justice and dispute resolution at a global level have determined a market failure in access to justice, where property rights cannot be efficiently allocated because they are litigious. Moreover, it will try to explain how, in a sharing economy context, TPLF would have emerged because it removes the barriers to effective access to justice, by bearing the litigation costs and risks in exchange for a share in litigious property rights. It will then define who are the actors that would be capable of facing the challenge of this market, with particular regard – for obvious reasons – to third party funders. It will moreover, and in parallel, attempt to provide a general classification of their investment schemes and/or modus operandi. In this regard, it is to be recalled that the comparative overview has shown that professional third party funders do not seem to be the sole

entities that are capable of competing in the litigation market. Also insurers and litigation lawyers (or others), to a certain extent, somehow already bargain over litigation for a reward. It has been interesting to note that the emergence of TPLF seems to have been influenced also by the more or less liberal regulatory regime impacting on their capability to bargain over litigious rights. For this reason, it will briefly describe also how these actors would be capable of maintaining litigation, mainly to understand what could be the impact of the regulatory regime binding on them on the future evolution of TPLF. In these discussions we will therefore adopt a more positive law and economics approach, although it is not excluded that some normative consideration will be made.

Chapter 5 will instead carry out an economic analysis of TPLF, both in the private and in the societal dimension. The first will start from the Shavell basic formula of litigation and the De Morpurgo basic economic model on TPLF, which will help understanding the conditions in which the parties enter into TPLF transactions, which will ideally help also to confirm (or not) the reasons why it has emerged. This exercise will be made under both the American and the English Rules on legal costs, and both from the funder's and the claimant's point of view. It will then discuss this model in practice with concrete claims, which will ultimately help understanding which are the cost and risk items that have to be taken into account in the economics of litigation, at least in general terms. Considering however that access to justice and dispute resolution may also have broader societal repercussions, it will then also analyse the societal dimension of TPLF, starting from the contrast between the private and social incentives to litigate outlined by Shavell. In order to see what would be the impact of TPLF in this contrast, it will analyse both the potential positive and the negative externalities of TPLF, trying to develop the existing law and economics literature and to give a more systemic perspective, but also discussing whether these can be qualified as such in legal and economic terms. In the light of the considerations made, with a more normative legal and economic approach, it will then discuss in Chapter 6 some policy recommendations to promote a desirable litigation market where TPLF would be present. To do so it will draw on the existing discussions on how externalities are addressed by the states or private bargaining, and apply them to TPLF in/and the litigation market, attempting to provide an initial categorisation on how TPLF could be treated from a regulatory point of view.

Chapter 4

The Emergence of the Litigation Market and Third Party Litigation Funding

This Chapter aims at understanding the effects that the rules (or case law) analysed in the historical and comparative Part have had in the emergence of the litigation market and will have on the evolution of TPLF. The litigation market will be first described from an 'objective' point of view, as a way to define exactly what effectively the asset at stake is, and how it has emerged. To do so, it will be important to briefly retrace the history of the relationships between property rights and litigation, in the light of the socio-economic events that have influenced their evolution. The analysis of this relationship will start, in particular, from the enactment of the Code Napoleon, widely regarded as a turning point in the establishment of modern liberal states. The socially oriented concept of property typical of the welfare states will then be taken into consideration. In both cases access to justice and litigation will be analysed in parallel to property law, as ways to track and define the evolution mentioned. This will help in demonstrating, also drawing some elements from the law and economics literature, how TPLF has emerged. In particular, it will be argued that the series of legislative and jurisprudential changes analysed especially in Chapter 3 have somehow liberalised the litigation market. It will discuss how these changes, together with a series of trends that have recently affected access to justice and dispute resolution, and in particular the recent financial crisis, have allowed the emergence of and the bargaining over a new asset class, referred to as 'litigious rights'. Moreover, we will attempt to describe how, particularly after the recent financial crisis, TPLF would have emerged as an efficient service aimed at maintaining the litigation costs and risks, in exchange for a share in litigious rights. This discussion will be supported also by including TPLF in the more general trend affecting property rights, the sharing economy. The litigation market will then be analysed from a more subjective point of view, by defining who are the actors that are potentially capable of competing in it are, and to what extent. The main focus will be, for obvious reasons, on third party funders and their modus operandi. In particular, we will try to define how these entities operate, and which are the potential conflicts that are likely to arise in the contractual relationships with lawyers and claimholders. It will then also briefly describe how lawyers and insurers are capable of maintaining litigation, especially to distinguish them from third party funders.

1. Property rights and litigation

The historical overview has given the chance to see that various practices to fund litigation have been carried out since the ancient Greek times, then more extensively in the Roman times and finally also in medieval England³⁰³. It has been interesting to see that in each scenario these practices have led to similar abuses, often entailing the distortion of justice and the exploitation of the claims of impecunious people. As a way to prevent these abuses, the governors of those times devised certain prohibitions and/or limits to fund or otherwise maintain litigation, which have been identified mainly in the figures of champerty and maintenance in the common law jurisdictions³⁰⁴, and in the prohibition of the PQL and the limit on the RL/rétrait litigieux in civil law³⁰⁵. From another perspective, these prohibitions and/or limits could however be framed as a more general evolution of society aimed at restraining the powers and/or privileges of the notable people of those times. As known, this trend culminated in the creation of more centralised states, where the sovereigns ultimately owned property and granted the possibility to use it through feudal tenures or other systems of loyalty. The centralisation of powers and property in the hands of a monarch was intended as way to limit the power of local feudal lords, including that of administering justice. In the cases of the more enlightened sovereigns, this was also intended as a way to spur an efficient use of property and increase the wealth of their reigns.

History has shown that there have been virtuous examples of modern state structures, where justice was administered fairly, and property allocated more or less efficiently. This has not been the case in France, whose repressive and antiquated monarchic system survived until the XVIII Century, when the ancien régime was finally overthrown by the revolutionaries. This event is widely regarded as the symbol of the rupture with the past, and the beginning of a new phase not only for France, but for all the modern societies. However, it is with the subsequent enactment of the Code Napoleon that the Enlightenment ideas of equality before the law and fair

³⁰³ See Chapter 2.

³⁰⁴ See Chapter 2 par 1.3.

³⁰⁵ See Chapter 2, par 1.2.1. and 1.2.2.

administration of justice were finally translated into law³⁰⁶. In the following paragraph, it will be interesting to see how the regime of property has played a central role in this process, somehow paralleling certain changes to the administration of justice and resolution of disputes. Then, the evolution of the relationships between property rights and litigation will be analysed with regard to Welfare states, where indeed the ownership of property became somehow more limited by the states. It will be interesting that these limits had somehow the same motivation of the introduction of legal aid to favour access to justice for the poor, i.e. spur the distribution of property rights, or otherwise increasing the capabilities of states to provide social services. After this, the relationships between property rights and litigation will be discussed in the light of some recent trends affecting them, and more generally within the sharing economy context, which indeed seems to be reshaping this relationship.

1.1. Property rights and litigation in the liberal states

It is well known that the liberal concept of property lies at the foundation of any free market. Putting it into another perspective, free markets can be defined as such only to the extent that property can be enjoyed by everyone and transferred freely. The modern notion of private property and property rights emerged in Europe during the Renaissance, when international trade by merchants gave rise to mercantilist ideas. In 16th Century Europe, Lutheranism and the Protestant Reformation began to advocate property rights using biblical terminology, therefore linking it to an inner human dimension. The protestant work ethic influenced the social view in emerging capitalist economies in early modern Europe, where property represented a means through which to assert the freedom to shape the mankind's destiny. It is in this period that the right to own property began to be regarded as a human right, and as a means to assert citizens' freedom from their sovereigns. It is not the case that the right to own property and transfer it freely was at the centre of the most important historical events of those times, like the English Civil War and, then, the American and the French revolutions. In general, especially the two revolutions mentioned were deeply inspired by the ideas of John Locke on property and democracy. Locke for the first time convincingly argued – in a secular manner - that the safeguarding of natural rights, such as the right

³⁰⁶ See Chapter 2 par. 2.2.

to property, along with the separation of powers and other checks and balances, would help to prevent political abuses by the state³⁰⁷. These ideas were then developed by the theorists of the Enlightenment, then inspiring the French Revolution, and by the American founding fathers. It is not a coincidence that the latter referred to it in the Fifth and Fourteenth Amendments of the Constitution, that declare that governments cannot deprive any person of ‘life, liberty, or property’ without due process of law³⁰⁸. While the American Constitution was intended as a means to finally establish a self-standing legal order in these territories, the French Revolution is instead regarded as a rupture with an archaic and highly inefficient view of the relationships between the state and the people, especially with regard to the regime of property rights.

The affirmation of modern liberal states³⁰⁹ has in fact passed through the establishment of the right of individuals to own private property and to transfer it freely as a way to create wealth for themselves and for their nations. In this regard, more than the Revolution, the Code Napoleon can be defined as the ultimate result of centuries of intellectual evolution with regard to the conception of human beings and their social relationships. This is the reason why the keystones of the Code Napoleon were the dogmas of private property (art. 544) and free will (art. 1134 and 1108). Property was devised in absolute terms³¹⁰, in a way that no sovereign could compress it unreasonably. For this reason, the possibility of enjoying property rights was then often juxtaposed to freedom: only free men could own property, and only those men that could enjoy property could be deemed to be free. The economic principle of laissez

³⁰⁷ J LOCKE, *Second Treatise on Civil Government*, 1689.

³⁰⁸ See the U.S. Constitution at <http://constitutionus.com> (last vis. 8.2.2017)

³⁰⁹ In general terms, it is worth mentioning that by 'liberal states' it is here meant those states that have – *inter alia* – committed to respect and protect the fundamental freedoms of individuals (including the freedom to contract and to own property), either in their Constitution or in civil codes or otherwise, starting mainly from the end of the XVIII century/beginning of the XIX. For reasons of comprehensiveness, it is moreover worth mentioning that this sub-paragraph recalls and complements the discussions made in Chapter 2, paragraphs 2.1, 2.2 and 2.3.

³¹⁰ Property was devised as the right to ‘enjoy and dispose things in the most absolute manner’. See Art 544 of the Code Napoleon. This rule in fact recalls the provision of art 16 of the Declaration of the Rights of Man and Citizen of 1793, which states: ‘The right of property is that which belongs to every citizen to enjoy, and to dispose at his pleasure of his goods, income, and of the fruits of his labour and his skill’.

faire became then the rule, and an instrument through which property could be freely allocated as way to increase the wealth of individuals and their nations.

As way to effectuate these values, all of the modern states separated the judiciary from the other powers, in a way that justice (meant also as a way to redistribute property according to substantial rules) could be administered independently and fairly. This is not of secondary importance for the purpose of defining the relationships between property rights and litigation. The fact that justice was administered independently was in fact a guarantee that the allocation of property rights through litigation was only bound by the law, and that this applied equally to each individual. As a way to guarantee this independence, the Code Napoleon re-iterated the prohibition on the ‘PQL, which was extended to all the personnel involved in the judiciary³¹¹. In other words, the Code Napoleon prohibited the possibility of meddling litigation for profit (by becoming assignees of any litigious rights) to all the personnel involved in the judiciary. The fear (and therefore the rationale of this rule) was in fact that the possibilities to get involved in disputes that were dealt with in their jurisdiction and make an undue profit out of them could not taint them.

The independence of the judiciary was an issue also on the other side of the Channel, although the figures of champerty and maintenance – which applied to every individual and not only to the personnel involved in the Judiciary – were already looking after the possible distortions of justice. It is however already in this period that some doubts were cast on their utility. In 1787, Bentham - in his celebrated ‘Defence of Usury’ – convincingly argued that the crimes of champerty, maintenance and usury distorted the legal system in favour of the wealthy³¹². In these circumstances, for the first time the

³¹¹ See above Chapter 2, par 2.2., and footnote 68.

³¹² ‘[N]o man of ripe years and of sound mind, acting freely, and with his eyes open, ought to be hindered, with a view to his advantage, from making such bargain, in the way of obtaining money, as he thinks fit: nor, (what is a necessary consequence) anybody hindered from supplying him, upon any terms he thinks proper to accede to. This proposition, were it to be received, would level, you see, at one stroke, all the barriers which law, either statute or common, have in their united wisdom set up, either against the crying sin of Usury, or against the hard-named and little-heard-of practice of Champerty; to which we must also add a portion of the multifarious, and as little heard-of offence, of Maintenance.’ J BENTHAM, above at footnote 62, par 1.

bargaining over litigation was seen as a possibility for the have-nots to obtain justice against the powerful and the wealthy.

1.2. Property rights and litigation in the welfare states

The concept of property has taken a completely different shape in the socialist states. In this context, the centralisation of the control over property was intended as a pivotal instrument for the state to redistribute wealth and so create a society made of equals. In this scenario there was not much space left for a redistribution of property through litigation among private individuals or entities. The socialist ideas nevertheless influenced welfare state theories, and with it an idea of private property that has survived until today, at least in its general features³¹³. Welfare states in fact interpreted private property (and economic initiative) as a means through which individuals had to contribute to the development of society, and to the provision of services in the general interest. In the German Civil Code ('BGB'), during the Weimar Constitution period, the use of property was eventually limited by the law (or of the rights of third parties)³¹⁴. More explicitly, the Constitution of 1949 explicitly stated: 'Property imposes obligations. Its use has to serve also the common welfare'³¹⁵. This socially oriented concept of property had then influenced many of the European member states legislations, including those whose code drew inspiration from the Code Napoleon. Among them can be mentioned the Italian Code of 1942 and the Constitution which entered into force on the 1st of January 1948, which explicitly mentions the social function of private property in art. 42.2. It is interesting to see the evolution of the Italian legislation also from another point of view. As mentioned, these codes have deeply drawn inspiration from the Code Napoleon, which included the right to recover damages for tortious liability (more precisely, in the third book of the Code devoted to the 'ways in which property can be acquired' (art 1383). The Italian Code of 1865 also

³¹³ It is worth mentioning that by 'welfare states' it is here referred to those states that have – *inter alia* – limited the use of private property by various means as a way to redistribute resources more equitably in society, provide social services, and so on. For reasons of comprehensiveness, it is moreover worth mentioning that this paragraph recalls and complements the par 2.4 of Chapter 2.

³¹⁴ § 903, which recalled the § 153 of the Weimar Constitution.

³¹⁵ § 14.

included this feature in the III Book of the Code, which nevertheless was named ‘On the way in which property *and other rights* are acquired and transferred’ (emphasis added). The Italian Code of 1942 had instead separated the two, and included the right to claim damages for civil wrongdoings in the VI Book, devoted to the ‘Protection of rights’. From this evolution it is possible to see how the view that litigation could be potentially deemed as property, and in particular the claims for damages arising out of liability, was not endorsed at the time. The administration of justice was indeed intended as a mere public affair, and the possibility to bargain over it would have evidently clashed with these views.

Owning property remained however a sort of pre-condition to access justice: its costs and risks have in fact always been a barrier for impecunious claimants willing to solve their disputes. This concern was well known among Welfare state theorists, thanks to whom many of the modern states had then introduced legal aid systems to maintain impecunious peoples’ disputes. Legal aid was however devised only as a state means that allowed a limited category of claimants to access justice, and not as tool to finance the costs of litigation and hedge its risks available to everyone. Moreover, legal aid was seen as a necessary tool to implement the right to access state justice, equality before the law, the right to a fair trial and a whole series of social rights³¹⁶. As such, it was meant as a means to stimulate a fairer redistribution of resources: without the possibility of accessing courts to enforce legitimate legal positions, housing, social assistance, education, labour, and social care rights could have remained a dead letter.

It is interesting to see that the social concept of property influenced also the idea that the EU has adopted for its social market economy³¹⁷ and, before, that of the

³¹⁶ M CAPPELLETTI, above at footnote 1.

³¹⁷ Charter of Fundamental Rights of the European Union (2000/C 364/01), Article 17: ‘Right to property. 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. (...).’ The Charter of Fundamental Rights of the European Union, with the entrance into force of the Lisbon Treaty, has then become integral part of the legislative framework of the European Union. Article 6 of the Treaty on European Union states that ‘The Union recognizes the rights, freedoms and

Convention for the Protection of Human Rights and Fundamental Freedoms³¹⁸. Private property in this context seems to have become a means through which promoting the general socio-economic interest of European citizens became possible. This concept is now binding on all of the European states, and it is a fundamental pivot of its social market economy. In this context, access to justice is therefore meant not only as a means to protect or acquire property, but also to enjoy an array of social rights granted by welfare states.

1.3. Property rights and litigation in the post-welfare states

In the two previous paragraphs it has been interesting to note that the legal regime of property, throughout the years, has evolved in a more ‘democratic way’. The right to own property has been enlarged to people that before were not entitled to it, and then also devised as an instrument to serve the general socio-economic interests. In other words, the establishment of a more independent judicial administration and, the modernisation of the legal systems through the liberal constitutions and civil codes has given the chance to redistribute property in a ‘more equal’ way and, at least hypothetically, ‘level the playing field’. The welfare states then limited the right to enjoy property in a way that this could be redistributed by the states through a series of social rights. This however often required action by the citizens of a given legal system to be enjoyed. Considering however that the costs and the risks of litigation were a barrier for impecunious claimants to access justice, the modern Western states introduced their regimes of legal aid as an instrument to enforce the mentioned rights effectively. It is interesting to note also that the welfare theories on access to justice not only helped to achieve these social goals, but also finally changed the vision that people had of litigation³¹⁹. It is however since the 1990’s that the welfare states have

principles enshrined in the Charter of Fundamental Rights of 7 December 2000, adjusted December 12, 2007 in Strasbourg, which has the same legal value as the Treaties ...’.

³¹⁸ Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms: ‘Protection of property. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law’.

³¹⁹ See Chapter 2, par 2.4. and in particular SC YEAZELLE, above at footnote 86,16.

started to be questioned about the idea, of Thatcherian derivation, that they were too expensive, including with regard to the administration of justice³²⁰, as they required 'affirmative action' by the states³²¹. Along with this idea, there have been a series of trends that seem to have reshaped the regime of property rights and with it also its relationships with litigation (as a means to allocate property)³²². In this regard, there seems to be room to think that the intertwinement of these trends has allowed the emergence of TPLF in/and the litigation market. We will now analyse these trends more in detail, trying to show the cultural change regarding the concept of property and the role of states (mostly with regard to the administration of justice), and how these have influenced a new market demand.

³²⁰ U MATTEI, 'Access to Justice. A Renewed Global Issue' (2007) *Electronic Journal of Comparative Law*, Vol 11, n 3, available at: http://works.bepress.com/ugo_mattei/34/, 2 (last vis. 8.2.2017). In England and Wales, for example, these ideas have pushed a process of reforms that has begun in the 1990 with the Courts and Legal Services Act, and is still on going, aimed at restructuring justice administration in a more efficient and cost-saving way. For example, it is interesting to note that the overriding objectives of civil procedure regarding the role of courts have been recently modified so that cases will have to be dealt with 'justly and at proportionate costs'. On proportionality see G COX, 'Proportionality', in R PIROZZOLO (ed), see above at footnote 174, Chapter 2, 12-23. See, also, R JACKSON, above at footnote 174, Ch 4.

³²¹ M CAPPELLETTI and B GARTH, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) *Articles by Maurer Faculty*, paper 1142, in <http://www.repository.law.indiana.edu/facpub/1142>, 184. (last vis. 10.2.2017), citing P CALAMANDREI, *Opere Giuridiche*, Vol 3, 183-210, Naples, Morano; M CAPPELLETTI ed., 1968; RP CLAUDE, 'The Classical Model of Human Rights Development', Vol 6, n 32, in RP CLAUDE (ed) *Comparative Human Rights*, Baltimore and London: Johns Hopkins University Press, 1976, stating that 'positive rights generally presuppose an affirmative commitment from the state'.

³²² It is worth mentioning that I referred to these as 'post-welfare states' for lack of better definition, also considering that it might be too early to speak about a new specific state model. It is however worth also considering that a main feature of these states could be that they are somehow withdrawing from the private sphere, including with regard to the redistribution of property and the management of services of public general interest, like the administration of justice, also in a sharing economy perspective (see in particular, below, par 1.3.4.). For reasons of comprehensiveness, it is moreover worth mentioning that this paragraph recalls and complements the par 2.5 of Chapter 2.

1.3.1. The liberalisation of the litigation market. Litigious rights as property

The fact that there could be a litigation market is quite a new and intellectually challenging issue. In this regard, it is interesting to note how the prohibitions to fund or otherwise maintain litigation, after having been questioned starting from the establishment of liberal states, have started being repealed as a way to enhance access to justice for the impecunious claimants. It is for example interesting to note that the introduction of legal aid in the UK, recommended in the 1945 Rushcliffe Report³²³, had been interpreted indeed as the first statutory breach to maintenance, justified by the fact that it served to grant access to justice for the impecunious parties. In the following years, then, such prohibitions have continued to be abandoned, repealed and/or restricted. In the US, a series of prohibitions on the assignment of claims have been gradually repealed and/or abandoned (though some exceptions survive³²⁴). In England and Wales, the criminal provisions attached to the torts of champerty and maintenance have been abolished by the Criminal Law Act³²⁵, which nevertheless kept champertous agreements invalid. In Australia, the first derogation to the doctrines of champerty and maintenance by means of law has been introduced in 1995, and then more extensively by judicial means in the early 2000's³²⁶. Similar discussions have taken place in Canada during the early 2000's³²⁷. In the European civil law jurisdictions, the bargaining over litigious rights for lawyers and other personnel involved in the judiciary is limited by the PQL, which still survives in one way or another in European civil codes and/or bar regulations³²⁸. There has however been some recent EU legislation and case law that has basically eroded its field of application by limiting the lawyers' fixed tariffs, and allowing instead success-based fees that to a certain extent permit bargaining over litigious rights³²⁹. The bargaining

³²³ See the reference to the Rushcliffe Report above at footnote 87.

³²⁴ AJ SEBOK, above at footnote 13, 74.

³²⁵ C. 58, § 14. See more in detail above at Chapter 3 par. 1.3.1.

³²⁶ See Chapter 3, par 1.1.

³²⁷ See Chapter 3, par 1.2.

³²⁸ See Chapter 3, par. 2.2. and 2.

³²⁹ With regard to the legislation see, in particular, the 'Establishment Directive' 98/5/EC. As with regard to the case law, instead, see the cases C-94/04 and C-201/94, *Cipolla and Others*,

over litigious rights seems to be instead freely allowed to any other entity, unless the limit deriving from the RL applies; this has also been repealed in a series of European continental jurisdictions³³⁰.

There seems to be no concern in defining this series of changes in legislation and case law concerning the potential prohibitions and/or limits to fund or otherwise maintain litigation as a process of liberalisation of the litigation market. The liberalisation indeed happens when the regulation impacting on a given sector is de-regulated either directly or indirectly with acts having an equivalent effect (like changes in case law), sometimes leading to the privatisation of state assets³³¹. As demonstrated in the historical and comparative part, these changes were introduced more or less explicitly to enhance access to justice for impecunious claimants, having acknowledged that they limited mainly those parties suffering from financial constraints. Talking about liberalisation, it is interesting to discuss – in line with some law and economics literature on how property can be 'created'³³² - the reasons why a new asset class consisting of litigious rights has emerged³³³. The same fact that we are speaking about the emergence of a new asset class refers to the idea that none recognized that litigious rights could be an object of property before, and therefore likely to be the subject of bargaining. This is in fact the reason why, historically, new forms of property have arisen in contexts where there was no property before, or anyway where property rights were established poorly. It is possible to think, for example, of the California Gold

ECLI:EU:C:2006:758, above at footnote 96, where the European Court of Justice deemed regulations on minimum lawyers' fees as inconsistent with the EU's principles on freedom to provide services. On costs and funding mechanisms in the European Member States see moreover BJ Rodger (ed.), Part I, Ch. 2, § 2.05, above at footnote 97.

³³⁰ See above Chapter 2, par 2.1.

³³¹ See ‘Economic Liberalisation’ in Wikipedia, at https://en.wikipedia.org/wiki/Economic_liberization (last vis. 8.2.2017)

³³² L KAPLOW and S SHAVELL, ‘Economic Analysis of Law’, in *Handbook of Public Economics*, AJ Auerbach and M Feldstein (eds) Amsterdam, New York: Elsevier, 2002, Vol. 3, Chapter 25, 1684.

³³³ Some initial discussions on the possibility to look at 'Litigious Rights' as property were also made in M DE MORPURGO above at footnote 13, 349. See also AJ SEBOK, above at footnote 13, 63.

Rush in 1848³³⁴. At the time when the first gold veins were discovered in this territory, the regime of property was unclear and there were no authorities capable of enforcing it. The possibility to create wealth out of the optimization of these resources had in fact pushed a series of institutional and legal improvements, including the establishment of a clear regime of property law over them. The creation of private property also happened for example during the privatization of state-owned resources of former communist (but not just them) countries, or in the liberalization of state-run activities, such as telecoms and post services, or of the market for the carbon emission trading³³⁵. Another example could concern the liberalization of the trade of certain goods whose sale is now prohibited for reasons of public policy, like the sale of organs, human beings, drugs etc.³³⁶. The type of prohibition however varies depending on the more or less liberal cultural context, which gives rise to different rules of public policy depending on a series of reasons, including the fact that opening a certain market would have more beneficial effects to society than leaving it illegal. In this regard, the on-going debate on the liberalization of marijuana represents an interesting example. More and more states are in fact allowing the use and sale of this soft drug relying on the fact that this would have more positive economic effects to society than keeping it prohibited³³⁷, and so created a new form of property that can be sold in the market.

The issues related to a market for litigious rights seem to be similar to such markets, considering that the stated process of liberalisation of this market seems not dissimilar from others. The possibility to bargain over litigious rights is now permitted – at least in part – also for those who were the main addressees of the prohibitions (the lawyers, through fees based on success and/or on a fraction of the recovery). The limits for lawyers to this bargaining do however leave room for third parties, which are not

³³⁴ J UMBECK, ‘Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights’ (1981) *Economic Inquiry*, Vol 19, Issue 1.

³³⁵ On the environmental benefits and costs of this market see JS SHAPIRO, ‘Trade, CO2, and the Environment’ (July 1, 2014). Available at SSRN: <https://ssrn.com/abstract=2374883>

³³⁶ W BOULIER, ‘Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts’ (1995) *Hofstra Law Review*, Vol 23, Issue 3, Article 4, 693.

³³⁷ DG EVANS, ‘The Economic Impacts of Marijuana Legalization’ (2013) in *The Journal of Global Drug Policy*, Vol 7, Issue 4.

bound by the mentioned limitations, also to bargain over litigious rights. In this regard, also for future considerations on the definition of this new asset class, it is worth discussing what would be the asset at stake and who could bargain over it. Generally speaking, it seems reasonable to think that in order to claim property over a litigious right it is necessary that someone could assert somehow the potential ownership of a claim and the related power to sell it (or sell the interests in it) to another party. There are therefore two orders of reasons that have to be discussed, one 'objective' and one 'subjective'. From an objective point of view, it is necessary that what is traded is disputed between various parties, be the dispute already filed or, also, potentially to be filed. From a subjective point of view, instead, it is necessary that the seller has (at least the potential) ownership of the claim, or at least equipollent powers of disposal. Professor Sebok has discussed this subjective issue thoroughly, convincingly arguing that the fact that a claim is not 'authentic' should not prevent TPLF to develop³³⁸. To explain this concept he argues that those who counter the possibility to bargain over litigious rights, maintain that in a claim there is something more than the mere legal validity, which confers 'authenticity' to a lawsuit, and that a court could not recognize it disregarding the possible positive effects that this transaction would have in society. According to this 'inauthentic claim' argument 'even a suit based on allegations known to be true and legal theories known to be valid cannot be heard by a court because actions taken by the claimant corrupted or polluted the claim'³³⁹. This argument relies, among other arguments, on the theory of corrective justice, so that private law claims (not only tort) would be 'relational'. In particular, one may recall that the arguments expressed by Coleman that 'all viable accounts of corrective justice, whatever their substantive disagreements, are committed to the centrality of human agency, rectification, and correlativity'³⁴⁰, and that 'corrective justice is a norm that links agents with wrongful losses'³⁴¹. As such, claims ought to be brought only by the person that has suffered a wrongdoing, or anyway should not be aided or supported by a non-party, and the defendant's obligation to rectify its action should be honoured

³³⁸ AJ SEBOK, above at footnote 13, 63.

³³⁹ Ibid.

³⁴⁰ JL COLEMAN, 'The Practice of Corrective Justice', (1995) *Arizona Law Review*, Vol 37, n 15, 26.

³⁴¹ JL COLEMAN, 'Risks and Wrongs' (1992) *Harvard Journal of Law and Public Policy*, Vol 15, 646.

directly and only to the claimant³⁴². Sebok however shows that these theories fail to demonstrate why the defendant/wrongdoer can repair the damage only to the original claimholder or, in other words, why the latter is entitled to recover these sums only from the defendant/wrongdoer³⁴³. While this issue to date is not settled, for future considerations it will be necessary to distinguish – relying on the laws on assignment of claims in both common law and civil law jurisdictions³⁴⁴ - between those claims that by law are not assignable (often because they are ‘strictly personal’) and claims that instead can be assigned for the sake of freedom of circulation of rights. In this regard, it is however worth recalling that the comparative overview has shown that, ‘de iure condito’, the legality of TPLF in the analysed jurisdictions would not cause too many worries. However, it is likely that, ‘de iure condendo’, the stated ‘authenticity’ of claims will certainly have a central role in future discussions.

1.3.2 Other trends affecting access to justice and dispute resolution

The previous sub-paragraph has attempted to explain how the process of liberalisation of the litigation market would have allowed the emergence of a new asset class consisting of litigious rights. This discussion has however not justified alone the emergence of TPLF; it would be otherwise difficult to explain why TPLF has for example emerged in the UK only recently, and not when the criminal sanctions attached to the figures of maintenance and champerty were repealed. In this regard, it is now time to discuss a series of trends affecting access to justice and dispute resolution at a global level, which were briefly introduced in Chapter 2, par 2.5., to analyse more in detail the impact they had on the emergence of TPLF.

- a) The economic globalization, which can be referred to as the growing interconnection between national economies resulting from the increase in the exchange of goods, services, capital and workforce³⁴⁵. Globalization is the result of precise policy choices aimed at favouring cross border business and,

³⁴² AJ SEBOK, above at footnote 13, § IV.

³⁴³ AJ SEBOK, Ibid..

³⁴⁴ A general discussion on the laws allowing (or, from another point of view, limiting) assignments of claims will be made below par 1.2.1.1.2.

³⁴⁵ In general, see J RAKESH MOHAN, above at footnote 98.

as a consequence, create wealth by stimulating an efficient allocation of resources at a global level³⁴⁶. The assumption is that if companies operate across different jurisdictions, they may rely on the comparative advantage of working and trading in countries where the products or services they normally buy are cheaper and/or their products/services can be sold/offered at higher prices than normally. It seems however that the possibility of entering into new transactions engenders a higher probability that new disputes arise. We can recall in this regard the statistics of the ICC, which show that the number of international requests for arbitration has steadily increased in the last years³⁴⁷. In this regard, it is not difficult to understand, according to simple economic considerations, how an increase in demand generates an increase in costs for litigation related services.

- b) The statistics of the ICC give the chance to note how business operators lately have decidedly preferred the possibility to solve disputes through ADR, rather than litigating them in national courts³⁴⁸. This however does not only relate to a market choice, but also to a general tendency of the states to shift much of this workload to the private sector. In this scenario, it seems possible to identify a process of 'privatization of civil and commercial dispute resolution'. Civil and commercial dispute resolution, from a state monopoly, has now become more of a private market-oriented affair due to specific policy choices³⁴⁹, but also to a growing specific market demand. We have indeed seen above how ADR have proliferated in the last years as more efficient tools to solve civil and commercial disputes, especially if cross-border, than court proceedings. ADR are indeed capable of overcoming certain problems of length and cultural

³⁴⁶ See above footnote 98.

³⁴⁷ See above Chapter 2, par 2.5. and in particular footnote 102.

³⁴⁸ See moreover the Report PRICEWATERHOUSECOOPERS, above at footnote 103, providing empirical data in support of this assumption.

³⁴⁹ As with regard to the United States, it is possible to mention the rules 16, 58, 63 and 86 of the Code of Civil Procedure. As with regard to the European Union, *inter alia*, see: Directive on Civil and Commercial Mediation, 2008/52/EC; Directive on consumer ADR, 2013/11/EU; Regulation (EU) on consumer ODR No 524/2013.

diversity of national judicial proceedings³⁵⁰, such as in costs and structure³⁵¹. While this issue does not directly relate to TPLF, it is here mentioned as a main signal of the states' incapability to provide an efficient civil and commercial dispute resolution system administered at a central level, which has contributed to the opening of the litigation market.

- c) In line with the previous trend it is also possible to mention the process of globalisation and/or privatisation and/or liberalisation of the legal profession. If the lawyers' role in society, as holders of the (legal) knowledge, has traditionally granted them the monopoly over access to justice (and therefore – in the particular context - play a pivotal public function), today this monopoly has been eroded from both sides. The legal profession, often referred to as the last bastion of national corporatism – is more and more liberalised and globalised³⁵². Moreover, it is now very common to resort to (non legal) experts

³⁵⁰ For this reason many claim that as such ADR enhance access to justice. See for example: A FEJÖS and C WILLETT, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) *European Review of Private Law*, Vol 24, Issue 1, 33. C HODGES, N CREUTZFELDT, F STEFFEK F and E VERHAGE, 'ADR and Justice in Consumer Disputes in the EU', Project Report. *The Foundation for Law, Justice and Society*, 2016, Oxford, 5.

³⁵¹ Among the many reports see, for example, OECD, 'What makes civil justice effective?', *OECD Economics Department Policy Notes*, n 18 June 2013, available at <http://www.oecd.org/eco/growth/Civil%20Justice%20Policy%20Note.pdf> (last vis. 25.8.2017). For the European Union member states see EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *Study on the functioning of judicial systems in the EU Member States*. Facts and figures from the CEPEJ questionnaires 2010-2012 2013-2014, Strasbourg 14 March 2016, available [http://ec.europa.eu/justice/newsroom/files\(scoreboard/2016_cepej_study - part_1_indicators.pdf](http://ec.europa.eu/justice/newsroom/files(scoreboard/2016_cepej_study - part_1_indicators.pdf) (last vis. 8.2.2017).

³⁵² In a way, it can be said that also technology is contributing to this process. The privileges historically enjoyed by the 'caste' of lawyers and indeed being reduced also as result of the outsourcing of legal information through technologic means. See, in this regard, MC REGAN JR, PT HEENAN, 'Supply Chains and Porous Boundaries: The Disaggregation of Legal Services' (2010) *Fordham Law Review*, Vol 78, 2137. Global law firms are also 'outsourcing' the discovery activities related to countries where discovery entails high costs, such as the United States and United Kingdom, to other countries where lawyers and paralegals have a minor cost. See PA BERGIN, above at footnote 106. See moreover in the above par 1.1.3.1. the discussion concerning the liberalisation of the litigation market via certain European legislation and case law allowing the lawyers to bargain over litigious rights.

to determine (sometimes the most) important features of litigation, such as the quantification of damages' amounts. This trend may shift (at least part of) the monopoly on dispute resolution related information to non-lawyers and determine a further increase in the related costs and complexities³⁵³. In other words, this trend is capable of increasing the asymmetry of information and economic positions, especially if claimholders were already impecunious. It is finally to be mentioned how this process of disruption of the legal profession is moreover being stimulated by the legal Internet and Technology ('IT') tools³⁵⁴.

- d) The increase in the barriers to access justice is to be referred to also in the 'enlargement of the legal world', Galanter uses this wording to explain how in the last decades 'there has been a dramatic change in scale of many aspects of the legal world: the amount and complexity of legal regulation; the frequency of litigation; the amount and tenor of authoritative legal material; the number, coordination and productivity of lawyers; the number of legal actors and the resources they devote to legal activity; the amount of information about law'³⁵⁵. In civil law jurisdictions, the process of de-codification has further exacerbated this problem, and made the interpretation of the law even more difficult (and therefore expensive). By process of de-codification it is here referred to the phenomenon, often discussed in civil law jurisdictions for some decades³⁵⁶, according to which the civil codes would not have any more a universal and omni-comprehensive role in the legal system, as it was thought in the 'era of codifications'. This would be due to the proliferation of special and self-standing laws (for example those of EU derivation and/or of soft law) that would have in fact 'enlarged the legal world' and made the interpretation of the law even more difficult. It is evident, in this regard, how these phenomena

³⁵³ See MG FAURE and LT VISSCHER, above at footnote 107.

³⁵⁴ This trend is often referred to as 'Legal Technology' or 'Legal Tech', and it is composed of those companies (often start-ups) that purport to innovate and/or disrupt the traditional legal market by making use of IT tools. See B GOODMAN, 'Four Areas of Legal Ripe for Disruption by Smart Startups' *Law Technology Today* 16 December 2014, available at <http://www.lawtechnologytoday.org/2014/12/smart-startups/> (last vis. 28.8.2017)

³⁵⁵ See M GALANTER above at footnote 104.

³⁵⁶ N IRTI, *L'età della decodificazione*, Giuffré, Milano, 1979.

impact on the asymmetry of information of the parties, and also on the costs for more specialised legal services.

1.3.3. The financial crisis and the market failure in access to justice

The previous sub-paragraph has explained how a series of interrelated trends have affected access to justice and dispute resolution at a global level. In this context, it is worth exploring the impact that the recent financial crisis has ultimately had on the recently liberalised litigation market, affected by the stated trends. It is indeed argued that the crisis has first of all increased the volume of disputes³⁵⁷, including against those who are thought to have somehow caused the crisis³⁵⁸. Moreover, the credit-crunch that has followed the crisis has limited the capability of companies and individuals to get capital in the markets, and increased the aversion to (litigation) costs and risks³⁵⁹. It goes without saying that a more limited availability of capital in the markets has a direct impact on the way in which individuals and companies decide to allocate their current resources. In this scenario, especially the companies that have survived the financial crisis have been experimenting with alternative ways to carry out their businesses with less financial risks. It has indeed been reported that a significant number of multi-national companies decided to withdraw from legal proceedings due to lack of economic resources, while others more and more often resort to alternative lawyers' fee schemes, TPLF or LEI³⁶⁰. The crisis has affected also the states budgets, leading to further cuts to spending in the Judiciaries (also to legal aid³⁶¹), and parallel increases in court costs³⁶². These have moreover led to other reforms that have

³⁵⁷ PRICEWATERHOUSECOOPERS, above at footnote 103. GEORGETOWN LAW – CENTRE FOR THE STUDY OF THE LEGAL PROFESSION, above at footnote 2.

³⁵⁸ See above at footnote 2. M STEINITZ, 1277 (citing Baker & McKenzie LLP, 'Demand for Third Party Litigation Funding Rises as Supply Becomes Volatile', 2008, '[T]he sub-prime crisis in the US is leading to an increased volume of underlying litigation in an effort to apportion blame—and with it, legal liability.'

³⁵⁹ Ibid.

³⁶⁰ PRICEWATERHOUSECOOPERS, above at footnote 103.

³⁶¹ See above A FLYNN, N BYROM and J HODGSON, at footnote 108.

³⁶² See the HOGAN LOVELLS LLP report on litigation costs above at footnote 109.

somehow diminished the role of the state in civil and commercial dispute resolution, for example by promoting the use of ADR³⁶³ or by encouraging the substitution of the state legal aid with private LEI schemes³⁶⁴.

The above trends have seemed to have ultimately created a market failure in access to justice³⁶⁵, where litigious (property) rights cannot be effectively allocated/enforced due to certain barriers to access justice and solve disputes. The traditional economics literature indeed refers to market failures when goods and services cannot be efficiently allocated³⁶⁶, which can happen for a variety of reasons: negative externalities, barriers to trade in certain markets (including with regard to the public nature of certain goods), etc. In this case, it is believed it is possible to talk about a market failure in access to justice for a series of reasons. First of all, the financial crisis has engendered the negative externality consisting in the increase in the amount of disputes. It has moreover done so due to the credit crunch, which has on the one hand increased the parties' aversion to costs and risks and, on the other, pushed the states to increase the costs of litigation in national courts. These costs have moreover increased due to the mentioned phenomena of the economic globalization and of the enlargement of the legal world. It is moreover worth noting that the bargaining over litigation, at least in certain contexts, was limited by a series of regulatory conditions which prevented this trading, including the traditionally public nature of the role of lawyers, although we have seen that this has recently changed³⁶⁷. It is thus in this context that TPLF seems to be finding its space in the market, providing capital and sophisticated legal knowledge to overcome the mentioned barriers to access justice, and potentially to ensure an efficient resolution of disputes. In other words, there seems to be reason to think that TPLF has emerged because there is a market failure which it is capable of

³⁶³ See the legislation concerned above at footnote 347.

³⁶⁴ See the discussions and the related literature, also reporting empiric evidence, above at footnotes 10 and 282.

³⁶⁵ As mentioned above at footnote 15, the idea of a market failure has initially been discussed also by M STEINITZ, above at footnote 2, 1311, and by JT MOLOT, above at footnote 11, at 83, who also sees it as a failure of the procedure.

³⁶⁶ This expression has been used first in FM BATOR, 'The Anatomy of Market Failure' (1958) *Quarterly Journal of Economics*, Vol 72, n 3, 351–79.

³⁶⁷ See in the previous paragraph, c).

addressing.

1.3.4. The sharing economy and TPLF

The previous paragraphs have briefly reported the historical cycle that the relationships between property rights and litigation have followed. Especially in the last subparagraph I have attempted to focus the attention on a series of trends affecting access to justice and dispute resolution at a global level, to end up discussing how they – and, in particular, the financial crisis - would have created a market failure in access to justice. In this regard, it is finally to briefly consider how the recent financial crisis seems to have affected not only access to justice and dispute resolution, but moreover the concept of property rights. Until the crisis there was indeed a generally expansive economic cycle supported by generous (to use a euphemism) debt financing offered by financial institutions, and monetary and fiscal policies by the states. The financial crisis (and the credit crunch that has followed therefrom) seems instead to have reversed this trend, re-inforcing the idea that resources are limited and leading individuals and companies to optimise their existing property by sharing it with others. Many successful businesses have arisen out of this idea, while new technologies have facilitated this process by matching the demand for cheaper products and services, and the new offer arising in the market. This economic phenomenon has taken the name of the sharing economy³⁶⁸, as way to identify those innovative businesses that have facilitated the possibility to share property with other individuals, and reduce their actual costs or the risks of owning and using them on an exclusive basis. While this phenomenon has not yet gained large attention from the law and economics literature it is worth noting how there seems to be room to think that TPLF would be also part of it. The recent financial crisis, especially if coupled with the other trends, has in fact increased the aversion to litigation risks and costs not only of those who were retained as impecunious claimholders, but also of any other entity³⁶⁹. Even well-resourced claimholders show more and more concerns regarding their budgets, and are now exploring the possibility to avoid certain costs and risks by sharing them with other

³⁶⁸ For some literature discussing the sharing economy, see above footnote 18. In particular see Z KELLEN discussing the concept of property and the sharing economy.

³⁶⁹ M STEINITZ, above at footnote 2, 1283.

parties, eventually giving up a stake in their property rights. It is in this context that the litigious rights, after having acquired the dimension of property, have started being bargained by companies and individuals. These parties seem to do so not only when they do not have the necessary resources to bring their claims forward autonomously, but also as an optimal business management / risk diversification strategy, thus leaving room to think that TPLF could be a sort of corporate finance instrument. Considering however that there would also be other ways to achieve similar scopes (for example, via lawyers' funding or LEI), there must be a reason why TPLF has nonetheless emerged, and is gaining such traction in the global legal community. As a way to provide an answer to this question, in the next paragraph we will define in more detail who are the actors of the litigation market, and their modus operandi. For obvious reasons it will dedicate much of the attention to third party litigation funders, and the ways in which they do (or, could) contend the litigation market. However, as a way to confirm the reasons why TPLF has emerged, we will discuss also how lawyers and insurers would be capable of doing so, specifically by highlighting what would be the regulatory or other limits impacting on their activity, to understand what is – and what will be – the field of operation for third party funders. This analysis will further contribute to explain the reasons why TPLF has emerged, but also – with a positive legal and economic approach - how it is likely that it will develop.

2. The actors in the litigation market and their modus operandi

The previous paragraph has concluded that TPLF may have emerged as a way for companies and individuals to avoid the litigation costs and risks by sharing a part of their litigious (property) rights. It has however been noted how TPLF may not be the only way to do so, but also lawyers and insurers would be able to offer a similar service, although their ability to take part of litigious rights may be more limited. For this reason it will not analyse more in detail what would be the possibilities for these actors to compete in this market, although particular attention will be given – for evident reasons – to third party funders. The goal is not only to understand how they operate, but also – with a more positive law and economics approach - to see how the rules of different jurisdictions may shape their future business models. This analysis will moreover be helpful to describe the specific TPLF financial industry, namely by identifying the features that are common to all of its models. Then, briefly, the

lawyers' and the legal expenses insurers' litigation funding methods will be defined, specifically to distinguish their (actual or potential) field of operation from third party litigation funders.

It is moreover worth noting at this stage that, for taxonomic purposes, all of the methods to fund or otherwise maintain litigation that are alternative to the party's own funds will be referred to as Alternative Litigation Funding (ALF) methods. This definition seems in this case appropriate to the extent that the funding is done with resources that are alternative to those of the original party to a dispute. It is worthy of note also that while all these ALF entail that a non party to a dispute finances the costs (or anyway bears the costs and the risks) of litigation, it might happen that he becomes a party himself, or anyway enjoys powers of attorney which assimilate it to the original party: in the case of TPLF, this happens when the claim is assigned; in the case of insurance, when there is a sub-rogation clause; in the case of the lawyers, when they enjoy very wide power of attorney, such as the power to settle or anyway decide autonomously the litigation strategy with the party. In such cases the definition would still remain appropriate, considering that – even if they become parties themselves or otherwise are assimilated to them – the funds or other resources that they use would still be alternative to the parties' own. It is moreover worth noting that while the main ALF seem to be TPLF, lawyers' funding and LEI, there might also be other funding possibilities, such as professional or trade union's funds, legal aid, and so on.

2.1. Third party litigation funders

Third party litigation funders can be defined as any entity that professionally maintains others' disputes' costs in exchange for a share of the expected financial recovery, only in case of victory, eventually transferring the claim. Third party litigation funders have been thought of as part of the 'second-wave litigation funding', which encompasses institutional investors of different types, ad hoc investment funds, special purpose vehicles, banks, and insurance companies³⁷⁰. Supporters of TPLF claim that third party funders enhance access to justice³⁷¹, level the playing field³⁷², and help in reaching

³⁷⁰ Instead, the 'first-wave litigation funding' was composed of smaller and less sophisticated firms, which were basically devoted to the litigation-lending business. M STEINITZ, above at footnote 2, 1277.

³⁷¹ Inter alia, see R JACKSON, above at footnote 174, Ch 11, 118. C VELJANOVSKI, 'Third Party Litigation Funding in Europe' (2012) *Journal of Law, Economics and Policy*, Vol 8, n 3, 407. JP

various positive objectives of public policy, including deterrence of potential wrongdoers³⁷³. Opponents of this practice equate them to ‘vulture capital funds’,³⁷⁴ ‘gamblers’,³⁷⁵ and ‘loan-sharks’.³⁷⁶ As such, third party funders are represented as quite controversial entities. While the way in which they operate is often unknown due to non-disclosure agreements, the information available to date gives the possibility of drawing some first categorisation. The first issue to be noted would be, also in light of the comparative overview, that to date there is no unique model of TPLF agreements. Third party funders tend to regulate their relationships depending on the type of claimant, the type of claim, the dispute resolution procedure, etc., eventually according to the laws and other regulations of the jurisdiction where they are embedded. As such, the TPLF agreements are often referred to as ‘bespoke’ arrangements³⁷⁷. It is nevertheless possible to distinguish, among the various models (and drawing on existing categorisations in the financial industry), two main categories, ‘passive’ and ‘active’ TPLF, depending on the type of involvement that the funder has in a dispute. Just for taxonomic purposes, another distinction should be drawn between ‘claim funding’ and ‘defence funding’. This distinction will not however be explored in detail in the following paragraphs, to the extent that the TPLF schemes would not vary depending on the fact that the funding is done for a claimant or for a defendant. It is

ROSSOS, above at footnote 171. M DE MORPURGO above at footnote 13, 381.

³⁷² M STEINITZ, above at footnote 2, § III.

³⁷³ M DE MORPURGO above at footnote 13, 382-383. See also below Chapter 5, par 2.1.1.2. on deterrence.

³⁷⁴ O BOWCOTT, ‘Elvis Presley case highlights growth of third party funding to back legal claims’, *The Guardian*, 30 November 2012, available at <https://www.theguardian.com/law/2012/nov/30/elvis-presley-third-party-legal-claims> (last vis. 27.8.2017), reporting the view of a barrister. In the same article, however, this view is rejected by a litigation fund professional.

³⁷⁵ JT MOLOT, above at footnote 11, 96 (describing hedge funds as trying to ‘earn returns by betting on litigation’). See also See letter (dated Mar. 7, 2011) from the ATRA, above at footnote 251; US CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, above at footnote 248, 13.

³⁷⁶ JW HASHWAY, above at footnote 232.

³⁷⁷ M STEINITZ and A FIELD, ‘A Model Litigation Finance Contract’ (2014) *Iowa Law Review*, Vol 99, 711, 720.

certainly worthy of note that TPLF finds its pivotal function on the claimant side, although funders are starting to provide financing or other risk-hedging schemes also for defendants³⁷⁸. In this regard, however, it is worthy of note that the defence litigation funding is a service already largely provided for by legal expenses insurers³⁷⁹, another reason which could ultimately make this market less attractive for third party funders. In the following paragraphs, therefore, the two models of passive and active TPLF will be analysed, together with some general contractual issues that are likely to arise in practice. It will moreover be a chance to discuss some of the empirical models emerging in the market and on the existing literature on TPLF.

2.1.1. Passive vs. active TPLF

Third party funders are offering both passive funding and active funding, depending on the type of claim and of the regulatory issues impacting on the TPLF transactions³⁸⁰. Passive funding means that while the funder pays for the costs of litigation (and, where applicable, bears the risk of adverse costs in the case of loss), the control of litigation stays mostly in the hands of the original claim-holder and of its lawyers and consultants. In this scenario, the funder carries out a thorough due diligence of the claim and of the case strategy proposed by the lawyers involved. Once the investor decides to fund the proposed claim, he pays the costs and waits until the case comes to an end, hoping to get its share of the case's financial compensation, without trying to influence the legal strategy³⁸¹. It should be noted, however, that in practice this

³⁷⁸ A RODGERS, P SCOTT, A SANZ, and DM BROWN, 'Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know' (December 2016) *The Antitrust Source*, 2, available at <http://www.nortonrosefulbright.com/files/20161201-emerging-issues-in-third-party-litigation-funding-what-antitrust-lawyers-need-to-know-145438.pdf> (last vis. 27.8.2017)

³⁷⁹ See below par 2.3. It must be noted, however, that third party funders are already offering Insurance-type of funding. See more in detail below at par 2.1.1.1.4.

³⁸⁰ C VELJANOVSKI, above at footnote 371, 408.

³⁸¹ This type of funding has been assimilated to the 'placing a bet on a horse. After learning everything possible about the horse and its jockey, a decision is made whether to bet on the horse, and after the bet is made, the bettor sits on the sidelines and watches the race. The bettor neither coaches from the sidelines nor gets involved in decisions about how to ride the horse or manage the course or jockey. Similarly, after deciding to provide funding, a funder in this model does not get involved in choice of

extremely passive situation is unlikely to happen. Third party funders generally devise the contractual clauses so that the funding is deployed in different stages, and the control can be exercised at least by withdrawing from the further funding if certain conditions change and the case is no longer worthwhile³⁸².

Active funding, instead, refers to the situation whereby the funder provides capital and expertise but requires more control³⁸³, eventually acquiring it with the transfer of the claim. In the active funding model, ‘the funder is a claim manager that offers an entire suite of extra-legal (or non-legal) ancillary services: collecting documentary evidence; performing forensic accounting; finding, assisting, and liaising with experts; creating models for accounting losses, government relations, public relations, and marketing strategy development; advising on settlement offers; and providing general advisory services to the claim holder and the lawyers as needed. In addition to contributing capital, these investors partner with the claimant and various expert advisors across disciplines (e.g., economists, accountants, diplomats, PR specialists, and ethicists) to ensure that the extra-legal aspects of the case are strategically managed. Moreover, in the active model, funders expect to have a voice in settlement, litigation strategy techniques, and the selection of the lawyers throughout the life of the case’³⁸⁴. Evidently many of the features present in the active funding model can be done also in the passive one. In fact, the hypothetical investment structures briefly described encompass in the middle a wide variety of possibilities, which are adapted to specific situations, since TPLF is a ‘bespoke’ service. A common feature may be that TPLF entails non-recourse financing, as the funder takes the risk of the investment. The lack

counsel, settlement, litigation strategy, or negotiations.’ In MB DE STEFANO BEARDSLEE, above at footnote 245, 320.

³⁸² See, for example, the conditions to withdraw from cases listed in art. 11.2 of the Association of Litigation Funders of England and Wales, and the related discussion in R JACKSON, above at footnote 174, 119. The debate between the Association of Litigation Funders of England and Wales and Lord Jackson are reported more in detail in Chapter 3, par 1.3.3.

³⁸³ This model is described in the following sub-paragraph. Active funding without the transfer of the claim does evidently exacerbate the issues concerning the control of litigation and the lawyers’ independence, though it is somewhere practiced. See MB DE STEFANO BEARDSLEE, above at footnote 245, 323.

³⁸⁴ Ibid.

of collateral (or, better, the fact that the collateral is represented only by the potential outcome of the financed case) is indeed the element that distinguishes TPLF from other more common financing tools, and which makes it a typical risk investment³⁸⁵. In the passive TPLF model the investor generally expects to get between 20 and 49 %, of the claim recovery depending on the predicted timing, the type of claim, its value, etc. In the active TPLF, instead, the percentages vary more, depending on the model applied and in particular on the involvement of the original claimholder(s). For example, if the claim is purchased with an upfront payment, the third party funder may ultimately be entitled to the entire recovery of the claim. This scheme however is very rare to date given the risks that it entails, and anyway the third party funders might wish to leave a percentage to the original claimholder(s) also to keep them involved and address the problems of adverse selection. Other factors that characterize the funding structure are, generally, the type of investor and his needs³⁸⁶, its more or less deep involvement in the due diligence process, the fiscal issues, the regulatory (including the existence of the loser-pays rule) or ethical restrictions, but also the probable presence of other complementary funding tools.

2.1.1.1. Passive TPLF schemes

In the previous paragraphs it was mentioned that until recently it was not possible to have a clear picture of the TPLF market, considering that all litigation funders – for obvious reasons – did not disclose much of the mechanics of their business. It is since March 2016 – when the 2015 Annual Report³⁸⁷ of the main US litigation funder, Burford, was published - that some of this information was to a certain extent revealed

³⁸⁵ This however does not mean that third party litigation funders may decide to provide also normal loans, and ask an ordinary collateral, although in this case the service would not be regarded as TPLF (and there might be problems deriving from the application of financial regulation, especially if such an activity would be reserved to the monopoly of the banks or other financial institutions. See for example the discussions happened in France in this regard, below in Chapter 7, par 1.3.

³⁸⁶ For example, there could be investors that use own money and do not have the time and returns constraints that may have others that instead raise capital from other investors and committing to certain timelines.

³⁸⁷ BURFORD, Annual Report, 2015, available at <http://www.burfordcapital.com/investors/financial-reports-and-presentations/> (last vis. 8.2.2017)

to the public. Following this report overall the industry seems to have changed pace: from the classical one-off funding of international commercial arbitration and commercial litigation, to which all funders seemed to stick until then, Burford has blazed a trail away to provide all manner of funding to the legal industry at a blistering pace³⁸⁸. The publication of this report is regarded to as milestone in the legal/litigation finance industry. Since then all the funders have more or less tried to follow this path, and with it also the attitude of big law firms and corporations has changed. This change in the legal industry ‘resembles a slumbering giant that is now awakening’ and the width of whose boundaries is difficult to figure out and to predict. It is however possible, also relying on the mentioned Burford 2015 Annual Report and on other publicly available information, to track the path that this industry is following. This will be important to provide a first insight into this brand new financial industry, and to provide a first classification of the different models applied, clearly without any claim of exhaustiveness. It is moreover to be recalled that also the schemes that will be described in the following paragraphs will have to be adapted in practice to the cases and parties at stake, following the previously mentioned ‘bespoke’ approach.

2.1.1.1.1. One-off claim funding

The one-off funding scheme is the classical TPLF arrangement and, simply speaking, concerns those cases where the financing is provided to cover the costs of a single claim of a single party (or, for a multitude of parties with the same claim, like in class actions), in exchange for a share of the expected financial recovery. The type of party can vary from a corporate to a single individual/consumer, to classes of them, but also to insolvency practitioners that ultimately hold claims of insolvent companies. The common feature of this manner of funding, apart the financing being provided for a

388 Ibid., 4. 'Only a few short years ago, we would not have described our business quite this way. Instead, we would probably have called ourselves a "litigation funder". Indeed, that is how the press still tends to talk about this business. But along with the rapid growth of our business has come dramatic evolution in the use of capital in the legal sector. In our inaugural year, 100% of our business was single case litigation funding. In 2015, only 13% of our new investments related to single litigation cases, and the remaining 87% was for a variety of other forms of capital provision to the legal market. This transmutation is very significant, as it expands our potential market dramatically while enabling us to reduce volatility and retain our historical return profile.'

single claim of a single claimant (or a class of them), is that the financing is provided on a non-recourse basis. More precisely, funders tend to secure their financing only with the outcome of the disputes that they are maintaining. However, the practice shows that in some cases funders have sought also other types of collateral, like providing revolving loans or other types of credit facilities. Whilst third party litigation funders ultimately may provide also these types of financing, it does not seem possible to frame them per se within the category of TPLF, whose main feature is that it entails non-recourse financing in exchange for a share of the potential claim recovery.

2.1.1.1.2. Claim portfolio funding

The portfolio-funding scheme basically concerns the funding of a multitude of claims held by a single party or more parties to a dispute. In this case, too, the type of party may vary significantly, and of course this gives the chance to structure portfolio case funding of a different type. Just to give an example, it is now not uncommon that the funding is provided to consultancy companies or similar that deal with claims in scale, like claims management companies or restructuring and insolvency consultancies. This manner of funding seems to be a true innovation contained in the 2015 Burford Annual Report³⁸⁹, to the extent that is moving this industry from a mere legal and cost risk hedging tool, to a sort of new corporate finance instrument (if provided to companies). Indeed, traditionally the litigation costs have been regarded as 'profit & loss expenses', while the claims outcomes are not included among the balance sheets assets. This gap is being now filled by this manner of funding that – while generally more expensive than other own or external methods of corporate financing – is effectively turning out to be an efficient alternative for companies willing to diversify their risk and/or to monetize litigious assets. It is in fact not uncommon that the portfolio funding is secured with assets that are different from the potential outcome of a dispute (or a series of them), so making it not much different from other financing tools. This case, too, works on the same argument as above. Where the financing is secured with

³⁸⁹ Ibid., 4-5. 'Burford concluded a \$45 million financing arrangement with a FTSE 20 company in late 2015 to support a portfolio of pending litigation. Described by the press as "ground-breaking" and a "landmark deal", it illustrated the pervasive spread of litigation finance into even the largest global companies.'

collaterals that are different from the potential recoveries from the disputes it is unlikely that these could be framed within the TPLF scheme.

2.1.1.3. Law firms' funding

The law firm funding schemes concern those arrangements where the capital is provided to law firms as way to cover the costs and risks of their litigation activities. This segment has arisen due to a transformation of the law firms and their normal modus operandi, driven by a change in demand by the clients themselves. Clients have indeed lately been asking for a change in the normal hourly fee model, as a way to share the costs and risks of their litigation with their law firms³⁹⁰. This demand could be regarded as the same that has been pushing the emergence of TPLF. As the traditional model of law firms tends to be reluctant to make radical changes in this regard, it took not much time until third party funders stepped into this gap. This manner of financing indeed allows law firms to keep their traditional billing system, while responding concretely to their clients' demand. This trend seems to be no less disruptive than the others. In the Annual Report mentioned, it was stated that '... in January 2016, Burford provided \$100 million in financing to a major global law firm against a broad and widely diversified portfolio of matters. This is a similarly ground-breaking transaction. Law360, a leading legal trade journal, commented on Burford's approach: 'Industry experts have characterised the apparent move toward greater outside funding in law firms as "inevitable," while noting that the investments are starting to look and sound more like venture capital investments. This trend is in no way surprising. Law firms are one of the last businesses to try to exist as cash partnerships without external capital. That's fine when you can get your clients to pay you currently and by the hour. However, that model is significantly more challenging when clients demand alternative economic structures from their law firms – as they now do regularly. When that happens, law firms are like any other businesses and need to add external capital to continue to prosper and grow. Those trends are fuelling our business, and because we are at the early stage of the financial transformation of the legal industry, the future is appealing ...'³⁹¹. For this segment, too, it is necessary to

³⁹⁰ See above GEORGETOWN LAW – CENTRE FOR THE STUDY OF THE LEGAL PROFESSION, at footnote 2.

³⁹¹ BURFORD, Annual Report, 2015, above at footnote 387, 5.

remark that this financing falls within the TPLF category to the extent that it aims at hedging the costs and risks of litigation on a non-recourse basis. If the funding is provided to law firms to cover other activities unrelated to litigation and/or is backed by assets other than the recovery from this litigation, then it should be framed within the bigger legal financing industry.

2.1.1.4. Insurance type funding

The insurance type of TPLF - generally speaking – aims at covering those litigation costs and risks that are traditionally covered by insurers³⁹². Unlike the latter, however, third party funders provide capital on a non-recourse basis, or otherwise commit or bear a risk without asking for the payment of a premium, like for insurances). This may happen for example in those cases where the English rule on costs applies, and third party funders may be asked – in a wider funding structure - to cover the risk of it. It is also not excluded that party funders enter into agreements whereby they decide to cover all the potential litigation costs and risks of a party, provided that this is done on a non-recourse basis. This type of service may be provided for single cases or for a portfolio of cases, and may be either stand-alone or coupled with other types of litigation financing tools.

2.1.1.2. Active TPLF schemes

Third party litigation funders may decide to take a more active role in someone else's litigation, eventually by transferring (for example, via purchase, assignment, etc.) the claim to themselves (or to other controlled entities), and continuing the dispute autonomously against the original defendant³⁹³. The claim transferee in this case would acquire the control of litigation and ultimately be entitled to get the entire case

³⁹² On the distinction between TPLF and LEI see above MG FAURE and JPB DE MOT, above at footnote 10. In the practice, see BURFORD, Annual Report, 2016, 21, available at <http://www.burfordcapital.com/investors/financial-reports-and-presentations/> (last vis. 8.2.2017)

³⁹³ G McGOVERN, N RICKMAN, J DOHERTY, F KIPPERMAN, J MORIKAWA and K GIGLIO, above at footnote 116. A PINNA, 'Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims' in M TUIL and L VISSCHER (eds), *New Trends in Financing Civil Litigation in Europe*, 109, 2010.

proceeds, unless otherwise provided for in the agreement with the original claim-holder³⁹⁴. The issue of the control of litigation is of utmost importance, insofar as the new claim-holder could potentially appoint the lawyers, decide with them the case strategy, settle out-of-court, and so on. From a more legal point of view, it is indeed to be noted that some courts have already deemed a TPLF contract void (or not) relying on the reason that the control of litigation was not in the hands of the original claimholder³⁹⁵. Where the third party funder acquires the claim it may be argued that it would not be any more a 'third' party, thus the scheme does not constitute a TPLF transaction. While there seem to be no regulatory or other indications in this regard, future discussions will have to take into account that the funder is still a non original party to the dispute that is being funded.

Generally speaking, where this scheme in practice will entail the transfer of the claim, it will have to be confronted with the legislation impacting on such transactions, which have not always been permitted. Traditionally, in common law jurisdictions the rule was that assignments of choses in action were prohibited³⁹⁶. However, especially to facilitate commerce and free trade, there has been a radical change and now the rule is free assignability, and the limits to this transaction are the exceptions³⁹⁷. In the case *Trendtex Trading Corp v Credit Suisse*³⁹⁸ the House of Lords of the United Kingdom

³⁹⁴ In such cases the funder – in order to address problems of adverse selection (see below par 2.1.1.4.2.) – may wish to leave part of the compensation for the original claimholder, on contingency basis.

³⁹⁵ See, for example, *Ahmed v. Powell*, [2003] P.N.L.R. 22 (Eng.). On the other side, some courts have partially upheld funding agreements as the funder had a passive role. See, e.g., *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 104 (Tex. App. 2006).

³⁹⁶ See W S HOLDSWORTH, above at footnote 57.

³⁹⁷ In general, see V MORABITO and VC WAYE, above at footnote 62, 391. With regard to the US, see AJ SEBOK, above at footnote 13, 74. As for the United Kingdom, see A PINNA, above at footnote 393, par 2.1.

³⁹⁸ [1982] A.C. 679; [1981] 3W.L.R. 766. In a comment to this case, it has been noted that ' ... 1. The objection that an assignment of a cause of action savours of maintenance and champerty and is therefore invalid cannot be raised where: (a) the assignment is of a "property right or interest and the cause of action is ancillary to that right or interest; or (b) the assignment is of any claim, whether based on contract or tort, provided that the assignee has a "genuine commercial interest" in taking the assignment and in enforcing it for his own benefit. 2. Arguably the case under discussion has extended the law relating to assignments in holding that a right of action based on tort is assignable where the assignee has a "genuine commercial interest" in the suit. Such an interest exists at least where: (a) the assignee

formulated the modern test on assignment of 'bare rights of action'³⁹⁹, which has deemed not invalid on grounds of maintenance and champerty only if the assignee hold a 'genuine commercial interest' in the transaction. This test has been also recently affirmed in Australia, where the assignment of bare rights of actions was also traditionally forbidden as champertous⁴⁰⁰, in the high Court decision Equuscorp Pty Ltd v Haxton⁴⁰¹, although some aspects remain uncertain⁴⁰². In the US the principle of non-assignability has been almost entirely abandoned, although exceptions survive, for example concerning whether a claim survives the death of the assignor⁴⁰³. In general, it has been said that 'nowadays most common law claims can be assigned apart from personal injury actions arising in tort or fraud, and claims involving breach of contract

has financed the assignor's contractual obligations the assignee can take an assignment of the benefit of the contract even where the contract has previously been breached, and even where the cause of action arising from the breach is framed in tort; or (b) the assignee has a commercial interest (as, say, a creditor) in maintaining the solvency of the assignor. 3. In any event the above submissions are subject to considerations of public policy which may yet render ineffective an otherwise valid assignment, for example where an officer of the court takes an assignment of a cause of action and is thereby put in a position where his interest and duty may conflict. 4. A cause of action for damages for breach of contract is probably unassignable (subject to point 1. (b)) since it is not a property right or interest. It is a bare right of action. The word "probably" is used here because there may be considerations involved in the facts of the instant case which indicate that this conclusion is not necessarily to be reached. ...'. See D REICHEL, 'The Law of Maintenance and Champerty and the Assignment of Choses in Action' (1983) *Sydney Law Review*, Vol 10, n 1, 166. It is finally worth of note that some specific statutory exceptions exist in relation to assignments of causes of action to receivers, liquidators and trustees in bankruptcy (see for example *Bankruptcy Act 1966* (Cth) s 134; *Corporations Act 2001* (Cth) ss 420, 477).

³⁹⁹ By 'bare right of action' it is intended the assignment of the sole right to litigate to recover damages. D REICHEL, *Ibid.*, 168.

⁴⁰⁰ *Poulton v Commonwealth* (1953) 89 C.L.R. 540.

⁴⁰¹ [1982] AC 679; [1981] 3 All ER 520.

⁴⁰² More in particular, '(1) exactly what constitutes a genuine commercial interest (2), whether an assignee must have a pre-existing enforceable right against the assignor (3), whether the Trendtex principle can include the assignment of a cause of action in tort, and if so (4), whether personal torts are assignable'. These aspects are discussed in G ANDERSON, 'The Trendtex principle in Australian law: context and recent developments' (2016) *The University of Western Australia Law Review*, Vol 40, n 2.

⁴⁰³ AJ SEBOK, above at footnote 13, 74.

that are categorized as too personal in nature to be capable of transfer⁴⁰⁴. In civil law jurisdictions generally there is a provision on freedom of assignment of claims⁴⁰⁵, and then some explicit exception to such rule⁴⁰⁶. Apart from these prohibitions, the claim transfer model might engender a series of issues, for example – once the claim is assigned – if it is still necessary that the assignor remains involved. Should the assignor not be a party anymore, there might be no grounds for being compelled to answer to interrogatories, to provide evidence, etc. In the case mentioned, Sprint Communication⁴⁰⁷, these concerns were dismissed on the basis that such problems were physiological to the assigned claims, and that the courts were endowed with sufficient powers to compel assignees for discovery purposes. Similar powers are also available, for example, in England and Wales⁴⁰⁸ and Australia⁴⁰⁹. Apart from these specific issues of single jurisdictions, we will now describe some different and

⁴⁰⁴ V MORABITO and VC WAYE, above at footnote 61, citing 6 Am. Jur. 2d Assignments s.44; 6A C.J.S. Assignments s.43. AJ SEBOK, above at footnote 13. Sebok (at 86) however finds that certain states have allowed the assignment of certain claims that have personal nature, like medical malpractice claims, by way of subrogation. The assignability of other type of professional malpractice claims that have less 'personal character', however, has generally been more admitted. Also for claims for damages arising out of fraudulent actions, the courts in the US have shown a different approach depending on the fact that these consider such claims more or less 'personal' (at 89).

⁴⁰⁵ For example, art. 1321 of the French Code Civil, art. 1260 of the Italian Codice Civile and Art. 1112 of the Spanish Código Civil.

⁴⁰⁶ See, for example, the prohibitions for lawyers and eventually other personnel involved in the Judiciary to enter into a PQL and, where present, the RL (Chapter 2, par 1.2.1. and 1.2.2.). On this matter, see more in general G RASCHE, 'Prohibitions on assignment, a European civil code and business financing' (2002) *The European Legal Forum*, Vol. E, n 3, 133.

⁴⁰⁷ See above Chapter 3, par. 1.4.2.

⁴⁰⁸ Supreme Court Act 1981 s.34; CPR r.31.17. An analysis of the threshold conditions required to activate CPR r.31.17 can be found in *Three Rivers District Council v Bank of England* (No.4) [2003] 1 W.L.R. 210.

⁴⁰⁹ e.g. Ord.15A r.8 of the Federal Court Rules; Ord.32 of the Supreme Court (General Rules of Procedure in Civil Proceedings) Rules 1996 (Vic); r.5.4 of the Uniform Civil Procedure Rules 2005 (NSW); Ord.26A r.5 of the Rules of the Supreme Court (WA); r.146 of the Supreme Court Civil Rules 2006 (SA).

possibly concrete schemes of active TPLF with the transfer of claims⁴¹⁰. These are schemes that have been structured starting from empirical cases, or adapting similar business models to litigation. The list that follows is provided for without claims of exhaustiveness, and of course in practice these might be combined as a way to be adapted to concrete cases.

2.1.1.2.1. Transfer of claims for consideration or purchase

This scheme entails the payment of a sum in exchange of the transfer of a right to future (and eventual) case proceeds. For this reason it could be assimilated to the better known practice of debt factoring, whereby the creditor sells the debt to a debt factor. It however differs from it in some regard. Debt purchase and factoring is more a mere corporate financing method, whose main scope is to anticipate sums arising from existing commercial relationships of the assignor, and litigation is just an eventual pathology of that relationship. The claims that are sold are therefore not necessarily litigious (these would preferably not be so), and the problem is often that the actual debtor is in distressed conditions and has difficulties to repay on time. The goal of assignment for consideration as TPLF practice is, instead, to relieve the claim holder from existing disputes, and eventually anticipating part of their proceeds (should this happen, it would not be much different from the purchase of debt). For this reason the initial due diligence also entails the analysis of the litigation risk, and of the lawyers' team and proposed case strategy. While also in this case the funding is provided on a bespoke basis, the assignor is generally paid a sum at the time of the assignment and another part at the end of the claim⁴¹¹, also relying on the outcome of it. In an 'extreme model', the original claimholder would be paid the entire agreed sum at the time of the assignment, so that he would be disinterested in the dispute.

Relying on the debt-factoring scheme, it is possible to envisage a more general structure for this type of scheme. It follows that the transfer for consideration can be either recourse or non-recourse, depending on the fact that the assignee has recourse against the assignor if the debtor does not pay. In any case, the claim transferee

⁴¹⁰ This categorization has drawn inspiration from V MORABITO and VC WAYE, above at footnote 62, 389-433, which however discusses it only with regard to transfer by assignment.

⁴¹¹ C HODGES, J PEYSNER and A NURSE, above at footnote 9, 84.

generally enjoys the same rights as the original claimholders, disregarding the price at which the purchase was made. In this type of scheme it is likely that problems of adverse selection may arise, which are generally addressed through thorough pre-checking and claim evaluation processes, bona fide clauses or other clauses that impose liability on the assignor.

2.1.1.2.2. Partial transfer of claims

This scheme entails the transfer of a pre-agreed fraction of a claim, and the subsequent pursuit of the case in court together with the original claim-holder, or with another transferee. This figure, especially if the original claimholder keeps a fraction of the claim, has the advantage of hedging the risk of adverse selection. In this case, the relationship between the claim purchaser and the original claim-holder remains active, and information sharing – in the mutual interest - is more likely to happen⁴¹². Even in the case where the original claimholder sells the entire claim to a few different and independent transferees, the adverse selection might be reduced insofar as the legal assessment is carried out by more entities, and the risk is spread. However, the disadvantage of sharing the claim with the original claim-holder could be some conflict regarding the case strategy, including the possibility to settle⁴¹³.

2.1.1.2.3. Conditional transfer of claims

This scheme consists of a transaction where the transferee's 'rights to the fruits of the assignment are conditioned upon the occurrence of an event', or a transaction where the chose is in fact transferred but can revert back to the original claim-holder 'if a condition subsequently occurs'⁴¹⁴. In this case the main issue would be whether the transferee does have the standing to begin the lawsuit, even though his right is conditioned. It is likely that the answer to this problem would be negative, and anyway this scheme it is not likely to attract litigation funders due to a further uncertainty regarding the claim that they are purchasing. A litigation funder that accepts not to

⁴¹² V MORABITO and VC WAYE, above at footnote 61, 401.

⁴¹³ See VC WAYE, 'Conflicts of Interest between Claim holders, Lawyers and Litigation Entrepreneurs' (2007) *Bond Law Review*, Vol 19, 225.

⁴¹⁴ V MORABITO and VC WAYE, above at footnote 61, 403, describing it in the context of assignment.

have control of litigation could be fine by applying the TPLF scheme, without facing the uncertainty deriving from the condition.

2.1.1.2.4. Transfer of a potential claim

It might happen that a claim is transferred before the condition for the dispute is evident or is dormant, like in an insurance sub-rogation clause or a claim held by a liquidator or trustee⁴¹⁵. These types of transfers would fall in the TPLF field only to the extent that the main purpose of the contract would be to hedge the potential risk (and the eventual cost) of litigation. This distinction will be important for future (eventual) regulation of TPLF, as in theory all transactions may potentially entail a dispute.

2.1.1.2.5. Claims' transfer and aggregation

An interesting scenario - which might potentially concern all of the previous models - comes when, once it is established that a type of claim can be transferred, this is pooled with other similar ones and enforced all together with the funding of the costs. It is moreover to be mentioned that this scheme could be imagined also without the transfer, although of course it would create more difficulties from a practical point of view⁴¹⁶. Generally speaking, this possibility is not new at all and it somehow is similar to what happens already in class actions, from which however it differs for a series of reasons⁴¹⁷. First of all, claim aggregation differs from representative actions insofar as the claim aggregator is not supposed to represent (nor is a member) of a class. There are moreover different mechanisms for access to justice and for the class certification, or approval of the joinder and assignment⁴¹⁸. Claim aggregation does not have the problems and complexities related to the opt-out mechanism of class actions, insofar as the parties would voluntarily enter into a contract with the aggregator. In this regard, it might potentially offer a more interesting option for third party litigation funders in

⁴¹⁵ See above footnote 245, M DESTEFANO BEARDSLEE, 305.

⁴¹⁶ In this case, it would be probably be regarded as passive portfolio funding. See above par 2.1.1.1.2.

⁴¹⁷ V MORABITO and VC WAYE, above at footnote 61, 407.

⁴¹⁸ In the US, for example, listed under R. 23 of the US Federal Rules of Civil Procedure. In Australia, see above Chapter 3, par 1.1.2.

those scenarios where the class action legislation foresees an opt-out regime. From a law and economics perspective, the reasons to aggregate a claim are more than evident. Individual and one-shot claim holders are by definition more risk averse and in a weaker bargaining position with regard to settlement than aggregated repeated players. A professional claim aggregator will therefore be likely to achieve better results than single claim holders. They could play economies of scale, build a reputation, better allocate the risk, make experience and precedents, minimize the losses, etc. From a more general point of view, claim aggregators could enhance the deterrence of potential wrongdoers from breaching their contractual and non-contractual obligations, and provide effective remedies to original claim-holders. Certainly from a more specific perspective things are not very easy, since there are a series of legal and practical issues that make claim aggregation not immediate. First of all, claim aggregators might face high uncertainty regarding the validity of claim transfer, which will be likely to be validated by the judge even before assessing the merits of the claim(s). In this case, the claim aggregator might hypothetically pay the price for the assignment only if and when the judge approves the aggregation, but still it remains a burdensome procedure. Indeed, in claim aggregation there could be high logistical and organisational difficulties in collecting the claims, doing the due diligence, verifying the merits and the homogeneity with other claims, etc. This might result in an increase of initial costs and therefore might make the assignment not convenient anymore from an economic point of view⁴¹⁹. For these reasons, claim aggregation would not be an immediate transaction, although modern technologies may certainly facilitate this process⁴²⁰.

2.1.1.2.6. Claims' securitisation

Following the discussions of the previous sub-paragraph, it is worth discussing if the aggregation of claims could potentially lead to their securitisation⁴²¹. Securitisations indeed entail the aggregation of a series of illiquid assets, which are sold to a special

⁴¹⁹ V MORABITO and VC WAYE, above at footnote 61, 427.

⁴²⁰ This in fact already happens, and there are few web platforms already devoted to it. Among all, it is worth mentioning www.weclaim.com or www.topclassactions.com. (last vis. 8.2.2017)

⁴²¹ A PINNA, above at footnote 393, 17.

purpose vehicle that, in order to fund the sale, issues securities whose value is linked to the assets underlying them⁴²². For this reason, obviously one of the main issues that would arise in claim securitization would be the assessment of the claims' value and the collateral, and in particular if these assets are 'homogeneous' (and, thus, securitisable). This assessment is not straightforward, especially if this is related to non-liquidated damages compensation, for example, or other claims with uncertain value. Indeed, in these cases the real value can be known only once the judgement is delivered, although of course the practice often offers some guidance on how to calculate them. Moreover, the uncertainties would also concern the costs of prosecuting the claims, although this is also foreseeable. Another limit might come from the financial regulation, should this be too restrictive, for example, and allow securitisation only to large actors or to certain asset classes, or anyway impose too high economic and organisational burdens⁴²³.

2.1.1.3. Potential conflicts in the control over litigation

In the previous paragraphs it has been mentioned several times that a main problematic issue concerning TPLF is the control of litigation and the potential influence on the case strategy⁴²⁴. While this issue may certainly bring to some criticism, it has however been argued that the third party funder control over the legal strategy would be to a certain extent justified by the fact that the funders own a portion of the claim⁴²⁵. Apart from the general criticisms, it is worth noting that some courts might for example deem a funding arrangement valid or not, depending on the fact that the control of litigation

⁴²² JC SHENKER and AJ COLETTA, 'Asset Securitization: Evolution, Current Issues and New Frontiers' (1991) *Texas Law Review*, Vol 69, 1369, 1373–1375.

⁴²³ V MORABITO and VC WAYE, above at footnote 61, 424.

⁴²⁴ This concerns mainly the passive TPLF schemes, but also those active ones where the original claimholders retain some interest in the recovery and powers of control of the litigation strategy.

⁴²⁵ M STEINITZ, above at footnote 2, 1323-1324. This author argues that a third party funder would co-own some or part of the claim funded, and that the law should support transfer of the rights over litigation and control that go with that portion of ownership.

has changed⁴²⁶. Moreover, all modern jurisdictions somehow protect the lawyers' independence⁴²⁷, and the fact that a third party would have a significant role in defining the case strategy would probably clash with them⁴²⁸. Funders are aware of these rules, and always endorse the position (in the passive TPLF) that does not want to have a decisive influence over the case strategy⁴²⁹. However, it seems unlikely that funders would have no influence, considering that they would most likely fund those cases and those lawyers that abide by their investment policy principles. The specialisation and the track record of certain lawyers play indeed a pivotal role in the decision of funding a case. There are moreover other specific issues, like the pro-investor or pro-state bias in international investment arbitration, or the claimant or defendant orientation of certain law firms, which would motivate the choice of certain lawyers or arbitrators in these cases, rather than others. In such cases, however, it would be possible to speak only about an indirect influence, but it does not seem that could raise any specific legal concern. It is moreover unavoidable that this relationship will engender a series of conflicts, not only with the lawyers but also with the parties, due to the myriad of sensitive issues that this contractual relationship entails. These

⁴²⁶ See the cases *Ahmed v. Powell* and *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell* above at footnote 384.

⁴²⁷ Some states, with specific reference to the TPLF contracts, require explicitly to specify that funders will have a mere passive role. For example, see Ohio Rev. Code Ann. § 1349.55(B)(3).

⁴²⁸ See, ABA COMMISSION ON ETHICS 20/20, at footnote 252, quoting comments of Burford Group, LLC to the Am. Bar Ass'n Working Group on Alternative Litig. Fin. 5 (Feb. 15, 2011): 'Burford does not hire or fire the lawyers, direct strategy or make settlement decisions. Burford is a purely passive provider of non-recourse financing to a corporate party'. Moreover, quoting comments of Juridica Capital Mgmt. Ltd. to the Am. Bar Ass'n Working Group on Alternative Litig. Fin. 6 (Feb. 17, 2011): 'We do not seek to control any of the decisions regarding the conduct of any litigation that we finance, nor are we aware of any other supplier in this market segment who does.' See moreover the discussions in Germany below Chapter 7, par 2.1.

⁴²⁹ See in particular the provisions contained in the Association of Litigation Funders Code of Conduct, and reported above in Chapter 3, par 1.3.3.

conflicts have been summarised by Professor Waye⁴³⁰ and are reported in the paragraphs that follow.

2.1.1.3.1. Conflicts related to the strategies employed to pursue the claim

'Litigation entrepreneurs are almost wholly motivated by claim maximisation and therefore will endeavour to prosecute the claim as efficiently as possible. Efficient claim prosecution may eschew a number of procedures that some claim holders may wish to pursue. For example, a claim holder may wish to engage in lengthy and costly discovery processes, but the litigation entrepreneur seeking quick and cheap settlement of the claim may wish to by-pass discovery or only engage in minimal forms of discovery.'

2.1.1.3.2. Conflicts related to offers of settlement

There may be significant variations between the litigation entrepreneur and the claim holder regarding the reasonableness of an offer for settlement. In Australia and England failure to accept reasonable offers of settlement imposes a significant risk of an adverse costs order upon the litigation entrepreneur⁴³¹. Likewise a claim holder may want to settle too cheaply in the eyes of a litigation entrepreneur⁴³².

⁴³⁰ V WAYE, above at footnote 4, 241. It is interesting to note that Professor Waye, in her seminal book, refers to third party funders as 'litigation entrepreneurs'. When the book was written, in 2008, TPLF did in fact existed since not too many years in Australia, and almost non existing anywhere else. The idea of a litigation entrepreneur, indeed, shows how the business was 'artisanally made', and not carried out by sophisticated companies as they are (at least in part) nowadays. It is moreover to be noted that while the content of this categorisation has been entirely reported (with the adding of some footnotes), the numbering has changed to comply with the editorial house style.

⁴³¹ 'Australia and England adopt a cost-shifting rule to discourage unmeritorious suit. Under the cost shifting rule, the losing parties, that is the assignor and assignee, are liable to pay the party-party costs of the winning party in addition to the winning party's damages: *Cachia v Hanes* (1995) 179 C.L.R. 403. In the United States, the parties are generally responsible for their own costs.' (note of the original text)

⁴³² Similar conflicts arise also between parties and lawyers, especially when the latter charge conditional or contingency fees. See GP MILLER, 'Some Agency Problems in Settlement' (1987) *The Journal of Legal Studies*, Vol 16, n 1, 189-215. BL HAY, 'Contingent Fees and Agency Costs' (1996) *The Journal*

2.1.1.3.3. Conflicts related to offers of settlement other than by way of cash

Litigation entrepreneurs invest in the claim with a view to recouping a profit on their investment from the claim settlement proceeds. If the claim holder wishes to settle the claim for a non-cash form of redress, the litigation entrepreneur's investment objectives will be thwarted⁴³³.

2.1.1.3.4. Conflicts related to the withdrawal of proceedings

If the claim holder no longer wishes to pursue the proceedings this places the litigation entrepreneur in an awkward position if it wishes to continue, as all parties with an interest in the claim must be present before the court.

2.1.1.3.5. Conflicts related to the access and use of confidential information

The litigation entrepreneur and the nominal claim holder share a common interest in the claim enabling the sharing of confidential information concerning the claim without negating legal professional privilege. However each may not wish to disclose confidential information to another. For example, the claim holder may not wish to disclose information to the litigation entrepreneur if the entrepreneur also has dealings with the claim holder's commercial competitors. Most of the above types of conflicts of interest are more likely to arise in situations involving non-aggregated claims for personal injuries. For that reason, generally Australian non-recourse litigation funders, who underwrite claim prosecution in exchange for a portion of the claim proceeds, will only invest in commercial litigation or class action suits where the claim holders are unlikely to be motivated by personal vindication or other non-monetary concerns'.

of Legal Studies, Vol. 25, n 2, 503-533. BL HAY, 'Contingent Fees, Principal-Agent Problems, and the Settlement of Litigation' (1997) *William Mitchell Law Review*, Vol 23, Issue 1, Article 7.

⁴³³ This conflict often arises in class actions, where consumers may also wish to obtain relief besides or instead of cash. GP MILLER, 'Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard' (2003) *University of Chicago Legal Forum*, Vol 2003, Issue 1, Article 13.

2.1.1.4. Other contractual issues concerning TPLF

The novelty and the evident complexity of the matter mean that there are no standard TPLF contract models so far, and information is hardly available as litigation funders generally protect the funding arrangements with confidentiality agreements. The problem of a lack of available contractual information is probably less relevant for the discussions related to TPLF in the common law jurisdictions, where typicality of contracts has never been a problem for business transactions. In the civil law jurisdictions, instead, it could be one of the reasons that slow down the emergence of TPLF, to the extent that – given the specificity of such legal systems – this may engender uncertainty for operators. The civil lawyers approach is indeed to always try to encompass innovative contracts within the existing models already contained in their national civil codes⁴³⁴. In any case, at this stage it is important to highlight what could be the issues that these relationships are likely to raise. This is important also because, as discussed by professor Maya Steinitz, the lack of information concerning the TPLF contractual arrangements could be to the detriment of unsophisticated clients that may be placed in both an economic (due to increase in transaction costs) and legal asymmetric position towards the funder⁴³⁵. This is the reason why she has expressed the need for the formulation of a litigation contract that would address such a concern⁴³⁶.

2.1.1.4.1. A glance at a specific case: the Chevron/Ecuador dispute

Steinitz analyses the contractual elements of TPLF with an empirical approach, by taking into consideration probably one of the most important cases involving TPLF so

⁴³⁴ See M BUSSANI, above at footnote 271, 28-35. This has been evident in the discussions on the contractual model briefly reported above in the Chapter concerning the European civil law jurisdictions, with particular regard to France and Germany, but will be discussed more in detail below at Chapter 7.

⁴³⁵ Some of these issues will be also addressed in Chapter 6 and, with regard to the civil law context, in Chapter 7.

⁴³⁶ M STEINITZ, ‘The Litigation Finance Contract’ (2012) *William & Mary Law Review*, Vol 54, Issue 2, Article 4, 455. Professor Steinitz has moreover set up a crowdsourcing platform to device such contract, and where contributors from anywhere could participate with their contribution. See <http://litigationfinancecontract.com> (last vis. 5.4.2017).

far, not only for its political/social importance, i.e. the Chevron/Ecuador dispute⁴³⁷. In this case, the Ecuadorian indigenous people filed a lawsuit against Chevron for alleged environmental damages which occurred from the pollution of the local rain forests and rivers by Texaco, which was then acquired by Chevron in 2001. On February 2011 an Ecuadorian court awarded 18 billion dollars damages to the claimants, one of the largest awards ever recognised in environmental claims. The funding structure devised for this case was quite complex, foreseeing different funding stages and thresholds for the returns (which may have also ended in a quite unbalanced scheme if the damage award was low⁴³⁸) and a complex legal and financial structure. There were different actors involved, some prominent litigation funders, freelance investors, and active lawyers and the non-profit association Friends of the Defence of the Amazon and some other individuals who represented thousands of other villagers. Starting from the analysis of this case, Maya Steinitz argues that TPLF agreements may well be assimilated to venture capital ones, for a series of reasons⁴³⁹. Venture capital funds raise capital from individuals and other institutions to invest in early-stage highly

⁴³⁷ There have been several claims filed in this long-standing case. A quite comprehensive report in this regard, inclusive of the links to court and other documents, can be found in BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *Texaco/Chevron lawsuits (re Ecuador)*, available at <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (last vis. 27.8.2017).

⁴³⁸ In the magazine Fortune, the deal was described as follows: 'If Burford ponies up the full \$15 million and the plaintiffs end up recovering \$1 billion, Burford will get \$55 million. If the plaintiffs recover \$2 billion, Burford gets \$111 million, and so on. But here's the best part for investors: If the plaintiffs recover less than \$1 billion—all the way down to a mathematical floor of about \$69.5 million—Burford still gets the same payout it would have received if there had been a \$1 billion recovery. In other words, if there were a \$69.5 million recovery, Burford would still get \$55 million, though that sum would, under the circumstances, constitute almost 80% of the pot. In that event, by the way, the remaining 20% would not go to the plaintiffs; rather, it would go to other investors, who are also supposed to get their returns on investment (not just their capital outlays) before the plaintiffs start seeing a dime. In fact, under the "distribution waterfall" set up by the 75-page contract, it is only after eight tiers of funders, attorneys, and "advisers" (including the plaintiffs' e-discovery contractor) have fed at the trough that "the balance (if any) shall be paid to the claimants.' R PARLOFF, 'Have You Got a Piece of This Lawsuit?' (June 28, 2011) *Fortune*, available at <http://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/> (last vis 27.8.2017)

⁴³⁹ For a more detailed analysis and a comment on the contractual issues, see M STEINITZ, above at footnote 436.

technological or science based business with high potential of returns but at the same time, high risks of failure. These contracts aim at hedging uncertainty, information asymmetry and agency costs. The same features, according to Steinitz, would be present in TPLF agreements. As for the differences, Steinitz mentions the positive social utility of venture capital, which is universally accepted for TPLF.

2.1.1.4.2. The client-lawyer-funder-insurer relationship

Other issues may concern the fact that in the contractual relationship between third party funders and a client there are also lawyers involved, and eventually insurers. This contractual relationship is therefore not as free as others, but always suffers from more and less strict lawyers' statutes, or other. Moreover, this funding relationship may also entail information asymmetry and agency problems, which could further engender moral hazard (from different sides, depending on the circumstances). The information asymmetry is generally addressed through information sharing agreements between the litigation funder and the lawyers and/or the parties. This however might create problems for the privileged information, to the extent that the funders seemingly would not enjoy such privilege⁴⁴⁰. It is however unthinkable that a litigation funder would enter into a funding arrangement without having the possibility of being fully informed or, more in general, to have all the information regarding the grounds of the case. The litigation funder is in deep need of information from the claimant (and its lawyer), in order to reduce the asymmetry of information regarding the case. As with regard to agency problems, Steinitz argues that there is a similarity between the 'early harvesting problem'⁴⁴¹ in the venture capital context, and the early settlement problem in TPLF. In the first, while the interest of the entrepreneur would be to take more risk and keep the

⁴⁴⁰ It is however worth mentioning a recent decision in *In re: International Oil Trading Company, LLC*, 548 B.R. 825 (Bankr. S.D. Fla. 2016), where the US Bankruptcy Court for the Southern District of Florida denied in part an involuntary debtor's motion to compel production of communications between the creditor that had filed the involuntary bankruptcy petition and the petitioner's third party litigation funder. The Court – relying on both federal common law and on Florida legislation - found that the attorney-client privilege and work product protection were applicable to certain disclosures made to the third party litigation funder.

⁴⁴¹ M STEINITZ and A FIELD, above at footnote 377, 738.

investment longer, the investor instead would be willing to liquidate the investment as soon as possible. In TPLF investors might for the same reason be incentivized to settle early and have a secure (though discounted) amount, instead of going further and hope for a higher but uncertain reward. The claimant – who doesn't feel anymore the risk of loss – might be instead keener to wait until the end of the proceedings, maybe pushed also by the curiosity of knowing the judgment outcome. In another contribution, Steinitz resumes such problems also taking into consideration the position of the lawyers: 'Beyond concerns relating to control[,] ... [fragmentation of the attorney's relationship with the client, on the one hand, and the funder, on the other] creates conflicts between an attorney's interest to maximize fees and those of the financier to do the same. These divergent interests may lead one to settle early but the other to proceed to trial. Similarly, if fee splitting is prohibited and the attorney receives a flat or hourly fee instead of a percentage of the recovery, the attorney has less incentive to properly vet a case as [he] transfer[s] all risk to the funder. This moral hazard can increase if claims are then securitized and further distributed. While both attorneys and funders, as savvy repeat players, have an interest in creating and preserving reputational gains, this interest may pull them in different directions in any given litigation and may not be aligned with the client's interest'⁴⁴². In the light of these issues, and also of the concrete case Chevron/Ecuador, Maya Steinitz suggests some features that may better address the contractual relationships between the funder and the claimants. The first one would be to contract for staged financing or, in other words, in more instalments⁴⁴³. As it happens in venture capital transactions, the funder if it commits capital gradually, may leave the investment with a lower loss should things go unexpectedly wrong. This possibility might moreover align more the interests of the funder and the claimant insofar as the funding might be for example linked to the continuous cooperation in the case, and so reducing the agency problems. Another mechanism to align the positions of the claimant and the funder would be to let the funder play a role in the case strategy management⁴⁴⁴. This might however clash

⁴⁴² M STEINITZ, above at footnote 2, 1324.

⁴⁴³ M STEINITZ, above at footnote 436, 504

⁴⁴⁴ Ibid., 507.

with lawyers' statutes, which often preserve the independence of these professionals, and their freedom to decide the best case strategy in the interests of their clients.

It is evident from this analysis that it is difficult to speculate a priori on what would be the best contractual scheme that could address all these problems, especially in contexts where this has not been experimented thoroughly yet, like in the civil law jurisdictions. These moreover will depend specifically on the jurisdictions where the TPLF agreement is ultimately embedded, and will depend on the overall applicable regulatory conditions. In this regard, it is worth recalling that in those jurisdictions where the 'English Rule' on costs applies, a party or the third party funders may wish to hedge the adverse cost risk by transferring it to an insurer, in exchange for a premium. This would be of help especially in those cases where adverse costs are uncertain or high, and third party funders would not be prepared to offer (also) an insurance-type funding product (see above par 2.1.1.1.4.).

2.2. Lawyers' funding

Lawyers' funding is a (probably misleading) way to define all those situations whereby the lawyers commit to bear all or part of the financial risk of the cases that they are endorsed with, in exchange for a share of the expected recovery⁴⁴⁵. It is said to be misleading as the lawyers generally do not fund (provide capital) directly to their clients, but maintain their litigation by avoiding (or conditioning them on success) all or some of the disputes' costs related to their legal activity. While the comparative overview has only incidentally analysed various manners of lawyers' funding, it is nevertheless possible to draw on it to define this ALF market segment, which can be sub-divided into two main categories:

- 1) Arrangements on the lawyers' fees more or less proportional to the success in the cases. These arrangements may take quite different forms and names (contingency fees, conditional fees, no-win-no-fees, damages based agreements, and so on). The common feature is that they waive the traditional hourly-based fees and shift (at least part of) the risk of loss in the cases on to the lawyers' shoulders;
- 2) Other lawyers' funding transactions. This category includes other arrangements

⁴⁴⁵ C HODGES, J PEYSNER and A NURSE, above at footnote 9, 136.

when the financing for litigation is sought by law firms externally (from loans for specific cases to large operations in the financial markets, but also TPLF agreements) but nevertheless the lawyers – in one way or another - take part of the risk with the expectation of making a profit from litigation. In this case, the lawyers' funding arrangement evidently concerns only the part of the transaction whereby the lawyers hold the risk, and not that which is shifted to others.

As mentioned, the common feature is that all these practices mean that lawyers bear the risks of the cases they are endorsed with, with the hope of making a profit out of them (ideally, but not necessarily, consisting of a fraction of the parties' litigious rights). As such, their effect is not different from TPLF arrangements. For this reason, while it is not the purpose of this work to define how lawyers support litigation, it is nevertheless important to discuss the approach that they tend to have in this regard, as a way to distinguish this funding manner (and market segment) from TPLF, and also to see how the lawyers' regulatory regime and practice impact on it.

2.2.1. Arrangements of the lawyers' fees based on success

The way in which lawyers are allowed to maintain litigation for profit differs sharply from one country to another. The comparative overview has shown that all the countries analysed more and less allow lawyers to enter into risk/reward sharing arrangements, although this is done more openly in the common law jurisdictions. Among all, the US seems to have the most liberal approach, considering that lawyers have the widest possibility to enter into such arrangements, using contingency fees or any other fee more or less based on success⁴⁴⁶. While the debate on contingency fees in the US is quite controversial⁴⁴⁷, it cannot be denied that these have been decisive in

⁴⁴⁶ See Rule 1.5 of ABA Model Rules of Professional Conduct, and in particular the limits set forth in (d). See moreover above Chapter 3, par 1.4.

⁴⁴⁷ The debate on contingency fees has been summarised as follows: 'Contingency fees are praised as the average person's "key to the court-house" and attacked as the cause of excessive litigiousness, frivolous lawsuits, and greedy trial lawyers finding new ways to bring corporate America to its knees Trial lawyers are blamed for contributing to, if not causing, the supposed "endless tide of litigation" They encourage the "blame game," whereby individuals do not take responsibility for their own lives but look to others for undue compensation and thereby increase insurance and other costs to everyone. These lawyers continue to enrich themselves through windfall fees in cases such as tobacco litigation.'

many cases where claimants had limited financial means⁴⁴⁸. This might be the reason why TPLF in the US has emerged relatively later, as law firms already using contingency fees tend instead to get loans using the potential outcome from claims as collateral⁴⁴⁹. TPLF has instead emerged more decidedly in the field of class actions in Australia and Canada, whose approach on such arrangements is quite moderated. Pure contingency fees are in fact very limited or even prohibited, although there is room for other fees based on success⁴⁵⁰. European states as well tend not to allow pure contingency fees, which are in fact prohibited by the code provisions prohibiting the PQL⁴⁵¹ or, also, by the lawyers' deontological rules⁴⁵². With regard to the regime of mass claims, the European Commission has recently suggested to the EU member states that – in order to avoid potential abuses - they should not allow the use of contingency fees in such litigation⁴⁵³. However, it must be noted that in recent years the EU member states allow certain types of agreements on lawyers' fees that are capable of achieving the same goal as contingency fees⁴⁵⁴. In Belgium, for example,

They engage in activities that contort the justice system to advance their own interests, contributing to excessive adversarialism. And they take advantage of naive injury victims, charging high fees to compensate for the risk they are undertaking when there is no doubt that the victim will recover damages.' See HM KRITZER and S SILBEY (eds) *In Litigation: Do The 'Haves' Still Come Out Ahead?* Vol 1–2, 2003.

⁴⁴⁸ E JOHNSON JR, 'Justice, Access to: Legal Representation of the Poor', in N J SMELSER and PB BALTES (eds), *International Encyclopedia of the Social and Behavioral Sciences*, 2001, 8048, 8051.

⁴⁴⁹ S GARBER, above at footnote 3, 36 - 37.

⁴⁵⁰ GR BARKER, above at footnote 123, 17. HP GLENN, above at footnote 147.

⁴⁵¹ See MG FAURE, FJ FERNHOUT and NJ PHILIPSEN, 'No cure, no pay and contingency fees', in M TUIL M L VISSCHER (eds), above at footnote 393. Also, BJ RODGER, at footnote 97.

⁴⁵² See Art. 3.3. of the Code of Conduct for European Lawyers.

⁴⁵³ Communication 'Towards a European Horizontal Framework for Collective Redress' COM(2013) 401 final, par 2.2.2. (the 'EU Communication on Collective Redress'); Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU, (the 'EU Recommendation on Collective Redress'), par 30.

⁴⁵⁴ BJ RODGER, above at footnote 97, Part I, Ch. 2, § 2.05 on funding mechanisms and costs. This is also due to some EU Court of Justice case law deeming the regulations on lawyers' fees as inconsistent with

pure contingency fees are prohibited by Article 446 ter of the Civil Procedural Code. Nevertheless, this provision seems to leave room for combined fixed (small) - success fees that, enabling the main part to be paid only in case of victory⁴⁵⁵, might practically result in being very similar to contingency fees. In Germany, while the rule is that lawyers' fees should not be based on the case outcome⁴⁵⁶, no-win-no-fees are allowed whenever the client is not otherwise able to bring the claim to court⁴⁵⁷. In the UK recently the legislator has introduced the possibility of entering into Damages Based Agreements (DBA) or Conditional Fee Agreements (CFA)⁴⁵⁸. With a DBA a legal representative can agree with the client that the fee will not be paid unless the case is won⁴⁵⁹, and the sum will be calculated on the basis of the recovered damages. Under a CFA, if the case is won, the lawyer is paid the normal fee plus a further one, either fixed or as a percentage of the sum recovered⁴⁶⁰. Both DBA and CFA, following Lord Jackson's Report on Costs in Civil Litigation, have been somehow limited in order to control costs for the losing party⁴⁶¹.

2.2.2. *Other lawyers' funding transactions*

The comparative overview has also shown that lawyers, apart from charging success-based fees, sometimes structure more or less complex financial transactions to

the EU's principles on free movement and competition, thus somehow 'liberalising' the lawyers' bargaining. See for example the cases C-94/04 and C-201/94, *Cipolla and Others*, ECLI:EU:C:2006:758. In these cases, the European Court of Justice deemed regulations on minimum lawyers' fees as inconsistent with the EU's principles on freedom to provide services.

⁴⁵⁵ BJ RODGER, above at footnote 97, Part I, Ch. 2, S. 2.05 (Belgium).

⁴⁵⁶ Section 49b(2) Federal Attorneys Code. See moreover the discussions in Chapter 7, par 2.

⁴⁵⁷ Section 4a Attorney Remuneration Act.

⁴⁵⁸ CFAs were first made lawful by the Court and Legal Services Act 1990, and then liberalised with the Access to Justice Act 1999.

⁴⁵⁹ Damages-Based Agreements Regulations 2013/609, reg. 1(2).

⁴⁶⁰ Indeed, with the 'loser-pays' rule, the costs for the losing might be very high. W EMONS, 'Conditional versus Contingent Fees' (2004) *University of Bern Discussion Paper*, n 04.08. Available at SSRN: <http://ssrn.com/abstract=550301>.

⁴⁶¹ NH ANDREWS, above at footnote 178.

maintain their activities. When such transactions aim at sharing the costs and risks of the litigation that they are dealing with it is possible to frame them within the TPLF market. In the US it is not uncommon that law firms open lines of credit and/or apply for loans⁴⁶² aimed at maintaining the litigation that they are endorsed with, and secure them with the law firms' assets, including real property and future incomes⁴⁶³. There have been moreover cases where law firms have raised capital through private placements. For example, Dewey & LeBoeuf LLP—a New York-based law firm, raised \$125 million in a bond offering in April 2010⁴⁶⁴. The reason why the practices mentioned have been put in the section of lawyers' funding is because while the financing comes from third-party investors, the collateral applied to the financing belongs to the lawyers. In other words, the lawyers (or the law firms) ultimately bear all or part of the risks deriving from the transaction. For this reason they seem to achieve a result which is analogue to the other lawyers' funding arrangements, clearly to the extent that they hedge the costs and risks of litigation. Instead, it seems that those transactions where the funding is sought for activities that are not strictly related to litigation (for example, for the enlargement of office buildings in view of the growth of the law firm) cannot be encompassed in this category.

The practices mentioned are not typical only of the US. It is indeed an Australian law firm, Slater & Gordon, which launched the world's first 'IPO' for a law firm in May 2007⁴⁶⁵. Something is moving also in Europe. For example, at the beginning of 2016 Capital Law, a Welsh law firm, launched the first litigation fund set up by a law firm, as a way to finance their own activities⁴⁶⁶. It is moreover noteworthy recalling that also

⁴⁶² MG FAURE and JPB DE MOT, above at footnote 10, 16.

⁴⁶³ S GARBER, above at footnote 3, 13 and 33. The reason for a law firm to apply for these loans can be to open them up to compete with law firms with more capital, and to be able to take more cases.

⁴⁶⁴ D CASSENS WEISS, 'Dewey Refinances Its Debt in \$125M Bond offering' (April 19, 2010) *Aba Journal*, available at http://www.abajournal.com/news/article/dewey_refinances_its_debt_in_125m_bond_offering/ (last vis. 28.8.2017).

⁴⁶⁵ See A NOTARAS, 'Law firms: to list or not to list?', *International Bar Association*, Friday 10th September, 2016. Available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e2d1bfa3-e5c7-49e5-8e4f-7171c31c119e> (last vis. 8.2.2017).

⁴⁶⁶ S BARRY, 'Capital Law launches its own £50m litigation fund', *Wales Online*, 1 Feb 2016. Available at <http://www.walesonline.co.uk/business/business-news/capital-law-launches-50m-litigation->

in a country with a civil law background, the Netherlands, various attempts to finance lawsuits by recourse to the capital markets have been made by local lawyers⁴⁶⁷. In order to avoid the prohibition on the PQL, these transactions have often been made indirectly through special purpose vehicles, or otherwise made by lawyers that were not included in the bar anymore⁴⁶⁸. In the latter case, however, it might seem more correct to speak about a specific form of TPLF, rather than of lawyers' funding.

2.2.3. Lawyers' funding vs. TPLF

The various manners of lawyers' funding described here differ from TPLF in various regards, but nevertheless are capable more or less of achieving the same result of guaranteeing or otherwise enhancing access to justice by sharing the litigation costs and risks with parties to a dispute. TPLF and the lawyers' funding are often intertwined as a way to align the interests at stake and share/diversify the risk. The legal status of the lawyers (and law firms) is the most evident feature that, from a formal point of view, distinguishes them from third party funders. From a substantial point of view, however, this distinction depends very much on the laws, regulations and deontological rules of each country that limit their possibility to bargain over litigious rights, and more in general that prevent lawyers from carrying out many of the (commercial) activities that litigation funders do. In this regard, Professor Steinitz provides some interesting indications on what these distinctions could be. She notes that 'litigation-finance firms are likely to have different investment goals, strategies, and competencies than law firms and are likely to generate different agency problems. Specifically, finance firms are not subject to the constraints imposed by the canons of professional responsibility. This means that they can, on matters that conflict, solicit clients and have non-lawyers in management positions. The latter speaks to another notable difference—governance structures. Funders, unlike law firms, have boards of directors. Funding firms do not have to limit themselves to the practice of law and may gain advantages through synergies with other financial products and services they offer. They can accept alternative forms of compensation, such as equity in intellectual

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⁴⁶⁷ See above, Chapter 3, par 2.5.

⁴⁶⁸ Ibid., and in particular footnote 285.

property or exploration and drilling rights, and can join in the ventures of their clients. Last, but not least, there are differences in ownership structures and corporate finance options. Funding firms can—and do—raise investments from retail and institutional investors; they are likely to engage in secondary trading of the litigation stakes they purchase, and they may in the future engage in securitization of bundled legal claims⁴⁶⁹. It is evident that these differences might in the future distinguish clearly the extension of the activities of lawyers and litigation funding firms. More in general, for taxonomic purposes it is important to note that while the practice has shown that use of lawyers' funding often complements TPLF, the fact remains that the first are still a small part of the lawyers' services. TPLF is instead an activity that is totally devoted to bearing or better managing the costs and the risks of litigation, and the lack of regulation binding on them at this stage is likely to allow third party funders a much wider space of operation in this sphere. The existing scenario already provides some indications on how the relationships between the two will evolve. While both lawyers and third party funders are capable of contending the market for litigious rights, the national regulations limiting the lawyers' capability to take stakes in them will certainly help in defining to what extent third party funders are capable of operating: the stricter the limits on the lawyers, the wider the possibilities for third party funders to extend their activities.

2.3. Legal expenses insurance

Legal Expenses Insurance (LEI)⁴⁷⁰ contracts, generally speaking, require that an insurer commits to pay all or part of the legal expenses of the client, in exchange for a premium. LEI can be either Before the Event (BTE) or After the Event (ATE), depending on the time at which the insurance is taken out in relation to the event that has given rise to litigation. Another distinction should be drawn between LEI for bringing claims and LEI for defending from claims, which is almost always part of liability insurance contracts. This introduces another distinction, especially with regard

⁴⁶⁹ M STEINITZ, above at footnote 2, 1268.

⁴⁷⁰ It can be also referred to as 'legal cost insurance', 'legal protection insurance', or simply 'legal insurance'. See, T RAISER, 'Legal Insurance', in NJ SMELSER and PB BALTES (eds), *International Encyclopedia Of The Social And Behavioral Sciences*, 2001, 8638.

to the EU legal framework, i.e. between liability insurance and LEI⁴⁷¹, though these might intertwine to the extent to which liability insurances often also cover legal costs. Furthermore, LEI can be either stand-alone or add-on, depending on whether these are sold separately from other insurance agreements, or tied to, for example, household or motor vehicle insurances, or part of a legal service plan⁴⁷². For the avoidance of doubt, it is also worth mentioning that in this category falls also the litigation funded by insurers exercising their rights deriving from subrogation clauses⁴⁷³.

LEI models have evolved differently depending on the jurisdiction where these are applied, depending on several institutional and social factors. The LEI market in the US, for example, has been quite influenced by the large use of contingency fees in tort litigation⁴⁷⁴. LEI are generally encompassed within pre-paid legal services and group

⁴⁷¹ WH VAN BOOM, ‘Juxtaposing BTE and ATE - on the Role of the European Insurance Industry in Funding Civil Litigation’ (2009) *Rotterdam Institute of Private Law Working Paper*, 3. The Author notes that ‘the Directive excludes the LEI-aspect of liability insurance (i.e., the activity pursued by the insurer providing civil liability cover for the purpose of defending or representing the insured person in any inquiry or proceedings if that activity is at the same time pursued in the insurer's own interest under such cover, art. 2 (2) Dir.), and therefore the latter still plays a pivotal role in paying legal fees’. See Id., at footnote 2. The Directive mentioned is the Council Directive 87/344/EEC of 22 June 1987 on Legal Expenses Insurance ('the LEI Directive'). The LEI Directive has then been repealed by the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance, or 'Directive Solvency II' as of 1 November 2012. The Directive Solvency II nevertheless regulates LEI in Section 4, with the same aim of harmonizing national laws on the matter and preventing potential conflicts of interests between insurers and insured. Id., Consideranda 82-83. This basically covers all aspects of LEI regulation in European Union, insofar as member states apart from implementing European rules seem to have not added much. See O MC DONALD, I WINTERS, M HARMER, ‘The Market For ‘BTE’ Legal Expenses Insurance: A Research Report for the Ministry Of Justice’ (2007) 51.

⁴⁷² F REGAN, ‘Whatever Happened to Legal Expenses Insurance?’ (2001) *Alternative Law Journal*, Vol 26, N 6, 294. MG FAURE and JPB DE MOT, above at footnote 10, 5-6.

⁴⁷³ C SILVER, Litigation Funding versus Liability Insurance: What's the Difference? (2014) *DePaul Law Review*, Vol 63, Issue 2, 617, 635.

⁴⁷⁴ A US survey shows that 95% of claimholders attorneys, in tort litigation, charged contingency fees, while almost of defendants’ attorneys worked on an hourly basis. See JS KAKALIK and NM PACE, ‘Costs and Compensation Paid in Tort Litigation: Testimony before the Joint Economic Committee of the U.S. Congress’ (1986) P-7243-ICJ, July 1986, 295.

legal service plans, and are not much present as a stand-alone product⁴⁷⁵. In the EU, notwithstanding the common legal framework provided for by the LEI Directive, the member states' markets have not evolved homogeneously due to some local institutional differences impacting on markets for private insurance and on litigation. These basically concern the way in which disputes are settled, the single jurisdiction lawyers' statutes and the legal aid regime⁴⁷⁶. In the UK, for example, BTE LEI schemes have been available for more than 35 years and are usually added on to other products or services, such as motor, home or travel insurance⁴⁷⁷. This is probably the reason why LEI have not developed much as stand-alone, insofar as the wide presence of such agreements that hedge legal cases risk would diminish the need for ad hoc insurances. The use of LEI stand-alone by third party funders is instead growing as a way to hedge their adverse costs risks, especially in the light of the Arkin case law⁴⁷⁸. Germany is probably the market in which LEIs have developed more, especially with regard to stand-alone policies⁴⁷⁹. Moreover, in general, it has been argued that its regulatory environment is quite favourable for several reasons⁴⁸⁰. First, government funds for legal aid are limited, and even the party enjoying it, if she loses a case, has to pay the opponent's fees. Moreover, almost all forms of lawyers' result-based compensation is banned, and they enjoy monopoly also for out-of-court work, so creating a very stable and fore-closed market, with a formal and transparent fee regulation. The German Bar moreover has no reason to oppose a shift from public legal aid to private insurance schemes, especially because of the limited competition created by the rules mentioned⁴⁸¹. Overall, however, the German situation gives an

⁴⁷⁵ MG FAURE and JPB DE MOT, above at footnote 10, 5. Prepaid legal services are those arrangements whereby a person prepays for legal services that they may require in the future. Group legal service plans, instead, apply when a person pay a periodic premium for access to the covered legal services when the need arises.

⁴⁷⁶ R KIRSTEIN and N RICKMAN, 'Third Party Contingency contracts in settlement and litigation' (2004) *Journal of Institutional and Theoretical Economics*, Vol 160, N 4, 555, 556.

⁴⁷⁷ O MC DONALD, I WINTERS, M HARMER, above at footnote 471.

⁴⁷⁸ See above Chapter 3, par 1.3.2. and 1.3.4.

⁴⁷⁹ M KILIAN, above at footnote 261, 32.

⁴⁸⁰ M KILIAN, above at footnote 261, 43-44.

⁴⁸¹ MG FAURE and JPB DE MOT, above at footnote 10, 14-15.

important indication with regard to the relationships between TPLF and LEI, with particular regard to the Allianz case, where the subsidiary of the well-known insurer Allianz Prozessfinanzierug has withdrawn from the TPLF market for reasons of conflict of interest with the clients of the first⁴⁸². First of all, it confirms that the two entities are likely to compete for the same object. It is noteworthy mentioning this situation to understand how in the future the relationships between these two markets will evolve, and of course as a way to confirm that LEI is – and will continue to be – part of the litigation market. This is moreover confirmed by the relationships between LEI and legal aid. It has indeed been argued that the increase or decrease in the offer for legal aid might impact on the demand for LEI⁴⁸³. Indeed, if citizens know *ex ante* that the state will be keener to pay their legal expenses, they would not be willing to enter into LEI contracts and pay for a premium. Instead, they would prefer to ‘free-ride’ on states’ finances, which could create a moral hazard problem. Empirical evidence of this assumption can be found in a recent study in the Netherlands, where it has been demonstrated that the emergence of the LEI market had paralleled state cuts in legal aid⁴⁸⁴. In Sweden also the LEI market has apparently also been influenced by the reform of legal aid. The Swedish government has in fact, on one side, reduced the funds for legal aid and, on the other, encouraged LEI⁴⁸⁵, which nevertheless were already included ‘for free’ in household insurance policies.

The widespread use of contingency fees and largely available funds for legal aid cannot be the only reason for the non-use of LEI. Indeed, there are countries in which result-based lawyers compensations are not common, funds for legal aid are limited, legal costs are high, and anyway LEI – even though it is regulated and well embedded in the legal system - are not much used. A clear example of this is France, which moreover has even been the first country where LEI services were offered, but also Belgium and Italy⁴⁸⁶. The feeling in this case is that the market is not very mature, and

⁴⁸² See above Chapter 3, par 2.1. and in particular footnote 262.

⁴⁸³ MG FAURE and JPB DE MOT, above at footnote 10, 19-20.

⁴⁸⁴ C KLEIN HAARHUIS and B VAN VELTHOVEN, above at footnote 282. See moreover footnote 10.

⁴⁸⁵ F REGAN, above at footnote 282.

⁴⁸⁶ M KILIAN, above at footnote 261, 32. In France, LEI is regulated by the Loi 2007-210 du 19 février 2007 portant réforme de l'assurance de protection juridique [Law 2007-210 of Feb. 19, 2007 on Reform

therefore LEI are not commonly offered within other insurance packages, but also that potential consumers tend not to purchase stand-alone LEI.

2.3.1. Legal expenses insurance vs. TPLF

LEI is an alternative litigation funding method to the extent that an insurer takes the risk and the costs of their clients' litigation, and therefore it is capable – to a certain extent – to compete with and/or complement the action of the other actors in the litigation market. Amongst the various models analysed, *ex post* LEI are those that effectively share more features with TPLF. It is to be noted, however, that this is still regulated (also at EU level) as insurance. Liability insurances also share many features with TPLF⁴⁸⁷, but nevertheless have to be distinguished for a series of reasons. Liability insurances do generally cover the legal expenses of their policy-holders that have been sued, according to the policy that has been entered into, but not necessarily⁴⁸⁸. Unlike TPLF, these types of 'defence insurances' generally are encompassed in wider plans, for example of insurances for householders or car owners. Apart from this, it is worth reporting what Boardman listed as five 'key' features of the insurer defence relationship that helps in distinguishing (liability) LEI from TPLF: '(1) the contractual relationship [between the policyholder and the insurer] precedes the litigation. Thus, (2) the insurer's involvement in the litigation is *automatic*, not an *investment choice*, and (3) litigation funding is not the primary purpose of the contract. Once a legal claim is made, (4) the policyholder has a duty to cooperate with the insurer, and (5) the policyholder and the insurer are co-clients of the [defence] lawyer'⁴⁸⁹. The first two arguments clearly distinguish the two types of contract. The insurer, indeed, makes a promise to maintain the (defence) litigation of the policyholder, and has to do so even if the claim is totally ungrounded, or anyway non meritorious. The insurer may however bring other arguments, for example that the

of Legal Expenses Insurance], Journal Officiel de la République Française [J.O.] [Official Gazette Of France], Feb. 21, 2007, p. 3051. For Belgium and Italy, see RIAD, above at footnote 261.

⁴⁸⁷ C SILVER, above at footnote 474.

⁴⁸⁸ See above WH VAN BOOM, at footnote 471.

⁴⁸⁹ M BOARDMAN, 'Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation' (2012) *Journal of Law, Economics and Policy*, Vol 8, 673, 680.

dispute of the policyholder falls out of the policy coverage, or that he has intentionally procured the wrongdoing. As for the third point, while the insurance does cover the legal expenses, it is beyond doubt that litigation is not the primary purpose of the contract, but eventually only indemnification from the damage. This is evident in car accident disputes, for example, which are very often solved extra judicially through an agreement between the damaged party and the wrongdoer. As for the other two criteria, they relate more to the single contracts, so they do not characterize much the two figures in comparison. The duty of cooperation during the case is generally written in the insurance policy, but a similar duty can certainly be inserted also into the TPLF contract. The same holds true, though to a lesser extent, for the fifth criteria, the fact of being co-client of the lawyer dealing with the case. While in TPLF agreements formally the client is only the claimholder, it can certainly be decided by contract that the third party funder enjoys certain rights, such as the access to documents retained by the lawyer, of the power to veto or anyway to influence the lawyers' strategy. These features might certainly approach him to being a client himself, at least from a substantial point of view. Moreover, the payment of a premium is the feature that distinguishes sharply LEI from the TPLF models, where there is no payment of a premium upfront. Another feature that clearly distinguishes the two is the fact that insurers generally do not take stakes in the outcome of litigation, although this may vary in the future. Overall, the various practices analysed (and the Allianz case) seem to show that LEI, seem to be more appropriate for the funding of the defendants' legal costs, or to hedge the adverse cost risks in disputes where the English rule on costs applies, although it is not excluded that – depending on the regulation impacting on them – other schemes would be devised.

3. Concluding remarks. ‘One shotters’ vs repeated players in litigation

After having assumed that there was a brand new TPLF market phenomenon that has emerged following a specific market demand, this Chapter has attempted to explain how this has happened, in the wider litigation market context. Relying on some mainstream law and economics, it started by explaining how a new form of property (litigious rights) was created, showing that it has been the fruit of the overall process of liberalisation of the litigation market. It has moreover been the chance to argue how a series of global trends have created a market failure in access to justice, specifically by

increasing the barriers to access justice and the aversion to litigation costs and risks of parties to disputes. It has finally explained how the recent financial crisis has ultimately pushed the emergence of this market, moreover framing TPLF with the more general economic trend of the sharing economy. In the second paragraph it has then been the case to define who are the actors who are potentially capable to contend the market for litigious rights, obviously with the main focus on third party funders and their modus operandi. This analysis has served the main function to define the market from a subjective point of view, and also to understand the ways in which the various ALF could compete and/or complement each other. We have ultimately understood that the stricter the regulation impacting on the lawyers and insurers, the larger could be the space of operation for third party funders. Obviously the overall development of this market seems to depend also on some other issues that may affect the economics of litigation, for example: the more or less wide presence of resources available for legal aid, and the more or less high thresholds of entitlement to it; the presence of other funding methods⁴⁹⁰; the court costs; any other costs, especially if compulsory; the rules on adverse costs, etc. While these issues have not been the object of thorough analysis during this work, it is important to bear in mind their existence for future consideration (and will be incidentally taken into consideration to understand their impact on the TPLF market in the following paragraphs).

The limits to the capability of lawyers and insurers to contend the litigation market may certainly be a pivotal point to explain the emergence of TPLF, although it is possible to go a bit deeper in these considerations. In particular, starting from the mainstream economics argument that it is the possibility to fragment and create alternative bundles of rights that gives the incentive to use resources more efficiently⁴⁹¹, for example by trading them for some other more useful goods or service. In a sharing economy context, third party funders would therefore have responded effectively to the market demand for litigation without costs and risks, being able to deal with (fragmenting and creating alternative bundles of) litigious rights more efficiently and effectively than other established actors (and of the parties with their

⁴⁹⁰ For example, funds set up by trade associations or other professional bodies devoted to pay the legal expenses of their affiliated. D NEUBERGER, above at footnote 88.

⁴⁹¹ R COOTER and T ULEN, *Law & Economics*, Berkeley Law Books. 6th edition, 2016, Ch 4.

own funds), at least in certain circumstances where parties have no resources to pay for legal costs, and the claim presents high litigation costs. We have however seen that TPLF has emerged mainly in the corporate segment as an efficient corporate finance instrument. This issue poses the question of why, if a company has a potentially good claim and is not in distressed conditions, would one bargain a share in it. This issue has been explained recalling the difference between one-shotters and repeated players in litigation, and the problem of reducing ‘the Great Men’s grip on courts’⁴⁹², based on Galanter’s seminal article on how Great Men have ‘come out ahead in litigation’ and, more generally, on the distributive effects of legal processes⁴⁹³. Galanter identified two types of litigants, ‘one-shotters’ and ‘repeat players’. The first are generally claimants that deal with justice only occasionally and/or whose limited financial resources do not allow them to routinely and rationally manage either oversized or undersized cases. The second are individuals that engage routinely in similar types of litigation, and generally have substantial financial resources that allow them to pursue litigation even for low stakes, and in the long term⁴⁹⁴. In other words, Galanter maintains that repeat-players, due to their structural features (legal and financial sophistication), are able to play rationally, and optimise the outcome of litigation, as they are even able to ‘play for rules’. One-shotters, instead, are limited from a financial point of view (and might not be as sophisticated and/or experienced), and so would not be able to optimise the outcome of their dispute: they are often forced to accept inconvenient settlements on meritorious disputes, and cannot play on a large scale and in the long-term⁴⁹⁵. In order to reduce the possibilities of loss, it is therefore advisable to make a change in parties, in their structure and in their possibility of ‘playing with rules’,⁴⁹⁶ for example, by

⁴⁹² M STEINITZ, above at footnote 2, Chapter II. D. and Chapter III.

⁴⁹³ M GALANTER, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) *Law and Society Review*, Vol 9, 95. Galanter argues that ‘the basic architecture of the legal system creates and limits the possibilities of using the system as a means of redistributive (that is, systematically equalizing) change’.

⁴⁹⁴ Ibid.

⁴⁹⁵ In this sense, see, also, M GALANTER and M CAHILL, ‘”Most Cases Settle”: Judicial Promotion and Regulation of Settlements’ (1994) *Stanford Law Review*, Vol 46, 1339, 1349.

⁴⁹⁶ See M GALANTER, above at footnote 493, 150. Apparently, this is also true 35 years later. See KA KINSEY and LJ STALANS, ‘Which “Haves” Come Out Ahead and Why?’, in HM KRITZER and S SILBEY

transferring this risk to a structured legally and financially equipped third party. These arguments would give the chance to discuss the reason why TPLF is steadily gaining ground also in the corporate segment. In the presence of a market failure in access to justice (where parties cannot or prefer not to enforce and obtain their property litigious rights), TPLF would have emerged as a more efficient way to guarantee access to justice (or, putting it in other terms, enforcing and/or allocating their property rights) than the parties' own funds and/or other ALF and/or the state. Third party funders are legally sophisticated and financially endowed entities that are more able to bear these costs and risks than single parties, by pooling them altogether and spreading their costs and risks efficiently. In this regard, it can be noted how a high value but costly claim with only 1 % possibility of success might not be a good claim for a risk and cost averse claimant, but might be so for litigation funders and their large portfolios, provided that the potential returns would be attractive to them. A 100 million case with 1 % possibilities of success would equal, in this portfolio, having a 1 million claim with 100 % probability of success. Their legal and financial sophistication and their feature of being repeated litigation players allow them to play economies of scale with regard to the management of the litigation costs and risks, also by aligning the interests of the various parties at stake.

3.1. TPLF as a stand alone industry

The discussions of the previous paragraph seem to bring the assumption that TPLF would have emerged as more capable to deal with litigation costs and risks in scale than the parties and other actors. We moreover considered that in so doing, they would do so especially where insurers and lawyers would be more limited to deal with litigation for regulatory or opportunity reasons. This consideration however does not explain why other financial industries could not do this work, i.e. extract value from a better allocation and enforcement of litigious rights. Third party funders, due to their legal sophistication, seem indeed to be filling a gap for litigation risks in the financial markets⁴⁹⁷. This would allow them – more than other financial actors – to understand the value of the litigious assets and devise appropriate litigation cost or hedge-risk

(eds), *In litigation: do the 'haves' still come out ahead?* 1–2, 2003, 138.

⁴⁹⁷ JT MOLOT, above at footnote 205.

instruments⁴⁹⁸. TPLF would have therefore emerged as a stand-alone financial industry because it also seems more able to understand the legal merits and to deal with litigation costs and risks than other capital providers, with which however it shares some minor features.

- a) As discussed already, TPLF certainly shares some features with the venture capital, to the extent that in both cases the investors bet on a highly uncertain business, and the related contract presents very similar features⁴⁹⁹. It does however differ from it to the extent that venture capital is a form of financing that is generally provided to small, early-stage, emerging businesses, that are deemed to have high growth potential, or which have demonstrated high growth (in terms of number of employees, annual revenue, or both) and capability to innovate. TPLF is instead generally provided to experienced teams of lawyers, with a good track record in a specific legal field, and possibly for cases that present some favourable precedents and not too innovative points of law.
- b) There might be also some points in common with the distressed financial industry⁵⁰⁰. Third party funders do effectively extract value from situations where the legitimate owners of certain litigious rights are not capable of managing it due to their distressed condition. Especially in the portfolio funding, third party funders – as distressed funds do - restructure certain assets (the litigation) more efficiently than the claimholder and/or their lawyers would do. It however differs from it for some reason. For example, the distressed funds purchase distressed debt which very often is regarded as such due to the difficult economic conditions of the debtor. Third party funders, instead,

⁴⁹⁸ The various models analysed, and in particular the law firms financing, have shown that third party funders sometimes provide financing that is not directly related to covering litigation costs and risks. Should this at least indirectly entail the coverage of costs and risks of litigation, it seems reasonable to still encompass it within the TPLF category. If the funding instead covers other legal activities, it would be probably more appropriate to encompass it within a bigger legal finance family, and not specifically as TPLF.

⁴⁹⁹ M STEINITZ, above at footnote 436. The Author argues that the both the economics of litigation funding agreements and of venture capital present uncertainty, information asymmetry, and agency costs. See more in general the discussions above in par 2.1.1.4.

⁵⁰⁰ This has actually been a sort of 'accusation' made by opponents of TPLF. See above footnote 374.

finance claims of claimants that are not necessarily in distressed conditions, and only when the defendant is at least *prima facie* a solvent entity. In other words, while the distressed funds create value more out of their capability to purchase at a low price and monetize out of their capability to restructure certain assets efficiently, third party funders tend to create value out of their capability to bet on meritorious litigation where the parties to a dispute lack the finances to cover the litigation costs or are adverse to the litigation risk, and to do so in scale, managing them efficiently within large portfolios.

- c) TPLF can be compared also to another fast-growing financial industry, the social impact finance, which ‘... tries to achieve a positive social impact through finance and banking. A positive social impact includes an impact on society, the environment, or sustainable development’⁵⁰¹. In this regard, TPLF would resemble this industry to the extent that it would impact on society by guaranteeing one of the most important social rights, namely access to justice, which is ultimately the key for the enforcement of any other right. It moreover deters potential wrongdoers from engendering negative externalities (like the pollution of the environment), or otherwise might internalise them⁵⁰².
- d) Last but not least, TPLF could be also regarded as a type of corporate finance, to the extent that it helps in increasing the value of companies by allowing an efficient allocation of their litigious rights (but not only this)⁵⁰³. It has indeed been mentioned several times that the demand for TPLF has emerged mainly from the corporate world due to the situation of economic constraints that has followed the financial crisis, which would have pushed the pursuit of efficient allocations of property and risks (sharing economy).

⁵⁰¹ O WEBER, ‘Social Finance and Impact Investing’ (October 11, 2012), 2. Available at SSRN: <http://ssrn.com/abstract=2160403>.

⁵⁰² See below Chapter 5, par 2.1. on the positive externalities of TPLF.

⁵⁰³ See how this does happen in practice in the practical case described at Chapter 5, par. 1.2.2.

Chapter 5

An Economic Analysis of Third Party Litigation Funding

The comparative overview and the previous Chapter on the litigation market have given the chance to understand that TPLF seems to have emerged in response to a fast growing demand for better access to justice. It has been attempted to theorise that this demand has steadily grown as result of the recent financial crisis and other more or less inter-related trends, which have determined a market failure in access to justice, characterized by a general increase in court costs and reduction in the resources devoted to justice (including, in some countries, to legal aid). In many countries these cuts have been part of more general reforms aimed at restructuring in a more efficiency-oriented way the states' administration, of which justice evidently represents a significant part in the budget of the expenses. For the same reason, states are withdrawing from the administration of civil and commercial justice, which is more and more dealt with privately through ADR (also due to incentives introduced by some legislators)⁵⁰⁴. The analysis of TPLF in/and the litigation market has thus brought into consideration that this instrument may have an impact not only in single disputes, but also on a more general societal point of view⁵⁰⁵.

These arguments need now to be explored more in detail with an economic analysis of TPLF in its private and societal dimension. The first will start from a simple economic model that will attempt to explain when and under what conditions TPLF would be capable of enhancing the enforcement of litigious rights and better allocate the litigation costs and risks. After this, also relying on concrete examples, the single litigation costs and risks items will be analysed. In the second paragraph there will instead be the chance to analyse TPLF from a societal point of view, trying to understand what could be its externalities, and whether and to what extent these could be beneficial at this level. These discussions will attempt to set forth a series of arguments that will allow understanding of the impact of this instrument in the litigation market and beyond, thus the potential public policy issues related to it.

⁵⁰⁴ See above Chapter 4 par 1.3.2., and in particular footnote 349.

⁵⁰⁵ See G MCGOVERN, N RICKMAN, J DOHERTY, F KIPPERMAN, J MORIKAWA and K GIGLIO, above at 116, where TPLF was described as one of the 'biggest and most influential trends in civil justice'.

1. The private dimension of TPLF

The private dimension of TPLF will focus on the incentives that the various parties to a dispute have in dealing with litigious rights. It aims at explaining why and under what conditions the parties enter into a TPLF arrangement, but also whether and why TPLF would do so better (or not) than the parties' own funds and/or of other ALF. It does so starting from a simple economic model, to then analyse more in detail – also relying on concrete examples - the variables affecting the economics of litigation.

1.1. An economic model

The discussions on the private dimension of TPLF start with the De Morpurgo basic economic model on TPLF⁵⁰⁶, which has initially explained the incentives mentioned to enter into such arrangements. This Author started from Shavell's basic theory of litigation⁵⁰⁷, which simply defined the conditions under which suits are brought, representing them as follows:

$$C < \lambda R$$

Where C are the costs to litigate, and λ the probability to obtain a given return R. De Morpurgo then developed this formula in the context of TPLF arrangements, relying on the assumptions that

- '(1) all parties are rational and risk neutral;
- (2) if a plaintiff brings a suit, there will definitively be a trial (i.e., [De Morpurgo] refrain[s] from the possibility of settlement before trial);
- (3) we are in a simplified world, with only two time dimensions: T1 and T2 (the time of the TPLF agreement and the time of the judgment, respectively);
- (4) at T2 there are only two possible scenarios: plaintiff wins or plaintiff loses;
- (5) the lawyer is paid on a hourly basis, and that is included in the costs of litigation; and
- (6) there are no transaction costs.'

De Morpurgo then attempted to define the incentives that third party funders and

⁵⁰⁶ M DE MORPURGO above at footnote 13, 370.

⁵⁰⁷ L KAPLOW and S SHAVELL, above at footnote 332, 1722.

claimants have to enter into a TPLF contract, under both the American and the English rules on the cost allocation. In the pages that follow, there will be a report and elaboration of this basic model under both the American and English rules on legal costs, and then try to develop it with further considerations, also drawing on elements from the comparative overview and from the paragraph related to the actors of the litigation market⁵⁰⁸.

1.1.1. American rule

Under the American rule, each party to a dispute pays only for its own legal expenses, disregarding who wins or loses. For this reason, the American rule offers more certainty with respect to the cost of a claim, insofar as the party only has to consider his own costs, and not the defendant's ones. The American rule therefore incentivises the beginning of a claim, as the financial exposure in case of loss is more certain and limited than in the case where the English rule is applied. It must be noted though that the American rule on costs is not very common outside the US, including in most of the EU member states, at least as a default⁵⁰⁹.

1.1.1.1. The third party litigation funder

The De Morpurgo model starts analysing the point of view of the third party funder which, being a rational profit maximizer, will be willing to fund claims when his expected profit $E(\pi)_F$ would be positive. Practically speaking the third party funder will assess the inner merit of the proposed claim, the overall potential return (R), and the probability of success of the claim (λ), considering a series of risks that this entails⁵¹⁰. After this assessment, the litigation funder will bargain the share of the potential

⁵⁰⁸ Chapter 3 and par 2 of Chapter 4.

⁵⁰⁹ BJ RODGER, at footnote 97, § 2.05. Ch 2. See, also, EU Communication on Collective Redress, par. 3.9.3. A recent multi country survey has shown that the English rule, rather than the American rule, is applied in the majority of the assessed jurisdictions. HOGAN LOVELLS LLP, above at footnote 109, 4. Forty-nine, or 87.5%, of the fifty-six largest jurisdictions apply the English rule on costs.

⁵¹⁰ On the use of risk analysis applied to litigation see RB CALIHAN, JR DENT and MB VICTOR, *The Role of Risk Analysis in Dispute and Litigation Management*, American Bar Association, 2004. More specifically, the type of risks are analysed below at par 1.2.3.2.

recovery (σ) that he will be entitled to get after a judgment (or arbitral award) is enacted. In this scenario, the expected profit of the third party funder can be represented as follows

$$E(\pi)_F = \sigma(\lambda R) - C_C$$

where C_C are the claimant's legal and other costs the funder commits to pay. It is possible in this regard to present a numerical example to better explain this formula. Suppose the claimant has a claim worth € 1.000.000 and after a thorough review of its merits the third party funder determines, according to his risk model, that the claim has 70 % probability of success. The litigation funder and the claimant agree that the first is entitled to a share of the potential proceeds from the claim of 30 %, while the litigation costs are € 200.000. If we apply the above formula it will be

$$E(\pi)_F = \{.3[.7(100.000)]\} - 200.000$$

$$E(\pi)_F = 210.000 - 200.000$$

$$E(\pi)_F = 10.000 \text{ €}$$

Under the given conditions, the third party litigation funder will invest in the claim because $E(\pi)_F$ is positive.

1.1.1.2. The claimant

Let us now assume for simplicity that the claimant is also a profit maximizer, and wants to begin a claim to obtain the highest reward possible and not, for example, to vindicate the argument against the defendant. In a scenario where TPLF is largely available the claimant would have two possibilities, maintaining the claim with his own money or resorting to TPLF. In the first case, the claimant's profit $E(\pi)_C$ - recalling the Shavell formula of litigation⁵¹¹ - can be represented as

$$E(\pi)_{C1} = \lambda R - C_C$$

In the second scenario, with TPLF, the claimant's profit could be represented as

$$E(\pi)_{C2} = \lambda R (1-\sigma)$$

Being in front of these two possibilities, the rational claimant will be seeking third

⁵¹¹ See above par 1.1.

party litigation funding and ready to enter into contract if and only if

$$E(\pi)_{C1} < E(\pi)_{C2}$$

It is worth noting however that in reality there might be two type of claimants: 1) the 'impecunious claimants', those that do not have any money to pay for legal costs; 2) the 'other claimants', those that would have sufficient money to pay for legal costs but nevertheless could prefer to avoid the upfront litigation costs and hedge its risks. The impecunious claimant would always be better off in a situation where TPLF is largely available. The reason is quite straightforward: in this situation he could never be able to pay for any cost, and thus be in a position not to start a claim, unless obviously his lawyers would accept to work on a contingency fee basis (where possible) and there would be no other costs. For this claimant, any profit he would potentially make with the intervention of a third party funder would always make him better off than getting zero, as would be the case without TPLF. The claimant with sufficient resources instead will have to think whether he would be better off by getting TPLF or not, in the terms set out in the above formulas. It is possible also in this regard to make an explanatory numerical example. Suppose again the claimant has a claim worth € 1.000.000 and after a thorough review of the merits the third party funder determines, according to a risk model, that the claim has 70 % probability of success. The litigation funder and the claimant agree that the funder is entitled to a share of the potential proceeds from the claim of 30 %, while the litigation costs are € 200.000. The claimant in this case would be willing to get TPLF when $E(\pi)_{C1} < E(\pi)_{C2}$, which can be represented and calculated as follows

$$E(\pi)_{C1} = \lambda R - C_C = [.7(1.000.000) - 200.000]$$

$$E(\pi)_{C1} = 700.000 - 200.000$$

$$E(\pi)_{C1} = 500.000 \text{ €}$$

$$E(\pi)_{C2} = \lambda R (1-\sigma) = [.7(1.000.000)] (.7)$$

$$E(\pi)_{C2} = 700.000 (.7)$$

$$E(\pi)_{C2} = 490.000 \text{ €}$$

In this case the claimant with sufficient resources would most likely not get TPLF, because $E(\pi)_{C1} > E(\pi)_{C2}$. Let us now imagine a scenario where the probability to win the case is lower (thus the risk higher), say 50 %, while all the other variables remain

equal.

$$E(\pi)_{C1} = \lambda R - C_C = [.5(1.000.000) - 200.000]$$

$$E(\pi)_{C1} = 500.000 - 200.000$$

$$E(\pi)_{C1} = 300.000 \text{ €}$$

$$E(\pi)_{C2} = \lambda R (1-\sigma) = [.5(1.000.000)] (.7)$$

$$E(\pi)_{C2} = 500.000 (.7)$$

$$E(\pi)_{C2} = 350.000 \text{ €}$$

In this second case the claimant would be better off in getting TPLF rather than paying the claim with his own money, considering that his expected profit would be higher with TPLF.

1.1.2. English rule

Under the English rule the party who loses a dispute has to re-imburse the legal expenses to the other⁵¹², thus making the case potentially riskier/costlier.

1.1.2.1. The third party litigation funder

Under the English rule on cost shifting the third party funder has to take into account that, in the case of loss, the claimant might also have to pay the defendant's legal costs (C_D), while in the case of victory the defendant would re-imburse the claimant's legal costs (C_C). It is for this reason that in such scenario the expected profit of the third party funder can be represented as follows

$$E(\pi)_F = \sigma(\lambda R) - (1-\lambda)(C_C + C_D)$$

⁵¹² AW KATZ and CW SANCHIRICO, 'Fee Shifting in Litigation: Survey and Assessment' (2010) *University of Pennsylvania Institute for Law and Economics Research Paper*, n 10-30. JPB DE MOT, 'Sequential Trials and the English Rule' (2012) *European Journal of Law and Economics*, Vol 34, n 1. It is worth recalling also that the English rule is the most common at a global level. See HOGAN LOVELLS LLP, above at footnote 109, 4. Forty-nine, or 87.5%, of the fifty-six largest jurisdictions apply the English rule on costs. Before starting this analysis, it is worth recalling that the risk to pay the expenses of the counterparty in case the dispute is lost will be referred to as 'adverse cost risk'.

Let us now make a numerical example to better explain this situation, considering also that both the claimant and the defendants' legal costs are 200.000 €, the agreed share of the recovery σ is always 30 % and the probability to win is 60 %. If we apply the above formula it will be

$$E(\pi)_F = \{.3[.6(1.000.000)]\} - (.4)(200.000 + 200.000)$$

$$E(\pi)_F = 180.000 - 160.000$$

$$E(\pi)_F = 20.000 \text{ €}$$

In this case the funder will invest in the claim, as the expected profit, considering also the increase in costs/risk due to the English rule, is positive. Let us now do the same example with lower probability of success, say 50 %.

$$E(\pi)_F = \{.3[.5(1.000.000)]\} - (.5)(200.000 + 200.000)$$

$$E(\pi)_F = 150.000 - 200.000$$

$$E(\pi)_F = -50.000 \text{ €}$$

In this case, the funder will most likely not invest, as the profit is negative.

1.1.2.2. The claimant

The decision of the claimant to bring suit in a scenario where the English rule on costs applies will have to consider his own costs plus the risk of having to pay the defendants' costs in the case of loss. In the case where TPLF is largely available he will have to consider, as in the case represented above in the context where the American rule applies, whether using TPLF will make his expected profit higher than without, considering also the risk of paying for the defendant's costs. The expected profit in the case where he decides not to make use of TPLF can be represented as follows

$$E(\pi)_1 = \lambda R - (1-\lambda)(C_C + C_D)$$

While in case in decides to recur to TPLF, it would be

$$E(\pi)_2 = \lambda R (1-\sigma)$$

Considering that the rational claimant would make use of TPLF only if $E(\pi)_1 < E(\pi)_2$,

the opportunity of maintaining the claim with his own money or not can be understood using the following formula

$$\lambda R - (1-\lambda)(C_C + C_D) < \lambda R (1-\sigma)$$

It is possible to better understand this situation with a numerical example, considering a case worth 1.000.000 €, whose probability of winning is 60 %, the agreed share of the recovery is 30 %, and the legal costs for the parties of 50.000 € each. If we apply the above formula, it would be

$$E(\pi)_1 = (.6) 1.000.000 - (.4) (50.000 + 50.000)$$

$$E(\pi)_1 = 600.000 - 40.000$$

$$E(\pi)_1 = 560.000 \text{ €}$$

$$E(\pi)_2 = (.6)(.7) 1.000.000$$

$$E(\pi)_2 = 420.000 \text{ €}$$

$$560.000 > 420.000$$

In this case the claimant will maintain the claim with own money because his expected profit would be higher than resorting to TPLF. Let us now decrease the probability of winning to 40 % and increase the costs for the parties at 120.000 € each, with all the other variables being equal.

$$E(\pi)_1 = (.4) 1.000.000 - (.6) (120.000 + 120.000)$$

$$E(\pi)_1 = 400.000 - 144.000$$

$$E(\pi)_1 = 256.000 \text{ €}$$

$$E(\pi)_2 = (.4)(.7) 1.000.000$$

$$E(\pi)_2 = 280.000 \text{ €}$$

$$256.000 < 280.000$$

In a scenario with higher litigation costs and risks it is not difficult to see that a claimant, even if with sufficient resources, would be better off if a third party funder would pay the costs and bear the risks, including the risk to pay the defendants' costs. It is finally worth recalling that in a context where the English rule applies, an

impecunious claimant would benefit more from the use of TPLF than where the American rule applies, considering that in the case of loss he will not only have to bear his own legal costs, but also the defendant's. Moreover, he will always be better off because his expected profit, without the possibility to pay the upfront costs, would always be zero if no third party funder intervenes.

Another scenario is possible in this context, such as the case in which the claimant has the money to pay for his own legal costs, or anyway these costs would be annulled (say in the case where the lawyers agree to work on a total contingency fee basis), but cannot pay (or anyhow bear the risk of) an adverse cost order in the case of loss. In such a scenario the claimant would obviously benefit from an insurer-type funding aimed at covering the adverse costs' risk⁵¹³, or from the payment (by a third party) of a legal expenses' insurer premium for the coverage of this risk⁵¹⁴.

1.1.3. Lessons from the economic model

The economic model of De Morpurgo explains what are the conditions in which the litigation funders, on the one hand, and the claimant, on the other, decide to enter into a TPLF agreement, based on the rational assessment of their potential profit. Normally deals are made when both parties profit or otherwise benefit from a transaction, i.e. when there is a Pareto superior allocation making them better off than without the deal⁵¹⁵. Considering that we have acknowledged a significant increase of TPLF in recent years, it is thus worth exploring further the reasons that push parties to enter into TPLF agreements.

1.1.3.1. Why the parties enter into a TPLF agreement

The conclusions of the De Morpurgo model brings us to consider that, assuming that

⁵¹³ See above Chapter 4, par 2.1.1.4.

⁵¹⁴ See above Chapter 4, par 2.3.

⁵¹⁵ A change from one allocation to another is Pareto superior when at least one party is better off and no one else is worse off. See R PINDYCK and D RUBINFELD, *Microeconomics*, 7th ed International, 2009, 590.

the claimant and the third party funder have symmetric information⁵¹⁶, the same prediction about the outcome of the dispute and are equally risk and cost neutral, there is no possibility to enter into a TPLF agreement. In other words, there would be no share σ that they could agree upon making both of them better off, both under the American rule and the English rule for allocation of legal costs.

1.1.3.1.1. American Rule

Assuming that the claimant and the third party funder have the same prediction about the outcome of a case (it could be the situation whereby they use the same risk model and have similar perfect information), that the probability to win is a given percentage λ , the same perception of the claim value (and, thus, of the expected revenue, and that the litigation costs are 20.000 €. In such conditions, there is no σ that can be agreed upon, as De Morpurgo shows, considering that ‘[u]nless their respective expected profit under the financing contract is equal to that without the contract, there will always be a σ by which one party gains and the other loses’. It is possible to better explain this situation with a numerical example considering the expected profit of both the funder and the claimant, in the situations without and with a funding agreement (this will be indicated with F), starting with the following table.

	Third party funder	Claimant
No TPLF	$E(\pi) = 0$	$E(\pi) = \lambda R - 20.000$
Yes TPLF	$E(\pi)_F = \sigma(\lambda R) - 20.000$	$E(\pi)_F = (1-\sigma)\lambda R$

In the previous paragraphs we have mentioned that both the funder and the claimant will enter into a contract when their respective profit with the funding agreement would be higher than the profit without. Considering this quite straightforward point, in these circumstances none of them seem that they would be prepared to do so. Indeed, in the case at stake it would be

⁵¹⁶ For a model of parties’ litigation and settlement decisions under imperfect information see LA BEBCHUK, ‘Litigation and Settlement Under Imperfect Information’, (1984) *Rand Journal of Economics*, Vol 15, n 3, 404.

Third party litigation funder

$$E(\pi)_F > E(\pi)$$

$$\sigma(\lambda R) - 20.000 > 0$$

or

$$\sigma(\lambda R) > 20.000$$

$$\sigma(\lambda R) > 20.000$$

Claimant

$$E(\pi)_F > E(\pi)$$

$$(1-\sigma)\lambda R > \lambda R - 20.000$$

$$\lambda R - (1-\sigma)\lambda R > \lambda R - 20.000$$

$$\sigma(\lambda R) < 20.000$$

This comparison shows that, in a context where the American rule on costs applies, where both parties have perfectly symmetric information and are risk neutral, that they will never find an agreement. The funder indeed will want to have a profit higher than the costs incurred, while the claimant would be prepared to give up a share that is lower than the costs.

1.1.3.1.2. English rule

Similar considerations can be made in a context where the English rule on cost applies, although in this case also the defendant's legal costs would have to be considered, at least in the case of a potential loss. Let us assume in this case also that the claimant and the third party funder have the same prediction about the outcome of a case, that the probability of winning λ is 60 %, the same perception of the claim value (and, thus, of the expected revenue R , and that the total litigation costs of the claimant and of the defendant ($C = C_C + C_D$) are 40.000 €. The following table shows, as the one before, the scenarios with and without TPLF, the first indicated with F .

	Third party funder	Claimant
No TPLF	$E(\pi) = 0$	$E(\pi) = \lambda R - (1-\lambda)C$
Yes TPLF	$E(\pi)_F = \sigma(\lambda R) - (1-\lambda)C$	$E(\pi)_F = \lambda R (1-\sigma)$

As mentioned before, both the funder and the claimant will enter into a contract when their respective profit with the funding agreement would be higher than the profit without. Also in circumstances where the English rule on costs applies, none of them would be prepared to enter into such an agreement. Indeed, in the case at stake it would be

Third party litigation funder	Claimant
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$$E(\pi)_F > E(\pi)$$

$$\lambda\sigma R (1-\lambda) C > 0$$

or

$$\lambda\sigma R - C + \lambda C > 0$$

$$(.) \sigma R - 40.000 + 24.000 > 0$$

$$(.) \sigma R - 16.000 > 0$$

$$(.) \sigma R > 16.000$$

$$E(\pi)_F > E(\pi)$$

$$\lambda R (1-\sigma) > \lambda R - (1-\lambda) C$$

$$\lambda R - \lambda\sigma R > \lambda R - C + \lambda C$$

$$- \lambda\sigma R > - C + \lambda C$$

$$(.) \sigma R > - 16.000$$

$$(.) \sigma R < 16.000$$

This comparison shows that, in a context where the English rule on costs applies, where both parties have perfectly symmetric information and are risk neutral, that they will never find an agreement. The funder indeed will want to have a profit higher than the costs incurred and than the risk to pay the counter-party's costs, while the second would be prepared to give up a share that is inferior to his own potential and defendants' costs.

1.1.3.2. Different perceptions and attitudes towards risk and costs

The latter considerations of the De Morpurgo basic model have represented that if a funder and a claimant have symmetric information, the same prediction about the case outcome and equal litigation risk and cost tolerance, they would not enter into a TPLF agreement. Part I has however shown that there is a fast growing emergence and use of TPLF in both common law and civil law jurisdictions, although in the latter it has been relatively slower. Also considering the discussions on the market failure in access to justice, the reasons why parties to a dispute and funders contract seem of two orders: '[o]n the one hand, the parties are likely to have different perceptions of R and, even more likely, of λ^{517} . On the other hand, they have different attitudes towards risk (and different marginal disutility of loss)⁵¹⁸ and/or ability to bear the litigation costs. As

⁵¹⁷ Compared to the individual plaintiff, litigation financing firms are likely to have greater expertise and thus higher ability to evaluate the probability of success of a claim. (footnote of the De Morpurgo article)

⁵¹⁸ In fact, a \$20,000 loss is likely to negatively affect an individual plaintiff more than a well-financed litigation funding company, for which such a loss might not be as significant. (footnote of the De

discussed, in the conclusions of Chapter 4, third party litigation funders are legally sophisticated and financially endowed repeated players that are better prepared to assess the potential revenue from a dispute R and the probability of victory λ , but also to manage and bear the litigation costs C . They could indeed more easily spread the risks of claims they fund in a larger portfolio, and better manage costs in a way to achieve economies of scale than single 'one-shotters'.

1.2. The economic model in practice

De Morpurgo, after analysing the situation of a risk and cost neutral party, concludes that the main reasons why the parties enter into TPLF contracts is because they have different perceptions of the potential return (R) from the dispute, but most importantly of the probability of success (λ). It has further been noted that an individual claimant and third party funder have different attitudes towards risks and costs, and the funder obviously feel the losses less. This situation is not difficult to understand if we recall the Galanter distinction between 'one-shotters' and 'repeat players' in litigation⁵¹⁹. Considering however that TPLF has emerged differently depending on the jurisdiction, there is reason to think that there are also other exogenous factors that influence the economics of litigation, deriving for example from the regulations applicable to the different parties at stake. For this reason we can now see, also by grasping more elements from the comparative overview and the paragraph related to the actors in the litigation market, how these factors could work in practice in some specific jurisdictions and with concrete claims. We will use this case to show in practice what is the scenario that the two different types of claimants indicated by De Morpurgo would face: the impecunious parties, those that do not have the finances to cover the costs of a claim and are not entitled to legal aid⁵²⁰ and the other parties that, while not impecunious, nevertheless may consider to resort to a third party funder to assess and

Morpurgo article)

⁵¹⁹ See above Chapter 4, par 3.

⁵²⁰ It is the case, for example, of consumers having a slightly higher income than the threshold foreseen by their states for legal aid, or of insolvent companies.

manage the litigation costs and risks⁵²¹. As for the category of the impecunious claimants, as a way to facilitate both the analysis and the link with the following Part III on the European perspective, we will take into account a typical market failure in access to justice of EU law, i.e. the right of some impecunious victims of anti-trust violation to sue the cartelists in private follow-on actions, in comparison with a similar claim in the US. This type of claim is interesting as it touches basically all the potential barriers to access justice (or at least many of them), and because it gives the possibility to see both the passive and the active model of TPLF⁵²². As with regard to the second category, we will take into consideration an average international commercial litigation claim, and the situation in which the claimant has to decide whether spending its money on this case or on another business development activity, such as the research on a new product. we will attempt to show how third party funders could address the problem of access to justice or anyhow help to better manage the litigation costs and risks, and to what extent, especially in consideration of the regulations affecting the local actors of the litigation market. While doing so, we will try to define in detail what are the various elements that may affect the parties' aversion to costs and risks which, if looked at from another perspective, would signal what is the added value of having a litigation market where TPLF would be widespread. In particular, in the last part of the third party funders' perspective, we will take the chance to indicate – in light of the previous discussions – which are the inefficiencies that TPLF is likely to address.

1.2.1. The impecunious parties' perspective

The case at stake sees the upper side of the market composed of two companies, X and Y, which have entered into an agreement prohibited by Section 1 of the Sherman Act in one case, and Article 101 of the Treaty on the Functioning of the European Union ('TFEU') on the other. J, K and W are instead the group of victims of this anti-competitive behaviour (when acting together, referred to as 'the victims', the 'claimholders' or 'JKW'). The Antitrust Division of the U.S. Department of Justice, in

⁵²¹ Sometimes the literature and the practice often refer to these parties as 'the sandwich class'. See MG FAURE, FJ FERNHOUT and NJ PHILIPSEN, above at footnote 451, 48-49.

⁵²² The active model of TPLF does indeed suit better in those cases where there are diffuse interests, such as those of rights of the victims of cartels to obtain damages compensation.

one case, and the European Commission in the other, following a complaint of the victims, have investigated, ascertained and then sanctioned the two cartelist. The victims now intend to file a follow-on claim in a national court in order to recover damages arising out of the cartel entered into by X and Y. JKW are profit maximizers and want to bring a claim to obtain the highest reward possible, and not to vindicate X and Y. Considering their limited financial strength, the victims assess the possibility of involving a third party funder (F), in order to request funds in exchange for a share in the future amount eventually recovered. The following scenarios will therefore present the case at stake in both the US and EU (and their respective rules on cost shifting) drawing on the economic model presented above⁵²³, and then developing it with further considerations based on the comparative overview of Chapter 3 and the paragraph related to the actors in the litigation market at Chapter 4. In particular, this practical perspective will take into account the various barriers that could affect the parties' perception of costs and risks in these two legal contexts, and thus prevent access to justice. In particular, we will consider what is the impact of more or less liberal regulations binding on lawyers, and what could be the role of insurers. This assessment, in particular, will help to figure out what are the gaps in the market that TPLF would be likely to fill.

1.2.1.1. American rule: a practical case in the United States

JKW have acknowledged their right to obtain compensation for damages due to the anti-competitive behaviour of X and Y and considering that they have zero resources but nevertheless want to file this highly meritorious claim, explore some alternatives. They discuss with three different law firms, asking all of them if they could bring the claim forward on a contingency fee basis (no-win-no-fee based only on a fraction of the recovery). All of them agreed, because they moreover know that – since the claimant is potentially entitled to treble damages⁵²⁴ – their final fee could be very high. In this scenario, JKW could choose the law firm with the best quality price. The selected lawyers prepare the litigation plan. They first of all tell JKW that they need some experts to quantify the damages, and that they know already two of them: one would be keen to enter into a no-win-no-fee calculated as fraction of the recovery,

⁵²³ Infra, par 1.1.

⁵²⁴ 15 U.S.C. § 15 (A).

while the others are not. The lawyers told JKW that they would be more comfortable if they could work with the latter, because they know the quality of their work and want to increase the probability of obtaining their contingency fee. The lawyers have told JKW that if they ultimately decide to select them, their law firm could easily apply for a loan to pay the latter experts. The lawyers moreover present to JKW the further costs to be borne, namely: the court costs, and the witness and other evidence-related expenses. They however remind to the claimants that if they lose, they have to pay no costs to their defendants. Indeed, as mentioned, under the American rule a party pays only his costs, also in the case of loss. The lawyers also remind J and K that they will have to travel a few times to attend the hearing in the W jurisdiction court, but that there are no other transactional costs, like translators (because everything will be dealt with in American English). As with regard to the costs that have to be borne, including daily and travel expenses, JKW apply for loans. While they have no resources to back the loan with, they know that there are different financial institutions ready to lend them money and accept a fraction of the recovery from their claim as collateral.

In this scenario, the right of impecunious claimants to access justice and have their litigious rights enforced by various means, which are moreover – to a certain extent – in competition with each other, is implemented. It moreover shows how the intervention of a third party funder would not necessarily be needed, as a wider presence of other ALF and the absence of adverse cost risk increased the claimants' possibility to bargain over their litigious rights and fund their dispute and the other costs related to it.

1.2.1.2. English rule: a practical case in the European Union

We will now represent a similar case in the EU, moreover applying the English rule on costs, which is the most common in these jurisdictions⁵²⁵. It will also present two different scenarios, one without TPLF and one with; this will help to see – in the light of the current legal framework and maturity of the TPLF market, what would be the various possibilities to access justice.

- i. JKW have acknowledged their right to obtain compensation for damages due to the anti-competitive behaviour of X and Y, and meet to discuss how to bring

⁵²⁵ See HOGAN LOVELLS LLP, above at footnote 109

this claim forward. Considering that they have zero resources, but nevertheless want to file this potentially highly meritorious claim, they explore some alternatives. They first of all discuss with some lawyers to see whether it is possible to enter into a no-win-no-fee arrangement, and the fee to be calculated as a fraction of the recovery. The lawyers of J and K belong to a jurisdiction where such fees totally based on success are prohibited by the local bar regulations and/or by the code prohibition on the PQL. Moreover, the value of the claim is uncertain and nevertheless, considering that only compensatory damages apply in the EU, they would not feel like bearing such a risk for a claim of which the value is not known in advance, and that ultimately could be low. The laws and regulations of the hypothetical jurisdiction where W is resident instead allow lawyers to base their fee largely (although not only) on success, as a fraction of the recovery. JKW, considering that the law allows them to file the claim in any of the cartel victims' forum, decide to begin the dispute in the W jurisdiction, in a way that they would not have to disburse much money upfront for the legal fees. Having zero financial resources available, though, they still have to find some to pay these upfront expenses. They have asked local financial institutions, which however do not accept a fraction of the potential recovery from the claim as collateral, but only ordinary assets. The other difficulty they find is moreover that do not know the value of this claim, and therefore could not practically devise the loan, its reimbursement plan, etc. JKW have therefore to pledge part of their personal property to back this loan, therefore risking to lose them if the dispute is lost. They nevertheless believe very much in this case, and decide to proceed. The lawyers prepare the litigation plan. They first of all tell JKW that they need some experts to quantify the damages, and that they know already two of them: one would be keen to enter into a no-win-no-fee calculated as a fraction of the recovery, while the others do not. JKW immediately remind the lawyers that they do not have any resources to pay for the experts, and therefore they have no choice other than to resort to the first ones. The lawyers moreover present to JKW the further costs to be borne, namely: the court costs and the evidence and other related expenses. They moreover remind the claimants that they either have to pay an insurance premium to hedge the adverse costs risks, or they have to bear this risk themselves. The lawyers moreover remind J and K that

they will have to travel a few times to attend the hearing in the W jurisdiction court, and present other transactional costs, such as translators for the documents of J and K in the language of the tribunal of W. JKW apply for loans to pay for such expenses, but having no further resources to back the loan with, the banks decide not to provide it to them. In this scenario, the right of impecunious claimants to access justice and enforce their litigious rights cannot be implemented.

- ii. The scenario would not have been the same if the litigation market was more mature, and so the market for TPLF in that case. JKW get in touch with a few third party litigation funders, which are all potentially interested in bringing the claim forward. They indeed have internal legal and financial experts that have assessed the claim's inner legal merits and priced its value for free. Being therefore interested in its prosecution, they suggest JKW how to do so at its best. All the third party litigation funders contacted agree that these claims should be reunited and assigned to a special purpose vehicle for reasons of simplicity and economies of scale. This would indeed give them the chance to represent the claimant as unique, have single legal costs and have a more efficient TPLF scheme⁵²⁶. They moreover agree that a settlement should be sought first. Representing the claimants as a unique entity backed by a third party funder would indeed help 'levelling the playing field' and, considering that the XY's violation is already ascertained by the European Commission, they have higher probabilities to settle for a high amount. They agree that if the settlement negotiations fail, they will eventually file the claim in the jurisdiction of J, which is well known to be efficient, and where a few cases of anti-competitive behaviour were already successfully filed. When it comes to discuss the economic arrangements of the TPLF agreement, however, one funder (F1) offers to divide the equity in the special purpose vehicle⁵²⁷ on a 20 (for the funder) / 80 (for the claimants), another (F2) on 25/75 and the other (F3) on 30/70 basis. All of the third party funders agree to cover the adverse costs risks and the other expenses. JKW finally select F1, the third party funder

⁵²⁶ See above Chapter 4, par 2.1.1.2.

⁵²⁷ On the use of special purpose vehicles in competition law damage claims (and related legal and economic issues), see STADLER A, above at footnote 271.

whose funding will be ultimately cheaper. JKW and F1 discuss with different law firms, more or less specialised in the private enforcement of EU competition law. They finally decide to choose a law firm with the longest positive track record in such claims. For the same reason, to assess the damages, they finally decide to choose the most reputable consultancy firm.

The analysis of these hypothetical European cases (without and with TPLF) has been very interesting for two main series of reasons. First of all, it shows how impecunious claimants in the EU (where generally pure contingency fees are prohibited and the English rule on costs applies) would always be better off if a third party intervenes and bears the costs and risks of litigation, especially where there are high costs and risks like in the cases of the type at stake. It moreover shows how a mature market for third party funders⁵²⁸ could enhance access to justice not only by making this access effective, but also by allowing claimants to choose the best solutions for their specific case, even if they have no money.

1.2.2. The other parties' perspective

We will now present a case in which a well-resourced claimant involved - say - in a pharmaceutical business, has a potential high-value claim (\$ 80,000,000) against a former business partner, to be filed in an international arbitration tribunal. To make it simple, we assess the case in which there are no adverse costs and the lawyers are paid on an hourly based fee arrangement. The claimant has an in-house legal office that can understand the merits and the risks of the claim, which have been quantified at a 70 % probability of success. They have moreover quantified the necessary costs to bring it forward at \$ 1,000,000, and the time of the recovery at three years. Knowing about the expenses of this claim, the claimant has allocated \$ 1,000,000 to the budget for legal expenses, while all of the other budget items were already committed and could not be used otherwise.

⁵²⁸ Third party funders for the moment enjoy a non competitive environment, that permits them to charge high costs to claimant, which are generally in need of their services. M RODAK, 'It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effects on Settlement' (2006) *University of Pennsylvania Law Review*, Vol 155, N 2, 503.

At the same time the company is approached by a researcher who, upon the signature of a non disclosure and non use agreement, presents the opportunity to sell a patent of a new product at the non-negotiable price of \$ 1.000.000. The sale of this new product in the market, according to the forecasts of the researchers, could lead the pharmaceutical company to profits of up to \$ 15.000.000 in three years, which could even double if the company put more effort in the marketing and business development activities. This new business has also some risks, but the CEO and major shareholder is graduated in chemistry with an MBA, and is very excited about the idea of committing time and resources to this new opportunity. The budget has already been calculated and all the current capital already allocated to other expenses, and being afraid that the researcher will present its patent to a competitor, he has to decide quickly what to do, whether to spend its million on legal expenses or invest it in the new product. The general counsel advises the CEO to seek third party funds to cover its litigation costs. They contact a prominent litigation funder who, after some due diligence of the claim, decides to finance the costs of the claim in exchange for a share of the expected recovery of 20 %. The CEO understands that he will have no costs to face this claim (the American rule on costs applies), and will eventually give up a percentage of the recovery after three years to the funder, obviously only in the case of victory. The investment on the new product instead is likely to bring returns of at least \$ 15.000.000 in three years. The CEO is moreover convinced that if he dedicates more effort to the promotion of this product he would be able to eventually double it, and of course enlarge its position on the market.

Apart from not wanting to risk money, the CEO – being not a legal expert - does not want to be involved in the case preparation and management, and would prefer that someone more expert would do so. The third party funder proposes to assign the claim to a special purpose vehicle, and share the equity on a 20-80 basis, as agreed before. They moreover devise the statutory voting powers as that the decision related to the case management (therefore including control of the litigation strategy) will be taken by the third party funders. Indeed, the CEO knows that the third party funder is a profit maximiser, and having the interests aligned with it will certainly ensure that he would get the most out of the claim. The third party funder moreover is glad that he can lead the case strategy (having now – according to the bylaws of the special purpose vehicle

- the power to remove or appoint the lawyers, to decide with them the case management strategy, etc.) where moreover adverse selection is addressed.

This very simple case has shown how TPLF in the case where the claimant has enough resources to cover legal costs can nevertheless be an efficient corporate finance and risk diversification tool⁵²⁹. Litigation is not necessarily a benefit, and a rational management may well decide to bargain its interest in it as a way to avoid certain costs and risks, but also not to concentrate human resources and time on its preparation and subsequent monitoring. Moreover detail, it has shown also how TPLF – by ‘enlarging the pie of opportunities’ could also allow an efficient allocation of property rights other than litigious rights⁵³⁰.

1.2.3. The third party litigation funders’ perspective

The specific cases presented in the previous paragraphs have shown in very simple terms what could be the regulatory and other conditions that may further impact on the parties’ subjective economic and informational situations. As a way to make these scenarios more interesting, the case where the claimants had a certain level of sophistication (knowledge of the applicable dispute resolution process and alternative funding mechanisms) was presented. This has helped to understand, on the one hand, that besides subjective barriers to access justice, there are also objective ones (i.e. some regulatory matters concerning the lawyers’ fees, the dispute resolution, etc.) and, on the other, how a bigger variety of tools to maintain litigation and related expenses increases the probabilities of bringing a claim forward. It has moreover shown how TPLF may potentially address both these subjective and objective barriers preventing access to justice, especially in those cases concerning the impecunious parties. The claimants who were allocated certain rights by substantial law could not enforce them effectively because of the previously mentioned subjective and objective barriers to access to justice. It has been shown how, especially in certain circumstances, the intervention of third party funders could be necessary to implement this right and enforce litigious rights, including by promoting an efficient dispute resolution and by choosing the best lawyers.

⁵²⁹ See above Chapter 4, par 3.

⁵³⁰ Ibid.

The case concerning the pharmaceutical company has moreover demonstrated that TPLF, by enlarging the range of opportunities, would help also in better managing the other property/resources and risks. For this company it was indeed more efficient to dedicate its (financial and human) resources to the launch of the new product rather than to beginning a dispute. Knowing that the third party funders (repeated player in litigation) could better manage the dispute costs and bear its risks, they have rationally decided to outsource the dispute resolution to them, and spend the money in what they felt more comfortable with. It has been shown how third party funders enhance the allocation of property by incentivising the fragmentation of litigious rights and the creation of some more useful alternative bundles of litigious property rights⁵³¹. These explanations are in line with the above reported discussions concerning the sharing economy⁵³², on the one hand, and the assumption that TPLF is efficient⁵³³, on the other. We now go a bit deeper into these considerations and, also as a way to begin drawing some further conclusions for the economic model, track what could be the third party litigation funders' perspective in practice. In particular, we will now define what these litigation costs and risks entail, also see if they can also be potentially further fragmented and sharable.

1.2.3.1 Covering and/or optimising the litigation costs

It has been mentioned several times that the initial costs to resolve disputes represent the main barrier to access justice, especially for the impecunious parties. In the previous paragraphs we have moreover shown in practice how third party funders can enhance access to justice by paying for such costs, especially when there are no alternatives to fund or otherwise maintain litigation. Being repeated players in litigation, they do so also by managing these costs in a way that economies of scale can be achieved, which of course depends on a series of variables impacting on the cost items. Third party litigation funders may well be better placed than "one shot" claimants to understand these costs items, and then negotiate and further fragment them, avoid or shift them, also depending on the different stages of dispute resolution

⁵³¹ See above par 1.2.4.

⁵³² Chapter 4, par 1.3.4.

⁵³³ See above par 1.1.3.

procedures, and so on. Within their portfolios they can create alternative bundles of cost items, avoid the unnecessary costs and optimise the unavoidable, including by shifting the risk to pay for them to other parties. As a way to better understand the role of TPLF in the litigation market, in the following paragraphs - without claims of exhaustiveness – we will list and discuss what the potential cost items of a dispute are and, where possible, how these could be managed by a repeated player in litigation such as third party funders.

1.2.3.1.1. The court or arbitration tribunal costs. The impact of TPLF on settlements

The court or arbitration fees are generally present in (and depend on) each type of dispute resolution chosen, and are generally not negotiable. Their impact on costs may vary in those cases where the claimants have different possibilities to solve their disputes, in a way that they could choose the most cost-efficient and avoid (at least partially) these costs. Obviously these costs could be avoided if the dispute would be solved through settlement negotiations, which generally represent a more efficient solution than court procedures. Settlements indeed avoid much of the costs (not only the court or arbitration tribunal costs, but also those of lawyers', or at least part of them, especially in those cases where their fees are largely based on hourly rates). Settlements moreover potentially avoid also some of the risks (apart from the risks related to the claim's enforcement, and also those related to the prolonging of this procedure). In this regard, while it is not the object of this work to discuss in detail why and when the parties settle instead of going to trial⁵³⁴, it is interesting to examine whether third party funders could play a role in achieving (better) settlements.

⁵³⁴ This has indeed been object of thorough legal and economic research, to which we make reference for further analysis. For a recent review of the literature on the matter, in general, see AF DAUGHEITY and JF REINGANUM, 'Settlement', in edited by CW SANCHIRICO, *Encyclopedia of Law and Economics*, (2nd Ed.), Vol. 8 - Procedural Law and Economics, Edward Elgar Publishing Co., 2012, 386-471. More in particular, with regard to the reasons why parties settle instead of going to trial, it is worth – also to be consistent with the legal and economic approach endorsed in this work – referring to L KAPLOW and S SHAVELL, above at footnote 332, 1726. These authors in fact propose a summa of different approaches to the settlement vs. trial discussions, embodying them in two different models, the 'exogenous beliefs model' and the 'asymmetric information' model.

To start these discussions we begin from the assumption that an optimal settlement would be that of which the outcome corresponds more to the actual inner merits of the claim. Cost and risk neutral parties with the same perception of a claims' merit and risk/cost tolerance would be likely to start the bargaining process and end up agreeing approximately on the mean expected judicial award, i.e. the numerical average of all judgements⁵³⁵. Where instead there is asymmetry of economic positions and of risk tolerance, the bargaining power of the parties would be likely to be imbalanced and the settlement diverge significantly from the mean expected judicial award, to the detriment of the weak one⁵³⁶. The risk neutral party would indeed be capable of threatening the risk adverse party with the prospect of losing a claim, which instead would be less of a problem for a strong party. This holds even more true if we recall the distinction made by Galanter between one-shotters and repeated players⁵³⁷. A repeated player (think about an insurance company) may well distribute its risks to lose a claim in a large range of cases, and could play on this to 'push' the bargaining tactics in each set of circumstances. This would indeed allow them to gain more than the mean expected award from risk and cost adverse parties, and eventually settle for the mean damage award in those cases where instead the parties are cost and risk neutral. A one-shotter cost and risk adverse party, especially if the English rule on costs applies, would instead not be capable of doing so. This party would preferably settle for much less than the mean expected award rather than facing the risk of the worst-case scenario of losing a claim and paying the other party's costs (besides waiting a long time for an uncertain outcome).

These arguments on risk imbalances have been well explained, also drawing on empirical evidence, by Professor Jonathan Molot, which has considered it as a failure of both the procedure and the market⁵³⁸. He notes that finding a procedural solution (consisting ideally in the overhauling of the overall trial procedures as a way to make them more predictable) would seem a very burdensome (and not without difficult

⁵³⁵ JT MOLOT, above at footnote 11, 83.

⁵³⁶ MJ SHUKAITIS, 'A Market in Personal Injury Tort Claims' (1987) *Journal of Legal Studies*, Vol 16, 329, 336.

⁵³⁷ See above Chapter 4, par 3.

⁵³⁸ JT MOLOT, above at footnote 11, 83.

constitutional implications) process. For this reason, he rather prefers the promotion of a market solution, starting with the assessment of a concrete example. He considers the situation in which a group of parties with similar claims would pool all their claims together and decide to refuse a settlement for an offer that is inferior to the mean expected damages award, and spread the risk of winning or losing in court amongst the pool of claims. In this very simplistic scenario, while it is likely that they would overall increase their final recoveries, it would be very difficult – considering that all claims would be intrinsically different – to spread the recoveries fairly, moreover none of them being supposedly a sophisticated and specialised party that would do all this work. In this context, it is not difficult to understand what would be the role of third party funders – as, also, repeated players in litigation – in addressing these problems. Third party funders, apart of course from hedging the costs and risks of litigation, would be more capable of pricing the value of that claim. Having a more precise assessment and not being cost and risk constrained (besides showing legal sophistication and financial strength) levels the playing field and obviously induces more settlements and higher settlement amounts⁵³⁹.

2.1.2.3.1.2. The cost of legal fees

Legal fees represent by definition the main part of a dispute's costs, and their impact depends on several sub-variables that are likely to affect the price that is ultimately paid. It goes without saying that these will represent a higher or lower barrier to access justice depending on the net worth of the claim-holder, and that consequently this has an impact on the choice of the best lawyers. Certainly their impact would be less where the lawyers are free to bargain their fees and base them on success, and to a larger extent⁵⁴⁰, considering that this would not entail at least an upfront disbursement for the party to a dispute.

Other factors that may impact the costs of the legal fees are for example the sophistication of certain lawyers and the competitiveness of certain legal markets.

⁵³⁹ AF DAUGHEY and JF REINGANUM, ‘The Effect of Third-Party Funding of Plaintiffs on Settlement’ (2013) *Vanderbilt Law and Economics Research Paper*, n 13-8. See, also, a less recent article R KIRSTEIN and N RICKMAN, above at footnote 476.

⁵⁴⁰ See above Chapter 4, par 2.2. on the various manners of lawyers' funding.

These costs could potentially be higher in those cases of high specialisation and track record of the lawyers involved in a case and their capability to have a ‘grip’ on the court, or otherwise in non-competitive legal markets. In this context, third party litigation funders may: allocate the costs of legal fees in a better way by choosing the best quality/price law firm; they may divide these costs according to (and shifting them to) the different stages of the procedure; and/or they may also base these costs (at least partially) on the success or the achievement of certain results. In this scenario, it is not difficult to see what role third party litigation funders as repeated players could play, not only with a better allocation of these costs but also in promoting an efficient market for legal professionals⁵⁴¹.

1.2.3.1.3. The cost of experts’ fees

The cost of experts’ fees will impact on access to justice depending on whether an expert is necessarily needed, or not⁵⁴². Experts may be necessary for example to determine liability through very specific expert consultancies (think about the consultancy to determine a doctor’s liability in a claim for non pecuniary losses due to a mistake in an ordinary surgery, and to quantify its damage). Experts may not be necessary in those cases where the matter could be determined otherwise, with a party’s own means (for example, to determine whether a loss of profit occurred because of a certain event, which in certain simple circumstances could be easily calculated by comparing the cash flows before and after that event) or otherwise. There might be circumstances when it is necessary to have an independent expert consultancy on the liability and on the value of the damages occurred from a certain behaviour, which could help the claimant to decide whether to spend more on the dispute, or not. There are also circumstances where the consultant is called to defend its representation of damages in court or before an arbitral tribunal, and in this case a major direct involvement of the consultant could be beneficial, especially if they wish to enter into no-win-no-fee or other similar arrangements.

⁵⁴¹ This issue is discussed more in detail in the following Chapter 6, and more in particular at par 2.1.2.2.

⁵⁴² MG FAURE and LT VISSCHER, above at footnote 107.

1.2.3.1.4. The transaction and/or organisational costs

The transaction and/or organisational costs will depend on the type of claim that is being filed, and on its complexity. An example of high transactional costs is that of class actions or other mass claims, where in fact consumers or other weak claimants would find it difficult to reunite all the class, prepare the evidence, meet to discuss the case strategy, etc. In multi-jurisdictional claims, this may be also the cost for translators, for example. The organisational costs could moreover include, for example, the costs of reimbursing witnesses and the other evidence-related costs (like the e-discovery costs), clearly to the extent that these might apply in specific cases. The possibility to fragment, bargain and optimise these costs depends therefore on the single claim at stake, but also if the third party funder would be more or less willing to internalise these costs and act more or less like an entrepreneur.

1.2.3.2. Assessing and/or mitigating the litigation risks

The other main barrier to access to justice is the litigation risk, the understanding of which entails a specific knowledge of the myriad of variables that influence this factor, which obviously depend on the features of the specific claim⁵⁴³. For this reason, these variables cannot be defined here except in very general terms. The discussions that follow will anyway be important to see whether these litigation risks may also be fragmented, better allocated and/or mitigated.

1.2.3.2.1. The solvency risk

The solvency risk is the risk that the counterparty to a dispute does not pay the amount due in case she loses. This concerns in particular the case in which, after a settlement is achieved, or a favourable sentence or arbitral award is enacted: a) the losing party does not have the resources to pay the amount due; b) and, where the English rule on costs applies, the losing party cannot pay for the legal costs of the winning party. The lack of economic resources may be checked before the dispute is started, and also throughout its enforcement. It is therefore possible to monitor this risk and eventually require some specific guarantees. This risk may be hedged in case there is a third party,

⁵⁴³ On risk analysis and litigation, see RB CALIHAN, JR DENT and MB VICTOR, above at footnote 510.

including legal expenses and/or other insurer, which guarantees the payment eventually due.

1.2.3.2.2. The risk related to the substantial merit of the claim

The risks related to the claim's substantial merits obviously depend on the specific features of a claim, whether it is well supported from a legal or other related points of view. It first of all entails being aware of the legal certainty in a given jurisdiction or on a specific point of law (or case - law strand), so as to be able to predict the probability that a certain claim will succeed or not. It may also be advisable to price the claim value and to establish the liability more or less precisely. These features also represent a cost of the legal and consultancy fees (see above paragraphs 1.2.3.1.2. and 1.2.3.1.3.). For this reason, a third party litigation funder may either internalise this risk assessment activity but also, in certain cases, externalise this activity to the lawyers and experts that are involved in the case, and share this risk with them in order to align the interests at stake, etc⁵⁴⁴. Pricing the claim value is necessary to understand the financial investment in a claim, and requires also the knowledge of the dispute resolution procedure steps, its costs/risks and the main legal features⁵⁴⁵.

1.2.3.2.3. The risk related to the enforcement of the claim

The risks related to the enforcement of the claim also depend on the specific case at stake, but also on the various possibilities to solve a dispute that this claim presents, as mentioned in the practical cases described in the previous par. 1.2.. Having a full understanding of the various dispute resolution procedures applicable to a case would effectively give to a party the possibility to choose the most efficient one (cheaper, quicker and definitive). Knowing how certain judges or arbitrators have deliberated in other judgements or awards would indeed give the possibility to understand how they will decide in the specific case, whether they have a bias (for example, pro-investor or

⁵⁴⁴ A MITCHELL POLINSKY, DL RUBINFELD, 'Aligning the Interests of Lawyers and Clients' (2003) *American Law and Economics Review*, Vol 5, n 1, 165.

⁵⁴⁵ For example, in the par. 1.2.1. we have seen that a same claim can lead to different type of damages: in the European Union it only leads to compensatory damages while in the United States it would lead to punitive (treble) damages.

pro-state bias in international investment arbitration), etc. Having a full understanding of these issues would therefore give the possibility to better assess the litigation risks, and eventually mitigate or even hedge them by various means. This could happen, for example, by encouraging settlements (as seen in par. 1.2.3.1.1.) or by aligning the positions of the lawyers or other personnel involved in a case (as seen in the previous par. 1.2.3.1.2.).

1.2.3.2.4. The risk for adverse costs

The adverse cost risk is the risk of paying for the counter-party to a dispute's costs, and applies only in case of disputes filed in contexts where the English rule on costs applies. This variable is likely to impact more if, for example, these costs are uncertain⁵⁴⁶ or high, if there is a more or less wide availability of insurances that cover this cost/risk, and if the price of their premium is low, and so on. The aversion to these costs depends also on the litigation risk, to the extent that a party will more or less be keen to bear this risk/cost depending on the possibility of winning a dispute. Third party funders may well decide to bear this risk⁵⁴⁷, but also to hedge it by paying the premium for a legal expenses insurer that would cover them.

1.3. Private desirability of TPLF

The analysis of the private dimension of TPLF has served several purposes. The initial economic model has given the chance to understand, together with numerical examples, what are the conditions under which third party litigation funders and parties to a dispute would be prepared to enter into a transaction. The starting point of these discussions was the basic Shavell formula of litigation, which explained that a rational claimant would start a claim if the costs of the dispute (C) are less than the probability

⁵⁴⁶ In this regard, a good and concrete example of how this problem is addressed by legal means can be found in the Belgian regime for legal costs. The Belgian Civil Procedure Code, even if it foresees the loser pays rule, provides that the 'indemnité de procédure' (which basically refers to lawyers' fees) that the losing party has to pay to the winning party in case of loss, is capped by Royal Decree (See, Art. 1017 and 1022 of Belgian Civil Procedure Code). Another example can be found in the case *Arkin v Borchard Lines Ltd & Ors*, where the English Court of Appeal recognised third party funders liable to the other party limitedly to the extent of their own funding. See above Chapter 3, par. 2.3.2.

⁵⁴⁷ See above Chapter 4, par 2.1.1.1.4.

of obtaining a given revenue (λR). We have however also seen that the third party litigation funder would be willing to fund a claim when his expected revenue from his investment is higher than his expected costs, i.e. when his expected profit $E(\pi)$ would be positive. While De Morpurgo has shown that under symmetric information the parties cannot agree on any share of the potential recovery and thus do not enter into a contract⁵⁴⁸, he has nevertheless concluded that the reason why TPLF is emerging fast is because there are significant differences in the perception of the litigation costs and risks that have pushed this demand. We then noted in the practical perspective that these differences that prevent access to justice depend on both subjective conditions of the parties and on other objective conditions, such as the regulation impacting on access to justice and dispute resolution⁵⁴⁹. These considerations have been necessary to analyse in detail how third party funders may address the market failure in access to justice, more or less widely depending also on how other actors would be capable of doing so. In particular, the final third party litigation funders' practical perspective has further explained how this may happen in practice.

These considerations on the private dimension of TPLF seem to bring to the conclusion that this instrument may be desirable in a series of circumstances, namely when the parties cannot or prefer not to maintain a dispute with their own means. It is not difficult to see this if we reconsider the initial Shavell basic theory of litigation, that suits are started only if the expected costs of litigation are lower than the expected revenues. To see what could be the impact of a widespread use of TPLF in the context of a mature litigation market, simply speaking, We first want to note how third party funders, making sure that $C = 0$, would potentially eliminate any constraint related to the cost barriers. Moreover, by being more capable to assess the risk and price the claim value, they would potentially eliminate any constraint related to the risk barriers, and so potentially make sure that any dispute whose probabilities of success are $> 1\%$ could be brought forward. In a transparent and efficient litigation market third party funders would enhance access to justice by stimulating the enforcement of litigious rights, and better allocating the litigation costs and risks, especially where the alternatives to do so are limited. TPLF could moreover work as an efficient corporate

⁵⁴⁸ See above par. 1.1.3.

⁵⁴⁹ Which ultimately depend mostly on the jurisdictions where these claims are brought, also with regard to the regulatory framework impacting on lawyers and insurers to bargain over litigation.

finance instrument by allowing the 'other parties' to better allocate the litigation costs and risks and, in so doing, also stimulate an efficient allocation of other assets. As seen in par. 1.2.2., in a scenario without TPLF the company that had some (though limited) resources had to choose between prosecuting a claim or investing in the development of a new product. Instead, in a scenario with TPLF, the company could potentially extract value from both, having this litigation cost and risk hedging instrument 'enlarge the pie of opportunities'. Considering however that this effect is external to the dispute at stake, there is reason to think that TPLF may engender other effects that do not belong to the single dispute/transaction, and might be of more general relevance. This feature introduces the issues of the external effects of TPLF, which will be analysed in more detail in the next paragraph on the societal dimension of TPLF. At this point, as a way to conclude this paragraph, it is important to recall how De Morpurgo has shown⁵⁵⁰ that third party litigation funders would be prepared to fund claims (guarantee access to justice) only if their expected profit would be positive, and that obviously would present interesting returns on their investments. For this reason it is likely that TPLF will be directly applied (as is already being done) mostly to high value, costly and risky claims, such as large commercial disputes and mass claims (especially where the contingency fees are not permitted and the English rule on costs applies), where indeed access to justice is often a concern.

1.3.1. Efficiency vs(?) equity

The basic economic model of De Morpurgo has helped to understand that 'TPLF is, in principle, efficient, which ultimately helps to explain also why it has emerged. In the further explanations we attempt to show in practice how TPLF would be so efficient, namely by managing the litigation costs and risks in scale, and enforcing effectively the parties' litigious rights. The fact that such rights are litigious, *per se*, includes indeed that a dispute has arisen and, in presence of some objective and subjective barriers to access justice and solve disputes, parties would be prevented or otherwise discouraged from enforcing (and obtaining) them. In other words TPLF, in the presence of a market failure in access to justice, would guarantee access to justice but also level the playing field. This happens because access to justice – recalling the

⁵⁵⁰ See above par. 1.1.3.

Rawls' two main principles of justice – is both a ‘basic liberty’ and a key to arrange the social and economic inequalities⁵⁵¹, as moreover discussed by welfare state theorists⁵⁵². For this reason, it is worth exploring more in detail what would be the potential societal role of this practice, to see what could be the projection of its feature of being efficient by levelling the playing field.

As a way to introduce these discussions, which will be dealt with more specifically in the next paragraph, it is worth focusing one moment on the stated feature of TPLF of levelling the playing field. Moreover, we want to focus on the feature of TPLF of being at the same time not only efficient, but potentially also an equitable instrument. The discussions indeed prove interesting also because equity and efficiency are often juxtaposed in welfare economics and public policy discussions, and almost as often do not go in parallel but ‘trade-off’ each other⁵⁵³. What is equitably distributed might not be efficient, and what is efficiently distributed may not be equitable, depending on the circumstances. A highly competitive market, for example, could be efficient, but the redistribution of resources that it engenders might not be equitable. A system with very high taxation on the higher incomes may be equitable, but it might not be efficient. The

⁵⁵¹ J RAWLS, *A Theory of Justice*, Harvard University Press, 1971 (revised edition), 52.

⁵⁵² See above Chapter 2, par 2.4.

⁵⁵³ Of more importance for our purposes is the debate on equity and efficiency with regard to the legal rules, although these discussions – for obvious reasons – focus also on taxation, and are not strictly relevant in this context, but are more of political nature. WC SANCHIRICO, ‘The Continuing Debate on Equity and Efficiency in the Law: A Counter-Response to Kaplow and Shavell’ (2000) *UVA Law School Law-Economics Research Paper*, N 00-19. Available at SSRN: <https://ssrn.com/abstract=241573>. L KAPLOW and S SHAVELL, ‘Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income’ (2000) *Journal of Legal Studies*, Vol 29, 821. Available at

http://www.law.harvard.edu/faculty/shavell/pdf/29_J_Legal_Stud_821.pdf, responding to WC SANCHIRICO, ‘Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View’, (2000) *Journal of Legal Studies*. Available at SSRN: <https://ssrn.com/abstract=198825>. More with regard to equity Vs. efficiency and taxation, see DJ VENTRY, ‘Equity vs. Efficiency and the U.S. Tax System in Historical Perspective’, in JJ THORNDIKE and DJ VENTRY JR, eds, *Tax Justice: The Ongoing Debate*, 25, 2002. PS SPIRO, ‘Equity versus Efficiency in the Design of the Tax Mix’ (2012). Available at SSRN: <https://ssrn.com/abstract=2270323>. TM ANDERSEN and J MAIBOM, ‘The Big Trade-Off between Efficiency and Equity - Is it there?’ (2016) *CEPR Discussion Paper*, n DP11189. Available at SSRN: <https://ssrn.com/abstract=2766484>.

fact that TPLF seems to be at the same time both an efficient and equitable instrument therefore deserves certainly some deeper attention, and certainly opens the door for future discussions. There will now be a brief introduction to these arguments by starting from a simple definition of the two concepts.

- 1) Equity is a multi-faceted normative concept that does not have a universal definition, and that – adopting a ‘distributive justice’ approach – does not entail equal redistribution but ‘to give each one his own’. TPLF would do so by enforcing property rights that substantial laws allocate to certain individuals but that certain barriers to access justice and solve disputes prevent from obtaining them. In other words, TPLF would help in ‘giving each one (what the substantial rules of a given legal system recognised as) his own’, but the barriers to access justice and enforce these rules prevent this from happening. It is not difficult to explain this concept if we recall the practical example mentioned above on the cartel damage claim in the EU⁵⁵⁴. We have seen that in such cases the impecunious parties could probably not enforce their litigious rights in the absence of TPLF. In this case the measure of equity in that jurisdiction could be meant to be increased to the extent that in a scenario with TPLF the barriers to access justice would not prevent the distribution of that property.
- 2) Efficiency is an economic concept that refers to the optimal allocation of resources, more or less pragmatically and objectively, and for this reason it has different interpretations. An allocation is Pareto efficient if someone is made better off without anyone else being made worse off. An allocation can instead lead to Kaldor Hicks improvements when those that are made better off by a re-allocation of resources could hypothetically compensate those that are made worse off and lead to a Pareto-improving outcome⁵⁵⁵. In this case the compensation (re-allocation) does not actually have to occur and thus, a Kaldor–Hicks improvement can in fact leave some people worse off. It is possible again to explain this distinction with the same practical example of the

⁵⁵⁴ See par. 1.2.1.2.

⁵⁵⁵ P NEWMAN (ed), *Kaldor Hicks Compensation*, in Palgrave Dictionary of Economics and the Law, 2 (E-O), 2002, p. 417-421.

cartel damage claim mentioned above. X and Y (the wrongdoers/cartelists) made themselves better off by charging (through the cartel) higher prices to JKW, which were thus made worse off. X and Y, in the scenario with TPLF, could at least hypothetically compensate JKW.

These initial and general definitions of equity and efficiency in the context of TPLF apparently seem to confirm that this instrument could be equitable and efficient at the same time. This assumption however suffers already *prima facie* from many contradictions. The defendants may for example argue that being sued by a funded claimant has made them worse off. Others may argue that that TPLF may lead to additional costs for the states' legal systems if it pushes more cases to court and thus to an inefficient allocation of the state budget necessary for the administration of justice, and so on. For this reason the conclusion on the equity and efficiency of TPLF or, even more in detail, on whether TPLF leads to Pareto superior allocation of property or just Kaldor Hicks improvements cannot certainly be ended at this point⁵⁵⁶. It needs instead to be only the beginning of a discussion that will surely prove to be very interesting, considering the incentives that TPLF has in allocating property rights (also external to the dispute) and moreover that the TPLF and the litigation market are only in an early phase. In view however of promoting a litigation market and a legal system that are at the same time equitable and efficient, it is not to be forgotten that there could be a series of cases of which the costs would be too high if compared to the low expected recovery, and make them not economically viable for third party funders (and for lawyers charging conditional and/or contingency fees). This gap would ultimately hinder access to justice in a given system for impecunious claimants with low value claims but nevertheless important for them, and therefore also the possibility of having a truly equitable and efficient dispute resolution system/allocation of property.

2. The societal dimension of TPLF

The discussions concerning the societal dimension of TPLF will focus on whether this practice would be desirable (or not) also from a societal point of view, other than on a private level. These discussions seem to be quite challenging because the private

⁵⁵⁶ These discussions will be dealt with below in Chapter 6, par 2.2..

incentives to bring litigation are said to be naturally misaligned from the social optimal ones⁵⁵⁷. This would happen because while thinking about bringing a lawsuit, the claimant will only consider the costs of litigation that he will have to bear and not the costs for defendants and/or for the state. The claimant moreover will only consider the benefits for himself, and not about the benefits for society. This situation might lead to socially excessive suits, or anyway to suits that are not desirable from a societal point of view. Indeed, the gain that the claimant obtains would come from the defendant, and it could bring a larger or smaller social benefit⁵⁵⁸. In legal and economic terms, a suit would be socially desirable if ‘the expected litigation costs are less than the net deterrence benefits of suit’⁵⁵⁹ (it is indeed assumed that the threat of a suit will oblige the defendant to assume some costs of prevention and care).

As a better way to explain this disequilibrium, and therefore introduce the discussions of what could be the impact of TPLF at a societal level, we can start examining two specific cases representing two situations where often there is a problem of access to justice⁵⁶⁰: 1) a bank unduly and illegally charges for years higher interest rates than those provided for in the law in its clients’ bank accounts⁵⁶¹; 2) a factory throws industrial waste in a river which passes through a few states. If we suppose that liability is strict, recalling the above Shavell formula of litigation, the claimants will sue if

⁵⁵⁷ L KAPLOW and S SHAVELL, above at footnote 332, 1723.

⁵⁵⁸ For contrasts between socially optimal and private incentive to sue, see S SHAVELL, ‘The social versus the private incentive to bring suit in a costly legal system’ (1982) *Journal of Legal Studies*, Vol 11, 333.

⁵⁵⁹ L KAPLOW and S SHAVELL, above at footnote 332, 1723.

⁵⁶⁰ In such cases the claimants might rationally decide not to file a lawsuit because of the impossibility of sustaining the direct cost, but also for the non-opportunity to bear the transactional costs. The legal and economic scholarship refers in general to this behaviour as ‘rational apathy’ or ‘rational disinterest’. With regard to mass claims, see HB SCHÄFER, ‘The Bundling of Similar Interests in Litigation. The Incentives for Class Actions and Legal Actions Taken by Associations’ (2000) *European Journal of Law and Economics*, Vol 9, 183. S KESKE, A RENDA, and R VAN DEN BERGH, *Financing and Group Litigation*, in M TUIL and L VISSCHER (eds), above at footnote 393, 109.

⁵⁶¹ This happens for example in Italy with the figure of *anatocism*, i.e. the charging of interests on interests.

$$C_C < \lambda R$$

where C_C are the expected costs for the claimants and λR the probability of obtaining a given recovery from the claim. If the potential injurers know that its behaviour would lead to a suit, they would be induced to pay some costs of prevention and care⁵⁶². We will refer to these costs of prevention and care for the potential injurers if there is suit as C_{PI} . The probability of harm E if a suit is not brought will be referred to as E_1 , and E_2 if the suit is brought (therefore, E_1 will be higher than E_2 should C_{PI} be positive). In this scenario, a suit will be socially desirable if and only if

$$E_2(C_C + C_D + C_S) < (E_1 - E_2)R - C_{PI}$$

where C_D represents the litigation cost for the defendant and C_S the costs for the state (that would be eventually called to regulate and/or sanction the banks, or to remove the waste or to enforce a sanction against the polluting factory). In other words, as mentioned before, this illustrates what a suit would be socially worth if ‘the expected litigation costs are less than the net deterrence benefits of a suit’. It is indeed evident from this formula that conditions for the claimants to sue the injurers, and for the state to remove the damage or to enforce a sanction, diverge. The claimants would bring lawsuits against the injurer even when society would not benefit from this legal action, or not sue when society would benefit from it. Indeed the claimants, as said, do not consider C_D and C_S when deciding to file a lawsuit, but only the expected recovery from the claim. The benefits for society instead depend on the harm weighed by the reduction in probability that all potential injurers would be deterred from actually being so ($E_1 - E_2$), net of costs of prevention and care (C_{PI}). Shavell, after having shown how the incentives for the state and for the claimants diverge, notes that in such cases state intervention may be desirable, either by taxing or otherwise barring claimants from bringing socially excessive suits or, in the other case, by subsidising or otherwise promoting certain socially desirable suits. He nevertheless notes that the costs of using the state legal system may be high, too, and the incentives for bringing

⁵⁶² In case of the banks, the costs could be represented by a decrease in profits due to the elimination of the illegal interests; in case of the polluting factory, the costs of recycling internally this waste, or to pay a specialised entity to take it away.

lawsuits should be weighed with an adequate use of it in a way that these costs are not borne by the state⁵⁶³.

Drawing on these considerations, we will now assess whether TPLF may be desirable also from a societal point of view by analysing the potential positive and negative societal effects of TPLF. Considering that TPLF would be addressing a market failure in access to justice, we will refer to these effects as they are traditionally called in the economic jargon, externalities, which can be both positive and negative. Positive externalities are those benefits granted to a party that did not pay for them, by an activity that was not meant to benefit that party⁵⁶⁴. Negative externalities are instead those costs imposed by an activity on a party that does not enjoy the benefits of that activity⁵⁶⁵. The analysis of the positive and negative externalities of TPLF will be necessary to understand its social desirability and then to eventually address – with a more normative legal and economic approach – some policy measures that may foster its use. Before entering into this analysis, one should note that at this point it is uncertain whether certain external effects of TPLF can be regarded as externalities, or just the effectuation of access to justice and dispute resolution in single disputes. This caveat will be the object of more specific analysis throughout the paragraphs that follow.

⁵⁶³ L KAPLOW and S SHAVELL, above at footnote 332, 1723.

⁵⁶⁴ Typical examples of positive externalities include, for example, the activities of the beekeepers, or the restoration of a private historical house. In the first case, the value generated by the activity of the bees is not only the production of the honey for the owner, but also the pollination of the surrounding crops. This may actually have a higher (social) value than the production of the honey for sale itself. In the second case, the restoration of a private historical building may have the external effect of increasing the market price of the houses in the neighbourhood, besides that of the building itself.

⁵⁶⁵ Typical examples of negative externalities include, for example, those industries that emit toxic waste in the environment. The production costs of their good do not include the costs for cleaning the environment, which are instead borne by the local communities affected from that pollution, or by the local administration that are called to clean the environment. Another very actual negative externality is the systemic risk engendered by the moral hazard of financial operators. The costs of this risk is not internalised by the financial institutions, which is instead imposed on the ultimate users of such services, such as the buyers of toxic bonds, or on the state that would be called to increase its regulatory and enforcement activities and/or to sanction these wrongs.

2.1. The positive externalities of TPLF

In the paragraph related to the private dimension of TPLF it is concluded that TPLF, if projected on a societal level, could potentially be an instrument capable of leading to societal improvements not only in terms of efficiency, but also equity. The latter, in particular, would happen because – under the 'distributive justice' concept of equity chosen in those conclusions – TPLF would make sure that 'each one obtains his own'. These features would come either directly or as an indirect (external) effect of effectuating the right of access to justice in single disputes. The discussions that follow seem thus to be quite interesting also because – as mentioned in the previous par 1.3.1 - it is a long time since Welfare economists started attempting to strike a fair balance between equity and efficiency⁵⁶⁶, also as a way to find the right way forward to the maximisation of the social welfare (socially optimal allocation of resources). From a welfare economics perspective, a socially optimal allocation of resources is indeed achieved if resources are allocated efficiently and equitably, according of course to the measures of efficiency and equity that the single states adopt⁵⁶⁷. In this work we do not want to enter into the merits of these discussions and/or give normative elements to assess whether states are more or less equitable or efficient. In other words, we do not want to interfere in those discussions concerning what could be equitable or what could be the 'right' balance between equity and efficiency in the view of one state or another. This would indeed imply ethical, cultural and similar considerations that

⁵⁶⁶ The literature on the matter is immense and extends to many spheres of public policy. It is possible to have a recent summa of this debate in the book PC NICOLA, *Efficiency and Equity in Welfare Economics*, Lecture Notes in Economics and Mathematical Systems, Springer, 2013th Edition. Some of this literature will however be cited, where appropriate, throughout this paragraph. See also above footnote 553.

⁵⁶⁷ I want however note how these discussions so far tended to concentrate on how states would be capable of enhancing social welfare through an adequate system of taxes and subsidies, and trough the enactment of substantial laws that apply equally to anyone. The decision on whom to tax and whom to subsidy is indeed the way in which states redistribute resources in a more equitable way, according to the state's view on equity and efficiency, and so they do with the enactment of substantial laws. For the purpose of our discussion, needless to say that in both circumstances the efficacy of these provisions depends also on the efficiency of the related enforcement systems. In the case of taxes, for example, depends on an efficient tax enforcement system, and on right incentives or sanctions to deter evasion. In the case of substantial rules, it would depend on the dispute resolution and enforcement procedures.

would divert us from the main purpose of this work, and that would rather be of a political nature. What instead is wanted is to explore the societal projection of the features of TPLF of covering and/or optimising the litigation costs⁵⁶⁸, on the one hand, and assessing and mitigating the litigation risks⁵⁶⁹, on the other, in exchange for a share in litigious (property) rights. A legal system where there are more probabilities to access to justice and solve a meritorious dispute for example may have the effect – from a welfare economics perspective – of enhancing social welfare through redistribution of resources. In this context moreover the traditional law and economics literature considers not only the incentives to allocate property efficiently, but also those affecting the ‘utilities’ of citizens. They use this concept as an indicator of social welfare constituted not only by material goods, but by any item that is likely to increase individuals’ well-being⁵⁷⁰. This literature considers that ‘individuals possess, in connection with a notion of morality that includes equality, a set of tastes that affect their utility’⁵⁷¹. Social welfare, according to the classical utilitarian measure, would increase once the individuals’ utilities could be calculated. With other measures, not only the sum but also the distribution of utilities generally is taken into account⁵⁷². More specifically, it would be common sense that a more equal distribution would be superior from a social and moral point of view than less equal distributions.

As a way to better understand what could be the societal perspective for TPLF we are now going to discuss whether a series of its societal effects can be regarded as positive externalities and to what extent, and the impact that these would have in a given legal system. More in particular, we will assess these effects with regard to the funded claimants/potential victims of wrongs and the states. As with regard to the first, we will discuss whether the fact that TPLF increases the probability of enforcing litigious rights (at least for the impecunious claimants') could enhance social welfare by effecting the redistribution devised by states through substantial rules. I will then assess whether TPLF, by making access to justice more effective (and, thus,

⁵⁶⁸ See above par. 1.2.3.1.

⁵⁶⁹ See above par. 1.2.3.2.

⁵⁷⁰ S SHAVELL, above at footnote 13, 597.

⁵⁷¹ S SHAVELL, above at footnote 13, 601.

⁵⁷² S SHAVELL, above at footnote 13, 597.

meritorious disputes more probable to happen), could prevent losses deriving from wrong-doings (or at least minimize them) through deterrence. As instead with regard to the states, we will consider whether TPLF may lead to more cost-effective regulatory and enforcement systems, to the extent that a general increase in the probability of facing a single dispute may make regulation by legislation less needed, and enforcement more effective. We will then consider whether the feature of TPLF of better managing – as repeated player, in scale – the litigation costs and risks may lead to price-performing dispute resolution. We are not discussing the positive externalities with regard to defendants/potential injurers, because for obvious reasons TPLF finds its pivotal dimension on the claimants' side, although one could mention that some more general positive externality may also potentially affect defendants.

2.1.1. Positive externalities on claimants/potential victims of wrongs

The discussion of the societal dimension of TPLF will focus on whether its feature of effectuating access to justice and solving disputes efficiently could be regarded, on a broader level, as positive externalities and, if so, to what extent. Moreover, this subparagraph will concentrate on the potential positive externalities concerning claimants/potential victims of wrongs, discussing whether TPLF may enhance redistribution of property rights, and make sure, through deterrence, that actual property rights would not be jeopardised. In doing so, we will moreover take into account the concept of 'utilities' recalled in the paragraph above, and see the effect that TPLF may have on this value.

2.1.1.1. Redistribution

One societal projection of TPLF improving the probabilities of obtaining redress for meritorious claims, eventually inducing more settlements and for higher amounts⁵⁷³, is that it may enhance redistribution as devised by states through substantial rules. In other words, the market failure would consist in the fact that states may enact certain rules to redistribute wealth, which could however remain unenforced due to certain barriers to access justice and solve disputes. It is moreover to be considered that the ownership of certain litigious (property) rights may be ignored by the parties, or treated

⁵⁷³ See above par. 1.2.3.1.1. and in particular footnote 539.

inappropriately (think about the members of the class action filed where there is an opt-in regime, and they are not aware of the class action). Information concerning certain wrongs may moreover be left undisclosed, as injurers would have the socially undesirable incentive to settle in order to avoid a widespread harm coming to light and he would be sued repeatedly⁵⁷⁴. The disclosure of information (and the subsequent gain from settlement) concerning a widespread wrong in a case where there is a third party funder involved instead would give him the incentive to pursue similar claims. It is not difficult to see how this situation would prevent the socially undesirable incentive to settle as a way to keep certain information confidential. In such a scenario, it can be said that TPLF promotes redistribution to the extent that more wrongs are repaired. These features however probably cannot be regarded as positive externalities of TPLF. In the situations mentioned TPLF is indeed only making the redistribution process devised by a state through legal rules more effective or, in other words, addressing a market failure in access to justice. Moreover, the parties that benefit from this redistribution do not get this benefit for free, but they actually pay (at least when the case is won) with a share of their recovery. It is for this reason that it seems possible to think that from this point of view TPLF would be internalising the market failure in access to justice through private bargaining with the parties at stake. However, on a general scale, this feature is likely to engender the positive externality – in a given legal system – of affecting social welfare standards in terms of their citizens' utilities. The positive externality of TPLF would be identified once these individuals' utilities could be aggregated and/or distributed in society⁵⁷⁵. To make this concept more specific, citizens in a given legal system (also those not involved in a dispute, which thus do not pay for such benefit) would be happier to live in a system where more wrongs are repaired and 'each one obtains his own'.

One objection that someone may raise is that this process could decrease social welfare because it puts additional costs on defendants, to the extent that they would face more

⁵⁷⁴AF DAUGHEY and JF REINGANUM, 'Secrecy and Safety', (September 2003). <http://ssrn.com/abstract=440580>, showing how the strategy of a firm facing tort litigation to use confidential settlements not to be sued repeatedly leads to lower average product safety than transparent firms. E WILKINS, 'Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act' (2013) *Berkeley Journal of Employment and Labor Law*, Vol 34, n 1, 2013.

⁵⁷⁵ See above par 2.1.

disputes (and, thus, more costs). While these arguments will be discussed more in detail in the following par 2.2. on the negative externalities of TPLF, it is worth noting that any additional cost deriving from a well grounded and meritorious dispute does not seem that it could be regarded as a negative externality of TPLF. This would probably just represent the effectuation of access to justice in a specific legal system, which cannot happen due to the barriers of access to justice.

2.1.1.2. Deterrence

Potential wrong-doers, if they are aware that will not be sued because the claim-holders are risk and cost averse, will have no incentives in stopping doing wrong. If victims do not sue injurers for lack of financial resources, or more likely because they are risk adverse, the resulting scenario is the same as if there would be no liability for misconduct and, if there is no liability, injurers will continue to do wrong. Instead, also in the case of weak victims, the presence or even the possibility of taking advantage from third party funds to support litigation could have the societal effect to discourage the injurer from continuing or the potential injurers to commit wrongs. TPLF would have a deterrent effect to the extent that if injurers know in advance or at least reasonably expect that a financially endowed and organised entity one day might make them pay in full the costs (and, where punitive damages or the English rule on costs applies, even more) for their misbehaviour, they would rationally not do wrong⁵⁷⁶. Indeed, optimal deterrence requires potential wrongdoers to be aware that they will certainly bear the full cost of the damage they create or otherwise pay more than the gain unduly made, so that they would be better off not doing wrong⁵⁷⁷. In so doing, TPLF would contribute to the social goal of minimising accidents, and avoid their costs⁵⁷⁸. In this regard, deterrence could be regarded as a positive externality of TPLF,

⁵⁷⁶ M DE MORPURGO above at footnote 13, 383. JL MILLMAN , ‘Structuring A Legal Claims Market to Optimize Deterrence’ (2016) *New York University Law Review*, Vol 91, 496. J KIDD, ‘To Fund or Not to Fund: The Need for Second Best Solutions to the Litigation Finance Dilemma’ (2012) *Journal of Law, Economics and Policy*, Vol 8, 613.

⁵⁷⁷ R COOTER, ‘Commodifying Liability’, in FH BUCKLEY (ed.), *The Fall and Rise of Freedom of Contract*, 1999, 139.

⁵⁷⁸ This can be assimilated to the rationale of strict liability in the economic analysis of tort law, which induces potential injurers to choose a socially optimal level of care. If potential injurers are aware that

to the extent that it would benefit all the members of a given society where less wrongs would happen in a scenario with widespread TPLF and/or a mature litigation market. It is moreover interesting to note that at some point there would be fewer legal cases of the type already funded, and the third party funders would not benefit from this decrease⁵⁷⁹. This can be regarded as a positive externality for society to the extent that there would be fewer wrongs of the same type and less litigation⁵⁸⁰.

One objection that someone may raise is that this process could lead to over deterrence to the detriment of defendants and therefore decrease the social welfare standards in a given legal system, at least from their point of view. In this scenario, for example, potential wrongdoers would have to spend more in costs of prevention and care rather than, for example, growth-oriented investments (in this case potentially jeopardising also the overall welfare). While these arguments will be discussed more in detail in the following par. 2.2., it is worth noting that any additional cost of prevention and care deriving from a meritorious dispute represents only an internalisation of an externality, and therefore the resolution of a market failure.

2.1.2. Positive externalities on legal systems

In the course of this work we have repeatedly mentioned that the incentive of TPLF makes it an efficient instrument⁵⁸¹, capable of treating litigation costs and risks in scale, and of promoting effective enforcement of litigious rights. We are now going to explore these arguments in a societal perspective, relying moreover on some existing debates on the use of litigation and enforcement of law. First, there will be discussion of whether and to what extent TPLF, while enforcing effectively litigious rights, would lead to more cost-effective regulatory and enforcement systems, potentially without

potential victims will not sue them because they lack of economic resources or are risk averse, then they will keep a non socially optimal level of care that would result in wrongs. L KAPLOW and S SHAVELL, above at footnote 332, 1667.

⁵⁷⁹ MG FAURE and JPB DE MOT, above at footnote 10.

⁵⁸⁰ In so doing, the third party funder would moreover externalise this deterrent effect on other competitors' business, which will so decrease, with repercussions in terms of cheaper final prices for the funded parties. Following this reasoning, it is likely that the TPLF industry will provide funding until its marginal cost equals its marginal benefits.

⁵⁸¹ For a brief introduction to the general concept of efficiency in economic theory see above par. 1.3.1.

making anyone else worse off. This would depend on the fact that we discussed that TPLF would increase the probability of enforcing litigious rights in single disputes, but also enhance deterrence. Second, we will assess whether TPLF, while promoting an optimal allocation of litigation costs and risks, would lead to a lower (therefore more desirable) price-performance ratio in civil and commercial dispute resolution, potentially without making anyone else worse off. These discussions will be done also considering the impact that TPLF may have in a global dimension⁵⁸².

2.1.2.1. Cost-effective regulatory and enforcement systems

The resolution of a dispute through formal proceedings (these being in court or out of court) is a matter that does not concern only the parties involved, but pursues the more general goal of effectuating the substantial legal rules in a given legal system. It goes without saying that if access to justice is prevented by certain subjective and objective barriers the substantial legal rules are not effectively enforced, which equals the scenario in which such rules would not have been enacted. In other words, the states' legislations, in a scenario where certain barriers prevent access to justice, would not be cost effective, to the extent that an optimal enforcement of laws cannot be achieved⁵⁸³ even though the state has devoted resources to their enactment. More generally speaking, this holds even more true if it is considered that litigation can moreover be 'used' by the states as an instrument to regulate public policy matters. This concept is quite common in the US, where public policy issues have often been 'regulated' by means of litigation⁵⁸⁴. The reason depends on its particular constitutional structure, and

⁵⁸² CB ROBERTSON, 'The Impact of Third-Party Financing on Transnational Litigation' (2011) *Case Western Reserve Journal of International Law*, Vol 44, 159. CA WHYTOCK, 'Domestic Courts and Global Governance' (2009) *Tulane Law Review*, Vol 84, 67, 118.

⁵⁸³ GJ STIGLER, 'The Optimum Enforcement of Laws' (1970) *Journal of Political Economy*, Vol 78, Issue 3, 526.

⁵⁸⁴ It is very well known, for example, that certain relevant public policy matters, like abortion or right-to-die, have been ultimately decided by the Supreme Court. With regard to abortion, for example, it is possible to recall the landmark case *Roe v. Wade*, 410 U.S. 113 (1973). In the civil rights sphere, see See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 488 (1954), commented by SC YEAZELLE, above at footnote 86. As for product safety, see AP MORRISS, B YANDLE and A DORCHAK, 'Choosing how to Regulate' (2005) *Harvard Environmental Law Review*, Vol 29, 179.

of course in the judge-made law typical of common law countries. In the European states (especially those with civil law tradition), instead, this approach is not very common, with the (growing) exception of the Court of Justice of the European Union. A significant example to show this difference in practice, which has been for a long time (and still is) at the centre of the debate, concerns action for damages in anti-trust litigation. In the US the claims for private anti-trust damages are designed to have a deterrent effect on wrongdoers, while in the EU they mainly aim at compensating victims of the damages suffered⁵⁸⁵. The US legislator, in so doing, somehow attempts to 'free-ride' on the private actions to deter other potential wrongdoers, by enacting certain substantial rules that incentivise litigation. The EU approach is instead to rely only (or at least mainly) on the action of the public to do so, while actions for damages would be only meant to compensate victims⁵⁸⁶. Litigation is actually not commonly intended as a means that could be used to achieve this goal. While it is not the purpose of this work to discuss the benefits and problems deriving from one approach rather than the other, it is however worth noting that a wider presence of TPLF would increase the probabilities that wrongs are prosecuted and sanctioned, and/or deterred. If for example we recall the case presented at the beginning of this paragraph 2 (the polluter that throws its industrial waste in a river that passes through a few states or the banks that charge illegal interest rates) it is not difficult to see how this would happen.

⁵⁸⁵ JL HARRISON, 'Private Antitrust Enforcement in the United States and the European Union: Standing and Antitrust Injury' (2011). Available at SSRN: <http://ssrn.com/abstract=1932741>. The treble damages in the US have however long been criticised for the high incentives to litigate it provides. RD BLAIR, WH PAGE, 'Speculative Antitrust Damages' (1995) *Washington Law Review*, Vol 70, 423. Especially if coupled with the lawyers contingency fees and more liberal context to advertise and solicit clients (for example in personal injury claims). See NF ENGSTROM, 'Attorney Advertising and the Contingency Fee Cost Paradox' (2013) *Stanford Law Review*, Vol 65, n 633. These features, instead, are not common in the European context and are often limited by the national legislations and professional conduct rules. An overview on these rules can be found in B NASCIMBENE and E BERGAMINI (eds), *The Legal Profession in the European Union*, Kluwer Law International, 2009.

⁵⁸⁶ The possibility to claim for punitive (or similar) damages is explicitly excluded by the Considerandum 13 and by the art. 3.3 of the Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ('Directive on Actions for Damages').

Apart from contributing to the implementation of the regulatory and enforcement action of the states, an increase in meritorious litigation (be this in court or out of court) stimulated by TPLF may indeed help in clarifying the law⁵⁸⁷, address issues where there is regulatory failure or inaction⁵⁸⁸, prevent losses through deterrence⁵⁸⁹, or even prove to be more efficient than regulation in satisfying certain policy goals⁵⁹⁰. It may for example enhance product safety, most importantly if certain products are sold globally. In the balance between litigation and regulation, the latter is indeed more likely to affect product safety than litigation if the goods are sold at a national level⁵⁹¹. If the goods are sold at an international level, instead, regulation might be less effective, and manufacturers would be keener to lower the products' safety standards if they know that transnational consumer litigation has higher barriers to access. Therefore, the presence of TPLF may also deter manufacturers from lowering those standards⁵⁹². In this case, the feature of TPLF of being a deterrent also engenders the positive externality of potentially decreasing those costs that the states would incur in order to deter potential wrongdoers, and/or to make this function more efficient. States indeed attempt to do so not only by enacting substantial laws, but also by caring about their enforcement with their judiciary and administrative system. In a scenario where TPLF would be widespread, third party funders could – at least to a certain extent –

⁵⁸⁷ D ABRAMS and DL CHEN, above at footnote 4, 1080.

⁵⁸⁸ In this case litigation may raise awareness on issues of public concern where regulation is still non-existent or is anyway non sufficient. See TD LYTTON, ‘Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits’ (2008) *Texas Law Review*, Vol 86, 1837, 1876. W WAGNER, ‘When All Else Fails: Regulating Risky Products Through Tort Litigation’ (2007) *Georgetown Law Journal*, Vol 95, 693, 728. In this context, it is topical the case *Aguinda v. Texaco, Inc.*., 142 F. Supp. 2d 534, 55 1 (S.D.N.Y. 2001), where the defendants argued that ‘[o]n any fair view of the evidence so far adduced in this case, the alleged preference given by the Consortium to oil exploitation over environmental protection was a conscious choice made by the Government of Ecuador in order to stimulate its economy.’). More in general on the law and economics of regulation, see A OGUS, *Regulation: Legal Form and Economic Theory*, Hart, 2004.

⁵⁸⁹ See also the above par. 2.1.1.2.

⁵⁹⁰ CB ROBERTSON, above at footnote 582.

⁵⁹¹ DE BUEHLER, ‘Jurisdictional Incentives’ (2012) *George Mason Law Review*, Vol 20, 105, 128.

⁵⁹² CB ROBERTSON, above at footnote 582.

potentially make the states' action more effective by conducting their normal business and therefore by using own resources (although they of course do not primarily intend to do so)⁵⁹³. Overall, therefore, the cost effectiveness could be regarded as positive externality of TPLF for states, which would benefit as legal systems from these effects, without actually paying for them.

In this case an objection would be that this feature of TPLF could lead to an increase in states' costs devoted to dispute resolution, to the extent that more disputes would be filed, with then more costs for states. While these arguments will be discussed more in detail in the following par. 2.2. on the negative externalities of TPLF, it is worth noting that any additional cost deriving from a well grounded and meritorious dispute does not seem that it could be regarded as negative externality of TPLF, but just the effectuation of the enforcement and regulatory process of a legal system, and therefore the resolution of the state 'failure' to have its laws optimally enforced.

2.1.2.2. Price-performance of dispute resolution

The feature of TPLF of repeatedly allocating litigation costs and risks efficiently, if projected in a wider scale, could lead to more price-performing civil and commercial dispute resolution. A major availability of funds for litigation would for example facilitate forum shopping in those more efficient jurisdictions that – for claimants who would find it difficult to cover the costs and risks – would have been not accessible, and spur more cooperation in judicial matters. It is well known, for example, that the US has traditionally attracted transnational litigation also as a consequence of the possibility of charging contingency fees, to obtain broad discovery and high damages⁵⁹⁴. Now other countries are also enacting legislation aimed at facilitating

⁵⁹³ For some indications on how this may be calculated see below par. 2.3.3.

⁵⁹⁴ CB ROBERTSON, above at footnote 571. Another significant reason may be found in the Alien Tort Statute (§ 1330; ATS), according to which 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. This is the provision relied upon to file, for example, lawsuits against American corporations that have allegedly violated human rights abroad. The application of this statute, which has lain dormant until the 80's, has been recently limited in the case *Kiobel v. Royal Dutch Petroleum Co.* 133 S. Ct. 1659 (2013). See EA YOUNG 'Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation after Kiobel' (2014) *Duke Law Journal*, Vol 64, 1023.

(and, as a consequence, attracting and being more desirable for) transnational litigation⁵⁹⁵. TPLF in this scenario, while sustaining transnational cases that for reasons of lack of resources could not have been brought otherwise, or that would have been filed in a cheaper but less convenient forum, would spur a sort of ‘competition between jurisdictions’ which would be brought to give better services for lower prices. From a simple rational economics perspective, a claimant ‘will choose the court in which the expected value of her claim (less the costs of litigation) is the highest based on the substantive and procedural rules of that court's legal system’⁵⁹⁶. The most virtuous states would indeed know that attracting litigation by offering quality-price efficient services in its forum would have a positive impact on their economy⁵⁹⁷. There is moreover another interesting perspective: should the argument that TPLF increases the settlement rate⁵⁹⁸, the number of disputes in courts – often considered as physiologically more inefficient (in terms of costs and timings) than settlements or ADR – may be reduced.

TPLF could further lower the price-performance ratio in civil and commercial dispute resolution by spurring the competition in the legal and related services, with potential consequences in terms of more quality and lower prices for final users, and innovation in the legal market. As seen in the part related to the private dimension of TPLF, third party funders as repeated players would be more capable than one shotters of optimising the client-lawyer relationship, in particular by devising optimal fee schemes that align the interests and give the right incentives to the parties in question. They are

⁵⁹⁵ CB ROBERTSON, ‘Transnational Litigation and Institutional Choice’ (2010) *Boston College Law Review*, Vol 51, l08l, 1106 – 1107.

⁵⁹⁶ CA WHYTOCK, ‘The Evolving Forum Shopping System’ (2011) *Cornell Law Review*, Vol 96, Issue 3, Article 8, 481, 486.

⁵⁹⁷ See the speech by Mervyn King above at footnote 186. It is to be noted also that efficiency in dispute resolution would also be an important indicator in investment assessment. See the *Doing Business* annual reports of the World Bank, at <http://www.worldbank.org>. Among the various indicators taken into account to assess the reliability of an investment environment there is that related to the enforcement of a contract. A major presence of TPLF in a given jurisdiction would therefore mean, from an investor point of view, that that jurisdiction is efficient and that there are no concerns related to the compliance with the rule of law.

⁵⁹⁸ See above par. 1.2.3.1.1. and in particular footnote 539.

called to select only highly motivated and specialised lawyers with a proven track record in a specific strand of litigation, therefore promoting meritocracy in the legal market. Being third party funders repeated players, it is not difficult to think how such a scenario if projected on a wider scale would lead to better services at cheaper prices for the parties to a dispute, and to allocate human capital (meant as the best lawyers or experts for a given case) more efficiently than single parties would do. In this scenario, lawyers and experts may also benefit from working with third party funders in order to have a further and secure case flow in a given matter which they have specialised in. The externality in this case could therefore be the enhancement of the legal market by promoting meritocracy and quality in the services at potentially lower prices⁵⁹⁹. In all such cases, this feature could be regarded as positive externality of TPLF if it will result in the incentives, which it gives to promote efficient dispute resolution, enhancing services and lowering prices.

In this case an objection that someone may raise is that this feature of TPLF of lowering the price-performance ratio could have the external effect for example of reducinge the overall fee for lawyers. While these arguments will be discussed more in detail in the following par. 2.2. on the negative externalities, it is worth noting that, on the one hand, the bargaining between third party funders and lawyers would be a bargaining between equally sophisticated entities (at least, in theory). On the other hand, that anyway such bargaining should primarily be meant to guarantee access to justice and efficient dispute resolution for the party.

2.2. The negative externalities of TPLF

The comparative overview has reported that TPLF has received in different circumstances some academic and professional criticisms⁶⁰⁰, and also some judicial resistances⁶⁰¹. These criticisms and resistance can be resumed in the fact that TPLF

⁵⁹⁹ This would happen because a third party funder may be better placed to further fragment and allocate efficiently the litigation costs and risks, as described above in par. 1.2.3.

⁶⁰⁰ See, *inter alia*, A BRUNS, above at footnote 50, US CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, above at footnote 248; AMERICAN TORT REFORM ASSOCIATION, above at footnote 249, 13.

⁶⁰¹ See, for example, the Canadian case law reported in Chapter 3, par 2.1., and in particular the cases *Giuliani v. Region of Halton*, 2011 ONSC 5119, where the Ontario Superior Court of Justice dismissed the request for the recovery of interest on a loan financing the cost of disbursements, and *Metzler*

may engender some negative social effects that it may potentially impose on society and individuals, making them – in their opinion - worse off, without having additional advantages. From a law and economics perspective, these negative social effects may be regarded therefore as negative externalities, imposed on the legal system, on the parties and on their lawyers. We are now going to explore these potential negative externalities of TPLF more in detail, also as a way to introduce then to the normative legal and economic final considerations in the next paragraph.

2.2.1. The abuse of litigation and the misuse of the legal system

The ‘modus operandi’ of third party funders’ would seem completely aligned with access to justice: they make profits only by funding the costs of meritorious litigation in exchange for a share of the potential recovery on a non-recourse basis. It might however happen that TPLF could be rationally used to achieve goals that go beyond or even against the sound administration of justice in a single case and, if projected on a wider scale, may lead to socially undesirable effects. In the paragraph related to the private dimension of TPLF we have shown how cost and risk-averse claimants could benefit more from TPLF, particularly in those jurisdictions where the other ALF are limited and the English rule on cost applies. Considering however that such parties would have no possibility of bringing their claims forward otherwise, third party funders may gain on this state of necessity to impose large compensation shares as a reward for their investment. They may moreover do so in those cases where the claimants have no awareness of the potential value of their claim. In such a scenario, impecunious or risk-averse claimants with a good claim but limited access to capital and information may be keen to accept even an unfair agreement, which would anyway allow them to enforce their claim, instead of nothing⁶⁰². These situations, however, could probably not be defined *per se* as externalities considering that, if taken in a single case, are indeed problems that regard only the parties at stake, and would have to be balanced with the enforcement of their right to access justice.

Investment GMBH v. Gildan Activewear Inc. (2009), 81 C.P.C. (6th) 384 (SCJ), which found a funding agreement as champertous.

⁶⁰² See an example in par 1.2.1.2.

The externality is however more evident in the case where the third party funders would otherwise jeopardise the parties' financial position, in a way that lower costs are borne by the litigation funder. This would happen, for example, if the funder unjustifiably terminated the TPLF agreement or anyway withdrew from funding once the claim had been filed; or, in those cases where the English rule on costs applies, unjustifiably decline the liability for adverse costs, etc. In such cases the third party funders, eventually to save some costs, could jeopardise the party's financial and legal position, therefore making a negative externality on them. In other words, they would shift a cost and a risk that they would be supposed to bear on to the shoulders of the party, which would thus be made worse off, potentially without being compensated and/or being made better off.

Other social concerns were raised in a case, due to a large presence of TPLF, where it would pass the message that dispute resolution is not a value per se, but it is an instrument that can be exploited for any purpose other than the case at stake, including (if not especially) for profit. This criticism has been quite harsh in the already mentioned report of the US Chamber of Commerce 'Selling Lawsuits, Buying Problems: Third Party Litigation Funding in the United States', and in the subsequent 'Stopping the Sale on Lawsuits: a Proposal to Regulate Third-Party Investment in Litigation', where deep concerns regarding this phenomenon, and in particular the commoditization of justice, were expressed⁶⁰³. Similar criticisms were brought forward by the American Tort Reform Association, warning about the undesirable scenario that TPLF would transform courtrooms into a stock exchange, and litigation into a commodity⁶⁰⁴. A claim, according to these criticisms, could just not be a commodity, like blood, human organs, and so on⁶⁰⁵. These concerns, however, may not be regarded

⁶⁰³ US CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, above at footnote 248; US CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, 'Stopping the Sale on Lawsuits: a Proposal to Regulate Third-Party Investment in Litigation', October 2012, available at http://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf (last vis. 9.2.2017).

⁶⁰⁴ See AMERICAN TORT REFORM ASSOCIATION, above at footnote 249, 13.

⁶⁰⁵ MJ RADIN, *Contested Commodities*, Cambridge, Massachusetts, Harvard University Press, 1996. MJ RADIN, 'Justice and the Market Domain', in JW CHAPMAN and J R PENNOCK (eds), *Nomos XXXI: Markets And Justice*, NYU University Press, New York, 1989; MJ RADIN, 'Market-Inalienability' (1987) *Harvard Law Review*, Vol 100, N 8, 1849.

per se as negative externalities, unless of course it is proven that additional undue costs would be imposed on the legal systems, without making anyone else better off. It is however possible, drawing on some arguments raised with regard to LEI, to identify some behaviour that could diverge from what has been defined as socially valuable claims, and that would potentially lead to negative externalities for a legal system. For example, if people know that costs arising from potential disputes will be certainly covered by third party funders, they would be keener to enter into risky agreements, and be less careful with regard to the quality of the counterparty⁶⁰⁶. They would be more willing to create legal problems themselves, or anyway pursue a claim more intensely⁶⁰⁷, if they know that costs deriving from a dispute would be covered by a third party.

The above concerns are of course of minor impact in those cases in which funders would do a careful due check of the claims. It is however not excluded that they would decide themselves to over-litigate in order to create an aggressive reputation and ‘scare’ future defendants, and so force them to settle⁶⁰⁸. TPLF may be used for example to support disputes for discrediting competitors, even worse if false allegations are created on purpose. As shown in the historical overview, this has already happened in the early civil law and common law jurisdictions, where some litigation funding practices were used to achieve social, political and economic goals other than pursuing the claim itself, often to the detriment of the weak claimant, or of the defendant⁶⁰⁹. Similar abuses of litigation have also happened very recently. It is for example worth to recall the cases funded by the tech billionaire Peter Thiel against the media company Gawker. Thiel funded a series of lawsuits against Gawker – including one of the former wrestler Hulk Hogan – allegedly taking vengeance against the

⁶⁰⁶ See C KLEIN HAARHUIS and B VAN VELTHOVEN, above at footnote 282, 595, discussing the problem of moral hazard with regard to LEI. These authors show with empirical evidence that LEI policy holders have 11 % ‘more justiciable problems than non insured’. A similar argument, thus, could be raised in the case where TPLF would be largely available.

⁶⁰⁷ R BOWLES and N RICKMAN, 'Asymmetric Information, Moral Hazard and the Insurance of Legal Expenses' (1998) *Geneva Papers On Risk and Insurance*, Vol 23, n 87, 196, 197

⁶⁰⁸ M ABRAMOWICZ, above at footnote 4, 728.

⁶⁰⁹ See Chapter 2, par 1.

revelation of his homosexuality, causing the bankruptcy of the company⁶¹⁰. In this regard, however, it cannot be concealed that even if there was a purpose that went beyond the dispute itself, the single claim was still held meritorious by the courts. Drawing however on some considerations from tort litigation and the use of contingency fees, it has been argued that a socially undesirable effect of TPLF would come if third party funders used inefficient rules as a way to create potentially profitable situations⁶¹¹. In this case the abuse of the legal system seems more evident, especially if there is not an issue of access to justice involved.

With regard to the socially undesirable behaviour mentioned, it should be noted that, especially if the cases are ultimately held meritorious, and even if secondary purposes are pursued, they could not necessarily be regarded as negative externalities and/or abuses. Instead, in all those cases where litigation would put additional undue costs on the funded claimants (for example in the case of an undue withdrawal from funding), or on the defendants (in terms of vexatious litigation), or on the legal system (in terms of frivolous disputes), without them benefiting from it otherwise, it would be possible to speak about negative externalities.

2.2.2. Increases in the volume of disputes and of frivolous litigation

The other side of the TPLF medal enhancing access to justice is that it may increase the volume of disputes, eventually imposing additional costs on the state dispute resolution systems⁶¹². It goes without saying that if there are more financial resources available in the market for funding litigation, bringing lawsuits becomes less expensive

⁶¹⁰M DRANGE, *Peter Thiel's War On Gawker: A Timeline*, Forbes, 21 June 2016. Available at <http://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#67bd38bb7e80> (last vis. 9.2.2017)

⁶¹¹ See PH RUBIN, 'Third Party Financing Of Litigation' (2011) *Northern Kentucky Law Review*, Vol 38, n 4, 682. This could happen, for example, by lobbying for certain legislation which potentially increases litigation but also, for example, by surreptitiously or maliciously putting litigious clauses in contracts, as a way to create on purpose an opportunity to obtain profit.

⁶¹² This has been demonstrated, also with empirical evidence (with regard to Australia), in D ABRAMS and DL CHEN, above at footnote 4. Similar arguments are advanced for LEI. M KILIAN, above at footnote 261, 45.

and people keener to begin claims. The simple economic reason would be that claimants and their lawyers would be more comfortable in filing lawsuits if somebody else is bearing the cost and risk of such action. From a qualitative point of view, it has been moreover argued that this would result in more frivolous and unmeritorious claims being brought forward or, at least, the amount of ‘questionable claims’ would increase⁶¹³. This would happen also because claim-holders, in order to attract capital to fund a case, would highlight only the positive aspects of their cases (engendering thus an issue of adverse selection)⁶¹⁴, or would anyhow be induced to have morally hazardous behaviour⁶¹⁵. In the case of TPLF this issue could depend on the level of due diligence performed by third party funders, which however would depend also on the type of market⁶¹⁶. With regard to consumer lending, for example, where transactions are relatively small, funders might not be willing to spend too much time and effort in the case analysis, and would instead apply general schemes based on risk classification. The funder, especially if he has substantial resources, can mitigate his risks by enlarging his portfolio and so spreading the risk on all the loans he grants. As

⁶¹³ The harshest and most cited criticism of TPLF in relation to frivolous litigation can be found in US CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, footnote 248, 2-3. See also G YOUNG, ‘Two Setbacks for Lawsuit Financing: But the Practice is Still Alive’ (2003) *New Jersey Law Journal*, 21. With regard to models related to the incentives to bring frivolous suits, see RG BONE, ‘Modeling Frivolous Suits’ (1997) *University of Pennsylvania Law Review*, Vol 145, n 3, 519. D ROSENBERG and S SHAVELL, ‘A model in which suits are brought for their nuisance value’ (1985) *International Review of Law and Economics*, Vol 5, Issue 1, 3–13. With regard to the frivolous lawsuits in a discussion concerning the different type of enforcement in European private law, see MG FAURE and F WEBER, ‘The Interplay between Public and Private Enforcement in European Private Law: Law and Economics Perspective’ (2015) *European Review of Private Law*, Vol 4, Issue 4, 525.

⁶¹⁴ M ABRAMOWICZ, above at footnote 4, 743 – 745. Adverse selection happens when buyers and sellers have access to different information (asymmetry of information). Traders with better private information about the quality of a product will selectively participate in trades that benefit them the most (at the expense of the other traders). See GA AKERLOF, ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’ (1970) *Quarterly Journal of Economics*, Vol 84, n 3, 488.

⁶¹⁵ See above footnote 606 the arguments raised with regard to LEI.

⁶¹⁶ With regard to LEI, see WH VAN BOOM, ‘Insurance Law and Economics: an Empirical Perspective’, in MG FAURE and F STEPHEN, *Essays In The Law And Economics Of Regulation, In Honour Of Anthony Ogus*, 2008, 256-259.

for investment in commercial litigation, the problem of moral hazard and adverse selection could exist, too, although in a more limited way. Although when the market becomes more competitive, funders may reduce the due diligence standards as a way to spur quicker assessments and investments, it is difficult to imagine that this reduction would ever lead to a complete bet based on the *prima facie* merits of a claim.

It is even more difficult to envisage a funder granting capital for totally non meritorious lawsuits, provided that they are supposed to do a thorough check on the merits and generally grant capital on a non-recourse basis. For this reason, the fact that TPLF may stimulate new claims does not have to be regarded *per se* as a negative externality. The additional cost that is being eventually put on the state is only due to the enhancement of access to justice under the substantial laws provided by the same state in whose jurisdiction the dispute is being filed. The states, to the extent that they guarantee the protection of certain rights that they have granted to their citizens would be called on to make sure that these are enforced. It is however not excluded that third party funders would put in their portfolios some very high risk claims, provided that the potential returns would be attractive to them. The question in this case would be whether it is justifiable, from a public policy point of view, to allow such risky cases to be brought to court (and therefore impose a cost on the state), and to what extent. This assessment is however difficult to make in general terms and *ex ante*, but it is more something that would have to be dealt with on a case by case basis, weighing the different values at stake⁶¹⁷. Where the case would be totally unmeritorious/frivolous and/or the procedure chosen to solve it too burdensome, it is likely that the negative externality consisting in putting undue costs on the state legal system and parties would exist.

2.3. Societal desirability of TPLF

This paragraph related to the societal dimension of TPLF has started by considering the Shavell social optimal suit versus private incentives to litigate. It presented what are the conditions under which a suit may be socially desirable, and then tried to discuss the positive and negative externalities of TPLF. In particular, we started with the Shavell formula on the social desirability of litigation $E_2 (C_C + C_D + C_S) < (E_1 - E_2) R$

⁶¹⁷ Some instruments to do this assessment will be given in the Chapter 6.

$- C_{PI}$, which shows that a single lawsuit would be socially desirable only if the total social costs would be less than the net deterrent benefit of the suit. In the paragraphs on the externalities of TPLF we have analysed a series of effects that may impact on this formula and its components, taking into account that the market is in an early phase, and that there is no empirical evidence that unequivocally goes in one direction or another. For this reason, while it is not possible to draw final conclusions on whether TPLF would be desirable or not from a social point of view, it is important to remark that any of the above discussions should be seen as directions for future research and discussions aimed at confirming or denying what are de facto theoretic assumptions. Also in this regard, it is however important to report some findings of the above discussions, considering that a right balance of the positive and negative externalities of TPLF would ultimately help in better understanding whether TPLF is socially desirable, or anyway to define what would be the conditions for it to be so. It is moreover to be noted that while the societal effects of TPLF have been discussed under the 'umbrella' concept of externalities, during these discussions we have noted that many of these effects could probably not be regarded as such. These were sometimes only the general projections of enhancing access to justice and dispute resolution in single cases. In this regard, we have left open a series of questions that may certainly prove to be interesting for the future debate on TPLF. Also to provide some indications in this regard, and in order to develop the Shavell's formula initially recalled and the description of the cost items described therein, we are going to assess the social desirability of TPLF in relation to: claimants/potential victims of wrongs (C_C), defendants/potential injurers (C_D/C_{PI}) and states (C_S). This will help to see how TPLF may potentially affect them, and assess whether it may be desirable also from a societal point of view.

2.3.1. Claimants/potential victims of wrongs

We have seen in the paragraph on the private dimension of TPLF that the upfront litigation costs for the claimants in a scenario with TPLF could be annulled as a way to enhance access to justice in a single case. In terms of assessing the social desirability of TPLF, however, this factor should not be assessed only with regard to a specific dispute. Instead, its social desirability should be analysed also in terms of potentially enhancing social welfare where the claimants or potential victims would live, through

redistribution and deterrence⁶¹⁸. With regard to the first, we tried to discuss how TPLF could contribute to making the redistribution process devised by legal rules more effective, and obviously without (at least, initial) costs. With regard to deterrence, we tried to discuss how an increase in the probability of access to justice could potentially deter wrong-doers from committing wrongs, especially in those scenarios where they would pay more than the costs of the damage they create. If this could be confirmed by empirical evidence, it would be possible to argue that TPLF could contribute to the social goal of minimising accidents, and avoid their costs for potential victims/claimants. If it could be confirmed that TPLF induces higher settlements rates and for higher amounts⁶¹⁹, the claimants could moreover potentially benefit not only from costs savings (especially in those cases where the court fees are high and where lawyers' fees would be based mainly on hourly rates), but also from quicker (and therefore more efficient than via the court) dispute resolution. This would be a benefit not only for the party at stake, but also for any potential claimant living in a given legal system.

However noted that the claimants could suffer an increase in costs especially in those litigation markets with limited presence of TPLF. In such a scenario third party funders, especially where there are no alternatives to bring claims forward, could for example charge high interests on the loan provided⁶²⁰, or otherwise jeopardise the claimants' position, including with regard to their own lawyer. For example, this could happen if a third party funder unjustifiably terminated the TPLF agreement or anyway withdrew from funding once the claim has been filed or, in those cases where the English rule on costs applies, unjustifiably declined the liability for adverse costs. These problems are more likely to arise in those contexts where there is large asymmetry of information and economic positions between third party funders and parties, and where the TPLF or, more generally, where the litigation market would be less competitive. We could think for example of the claimants mentioned in the

⁶¹⁸ See above par. 2.1.1.

⁶¹⁹ See above at par 1.2.3.1.1. and in particular footnote 539.

⁶²⁰ Par. 2.2.1. These interests however would apply only in case of victory, being TPLF provided on a non-recourse basis.

European competition law damages claim⁶²¹, that would rather accept an unfair agreement with the third party funder than not bring the claim forward at all, as ‘something would be better than nothing’. As instead with regard to the possibility for litigation funders to withdraw from funding, it is possible to draw some food for thought from the Association of Litigation Funders’ Code of Conduct, and in particular to the first and the second grounds for terminating a ‘LFA’⁶²² that might eventually be put into such contracts. These arguments are indeed easily questionable, and will certainly leave room for further discussions to see what might be considered as ‘proper grounds to withdraw’. In particular, the possibility to withdraw from a ‘LFA’ at a later stage, if the litigation funder is not satisfied anymore with the merits, might certainly attract more funding, but another side could spur more non meritorious litigation. Funders could decide to fund cases and then, once they realize that they are not as meritorious (or, meritorious but with no more commercial value) as they expected, they can withdraw from it. It must however be taken into account that if stricter obligations are imposed on funders, they may be less keen to fund cases, and so access to justice may potentially be jeopardized in general terms. A similar reasoning can be made for the possibility to withdraw from a TPLF agreement if the dispute is no longer commercially viable. Future discussions will have therefore to aim at striking a fair balance between freedom of contract and protection of the clients’ interests, especially if they are not sophisticated and/or temporarily impecunious. Other ways to jeopardise the funded parties’ financial position would happen if third party funders would push them to settle at an earlier stage where this would not be opportune for the party⁶²³. This could happen, for example, as a way to recoup their investment earlier and provide returns to their own investors, or anyway to cope with his own investment goals. It is however to be noted that a similar conflict may arise in the case in which it is the claimant that wants to settle early for a low sum, pushed by his own financial constrictions, or for a redress that is in a form different from cash.

⁶²¹ Par. 1.2.1.2.

⁶²² See above Chapter 3, par 1.3.3. If the funder ‘... 11.2.1 reasonably ceases to be satisfied about the merits of the dispute; 11.2.2 reasonably believes that the dispute is no longer commercially viable ...’.

⁶²³ See above Chapter 4, par 2.1.1.3.2.

We should moreover take into account the potential undue costs that TPLF could impose on the relationship between the funded parties and their lawyers, which is one of the most delicate issues of the TPLF contracts. This relation in fact embodies centuries of evolution in the administration of justice and the role that lawyers have traditionally played in it⁶²⁴. We noted how this historical evolution seems to have transformed the lawyers' role from a quasi-public function aimed at supporting the judges' work⁶²⁵, to a more private oriented role, more sensible to market pressures⁶²⁶. This has been confirmed in the paragraph on the actors of the litigation market, that the evolution of the lawyers' role has somehow made them to a certain extent competitors of third party funders. TPLF may however also improve the client lawyer relationship, for example by aligning the interests at stake or by adding a further layer of due diligence to the claim merits. While there is thus no evidence that would lead us to think whether TPLF may improve or create problematic issues with regard to the client lawyer relationship, it is worth discussing when these issues may happen, obviously without claims of exhaustiveness. These (indirect) issues may derive from some problems related to: the conflicts in the control of litigation (issues such as the violation of fiduciary duties owed by the lawyer to the client, also in the light of the undue influence in the decisions on the litigation strategy that may jeopardise the independence of the lawyers) on the one hand; and in relation to the potential sensitivity of the information related to this relationship (violation of confidentiality and privileged communications), on the other⁶²⁷. Indeed, the third party funders first of

⁶²⁴ See Chapter 2 par 1, and Chapter 4 par 1, describing the evolution of the figure of lawyers in relation to the prohibitions and/or limits to bargain over litigation.

⁶²⁵ This view was endorsed not long ago. P PERLINGIERI, *Della cessione dei crediti*, in Comm. cod. civ., a cura di Scialoja-Branca, Bologna-Roma, 1982, 103.

⁶²⁶ HM KRITZER, 'The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World' (1999) *Law and Society Review*, Vol 33, Issue 3, 713, 716.

⁶²⁷ The fact that third party funders fund the costs of a dispute without being a party in it is not likely to engender conflicts with regard to the fiduciary duties that lawyers owe to the clients per se, especially if it is considered that their interests are supposed to be aligned to them. We have however mentioned that the passive TPLF model may engender various conflicts in the control of litigation that could undermine this relationship. For example, while it is often claimed that third party litigation funders do not seek to influence the case strategy and the autonomy of lawyers, it is well known that they choose them according to their specialisation and track record, of the claimant or defendant orientation of certain law

all may wish to get to know all the information related to the claim, and then, once they fund it, they may claim the right to be informed regarding the evolution of the case. While these situations do not necessarily lead to conflicts to the detriment of the lawyers' independence (and therefore to its potential undue costs and/or abuses), it is certainly recommendable that action would be taken to enhance transparency with regard to the parties involved in funded cases, to see whether this could happen and who would be responsible⁶²⁸. It is however to be noted that the right of third party funders to be informed about the sorts of cases could be justified by the fact that the funders somehow own a portion of the claim⁶²⁹. In this capacity, third party funders also play another important function. They counter-balance the information asymmetry between lawyers and clients, insofar as they are meant to understand the risks of the case as much as the lawyers that are dealing with it, which could ultimately decrease the possibility of having conflicts of interests⁶³⁰. Therefore, it would be advisable that this exchange of information would not be unduly hampered, and actually be potentially enhanced, for example via the enlargement of privilege to communications with funders⁶³¹.

2.3.2. Defendants/potential injurers

The costs for the defendants, generally speaking, may probably increase in a scenario with TPLF. If in those situations where access to justice and equality of arms is not fully and effectively implemented they may avoid paying for the damages they create, this would be certainly less likely where instead there is a mature litigation market with

firms, etc. This choice may potentially influence the strategies of certain lawyers, that would be brought to abide by the funders' preferences in order to get more funding for their cases in the long term (remember the third party funders as repeated players). This issue may lead to further conflicts if the lawyers also act as arbitrators. CA ROGERS, 'Gamblers, Loan Sharks & Third-Party Funders' in CA ROGERS, *Ethics In International Arbitration*, Oxford University Press, 2014, 177.

⁶²⁸ In those cases where the English rule on costs applies, it could moreover be necessary to know whom – in case of loss – would be called on to refund the legal costs of the winning party.

⁶²⁹ See M STEINITZ, above at footnote 2, 1323.

⁶³⁰ MG FAURE, FJ FERNHOUT and NJ PHILIPSEN, at footnote 443.

⁶³¹ M STEINITZ, above at footnote 2, 1227. This Author however rightly points out that not only protections, but also duties, should be extended.

a high presence of TPLF. Such an increase in costs however regards only the effectiveness of access to justice/Pareto allocation of property rights in a single dispute. What instead will have to be assessed from a societal point of view are the costs for the potential injurers that would be called to pay for the ‘internalisation’ of their externalities engendered by TPLF in a mature litigation market. It is indeed likely that a higher probability to face a lawsuit that TPLF would engender would induce potential injurers to invest in prevention (and therefore face more costs of prevention and care). If we recall the examples of the deceitful banks and of the polluters made at the beginning of this section, it is not difficult to see how this would happen. If banks and polluters knew that there would be a higher probability to be sued (and so pay in full or even more for the damage they created and/or the undue gains they made from their negative externalities) they would be less likely to do wrong again and/or spend more in costs of prevention and care. These costs (or losses of gain) would however not be regarded as negative externalities on them, but just an internalisation of their negative externalities. The externality instead would happen, for example, if a third party funder decided to over-litigate (even at a loss) in order to ‘scare’ other alleged injurers, and so force them to settle. For these situations it is likely that regulators will need to pay some more attention, although the existing rules condemning vexatious litigation may already provide an adequate blunt answer.

2.3.3. Legal systems

In the paragraphs related to the positive externalities there has been the opportunity to argue that TPLF may induce a more cost-effective legal system and price-performance in resolving civil and commercial disputes. For example, we mentioned that this would happen by increasing the settlement rates⁶³² or by promoting the use of ADR as more efficient dispute resolution methods⁶³³. We moreover argued that TPLF, also through deterrence, may potentially contribute to more effective regulatory and enforcement systems⁶³⁴. If for example we recall the two cases mentioned at the beginning (banking misconduct and environmental pollution), with more TPLF possibly fewer resources

⁶³² AF DAUGHEY and JF REINGANUM, above at footnote 539.

⁶³³ Par. 1.2.3.1.1.

⁶³⁴ Par. 2.1.1.2 and 2.1.2.1.

from the state would be needed for financial and environmental regulation and monitoring, and subsequent enforcement of fines or prevention of environmental damage or restoration of the polluted environment. It was nonetheless also mentioned that TPLF could impose additional costs on the state, due to a potential increase in disputes, although it was argued that this does not necessarily entail an externality. An increase in the volume of disputes could happen with regard to those cases that probably would not have been brought to court otherwise, either because the claimholders have no resources or because these cases have very low chances of success. The first argument, in this regard, is that even if this was true, would it be a bad thing, if the funded claims were not fraudulent and/or vexatious and/or frivolous? Wouldn't the absence of TPLF be to the detriment of weak and impecunious parties with meritorious claims? In such a scenario, the increase in the number of such cases would actually be a positive thing, to the extent that more misbehaviour would be repaired and more misfeasors held accountable⁶³⁵. Moreover, who says that a case with only a 1 % probability of success should not be brought to court? A scenario without TPLF may in this case go in favour only of those well resourced and risk neutral claimants that would bring them forward even without TPLF. Certainly the problem would come when third party funders pushed cases with 0 % probability of success (frivolous litigation), eventually with the hope of scaring the defendant and forcing a settlement, or just to persecute him for reasons that go beyond the single case (vexatious litigation). Apart from these extreme situations, it should be noted however that in ordinary conditions third party funders would carry out a further due diligence on the merits and, considering their business model and related financial incentive, fund only meritorious claims⁶³⁶.

While at this stage there is no empirical evidence that would point in one direction or the other, it is nevertheless possible to provide some guidance on how to assess this in

⁶³⁵ J KIDD and T ZYWICKI, 'Does Increased Litigation Increase Justice in a Second-Best World?', in F BUCKLEY (ed), *The American Illness*, Yale University Press, 2012.

⁶³⁶ Similar arguments have been discussed with regard to the lawyers' contingency fees, and it has been demonstrated that these decrease frivolous lawsuits to the extent that the lawyers would double the due diligence of the claim and decide to take it on a pure risk basis only where they see high merits. JD DANA and KE SPIER, 'Expertise and Contingency Fees: The Role of Asymmetric Information in Attorney Compensation' (1993) *Journal of Law, Economics and Organization*, Vol 9, 349.

practice in the future, at least with regard to the costs related to a major or minor use of the states' dispute resolution systems. First of all a distinction should be drawn between states' prospective sunk costs and prospective variable costs. In the scenario with TPLF, 'prospective sunk costs' can be referred to as those costs that the state will have to pay irrespective of a major or minor use of its structures deriving from an increase in disputes (like the costs for the tribunal buildings). Instead, the 'prospective variable costs' are those that increase if a major use of the state civil justice system is made as a result of an increase in disputes due to TPLF (like more judges, bailiffs, etc.). We should moreover recall the distinction made between impecunious claimants (those that would not have brought forward and solved their case otherwise) and other claimants (those that might have brought forward their claim with their own resources, but would have preferred to be funded). Let us now consider an unrealistic scenario where: TPLF would be provided without deep due diligence; settlements would not be doable or at least enforceable; and civil and commercial disputes would be a monopoly of state tribunals. In this scenario, while prospective sunk costs would not increase, it is likely that the prospective variable costs would be higher, as TPLF would have pushed to court those cases of impecunious claimants that would not have been brought to court otherwise, if not some other high-risk cases. In this case, however, these additional costs cannot be regarded as externalities, unless of course it could be established that it was frivolous or vexatious litigation, which would entail a negative externality for both the legal system and the defendants.

The scenario described above is not (and is not likely to be) real in any of the modern Western jurisdictions taken into account so far. Indeed, at least under the current market conditions, all third party funders do carry out a thorough due diligence of the cases aimed at 'cherry-picking' only the highly meritorious ones. Even when the market is more competitive and the funders keener to take on more risk, TPLF would not necessarily increase the volume of litigation in court (and, as a consequence, the states' prospective variable costs). Unlike the unrealistic scenario represented above, settlements or other ADR outcomes (such as mediation minutes or arbitral awards) are generally doable, enforceable and often incentivised⁶³⁷ as more efficient methods to solve disputes than court proceedings. As such, third party funders would most likely

⁶³⁷ See some legislation incentivising ADR in the US and in the EU above footnote 349.

(and they do already) prefer ADR to normal court proceedings, as they would be quicker, possibly cheaper and therefore more efficient than the court. An increase in TPLF would thus not necessarily impose additional prospective variable costs on the state (which are those mainly addressed by the above mentioned criticisms), because civil and commercial disputes can also be solved privately.

3. Concluding remarks. TPLF and social justice

Chapter 5 has served the main function to explain that TPLF can be, in principle, efficient, both at a private and at a societal level, and thus potentially desirable. We started the discussions on the private sphere of TPLF by reporting the De Morpurgo basic economic model on TPLF. This model, starting from Shavell's basic formula of litigation, aimed at assessing the incentives that parties have to enter into TPLF arrangements, under both the American and the English rules on cost-allocation. Shavell's formula and the De Morpurgo model have been quite solid starting points, to which we have however tried to add a general explanation - also with concrete examples - of the main variables affecting the economics of litigation. Moreover, we have tried to explain how third party funders, as 'repeated players' in litigation, in some circumstances would be more capable than 'one-shotters' and other actors of the litigation market to cover and/or optimise the litigation costs, to assess and/or to mitigate the litigation risks and to price the claim value. The discussions on the private dimension of TPLF have finally explained the reason why TPLF has emerged also in the corporate sector, where the financial constraints may not necessarily be an issue. We also explained this issue with the practical case of the well-resourced company reported in par 1.2.2. that would still be better off in a scenario with TPLF, as this 'enlarges its pie of opportunities'. At this point, we wondered what could have been the societal projection of TPLF, also considering that access to justice - recalling the two principles of justice of Rawls - is both a fundamental liberty and a key to arrange social and economic inequalities. Starting from this consideration, I have wondered how – in the context of a market failure in access to justice - TPLF could not only be efficient, but also equitable, values that the welfare economists often see in contrast. It has been considered a quite general distributive justice definition of 'equity', that can be resumed in 'giving to each one his own' was adopted. Indeed, at least in those cases concerning the 'impecunious parties', TPLF seemed that it could also be an 'equitable'

instrument, to the extent that it could contribute to 'give each one his own', whereas certain barriers to access to justice related to the litigation costs and risks would have prevented this. These considerations have led us to analyse more in detail the societal repercussions of this instrument, clearly in a wider mature litigation market.

Paragraph 2 on the societal dimension of TPLF started with a 'antithesis' to the main 'thesis' that TPLF would be privately beneficial. The 'antithesis' was represented by the fact that the traditional law and economics literature, and in particular Shavell, finds that the incentives to litigate are often misaligned, if not in contrast. As a way to better understand this matter, we engaged in the analysis of the societal repercussions of TPLF, under the main 'umbrella' law and economics concept of positive and negative externalities. We further divided the potential positive externalities affecting individuals and states. With regard to the first, we discussed the features of TPLF potentially making redistribution and deterrence more effective. The enhancement of redistribution would come because the incentive of TPLF is not only to guarantee access to justice, but also to make dispute resolution effective, thus effectuating the redistribution process devised by states through legal rules. This was considered that per se, this could probably not be regarded as a positive externality, but just the internalisation of the market failure in access to justice through the private bargaining with the parties at stake. It was nevertheless concluded that the positive externality would come once it could be confirmed that redistribution with TPLF is effective, thus affecting all of the citizens' utilities, that would be happy to live in a legal system where 'each one (effectively) obtains is own'. As instead with regard to deterrence, we mentioned that considering that TPLF could ideally push forward any case whose probability of winning is positive ($\lambda > 0$), injurers would be deterred from committing wrong again knowing that they would pay in full (or, if punitive damages or the English Rule on costs applies, even more) the damage they create. In this regard, we considered deterrence as more likely to be regarded as a positive externality of TPLF, considering that every citizen of a given legal system would benefit from TPLF internalising negative externalities through deterrence, even if they did not pay for it. We have moreover discussed how TPLF could contribute to more cost-effective regulatory and enforcement systems and to more price-performing dispute resolution, and whether these could be regarded as positive externalities with regard to legal systems, that may be better-off without actually paying third party funders for this. We

then analysed what could have been the negative externalities of TPLF, discussing how these may affect the funded claimants (for example in a case of an undue withdrawal from funding), the defendants (in terms of vexatious litigation), or the legal system (in terms of frivolous disputes that would put undue costs on it). At the end of these discussions we could not reach any final and incontrovertible conclusion on the societal desirability of TPLF, mainly because the market is in an early phase and there is not much evidence that goes in one direction rather than another. It has nevertheless been mentioned that if the potential negative externalities of TPLF would be internalised by state intervention or private bargaining, this instrument may ultimately be desirable also at a societal level.

We now want to focus for one moment on the features of TPLF ideally affecting all of the potential victims of wrongs/citizens (redistribution and deterrence), and in particular on its capability of tackling negative externalities. The latter indeed affect in general price equilibrium in a given market⁶³⁸, which would not so accurately reflect the benefits and the costs of a given product or service, therefore preventing the market from being fully competitive and make it fail in the optimal allocation of resources. States attempt to fight negative externalities through regulation (including liability rules)⁶³⁹ and enforcement⁶⁴⁰, or by changing the equilibrium of financial incentives through taxes and subsidies⁶⁴¹. The classic example of the resolution of negative externalities through taxation are the ‘Pigouvian taxes’ levied on – say – polluting factories, which for example externalise the costs of recycling their industrial waste by dumping them in the environment. As noted above, in this case polluters externalise their costs on society, so that their ultimate margins would not suffer from the recycling cost. Pigou

⁶³⁸ See, in general, in HR VARIAN, *Microeconomic Analysis* (Third ed.), New York, Norton, 1992.

⁶³⁹ S SHAVELL, ‘A model of the optimal use of liability and safety regulation’ (1984) *Rand Journal of Economics*, Vol 15, n 2, 271.

⁶⁴⁰ S SHAVELL, ‘The optimal structure of law enforcement’ (1993) *Journal of Law and Economics*, Vol 36, 255. MA POLINSKY and S SHAVELL, ‘The Economic Theory of Public Enforcement of Law’, (2000) *Journal of Economic Literature*, Vol 38, n 1, 45.

⁶⁴¹ H WIJKANDER, ‘Correcting Externalities through Taxes on Subsidies to Related Goods’ (1985) *Journal of Public Economics*, Vol 28, 111. WJ BAUMOL, ‘On Taxation and the Control of Externalities’ (1972) *American Economic Review*, Vol 62, Issue 3, 307.

maintained that in order to fight market failures due to such externalities it was necessary that states ‘internalise’ them through taxation⁶⁴². Another way to achieve this goal would be for example by holding the injurers liable for damages they inflict on certain victims⁶⁴³, which would be either compensatory or punitive. In the second case, this instrument would also aim at deterring the injurers and other potential injurers from harming again, besides incentivising claimants and lawyers to begin a legal action⁶⁴⁴. The optimal state enforcement of laws however often fails due to irrational enforcement, inertia, corruption and other⁶⁴⁵, which is similar to the situation where there are none of these Pigouvian taxes or liability systems. As mentioned, optimal deterrence requires potential wrongdoers to be aware that they will certainly bear the full cost of the damage they create or otherwise pay more than the gain unduly made, so that they would be better off not doing so⁶⁴⁶. It is evident in this case how TPLF (in a mature litigation market) would not only be addressing a market failure in access to justice but also a failure of the government in optimally enforcing its laws, in a way that would ensure each one obtains his own (through effective redistribution) and that actual assets would not be jeopardised (through optimal deterrence). In such a scenario, if it was confirmed that TPLF may contribute to these objectives, would it be not only an efficient, but also an equitable instrument? Would such transactions, once aggregated, enhance social justice and, perhaps, social welfare? In this regard, from a more general welfare economics perspective, it is interesting to note that the financial incentives of TPLF would be socially desirable as it could do more than is in its self-

⁶⁴² AC PIGOU *The economics of welfare*, Fourth edition, Macmillan, London, 1932.

⁶⁴³ L KAPLOW and S SHAVELL, above at footnote 332, 1667.

⁶⁴⁴ CM SHARKEY, ‘Economic Analysis of Punitive Damages: Theory, Empirics, and Doctrine’, in J ARLEN (ed), *Research Handbook On The Economics Of Torts (forthcoming)*, NYU Law and Economics Research Paper No. 12-02. Available at SSRN: <https://ssrn.com/abstract=1990336>.

⁶⁴⁵ Inter alia, see STIGLER, above at footnote 583, and S SHAVELL, above footnote 640.

⁶⁴⁶ R COOTER, above at footnote 577. This is of course more obvious where punitive damages or the English rule on costs applies, to the extent that they would possibly pay even more.

interest ‘to reduce detrimental externalities and to act so as to increase beneficial externalities’⁶⁴⁷, as this would lead to a socially optimal resolution of externalities.

Since TPLF and the litigation market are in an early phase, it is difficult to predict whether TPLF would be a truly efficient and equitable instrument, thus promoting social justice⁶⁴⁸ or, even, social welfare. This holds true in particular because we noted that the arguments concerning the negative externalities of TPLF might be strong. For this reason, and also as a way to address future policy discussions, it is necessary to see how the potential negative externalities and other potential abuses of TPLF could be addressed, with a more normative legal and economic approach. These discussions will aim first of all to understand whether these negative externalities are likely to happen and, if yes, to eventually suggest some possible regulatory or other measures that may prevent and/or sanction them.

⁶⁴⁷ L KAPLOW and S SHAVELL, above at footnote 332, 1693. ‘3.6.1. Socially optimal resolution of externalities ... As a general matter, it is socially desirable for individuals to do more than is in their self-interest to reduce detrimental externalities and to act so as to increase beneficial externalities.’.

⁶⁴⁸ The concept of social justice adopted here obviously ‘catches’ just the aspects that concern mainly access to justice and dispute resolution. It is however worth mentioning that the literature uses this concept in many regards, from alleviation of poverty, to health, to education, etc., which are generally included on the array of social rights advocated by Welfare state theorists. See C KAUFMANN and G MIRIAM, ‘Implementing Social Justice: Eliminating Poverty as a Legal Mandate?’ (2007) *NCCR Trade Regulation Working Paper*, 2007/18, Available at SSRN: <https://ssrn.com/abstract=1088704>. JP RUGER, ‘Health and Social Justice. The Lancet’ (2004) Vol 364, 1075. JD LAWTON, ‘The Imposition of Social Justice Morality in Legal Education’ (2016) *The Indiana Journal of Law and Social Equality*, Vol 4, n 457.

Chapter 6

Promoting a Desirable Third Party Litigation Funding (and Litigation) Market

This Part of the law and economics analysis of TPLF in/and the litigation market has so far served several functions. It first of all has given the chance to justify the assumption that the historical and comparative overview has allowed making, that a brand new market was taking shape. In particular, it has first attempted to show how the liberalised litigation market has allowed the emergence of a new asset class consisting of litigious rights. We then discussed how a series of trends, and in particular the recent financial crisis, have reshaped the global scenario of dispute resolution, very often increasing the barriers to access to justice and to solve disputes. In particular, we identified some subjective and objective conditions that create a market failure in access to justice, where property rights cannot be efficiently allocated because they are litigious, and this feature per se imposes some litigation costs and risks that parties may not be prepared to bear. We then discussed how, in a sharing economy context, third party funders, as repeated players in litigation, would have emerged as they would be better able to bear the litigation costs and risks than ‘one-shotters’, and would do so in exchange for a share in such property rights. We then identified and described who are the (actual or potential) actors that may contend this market, and how the different legal framework of each jurisdiction may impact on their ability to enforce litigious rights efficiently and effectively. Then we discussed, in the paragraph related to the private dimension of TPLF, what are the circumstances under which TPLF would be a more efficient instrument than the parties’ own funds and other ALF, also with practical cases. This was done also by attempting to identify the various litigation costs and risk items in a dispute. There has then been the opportunity to discuss the societal dimension of TPLF, namely by analysing its potential positive and the negative externalities. These discussions, while made without claims of exhaustiveness, have explained the main arguments in favour of or against a wider use of TPLF. This has therefore ultimately shown what would be the conditions where TPLF may be privately and socially beneficial, although there have been some criticisms and resistance to its application from the academic, professional and institutional environments. These, in particular, focused on some potential additional costs that TPLF would impose on individual parties and at a societal level under the form of negative externalities or other abuses, and which would make TPLF

undesirable from a societal point of view. In order to understand how these undesirable effects could be addressed, drawing on the existing debate on how to address negative externalities, we are now going to discuss – with a normative law and economics approach - how could these be ‘internalised’ by state intervention or private bargaining⁶⁴⁹.

1. State intervention

In order to prevent, deter and/or sanction externalities, states generally enact different types of legal acts⁶⁵⁰, depending of course on the issue to be addressed and on the jurisdiction at stake. As a way to provide some normative legal and economic indications, we are now going to explore – without claims of exhaustiveness - what type of regulatory and other measures could be applied to TPLF transactions. In doing so, we will also recall the main existing legislation that might be at stake, and the specific problems that could arise (or that have already arisen) in practice.

1.1 General substantial legal principles

The discussion starts with how to internalise the potential negative externalities (or, anyway, prevent the abuses) of TPLF with regard to the funded parties, and analyse them in the light of the existing basic civil law provisions potentially applicable to such cases. It has been discussed that parties to a funding contract, especially if impecunious and where the litigation market would be immature, may face the case that funders

⁶⁴⁹ Recalling the traditional law and economics distinction on how to internalise negative externalities of L KAPLOW and S SHAVELL, above at footnote 332, 1693-1698. A caveat is necessary in this regard. TPLF is a global phenomenon and will be treated as such in the considerations that follow. In particular, the regulatory and other measures potentially applicable to TPLF will be discussed in general terms. I will nevertheless attempt, especially to provide practical examples on how this is already done, to make some reference to the issues analysed throughout the course of this book, and in particular in the comparative analysis of Chapter 3. Where the existing regulation would not be sufficient, I will eventually try to suggest some hypothetical applicable measure, namely by drawing inspiration from existing situations. I will do so also by recalling the classification drawn in the previous par. 2.2.3., as a way to tailor the potentially applicable measures to specific addressee (TPLF in relation to claimants/potential victims of wrongs, defendants/potential injurers and states).

⁶⁵⁰ L KAPLOW and S SHAVELL, *Ibid.*

charge too high a fee for their funding. Legislators often give to weak parties the possibility to defend themselves from unfair contractual terms. In this regard, it is possible for example to recall the doctrine of unconscionability, in the common law jurisdictions, and the unfair exploitation, in civil law (and EU law)⁶⁵¹. Both these figures indeed give the party seeking to escape the contract (or, more realistically, some specific provisions of it) the possibility to do so when it is held that no reasonable or informed person would have otherwise agreed to it. There is moreover reason to think that these two arguments would often be discussed in relation to the limits on funding litigation for profit, which have been reported and discussed in the comparative legal and factual analysis⁶⁵². In particular, these limitations consist of champerty and maintenance for common law, and the PQL and (where applicable) the RL in civil law. We therefore make reference to the analysed legislation and case law to assess in practice whether a certain contract may be held invalid under these rules, depending of course on the jurisdictions where these are embedded, and in the light of the overall regulations affecting them. This would of course also include the assessment of the relationship with the lawyers and the problems that may arise in practice. In particular, we recall the problem of adverse selection and the conflicts related to the strategy to pursue the claim and to the access and use of confidential information⁶⁵³. In this regard, it was already noted how an active TPLF scheme with assignment could address some of these problems⁶⁵⁴, although the possibility to assign and/or purchase litigious rights had already received some judicial resistance⁶⁵⁵. In this regard, it would probably be beneficial if some substantive legislation would be

⁶⁵¹ MW HESSELINK, ‘Unconscionability, Unfair Exploitation and the Nature of Contract Theory - Comments on Melvin Eisenberg’s ‘Foundational Principles of Contract Law’ (2013), *Centre for the Study of European Contract Law Working Paper Series No. 2013-03; Amsterdam Law School Research Paper No. 2013-07.*

⁶⁵² Chapter 3, and in particular see the paragraphs 3.1. and 3.2. for a summary of the conclusions on these provisions.

⁶⁵³ Chapter 4, Par 2.1.1.3.

⁶⁵⁴ Chapter 4, Par 2.1.1.2. See also below par. 2. on the resolution of negative externalities through private bargaining.

⁶⁵⁵ See above Chapter 3, par 2.1. and in particular footnote 271.

enacted in order to clarify whether and how this could be done⁶⁵⁶, but also to facilitate the mentioned exchange of information. For example, it would be recommendable for states to take steps in order to make sure that such information would be protected by, for example extending the legal professional privilege also to third party funders⁶⁵⁷. Such provisions, if extended to third party funders, could lower the information asymmetry between them and clients, facilitate the third party funders' investments assessment, reduce conflicts of interests and protect clients' ability to communicate with funders⁶⁵⁸.

With regard to the undue costs that could potentially be applied to defendants and states in the form of frivolous or vexatious litigation, it is worth noting that all of the modern jurisdictions analysed, in one way or another, already prohibit the abuse of process, frivolous and vexatious litigation⁶⁵⁹. In this regard, considering that third party funders are repeated professional players that should be aware of such rules, eventually one may think of some type of specific sanction in case they do so.

1.2. Specific consumer legislation on fairness and transparency in contractual terms

In a certain situations it is likely that the above mentioned general principles applicable to protect the funded parties would probably only be of utility once the TPLF contract is entered into, and that could be raised only when the claim is filed and started. In the

⁶⁵⁶ This has already been done, for example, in the Directive on Actions for Damages, Art. 2.4. See more in detail below in Chapter 8, par 1.1.

⁶⁵⁷ M STEINITZ, above at footnote 2, 1227.

⁶⁵⁸ Ibid.

⁶⁵⁹ Where the cases would reach the extreme situation of creating reputational damage for the defendants, it is also not excluded that figures such as calumny could be applied. M TARUFFO (ed), *Abuse of procedural rights: Comparative standards of procedural fairness*, Kluwer Law International, 1999. As way to prevent these extreme scenarios, it is possible to draw some indication in the EU Recommendation on Collective Redress, which at par. 16 recommends that the European "... Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party: ... (b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant"⁶⁵⁹. This indication, while interesting for other regulation, might probably be redundant if we consider again the mentioned rules already existing in all the modern jurisdictions.

case of the impecunious claimants, it is not difficult to see that the abuses mentioned – if perpetrated after the claim is filed and started – could jeopardise not only the claim at stake, but also the economic position of the party. It may therefore be necessary that some sort of instrument of control *ex ante* would be devised, especially if the party at stake could be encompassed in the consumer category (in class actions or other mass claims, personal injury claims, etc.). In this regard, there might be several solutions already in place for similar transactions that could be applicable to these circumstances. For example, consideration could be given as to whether the consumer legislation on fairness and transparency in contractual terms, normally applicable to consumer contracts, should be applied also to TPLF⁶⁶⁰. This would seem obviously more appropriate in the case where the funded party can be encompassed in the consumer category, or that otherwise would be in a asymmetric economic and informational situation towards the third party funders. In these circumstances, it is probably recommendable that action would be taken also to devise some sort of fiduciary duty owed by the third party funders to the clients/consumers.

1.3. Lawyers' regulations

The traditional client-lawyer relationship, being quite complex for some historical and institutional reasons, is regulated in each jurisdiction at different levels: public (law); public/private (Bar regulations); and private (the specific mandates with the clients). Interfering in this relationship would therefore have to take into account all these layers of regulations, as moreover seen in the comparative analysis of Chapter 3. For example, it is worth recalling the prohibition on fee sharing with non-lawyers stated in Rule 5.4 of the ABA Model Rules of Professional Responsibility⁶⁶¹. It is moreover worth recalling the failed Swiss attempt to prohibit or at least limit TPLF as a way to preserve the independence of lawyers through an amendment to the Canton of Zurich

⁶⁶⁰ In the EU context, see for example the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁶⁶¹ See above Chapter 3, par 1.4.

Attorney Act⁶⁶². Considering that the client-lawyer relationship is for these reasons highly regulated, it does not seem that many other layers of regulation could be added, provided moreover that the lawyers are at the same time controlled and controllers of the specific situation due to their fiduciary duties towards the clients. If it is established that their legal strategy has been unduly influenced by the third party funders' interests or by their own interests⁶⁶³, the lawyers may be held liable for the violation of the obligations mentioned in their national regulatory frameworks, including their Bar regulations. It is moreover to be recalled that the Association of Litigation Funders of England and Wales' Code of Conduct also addresses this matter⁶⁶⁴, and therefore third party funders are regulated (and would eventually be sanctioned) under this framework. It is however to be noted, also for considerations related to future regulation, that only a limited number of third party funders are part of this association and are therefore bound to comply with these obligations.

1.3. Financial regulation

As a way to enhance transparency in TPLF transactions, consideration could be given to apply some sort of security regulation to TPLF investments, although of course this would entail first that such investments would be deemed as securities⁶⁶⁵. Defining

⁶⁶² § 41 of the Attorney Act of the Canton of Zurich (*Anwaltsgesetz des Kantons Zürich*), in force since January 1, 2005. This amendment was however repealed as it was deemed a disproportionate obstacle to the freedom of commerce. See Federal Supreme Court Decision (*Bundesgerichtsentscheid* or “BGE”) 131 I 223.

⁶⁶³ See, in this regard for example, below Chapter 7, par 1.4 and 2.1.

⁶⁶⁴ Art. 9.3.

⁶⁶⁵ It has already been discussed whether this definition is opportune, at least with regard to the US, and what would be the consequences. WG COUTURE, ‘Securities Regulation of Alternative Litigation Finance’ (2014) *Securities Regulation Law Journal*, Vol 42, 5. Couture, starting from the definition of security provided for by the Supreme Court in *SEC v. W.J. Howey Co.*, which defined an ‘investment contract’ as ‘a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party’ defined what would be the requirements that a TPLF agreement must satisfy in order to qualify as an investment contract: ‘(1) the expectation of profits; (2) solely from the efforts of the promoter or a third party; and (3) a common enterprise.’ It concludes that while the first two requirements are generally present, the third depends on the jurisdiction and the legal/financial model applied. As with regard to the US, it is

also by financial regulatory or other means the boundaries within which this industry could operate would also be beneficial for the TPLF industry. For example, defining this new asset and clarifying which claims are tradable (and which are not) would ensure more legal certainty for their investments. Embracing TPLF into the arms of security laws would moreover trigger information disclosure, and this could allow understanding whether a specific transaction could lead to abuses not only with regard to investors⁶⁶⁶, but also to the funded parties⁶⁶⁷.

1.5. Soft regulation

The use of soft law to regulate the relationships between individuals has steadily increased in the last years in the international legal context⁶⁶⁸. Soft regulation is often used as an efficient way to regulate matters that require a harmonised approach, but nevertheless do not need hard legislation and related complex legislative procedures to be addressed. The practice offers a series of ‘persuasive’, ‘collaborative’, or ‘exhortative’ legal acts issued by institutional bodies, trade associations, or by administrative authorities, which thus attempt to standardise the behaviour of the

moreover worth noting the far-reaching approach of the Supreme Court in embracing investments in security laws. See *Reves v. Ernst & Young*, 494 U.S. 56, 61, 110 S. Ct. 945, 108 L. Ed. 2d 47, Blue Sky L. Rep. (CCH) ¶ 73213, Fed. Sec. L. Rep. (CCH) ¶ 94939 (1990) ('Congress' purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called.').

⁶⁶⁶ *SEC v W.J. Howey Co.*, 328 U.S. 293, 299, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946) ('It permits the statutory purpose of compelling full and fair disclosure relative to the issuance of 'the many types of instruments that in our commercial world fall within the ordinary concept of a security.') (citing the legislative history of the Securities Act); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849, 95 S. Ct. 2051, 44 L. Ed. 2d 621, Fed. Sec. L. Rep. (CCH) ¶ 95206 (1975) ('The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors.').

⁶⁶⁷ This discussion was for example initially addressed in the report *Financement du proces par les tiers*, where however TPLF was not deemed as credit transactions, and as such reserved to the banks or other financial institutions. See LE CLUB DES JURISTES, above at footnote 292, 25.

⁶⁶⁸ DL SHELTON, *Soft Law. Handbook Of International Law*, Routledge Press, 2008.

ultimate addressees. In the context of TPLF, for example, this has been done in the EU Recommendation on Collective Redress, where a series of recommendations was given to member states to prevent certain costs from being unduly imposed on the funded parties, on the defendants and at a societal level⁶⁶⁹. In this context, other jurisdictions or professional bodies – especially in an early phase of the market, may think of using this instrument as a way to promote some best practices and to provide some indications for the TPLF contractual issues. This would probably be where the uncertainty concerning the contractual issues of TPLF may hamper the extension of this practice.

1.6. Self-regulation

Another interesting possibility is that third party funders might regulate their own activities. This is actually already happening in England and Wales, where most third party funders are based. They have founded their association, and created a code of conduct with related regulatory and sanctioning powers⁶⁷⁰. This code of conduct for example specifies the conditions under which a withdrawal from further funding/termination of the TPLF agreement is possible⁶⁷¹. While this self-regulation does not fall within the action of the state, it is nevertheless to be noted how the English government welcomed this form of self-control of third party funders in different circumstances⁶⁷². This code of conduct moreover provides other interesting indications, such as with regard to the capital requirement of the funders⁶⁷³, the obligation to ensure that the funded party has received independent advice on the

⁶⁶⁹ See below par. 1.7. and Chapter 8 par 1.2.

⁶⁷⁰ Chapter 3, par 1.3.3.

⁶⁷¹ Art. 11.2 and 12. See moreover the discussion at Chapter 5, par. 2.3.1.

⁶⁷² J HYDE, ‘MoJ not minded to regulate third-party litigation funding’, *Law Gazette*, 25 January 2017, available at <https://www.lawgazette.co.uk/law/moj-not-minded-to-regulate-third-party-litigation-funding/5059536.article> (last vis. 29.8.2017). See Chapter 3, par 1.3.3., and in particular the position of Lord Jackson in his Report on Civil Costs.

⁶⁷³ Art. 9.4 and 9.5. This feature could be interesting to know also the capability of third party litigation funders to pay for the adverse costs’ orders.

contract⁶⁷⁴, and confidentiality⁶⁷⁵. Apart from its substantial provisions, it is also worth discussing the formal choice of self-regulation and enforcement of the Association of Litigation Funders of England and Wales. This has indeed been the choice to regulate the activity that would have balanced the interests of the parties who want access to justice with the interests of the third party funders do not want financial regulations which are too burdensome. It must however be noted that such self-regulation seems to be appropriate for the current market conditions, whereby funders are mainly concentrating in corporate TPLF, although probably some further steps will have to be made once the industry moves more decidedly to the consumer segment.

1.7. Procedural controls and other forms of public intervention

Negative externalities of TPLF could be internalised also through different forms of procedural controls or other forms of public intervention. First of all, this could be done with a court control⁶⁷⁶ (or other type of control, like that of an independent authority) on the conditions that the undue costs would be charged prior to starting the claim. In this regard, it is interesting to note that there have already been some attempts to regulate the matter, especially in the context of class actions/collective redress. This has been done for example by legislative (or, better, quasi legislative) means by the European Commission in the EU Consumer Redress Recommendation. It has moreover been done by jurisprudential means in Canada, in the case in *Bayens v. Kinross Gold Corp.*, where the Ontario Superior Court of Justice approved a TPLF agreement in a consumer class action while listing a series of principles to regulate the matter⁶⁷⁷. Among the principles set forth in these two circumstances, it is worth recalling some that may serve for future considerations. First of all, in both of the scenarios there is an obligation of disclosure of the funding arrangement at the outset of the proceedings⁶⁷⁸. While however the Canadian court recognised the court power to

⁶⁷⁴ Art. 9.1.

⁶⁷⁵ Art. 7.

⁶⁷⁶ M STEINITZ, above at footnote 2, 1330.

⁶⁷⁷ *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013.

⁶⁷⁸ *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013, par 3). EU Recommendation on collective redress, par 14.

approve (or not) the TPLF agreement provided that certain conditions are met⁶⁷⁹, the EU Recommendation on collective redress provides for a power of the court to stay the proceedings if certain conditions related to the protection of funded parties are not met⁶⁸⁰. It is interesting to see that – *inter alia* - in both of these occasions the issue of over-compensation for third party funders⁶⁸¹, the issue of liability for adverse costs⁶⁸²,

⁶⁷⁹ *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013, par 2 and 3 and, with the sole regard to the class pre-certification, par 4. It is moreover interesting to recall what would be some specific circumstances that would lead to potential abuses to the detriment of the funded party and that may prevent approval, for example: ‘... 6) ... the third party funding agreement must not diminish the representative plaintiff’s rights to instruct and control the litigation; 7) ... the court must be satisfied that the representative plaintiff will not become indifferent in giving instructions to Class Counsel in the best interests of the class members. (To speak colloquially, the concern is that insulated from an adverse costs award and with a modest individual claim to compensation, the representative plaintiff will not have any “skin in the game” with a resultant diminished commitment to advance the class action on behalf of the class.); 8) ... the court must be satisfied that the agreement is necessary in order to provide the plaintiff and the class members’ access to justice; ... 10) the court must be satisfied that the agreement is fair and reasonable to the class. The court must be satisfied that the access to justice facilitated by the third party funding agreement remains substantively meaningful and that the representative plaintiff has not agreed to over-compensate the third party funder for assuming the risks of an adverse costs award. (This will be a difficult determination for the court to make, but the comparable benchmark of the Class Proceedings Fund’s percentage uncapped levy may assist the court in determining whether the third party funding agreement is fair and reasonable.); 11) To be approved, the third party funding agreement must contain a term that the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information; 12) It is an acceptable term of a third party funding agreement to require the third party funder to pay into court security for the defendant’s costs. (Whether this should be a necessary term in every case has not been determined in the case law.)?

⁶⁸⁰ EU Recommendation on collective redress, par 15: ... (a) there is a conflict of interest between the third party and the claimant party and its members; (b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure; (c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

⁶⁸¹ *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013, at 41, point 10). EU Recommendation on collective redress, par 16 (c) and 32.

⁶⁸² *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013, at 41, point 12), in footnote 659. EU Recommendation on collective redress, par 15 (c), in footnote 676.

the prohibition of withdrawal from funding and to influence the legal strategy were addressed⁶⁸³.

With regard to other forms of public intervention, it is probably too early to discuss the possibility that states would for example use fiscal and subsidy schemes for TPLF, and it is not sure that this would ever happen. What instead seems more realistic is the possibility of finding efficient ways to use public funds to support socially relevant litigation⁶⁸⁴, not excluding the possibility that this would be done through public-private partnerships. This would be even more desirable if we recall the conclusions of the paragraph on the private dimension of TPLF⁶⁸⁵, in the last lines of which we noted how the market (both third party funders and lawyers charging success fees) would probably never find attractive certain low value claims of impecunious parties⁶⁸⁶.

2. Private bargaining

The considerations on the elimination of externalities of TPLF through private bargaining generally speaking concern the exchange of information between third party funders and the funded parties, and in general their relationship with the lawyers⁶⁸⁷. This issue is generally addressed at the beginning of the due diligence by entering into non-disclosure agreements, considering that the exchange of information

⁶⁸³ The prohibition for third party litigation funders ‘to influence procedural decisions of the claimant party, including on settlements’ is recommended at par 16 (a) of the EU Recommendation on collective redress. This is also addressed in *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013, at 41, par 5 and 6.

⁶⁸⁴ See the Canadian Fonds d'aide aux recours collectifs above in Chapter 3, par 1.2.2.. In the literature, see also D CAPPER, ‘The Contingency Legal Aid Fund: A Third Way to Finance Personal Injury Litigation’ (2003) *Journal of Law and Society*, Vol 30, N 1, 66. D COLLINS, ‘Public Funding of Multi-Party Litigation’ (2010) *Manitoba Law Journal*, Vol 31, 211.

⁶⁸⁵ See above Chapter 5, par 1.

⁶⁸⁶ Therefore it would be difficult that in such circumstances there would be a bargain in Litigious Rights. This was also recognised by Lord Neuberger, President of the English Supreme Court. See D NEUBERGER, above at footnote 88, 55.

⁶⁸⁷ See the discussions in Chapter 5, par. 2.3.1.

with third party funders is not – per se – privileged⁶⁸⁸. This of course holds true unless this privilege, or other similar obligations of non disclosure⁶⁸⁹, come from the regulation impacting on the lawyers/fund managers⁶⁹⁰. It was moreover mentioned already in the previous par. 3.1.1. how the problems of adverse selection, conflicts related to the strategy to pursue the claim and to the access and use of confidential information could be addressed through the active TPLF scheme with assignment⁶⁹¹. However, even without resorting to this mechanism, an applicable solution to address the issues mentioned and at the same time apply the probably more practical passive TPLF model could be to introduce a clause to share with the funder both the costs and benefits of the case, so that adverse selection of the parties would be addressed. In this case, the parties' marginal costs would equal his marginal benefits where total marginal costs equal total marginal benefits⁶⁹², so aligning his position with that of the funder.

⁶⁸⁸ This has been remarked also in *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013, at 41, point 3). See, also, C HODGES, J PEYSNER and A NURSE, above at footnote 9, 89. GM GIESEL, 'Alternative Litigation Finance and the Attorney-Client Privilege' (2015). *Denver University Law Review*, Vol 92, N 1, 2015.

⁶⁸⁹ In general, in civil law countries a rule on legal privilege is not common, but nevertheless there are regulatory provisions on professional secrecy that more or less achieve the same scope of protecting confidentiality. CR EGGLERS and T TRAUTNER, 'An Exploration of the Difference Between the American Notion of "Attorney-Client Privilege" and the Obligations of "Professional Secrecy" in Germany' (1994) *SPG International Law Practicum*, Vol 7, 23.

⁶⁹⁰ In this regard, however, it has to be assessed in practice whether they enjoy this privilege also when they cross the border and go on the funders' side. This holds even truer in those jurisdictions where lawyers are not prohibited from getting shares of the cases' proceeds, and may have to give up their lawyer title. See below Chapter 7, par 2 on the German debate.

⁶⁹¹ See Chapter 4, par 2.1.1.2. The first would happen because where the claim is assigned and the original claimants keep some interests in it, they will be forced to share all the necessary information with the assignee/third party litigation funder. In this case, therefore, the interests at stake would seem completely aligned, provided of course that the claimant is interested in pursuing a claim only to obtain the highest redress. The latter instead would happen because once the claim is assigned to the third party funder, he becomes the new claimant and enjoys the privileged status of its communications with the lawyers.

⁶⁹² For such a scheme in the context of contingency fees, see A MITCHELL POLINSKY, DL RUBINFELD, above at footnote 544.

3. Concluding remarks. The TPLF market perspective(s)

At the end of this Part on the law and economics of TPLF the issue of what will be the future of this practice and of the litigation market seems now quite challenging. In modern societies driven by fast and radical changes, we have got used to innovation in any sphere of social and private life. Innovative changes are often welcomed, especially when their disruptive effects go in favour of a multitude of final users. At the same time, they often receive criticism for the impact it can have on various delicate aspects of private and social life, especially when it concerns the protection of human rights or sensitive social areas. The same controversial debate apparently is surrounding the idea of a litigation market where TPLF would play a central role. The comparative legal and economic analysis has shown a quite ambitious and at the same time controversial scenario, which certainly will raise a series of issues that are even difficult to imagine at this early stage of the market. While the private and the social desirability of the possibility to bargain over litigation has been shown to have strong appeal, to date the regulatory framework does not address all the potential issues that may arise. Certainly any future discussion cannot fail to take into consideration the potential private and societal improvements that TPLF may engender. Although more empirical evidence will be needed to confirm the above intuitions, TPLF seems to have the right features to bring improvements both in the private transactions and at a societal level. The assumptions underlying the intuitive guesses, and the related potential improvements, are indeed easy to capture also by non-expert lawyers and economists that are aware of the many externalities already existing in our society, that a wise use of TPLF may contribute to fight. In particular, the combination of the redistributive and deterrence factors makes TPLF different from other contractual or regulatory means that are normally used. This scenario, at least from a conceptual point of view, is likely to be very interesting. We are in fact likely to be in the case where there would be an ‘inversed’ subsidiarity, where private entities intervene in support of the state, in one of its most pivotal functions.

Instead with regard to the development of the TPLF market, there are reasons to believe that there is still a lot to discover, although the discussions – both on this potential physiology and pathology – have already been in existence for a number of few years. With regard to the market psychology, already some authors have advocated

the idea of a secondary market for legal claims, where these would be securitised and traded⁶⁹³. Others have even considered the very challenging scenario of a market in immature claims, that comes from the possibility for an individual or company to sell their claims even before harm occurs⁶⁹⁴. The examples in this regard – given the possibilities provided for by financial engineering - may continue, and more will certainly come up when the market is more mature⁶⁹⁵. As with regard to the pathologies of this future market, the discussions have mostly focused on the alleged socially undesirable effects resulting from the ‘commoditisation’ of justice⁶⁹⁶. A claim, according to these criticisms, could just not be commodity, like coffee, gold, and so on. If this happened, for example, TPLF may lead to outcomes similar to the recent sub-

⁶⁹³ MJ SHUKAITIS, above at footnote 536; D ABRAMS and DL CHEN, above at footnote 4; M ABRAMOWICZ, above at footnote 4; IM MARCUSHAMER, ‘Selling Your Torts: Creating a Market for Tort Claims and Liability’ (2005) *Hofstra Law Review*, Vol 33, Issue 4, 1544; A PINNA, above at footnote 393, 17; DL CHEN, ‘Can markets stimulate rights? On the alienability of legal claims’ (2015) *RAND Journal of Economics*, Vol 46, n 1, 23–65. V WAYE, above at footnote 4; JT MOLOT, above at footnote 205; M STEINITZ, above at footnote 2, 1282. This is actually already happening, for example with the trade of the Petersen claim by Burford. See the Burford Press Release of January 3, 2017

‘Burford reports further secondary market transaction activity’, available at <http://www.burfordcapital.com/newsroom/burford-reports-secondary-market-transaction-activity/> (last vis. 8.7.2017).

⁶⁹⁴ R COOTER, ‘Towards a Market in Unmatured Tort Claims’ (1989) *Vanderbilt Law Review*, Vol 75 383; R COOTER and SD SUGARMAN, ‘A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract’, in W OLSEN (ed), *New Directions In Liability Law*, 174, 1988.

⁶⁹⁵ It is worth noting that two main problems would arise in this context, limitation periods and time of the damage quantification. As for the first, as known, a claim has to be brought to court within the time provided for by law, though the claim could be traded even once the trial has begun, while the second refers to the fact that in certain jurisdictions the assessment is made at the date of the judgment (France), while in others at the date of the harm (England). Moreover, the price of claims might change from the moment of the assignment to the moment in which the judgment is delivered, either for natural or for legal causes, like ‘the modification of a line of case law or a practice of a court in measuring damages, or a lower court decision held in the lawsuit in which rights for action have been assigned’ A PINNA, above at footnote 393, 17.

⁶⁹⁶ US CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, at footnote 248. AMERICAN TORT REFORM ASSOCIATION, above at footnote 249, 13.

prime bubble, given moreover the risk underlying this asset⁶⁹⁷. Similar considerations are often made with regard to the legal profession⁶⁹⁸. While these concerns are certainly not to be under-estimated, it should be noted that civil law systems, in order to facilitate dispute settlement and circulation of rights, already commoditize claims. Trade in claims already happens in many practices, similar to TPLF, that have existed for decades, and are at the core of a modern free market economy, as in insurances' subrogation clauses and, incidentally, in the sale of distressed debt portfolios⁶⁹⁹. For this reason, there seems to be no reason why this market should ever be banned,

⁶⁹⁷ M STEINITZ, above at footnote 2, 1318. 'Trading in legal-claims-backed securities can create moral hazards relating to both the funder-client relationship and the funder-investor relationships. On the funder-client side, in certain subject matters of litigation (e.g., a pure business dispute) the original owners of the litigation, unlike owners of homes or cars, may have a diminished interest in the asset underlying the security and a diminished incentive to prosecute their claims or defences once the litigation ceases to be expensive and uncertain for them. On the funder-investor side, as legal claims are commodified and ownership in them becomes freely transferable as part of an originate-and-distribute model, there is a risk of an asset bubble of the kind recently witnessed with novel assets like sub-prime mortgages. Such a bubble may form in a legal- claims market since the clients and the originators, or funders, will externalize the risks of faulty due diligence, poor legal judgment, or unzealous representation onto those holding the securities. As the recent financial crisis has demonstrated, when converging with other forms of risky securities, this can have deleterious effects on the economy as a whole.' (citing K DOWD, 'Moral Hazard and the Financial Crisis' (2009) *Cato Journal*, Vol 29, 141, 142-144.

⁶⁹⁸ These criticisms have been raised now for a few decades. MH TROTTER, *Profit and the Practice of Law: What's Happened to the Legal Profession*, Athens Georgia, University of Georgia Press, 1997. RJ GERBER, *Lawyers, Courts, and Professionalism*, Greenwood Press, New York, 1989. CT BOGUS, 'The Death of an Honorable Profession' (1996) *Indiana Law Journal*, Vol 71, N 4, 911; WE BURGER, 'The Decline of Professionalism' (1995) *Fordham Law Review*, Vol 63, Issue 4, Article 2, 949. JC BUCHANAN, 'The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change' (1994) *Valparaiso University Law Review*, Vol 28, N 2, 563. AM ADAMS, 'The Legal Profession: A Critical Evaluation', (1989) *Dickinson Law Review*, Vol 93, 643. N BOWIE, 'The Law: From a Profession to a Business' (1988) *Vanderbilt Law Review*, Vol 41, N 4, 741. R SUSSKIND, *The End of Lawyers* (Oxford University Press, 2010).

⁶⁹⁹ W BRADLEY WENDEL, 'Alternative Litigation Financing and Anti-Commodification Norms' (2014) *DePaul Law Review*, Vol 63, Issue 2, Article 16, 655. MK VELCHIK JEFFERY and Y ZHANG, 'Islands of Litigation Finance (2017) *Harvard John M. Olin Center For Law, Economics, And Business Fellows' Discussion Paper Series*, Discussion Paper No. 71 04/2017.

although obviously some appropriate precautions may have to be taken to make it desirable from a private and a societal level, especially when used in the consumer segment⁷⁰⁰.

⁷⁰⁰ This is also the conclusion of VAN BOOM WH, above at footnote 3.

PART III

THIRD PARTY LITIGATION FUNDING AND THE EUROPEAN PERSPECTIVE

In Part I we have tried to show that TPLF, after having been experienced with some relative success in certain common law jurisdictions, for a few years has been slowly emerging in some European continental countries, with a civil law background⁷⁰¹. Having acknowledged the existence of a brand new market, Part II defined its object, the actors that would be capable of contending for it, and how they would be capable to do so according to the regulations that affect them. The private and societal discussions have then explained how TPLF could be both privately and socially beneficial, especially if some cautions are taken to prevent its externalities and other abuses both at a states' level and in private bargaining. It obviously made these considerations in general terms, although it discussed the application of potential limits both in common law and in civil law jurisdictions. Considering that TPLF seems not to raise particular concerns from a legal point of view, and that it could be desirable both from a private and from a social point of view, the reason why it has not emerged homogeneously in common law and in civil law is to date uncertain. This holds even more true in the EU member states with a civil law background, where access to justice and the resolution of disputes – as seen in the concrete example⁷⁰² - may find more constraints than in other jurisdictions. From another point of view, however, this analysis has also helped to show how TPLF would be desirable also in the European context, although this issue raises the question of why it has not been used extensively so far. Since TPLF and the litigation market are at an early phase and third party funders are mainly based in common law jurisdictions, it might be that they are first concentrating on those jurisdictions that are ‘more familiar’ to them. The common law jurisdictions moreover offer more legal certainty with regard to the nature of their investments (due to the “stare decisis” rule) and are generally deemed more efficient than civil law ones⁷⁰³. It is interesting to note, in this regard, that to date 26 out of 28

⁷⁰¹ See above Chapter 3.2.

⁷⁰² In particular, see the concrete situation in Chapter 5, Par. 1.2.1.2.

⁷⁰³ RA POSNER, *Economic Analysis of Law*. By 1 Boston: Little, Brown and Company, 1973, 98. In

member states of the EU have civil law traditions⁷⁰⁴, which effectively may present more complexities than the judge-made law of common law traditions⁷⁰⁵. Indeed it has been noticed that the complexity of the legal systems is a factor that impacts on the perception of the costs and risks to a dispute and, while certainly third party funders do not feel the constraints related to this, they would rationally now be focusing on those disputes that would present fewer complexities (and of course attractive returns). It is finally important to define what is meant by ‘European perspective’, and also to understand the potential applicability of the arguments contained in this Part. It first of all refers to the EU legal framework, in its intertwinement with that of its member states. It is moreover to be considered that the EU right of access to justice parallels that of the European Convention on Human Rights ('ECHR'), and that 44 out of 47 parties to this convention have mainly civil law traditions, like most of the countries worldwide⁷⁰⁶. For these reasons, it is likely that the arguments contained in this Part

particular, these arguments have been developed significantly starting from the mid-1990s by the economist Andrei Shleifer and his co-authors (who became known by the acronym LLSV). It is possible in this regard to cite a few works of this huge strand of literature, which has moreover gained some success due its endorsement in some World Bank programs. N GENNAIOLI and A SHLEIFER, ‘The Evolution of Common law’ (2007) *Journal of Political Economy*, Vol 115, n 1, 43-68. R LA PORTA, F LOPEZ DE SILANES and A SHLEIFER, ‘The Economic Consequences of Legal Origins’ (2008) *Journal of Economic Literature*, Vol 46 n 2, 285-332. P MAHONEY, ‘The Common law and Economic Growth: Hayek Might Be Right’ (2001) *Journal of Legal Studies*, Vol 30, n 2, 503-25, finding that ‘common-law countries experienced faster economic growth than civil law countries during the period 1960–92’. Contra, see N GAROUPA and C GOMEZ LIGUERRE, ‘The Syndrome of the Efficiency of the Common law’ (2011) *Boston University International Law Journal*, Vol 29, n 287.

⁷⁰⁴ Also to understand the geographic extension of this market, see the map in [https://en.wikipedia.org/wiki/Civil_law_\(legal_system\)](https://en.wikipedia.org/wiki/Civil_law_(legal_system)) (last vis. 10.2.2017). To be more precise, it should be noted that Malta and Scotland have mixed civil law and common law traditions, due to their well-known historical background. I have moreover to note that I am writing this Part after the Brexit referendum and the triggering of art 50 of the TFEU by the Premier Theresa May. I have nonetheless left included the United Kingdom in the EU countries, as the Brexit process should take a negotiation period of no less than two years to be formally initiated.

⁷⁰⁵ Apart from their codified systems, the legislations of the European states moreover present a further layer of complexity given by the intertwinement with the EU legislation.

⁷⁰⁶ See the reasons below at Chapter 8, par 1

could also work, at least to a certain extent, for those countries that belong to the Council of Europe⁷⁰⁷ and/or which have civil law traditions.

For the stated reasons, this Part is now going to analyse more in detail some debates concerning the legality and desirability of TPLF in the European perspective. In analysing the first issue, it will adopt a typical civil lawyer approach, relying on the existing debates on the legality of the TPLF contractual models under the general terms of civil codes⁷⁰⁸, to see whether some further specific problem may arise in practice. This analysis does not only aim at addressing the potential pathologies of TPLF under the current legal framework, but also the physiological contractual issues in a more certain way for the future. Once it has been confirmed that no particular legal problems would arise in this context, and also as a way to understand what could be the systemic role of TPLF, it will consider its private and social desirability under the main European legal framework. Moreover, it will assess its societal role in the light of some institutional changes that occurred with the entry into force of the Lisbon Treaty, namely: the entry into force of the European Union Charter on Human Rights ('EUCFR'), with particular regard to the right of access to justice and equality of arms; the establishment of the main economic policy objective, to achieve a 'highly competitive social market economy'. In this context, we will also analyse some well-known market failures in access to justice, also to see how TPLF could address them in a specific legal system.

⁷⁰⁷ See the web page <http://www.coe.int/en/web/about-us/our-member-states> (last vis. 11.03.2017).

⁷⁰⁸ See M BUSSANI above at footnote 271.

Chapter 7

Legality of TPLF in the European (and civil law) perspective

Third party litigation funding in the European Union would have to deal with a series of layers of regulation, from the EU legislation to the member states civil codes, to the national and European bar regulations. The general consideration that can be made at this stage, especially in the light of the comparative analysis provided for in Chapter 3, is that overall there does not seem to be any general prohibitions related to TPLF in the civil codes of European member states, nor in any other European legislation, although some specific limitations could apply. The TPLF contractual form has already been discussed to a certain extent in Germany and France, interestingly enough the two ‘souls’ of modern civil law jurisdictions, although it remains quite a controversial issue. These discussions are however a good starting point also for other civil law jurisdictions, whose civil codes in one way or another have drawn inspiration from the French Code Civil or from the German BGB⁷⁰⁹. For this reason, as a way to provide more elements for the discussions on the legality of TPLF in the European and civil law perspective, this Chapter aims at shedding some light on the main legal issues concerning the practice in this context.

1. The French debate

In France the legality of TPLF has been thoroughly discussed in the report ‘Financement du procès par les tiers’,⁷¹⁰ published by Le Club des Juristes, a think tank composed of leading practitioners, judges and academics. In this document are first

⁷⁰⁹ As with regard to those countries that have drawn inspiration from the French Code Civil it is possible to mention a few: Belgium, The Netherlands, Spain, Luxembourg, Romania, Italy or, outside of Europe, Mexico and Peru for instance. As with regard to the German BGB, instead: Austria, Czech Republic, Slovenia, Serbia, Slovakia, Hungary or, outside of Europe, Russia, China and Turkey. For a comprehensive list of the legal traditions for each state at a global level see the map at [https://en.wikipedia.org/wiki/List_of_national_legal_systems#/media/File:Map_of_the_Legal_systems_of_the_world_\(en\).png](https://en.wikipedia.org/wiki/List_of_national_legal_systems#/media/File:Map_of_the_Legal_systems_of_the_world_(en).png).

⁷¹⁰ LE CLUB DES JURISTES, above at footnote 292.

reported the discussions on the TPLF contractual form, to assess its legality and qualification under the general terms of the Code Civil. It then takes into account a series of problematic clauses of the TPLF contract, and its potential relationships with the banking legislation and lawyers' deontology. For this reason, this report – having moreover been drafted by a series of leading French practitioners - can be taken as a very good benchmark for the discussions on the legality of TPLF in France and potentially in all civil law jurisdictions whose code has drawn inspiration from it.

1.1. Qualification of the TPLF contract

The discussions on the qualification of the TPLF contract in the report 'Financement du procès par les tiers' have proceeded ad excludendum, i.e. by first assessing what this relationship would not be, according to the existing codified contractual models.

a) The report started by considering whether TPLF can be qualified as a gambling contract, given the aleatory nature of the relationship. This qualification would however have prevented the funder from claiming its recovery from the funded party, because the French Code Civil excludes this possibility for the creditors of obligations deriving from gambling⁷¹¹. The report has however concluded that TPLF cannot be considered as such, considering that the main object and actual consideration of the contract would be the financing of the claims' costs, while the aleatoriness concerns only the remuneration of the third party funder. For this reason, the report does not exclude that TPLF may grasp elements from the general category of aleatory contracts under the terms of art. 1964 of the Code Civil, to which however the previous prohibition to recover the sum from the debtor would not apply.

b) The report then goes on to discuss whether the TPLF contract could be considered as insurance, with which it shares the coverage of some litigation costs and risks. It however differs from it to the extent that in the insurance relationships there is a premium to be paid to the insurer, who would have paid its obligation only in the case where litigation happens. In other words, the premium to be paid to the insurer is not conditional on the event that the claim is won or not, unlike the obligation of the

⁷¹¹ Art. 1965 of the French Code Civil.

insurer. In the case of TPLF, instead, the alea affects the obligation of the funded party, who is obliged to give up a share in the recovery only in case of victory, and there is no premium to be paid in advance to the third party funder.

- c) The report then compares the TPLF financing structure to loans (art 1875 Code Civil), from which it however differs because TPLF is provided on a non-recourse basis, and there is no obligation for the funded party to give back the financing provided for.
- d) It is moreover excluded that TPLF should be devised as claim assignment, to the extent that this assignment may be jeopardised by the French provision on the retrait litigieux (RL)⁷¹². While however this limit would not prevent the assignment of a future and disputed claim being made, it concludes that this transaction would not represent the primary rationale of TPLF, and that the assignment of the claim may happen only as accessory to the main obligations (the report takes into consideration only the passive TPLF scheme without claim transfer).
- e) The report also excluded that the TPLF relationship could be devised as company contribution, to the extent that in the intentions of the parties the ‘affectio societatis’ (the will to be partners) would be missing. It is moreover justified by the fact that the losses would not be equally distributed, but would ultimately be borne only by the third party funder⁷¹³. It does not however exclude that TPLF could be seen as a de facto company, especially in the case in which the third party funder would meddle in the control of the case management.
- f) The report then analysed the possible qualifications, starting from the qualification of TPLF as a contract for the provision of services, which would link it to the provisions of a company contract. In other words, the rules applicable to the provisions of immaterial services provided for by an independent contractor would be qualified and regulated by the provisions on the company contract. This qualification has however been excluded relying on a case on some family and succession law matters involving TPLF, and decided recently by the French Cassation Court⁷¹⁴. In this case,

⁷¹² See above Chapter 2, par. 1.2.2. and Chapter 3, par 2.6.

⁷¹³ LE CLUB DES JURISTES, above at footnote 295, 13-15.

⁷¹⁴ Civ. I, 23 nov. 2011, n° 10-16770, P+B.

while the Cassation Court did not expressly mention the contract for the provision of services with reference to the funding of the costs of a claim, it seems to have nevertheless drawn on it to reduce the fee due to a funder. The report however does not agree with this interpretation, to the extent that – *inter alia* - such a reduction should not apply in the case where, like in TPLF, the fee is bargained in advance and is not imposed unilaterally.

g) In the light of the above considerations, the report concludes that the TPLF contract, under French law, is likely to be a composite contract encompassing obligations from different contracts (service/enterprise, mandate, aleatory contract, assignment, etc.). In the light of the principle of contractual freedom stated at article 1107 of the French Civil Code, the parties should therefore be free to conceive a contractual relationship which unifies the provisions of the different contracts, and tailor it to the specific case⁷¹⁵. This conclusion thus seems perfectly aligned with the view exposed above⁷¹⁶, that TPLF would be a 'bespoke' solution.

1.2. Problematic clauses and other issues

Considering the complexity of the TPLF contractual relationship, the report attempts to address some problematic clauses and other issues that may arise in practical TPLF transactions⁷¹⁷.

a) It first of all analyses the clauses relating to the distribution of procedural powers, with particular regard to the control of litigation, which should remain in the hands of the party. It however starts considering that the TPLF relationship finds several exceptions to this provision: on the one hand, the litigant is endued with a diligent and regular delivery of information to the financier (detailed periodic reports of the litigation); possibly require pre-decision advice, as well as reasonable procedural behaviour (obtaining the advice of his or her lawyer, complying with the judge's

⁷¹⁵ LE CLUB DES JURISTES, above at footnote 295,18.

⁷¹⁶ See above Chapter 4, par 2.1. In the common law this view has been well expressed by M STEINITZ and A FIELD, above at footnote 377.

⁷¹⁷ LE CLUB DES JURISTES, above at footnote 295, 19.

injunctions on communications of documents, etc.). In these cases, however, such clauses would not necessarily impinge on the control of litigation. On the other hand, if a clause that would explicitly leave the control of litigation to the litigation funder were to be included, as it is used in insurance law, the funder may be regarded as agent of the party, which would imply regarding this relationship as a mandate (with the related consequences, such as the responsibility of the litigation funder towards the party, right of unilateral revocation, etc.). A further risk that the clause giving control of litigation to the third party funder is that this could be regarded as 'owner' of that claim⁷¹⁸, and therefore a party to the dispute itself. For these reasons, the clause on the control of litigation for the funder seems to be avoided in contractual practice.

- b) Another problematic issue analysed concerns the freedom of the party to choose its own lawyer. In the French perception, the choice of lawyer is fundamental, being directly linked to the exercise of the rights of the defence, on the one hand, and on the personal trust ('intuitu personae') that the party has towards the lawyer, on the other. The report however notes that this principle does not appear to be called into question in the current practice of TPLF, where eventually (but not mandatorily) the funder may suggest a series of lawyers.
- c) The conflicts over settlement have then been discussed, recognizing that under French law this may be a problem with regard to the ownership of the claim, especially where the litigation funder would enjoy the right to veto the decision of the party to settle. Even in the absence of an express clause of this type, any proven practice of limiting the freedom to settle could lead a judge either to refuse to homologate the settlement or to revoke the transaction⁷¹⁹.
- d) Other problematic issues may arise with regard to the clauses on the financing having a procedural effect. It was mentioned that the legal and judicial strategy and the choices made at any stage of the proceedings are the responsibility of the party. In this regard, some problematic issues may arise in practice if, as it always happens, the deployment of funds is done in different chronologic stages, eventually imposing certain conditions for the granting of subsequent funds. When these conditions are not

⁷¹⁸ See below lett. e) for the consequences of this interpretation.

⁷¹⁹ Art 1568 of the Code of Civil Procedure and art 2053 of the Civil Code.

met due to the fault of the party (for example, omission of a procedural act), it seems acceptable that some form of contractual penalty could be imposed on the party. The problem may instead arise when the mentioned conditions cannot be met for reasons that are external to the party, and eventually leave room to the third party funder to withdraw from funding with apparently no reason. When, instead, the change in circumstances is a consequence of the choice of opportunity made by the litigant, the possibility of withdrawing from funding would leave to the litigation funder an indirect power of control over the procedural strategy, as it would arbitrarily threaten the termination of the proceeding as a consequence of the lack of funding, with potential loss of the eventual and future profits. In such a case, the report notes how – in line with the previous qualification of the TPLF contract as a contract for the provision of services/company contract, the funder could face contractual liability. The report moreover notes that similar difficulties would arise in the case where the TPLF contract foresaw some penalty clauses based on negligence of the funded party, although this could be addressed by the intervention of a third party to solve the conflict between the litigation funder and the party. The report however concludes that the TPLF contract may well foresee clauses that leave the litigant with control of the proceedings while requiring him to keep the funder informed of the course of the proceedings. There may also be more delicate clauses, enabling the funder to control of some issues related to the proceedings, mainly – as seen – indirectly and/or de facto, which would indeed put TPLF in the position of a de facto company. Such clauses or their implementation may be criticized whenever the third party funder interferes with substantive rights, actions or proceedings, to the point of becoming apparently co-owner of such substantial and procedural rights. The risk in this case would be that the third party funder would no longer be considered as ‘third’ and, for example, a judge may hold him responsible for all costs and expenses even if not agreed in advance, without having the benefit of ‘third party opposition’ not to pay for such costs.

- e) The report also analyses what could be the impact of an insolvency procedure on the funded party, distinguishing the two cases in which the TPLF contract would be concluded before the opening of the insolvency procedure or while this is already pending. In the first case, it seems that the subsequent opening of the insolvency procedure would not impinge on the TPLF relationship. In the second case, however, the TPLF contract may be affected by the procedure, for example as follows: the

interlocutor of the litigation funder may change, as the insolvent company could be prevented from managing any of its affairs; the TPLF contract could not be resolved or annulled solely by reason of the insolvency procedure, but the third party funder should continue with its obligations, eventually liaising with the liquidation body; the third party funder may not be able to freely get its proceeds, but this could be made in respect of the rules of the insolvency procedure (i.e. on the distribution of assets to creditors); in case the TPLF is necessary or otherwise favourable to the insolvency procedure, the third party funder – according to the French ‘Code de Commerce’⁷²⁰ – may be deemed as a privileged creditor; there is a danger that the mechanisms securing the right of the third party funder to pay its dues on future claims, possibly arising from an unfavourable judgment, may be ineffective⁷²¹; an on-going litigation between the third party funder and the financed party would be suspended by the opening of insolvency proceedings and could be resumed under the conditions laid down in Article L. 622-22 of the Commercial Code; during the safeguarding, reorganization or liquidation proceedings, the assets represented in the TPLF contract would be treated like the other contracts of the company.

1.3. TPLF and financial regulation

The report continues the discussions on the legality of TPLF in relation to art 313-1 of the French Monetary and Financial Code concerning credit transactions, which – under certain conditions - would be reserved for the banks and other financial institutions⁷²². This issue would be of primary importance, considering that the violation of this provision would lead to a criminal penalty⁷²³. The report however notes that any credit transaction pursuing the article mentioned would be characterised by an obligation to

⁷²⁰ L. 622-7 et L. 622-17.

⁷²¹ Pursuant to Article L. 622-7 I. 3rd paragraph (ineffectiveness of the 'pacts commissoires', providing for a security to be effected by a definitive transfer of ownership for the benefit of the secured creditor) or L. 622 -23-1 C. com. (Effectiveness of fiduciary agreements in collective proceedings).

⁷²² LE CLUB DES JURISTES, above at footnote 295, 25.

⁷²³ Article L. 571-3 du Code Monétaire et Financier.

repay the credit⁷²⁴, which is missing in the TPLF contracts, since they are provided on a non recourse basis. For this reason, but also in the light of the discussions on the contractual form briefly reported in the above par 1.1. and of the principle of strict interpretation of criminal laws, the report seems to exclude that TPLF could be an activity reserved for the banks and other financial institutions. It however recommends that the French legislator should take steps to clarify this issue with an express derogation from this regime.

1.4. TPLF and the lawyers' rules of professional conduct

The report also challenges the TPLF contractual relationship with the rules on professional conduct which are binding for French lawyers⁷²⁵, and in particular with regard to: the obligation on professional secrecy; to the conflicts of interests; and the prohibition of the PQL.

- a) As with regard to the obligation on professional secrecy, this being a public order principle, there does not seem to be room for any derogation, even if the client agrees with it. However, according to the report, nothing would prevent the client from providing such information related to its case directly to the third party funder, possibly after entering into a non-disclosure agreement.
- b) No particular concerns would arise with regard to potential conflicts of interest, provided that the funded party remains a client of the lawyer and that the latter is obliged to act in its best interest. The report however notes that the fact that the fee would be paid by a third party could, in general, raise concerns in the case that there would be influences over the case strategy by the third-party funder.
- c) Also the prohibition on the PQL, as moreover thoroughly discussed during the

⁷²⁴ Reporting footnote 39 of the Report : ‘Cass. Com., 2 novembre 1994, Bull. n° 321, pourvoi n°92-14.487, D. 1995 p. 182; Cass. Civ. 1, 1er juillet 1997, Bull. n°224, pourvoi n° 95-15.642, D. 1998 p. 32; Cass. Civ. 1, 29 octobre 2002, Bull. n° 253 pourvoi n° 99-20.450; S SABATHIER, ‘Les espoirs suscités par la remise en cause du caractère réel du contrat de prêt’ (2005) *Revue Trimestrielle de Droit Commercial*, N 5, 29.

⁷²⁵ LE CLUB DES JURISTES, above at footnote 295, 32.

course of this thesis, should not create many problems, considering that the latter would apply only to lawyers (and other personnel involved in the judiciary) and not to other entities⁷²⁶. The report moreover excludes that TPLF may be used to circumvent the prohibition, considering that the lawyers' fees and the third party funders' (eventual and future fee) are substantially distinct, and respond to different needs. The first is aimed at covering the legal activities of the lawyers, while the second would be the remuneration for having hedged a risk and born the costs (especially the lawyers' fees). For these reasons, however, the report concludes that French lawyers cannot be at the same time third party funders.

1.5. TPLF and arbitration

Finally the French report also addresses the legality of TPLF in relation to arbitration⁷²⁷, and in particular with regard to two issues: transparency with regard to the identity of the third party funder; and, with regard to investment arbitration, the criteria of nationality (and therefore what would be the law applicable to the litigation funder, in case its nationality would be different from that of the funded party, and the claim is transferred to the funder). As with regard to the first, the report acknowledges that to date there is no obligation of disclosure, which may create problems of potential conflicts of interests for the parties at stake. For this reason, the report recommends that more transparency would be needed in this regard, for example by imposing an obligation of disclosure before the arbitration is initiated or, at least, to have some contractual provision that would oblige the third party funder to research any potential conflict of interest and eventually inform the arbitral tribunal. As with regard to the criteria of nationality in investment arbitration the question would be how to determine this nationality in case the 'bare right of action' would be assigned. The problem that would arise in practice would concern, for example, the application of an investment treaty rather than another, in case the nationality of the party and that of the funder differ. The report, in this regard, recommends that it would be a question of

⁷²⁶ Reporting the footnote 63 of the report: T CLAY, preface to M DE FONTMICHEL, '*Le faible et l'arbitrage*' (2013) *Economica*, n 577.

⁷²⁷ LE CLUB DES JURISTES, above at footnote 295, 40.

competence to be decided by the arbitral tribunal called to rule on the question, and in particular to verify whether there would be such an assignment.

2. The German debate

German legal scholars have also engaged in discussions regarding the legality of TPLF, not without controversies. Bruns maintains that TPLF contracts would be void and therefore unenforceable as immoral and against public policy⁷²⁸. These arguments in particular start from the assimilation of the TPLF contract into contingency fees, which in Germany are unenforceable for reasons of a conflict with the principles of morality and public policy⁷²⁹, as they would taint lawyers as an ‘independent organ of the administration of justice’⁷³⁰. In particular, TPLF contracts under German law would be void under § 138 subs. 1 of the German BGB, which voids legal transactions running against public policy (in this case, the lawyers’ independence⁷³¹). The same Bruns attemptst to strengthen this argument starting from the alleged ‘truism that the requisite critical distance of the attorney from the matter in dispute and the plaintiff may diminish with an attorney’s increased economic interest in the case’s outcome’⁷³². He moreover notes that ‘[t]he new model of third parties financing litigation costs, although devised as a circumvention of the German ban on “quota litis” agreements, essentially avoids balancing the plaintiff’s and attorney’s interests. Under an ordinary third-party financing arrangement, the lawyer will be paid what is due according to the

⁷²⁸ A BRUNS, above at footnote 50, 534.

⁷²⁹ Reporting footnote 49 of A BRUNS, *Ibid.*: ‘Bundesgerichtshof [BGH] [Federal Court of Justice] 22 Entscheidungen Des Bundesgerichtshofes in Zivilsachen [BGHZ]162(163)(contingency fee of an attorney from Washington D.C. admissible); 34 BGHZ 64 (71); 39 BGHZ142 (145); 51 BGHZ 290 (293f); Bundesgerichtshof [BGH] 1981 Neue Juristische Wochenschrift [NJW] 998; 1987 NJW 3203 (3204); 1990 Neue Juristische Wochenschrift – Rechtsprechungsreport 948 (949); 133 BGHZ 90 (93); 1996 NJW 2499, 2500. For decisions which have been more generous with regard to the recognition of foreign judgments enforcing contingent fee agreements see 118 BGHZ 312 (340).’

⁷³⁰ So defined by § 1 of the German Federal Attorneys Law.

⁷³¹ § 1 of the Federal Attorneys Law. See moreover below par. 1.2.1.

⁷³² A BRUNS, above at footnote 50, 534.

legal compensation scheme regardless of the litigation's outcome,⁷³³ Bruns moreover states that another reason why the TPLF contracts would be void is because they would lead to over-compensation for funders, meant as an undue cost for the funded parties in terms of the large compensation share given to the third party funder⁷³⁴, and that TPLF could disturb the equal procedural powers⁷³⁵. The latter, in particular, would happen to the extent that this practice would allow the funded claimants to litigate without any risk, 'while leaving the defendant with no chance to secure comparable third-party financing support'. He ultimately concluded, in the light of the arguments discussed , that TPLF agreements would be void and therefore unenforceable, also in arbitration⁷³⁶.

2.1. TPLF, the lawyers' independence and the control over litigation

The arguments of Bruns represented above supporting the 'illegality' of TPLF have however not been left without criticisms⁷³⁷. First of all, while it can be discussed whether the prohibition for lawyers to enter into contingency fees/PQL could be opportune or not, its assimilation with TPLF contracts has been deemed to be inappropriate from a historical/functional point of view⁷³⁸. This assimilation would indeed fail to take into consideration that the prohibition on contingency fees/PQL in the civil law systems was indeed aimed at lawyers (and eventually to other personnel involved in the administration of justice) related to undue advantages given by their 'institutional' function. In particular, the rationale of the prohibition of PQL was to preserve the lawyers' independence and integrity with regard to the resolution of the dispute itself, in the interest of the client of a sound administration of justice. The assimilation to third party funders is therefore inopportune to the extent that the latter are private entities that do a financing activity entirely at their own risk, without being

⁷³³ Ibid.

⁷³⁴ Ibid., 535 – 537.

⁷³⁵ Ibid., 537 – 539.

⁷³⁶ Ibid., 539 - 540.

⁷³⁷ M COESTER and D NITZSCHE, at footnote 272, 95-96.

⁷³⁸ Ibid.

involved in the resolution of the dispute and/or providing compulsory legal advice⁷³⁹. For this reason, it would moreover be not correct to maintain that the TPLF agreements would be devised as a way to circumvent the contingency fee agreements, and therefore would be void because as they nonetheless pursue a prohibited scope⁷⁴⁰. Coester and Nitzsche indeed note that ‘under German law, legal acts circumventing a prohibited legal act are only null and void if the regulation is designed to avoid the result itself, independent of the means used to achieve it⁷⁴¹. In order to state whether this is the case, the object and purpose of the prohibiting law must be established⁷⁴². When introducing § 49b(2)⁷⁴³, the legislator stated that the sole aim of this regulation was to preserve the independence of the lawyer from his client, i.e. no acts taken by the lawyer when representing his client should relate to his own profit and economic interests. The legislator also clarified that the interests of the client were not protected and secured by this regulation, but only the independence of lawyers⁷⁴⁴. Due to the legislator's intention to preserve only the independence of lawyers, the financing contract is not null and void. It does not circumvent the purpose of the prohibition of

⁷³⁹ Ibid.

⁷⁴⁰ Ibid.

⁷⁴¹ See Federal Court of Justice, BGH N.J.W. 1959, 334; BGH N.J.W. 1991, 1061 (footnote of the original text).

⁷⁴² See W FLUME, *Allgemeiner Teil des Bürgerlichen Rechts, Zweiter Band --Das Rechtsgeschäft*, Berlin/Heidelberg/New York, 1979, 3rd ed, §17, n 5; see also Federal Court of Justice, BGH, BGHZ 100, 64. (footnote of the original text and adapted to the editor style)

⁷⁴³ Vereinbarungen, durch die eine Vergütung oder ihre Höhe vom Ausgang der Sache oder vom Erfolg der anwaltlichen Tätigkeit abhängig gemacht wird oder nach denen der Rechtsanwalt einen Teil des erstrittenen Betrages als Honorar erhält (Erfolgshonorar), sind unzulässig, soweit das echtsanwaltsvergütungsgesetz nichts anderes bestimmt. Vereinbarungen, durch die der Rechtsanwalt sich verpflichtet, Gerichtskosten, Verwaltungskosten oder Kosten anderer Beteiligter zu tragen, sind unzulässig. Ein Erfolgshonorar im Sinne des Satzes 1 liegt nicht vor, wenn lediglich vereinbart wird, dass sich die gesetzlichen Gebühren ohne weitere Bedingungen erhöhen. (The prohibition to enter into PQL for German lawyers, our note).

⁷⁴⁴ See papers issued by Deutscher Bundestag (German Parliament), BT-Dr. (Bundestagsdrucksache) 12/4993, S.31; see also J SCHEPKE, *Das Erfolgshonorar des Rechtsanwalts*, Tübingen, 1998, 117; HJ HELLWIG, ‘EU-Harmonisierung--Globalisierung--Kommerzialisierung Anwaltschaft quo vadis?’ (2000) *Anwaltsblatt*. 705 (footnote of the original text and adapted to the editor style)

contingency fees, as the financial interests of the client are not protected under this law⁷⁴⁵. The lawyer's independence is not endangered if his client is bound under a financing contract. The lawyer does not participate in any way in the success of the lawsuit. His statutory fees have to be paid in any event and are independent of the outcome of the lawsuit. They will be of the same amount if the lawsuit is won or lost. The additional amount to be paid by the financing company as compensation for the lawyer's additional work due to correspondence with the financing company also does not depend on the court's decision. As the prohibition against contingency fees protects the independence of lawyers but not the financial or economic interests of their clients, the fact that the client will have to pay a certain percentage of his award to the financing company is not of importance. A breach of the prohibition against lawyers' contingency fees would occur, if the lawyer himself is a partner or shareholder in the financing company. In this case the lawyer might indirectly participate in the financial success of the lawsuit as the outcome of the lawsuit may influence the dividends to be paid to him. The following distinctions can to be made:⁷⁴⁶

-- If a lawyer founds a financing company with the clear intention of financing the lawsuits of his own clients, s.49b(2)⁷⁴⁷ would be circumvented and the resulting financing contracts would be deemed null *C.J.Q. 98 and void under German law. In this case, the lawyer's independence could be compromised as his interests and the financial interests of his client would correspond, as he would both be paid as counsel and participate in any award as shareholder or partner of the financing company.

⁷⁴⁵ See also, N DETHLOFF, 'Verträge zur Prozessfinanzierung gegen Erfolgsbeteiligung' (2000) *Neue Juristische Wochenschrift* 2228; B GRUNEWALD, 'Rechtsschutzversicherungen und alternative Prozessfinanzierungen' (2001) *Anwaltsblatt*, 541-542; N MAUBACH, *Gewerbliche Prozessfinanzierung gegen Erfolgsbeteiligung*, Bonn, 2002, 41. But see A BRUNS, 'Das Verbot der quota litis und die erfolgshonorierte Prozeßfinanzierung' (2000) *Juristenzeitung*, 236 (arguing that the client should be protected against excessive amounts charged by his lawyer). (footnote of the original text and adapted to the editor style).

⁷⁴⁶ For further details hereto, see D NITZSCHE, *Ausgewählte rechtliche und praktische Probleme der gewerblichen Prozesskostenfinanzierung unter besonderer Berücksichtigung des Insolvenzrechts*, München, 2002, 56; see N MAUBACH, *Ibid.*, 161; DETHLOFF, *Ibid.*, 2228. (footnote of the original text and adapted to the editor style).

⁷⁴⁷ See above footnote 740 (our note).

Furthermore, in this case it has to be assumed that the company was founded expressly because the lawyer was not allowed to agree to contingency fees with his clients.

-- If a lawyer is a partner or shareholder in a financing company and this financing company does not conclude financing contracts with any clients of the lawyer, the lawyer's independence is not at issue.

-- A problematic case arises where a lawyer is a partner or shareholder in a financing company that concludes financing contracts with clients of the lawyer in addition to other plaintiffs. In such a case, whether the lawyer's independence was compromised must be evaluated in each single case. This will depend on the number of financing contracts normally concluded by the financing company per annum, how many partners or shareholders the financing company has and the percentage of the shares or partnership interests the lawyer holds in the financing company. It may be argued that the lawyer's independence will only be affected if the lawyer gains an additional substantial and significant financial advantage due to the success of the lawsuit in which he himself represents clients. At the time of writing, there has been no clear ruling on the cases to which this applies. As a result and to avoid any future disputes, lawyers holding shares or partnership interests in financing companies should prohibit their clients from concluding financing contracts with those companies⁷⁴⁸,

The issue of the independence of lawyers has also been discussed in more general terms⁷⁴⁹. More in particular, it has been noted that 'Section 49b(2)⁷⁵⁰ only applies to the financial independence of lawyers. Apart from this, judicial decisions mandate that each lawyer must be personally and professionally independent from any third parties, especially from the state, his clients, society and other persons⁷⁵¹. The lawyer has to reject and avoid any influence that could endanger his external or internal

⁷⁴⁸ M COESTER and D NITZSCHE, at footnote 274, 95-96.

⁷⁴⁹ Ibid, 97, par 5.4.

⁷⁵⁰ See footnote 740.

⁷⁵¹ See Federal Constitutional Court, BVerfGE 76, 184 et seq.; see also Busse, Freie Advokatur, AnwBl. 2001, 135, Federal Court of Justice, BGH, BGHSt 22, 157; K REDEKER, 'Freiheit der Advokatur—heute' (1987) *Neue Juristische Wochenschrift*, 2613. (footnote of the original text and adapted to the editor style)

independence. He may only pursue the interests of his client. Any real or perceived conflict of interest is forbidden. A client's financing contract, however, does not create a conflict of interest. As described in detail in 5.1, below, the lawyer is not bound in any respect to instructions the financing company may give him and may completely disregard them⁷⁵². In particular the financing company may not direct plaintiffs to certain lawyers, thereby creating a dependence between the lawyer and the financier⁷⁵³. It has however been pointed out also that this feature makes TPLF in contrast with the German Act on Legal Advice ('Rechtsberatungsgesetz'), which would give the monopoly over legal advice to lawyers (and notaries)⁷⁵⁴. These criticisms start from the consideration that 'the financing company not only assumes the financial risks of the lawsuit but--at least indirectly--also renders legal advice and counsel to the plaintiff, which would come under the Rechtsberatungsgesetz. This argument rests on the fact that before signing the financing contract, the financier reviews the plaintiff 's chances of success in detail. If financing contracts were covered by the Rechtsberatungsgesetz, an official approval would be necessary. Otherwise the financing contract would be null and void⁷⁵⁵. Under German law without such official approval, legal services may only be rendered by those enumerated in the Rechtsberatungsgesetz, e.g. lawyers and notaries. Financiers are not listed and cannot be included under any of the listed groups. According to the prevailing opinion, an official approval is not necessary as the financing company does not render legal services to the plaintiff⁷⁵⁶. The examination of the lawsuit by the financier is done only to protect its own interest, and the financier in no respect offers the plaintiff legal advice. The plaintiff receives legal advice only from the lawyer he retained. His lawyer is the only one who represents the client and who is charged with protecting the client's legal interests. The financing company, in contrast, protects only its own interests,

⁷⁵² D NITZSCHE, above at footnote 743, 76 (footnote of the original text and adapted to the editor style)

⁷⁵³ M COESTER and D NITZSCHE, at footnote 274, 97.

⁷⁵⁴ M COESTER and D NITZSCHE, at footnote 274, 97, par 5.3

⁷⁵⁵ For further details, see MAUBACH, above at footnote 742, 45 (footnote of the original text and adapted to the editor style).

⁷⁵⁶ See S STRÖBEL, *FORIS Beteiligungs-AG, BRAK-Mitt.*, Bundesrechtsanwaltskammer-Mitteilungen, 1998, 264; see also GRUNEWALD, above at footnote 738, 543. (footnote of the original text and adapted to the editor style).

which are identical to those of the plaintiff only to a limited extent. Furthermore, the financing company merely informs the plaintiff whether it accepts his offer to finance the lawsuit or not. In no case does the financier reveal the reasons for his decision to the plaintiff. Additionally, the plaintiff is not bound to conduct the lawsuit in a way determined or controlled by the financing company. If the financing company is not satisfied with the progress of the lawsuit, e.g. if the plaintiff does not accept a settlement *C.J.Q. 100 agreement with the defendant approved by the financing company, the financing company may give notice of termination of the contract. For the Rechtsberatungsgesetz to be applicable, the plaintiff would have to be advised by the financier on every detail of the case and especially how to enforce his rights. The fact that the financing company only furthers the legal interests of the plaintiff by assuming all financial risks and making advance payments does not meet this threshold,⁷⁵⁷.

2.2. Over-compensation for third party funders

The same authors also discuss the argument that TPLF may lead to overcompensation for the third party funders, in terms of large compensation shares imposed on funded parties. They start the discussions considering that '[I]n the beginning, financing companies often insisted on rates around 50 per cent. At the moment, rates between 20 and 30 per cent are usual in most cases. The criticism was based on a decision of the German Federal Supreme Court ('BGH', note of the Author) relating to permissible interest rates for loans and on the opinion of some legal commentators that these rules also applied to financing contracts and to the financier's participation. For loans--based on the decision of the 'BGH'--the following restrictions apply: interest rates are invalid if either the nominal interest rate exceeds the average interest rate by 12 or more percentage points⁷⁵⁸ or if the interest rate is over 100 per cent higher than the market average interest rate⁷⁵⁹. If these restrictions were applied to financing contracts as

⁷⁵⁷ M COESTER and D NITZSCHE, at footnote 274, 97, par 5.3

⁷⁵⁸ See Federal Court of Justice, BGH, N.J.W. 1995, 1148. (footnote of the original text)

⁷⁵⁹ See Federal Court of Justice, BGH. BGHZ 104, 105; see also Higher Regional Court Cologne, OLG Köln, ZIP (Zeitschrift für Wirtschaftsrecht) 1999, 2093. (footnote of the original text)

well, many percentage rates agreed upon would be deemed invalid. According to the prevailing opinion, however, this decision does not apply to *C.J.Q. 99 financing contracts. As discussed above, financing contracts cannot be considered as loan agreements because the financier assumes all financial risks related to the lawsuit and the plaintiff is not obliged to repay the financier's investment in any event, but only in the event of recovery. The 'BGH' decided that the restrictions mentioned above shall not be applicable to contracts that bear special risks⁷⁶⁰. In such cases, higher percentage rates are permitted. Such special risks are created for the financing company as the decision of the court is uncertain and unpredictable and, even if the plaintiff is successful in the court of first instance, the defendant may be entitled to appeal. As a consequence, participation rates are only invalid in very limited cases. This question has to be evaluated on a case by case basis. A uniform rate valid in each single case cannot be established. Percentage rates between 20 and 30 per cent for claims having a values of more than € 50,000 seem to be acceptable and valid^{761,762}.

2.3. TPLF and the equal procedural powers

Finally, the last argument - that TPLF could disturb the equal procedural powers and discriminate against the defendant – also seems quite unfounded, and lacks empiric assessment and an economics rationale. Coester and Nitzsche have indeed noted that '[t]he balance of power in litigation means that both plaintiff and defendant have the same rights, obligations and possibilities in general, that the litigation risks are equal for both parties and that the chance of success before the court is not dependent upon the wealth *C.J.Q. 101 of the parties.⁷⁶³ Under Prozessfinanzierung, the plaintiff 's financial risks are covered in total, whereas the defendant has no such possibility, unless he previously contracted for legal expenses insurance policy, but the latter is not available in all cases. Such criticism is not justified as in many cases only the

⁷⁶⁰ See Federal Court of Justice, BGH, N.J.W. 1994, 1056, 1057. (footnote of the original text)

⁷⁶¹ For further details, see NITZSCHE, 66. (footnote of the original text and adapted to the editor style)

⁷⁶² M COESTER and D NITZSCHE, at footnote 274, 96.

⁷⁶³ See Federal Constitutional Court, BVerfG, BVerfGE 1, 275 et seq. ; see also BVerfGE 2, 119, BVerfGE 9, 124, and BVerfG, NJW 2000, 1937. (footnote of the original text)

engagement of a financing company enables the plaintiff to initiate litigation and to assert his claims against the defendant before the court. Often claims are not asserted because the rightful plaintiff does not have the financial capacity to advance the court fees necessary to initiate the action. Therefore, Prozessfinanzierung is actually a means to establish or restore the balance of power between plaintiff and defendant and not to create an imbalance. Furthermore, the situation is comparable to that where the financial risks of either the plaintiff or the defendant are covered by a legal expenses insurance policy.⁷⁶⁴ Such a situation is not criticised as disturbing the balance of power between the opposing parties in litigation, but is accepted as a normal part of the risks of everyday life. The same applies to Prozessfinanzierung⁷⁶⁵. It is moreover to be noted that nothing excludes that defendants as well may benefit from TPLF or (if possible) other ALF arrangements, and therefore have the possibility to face litigation without costs and risks.

The discussions on the legality of TPLF in Germany have also concerned the active model with the claim transfer. It is to be recalled, in this regard, that in Germany the Higher Regional Court ('Oberlandesgericht') of Düsseldorf has already considered this matter, following a judgment delivered by the Regional Court ('Landgericht') Düsseldorf of 17 December 2013. The case concerned a claim for damages arising out of a cartel brought by Cartel Damage Claims SA, a vehicle established by the Belgian company Cartel Damage Claims ('CDC') that was assigned the claims. In this case, the Oberlandesgericht dismissed the appeal because the scheme allegedly violated 'the public morals as they amounted to an uneven distribution of cost risks to the detriment of the defendants', and voided the claim transfer⁷⁶⁶. In particular, the court noted that 'the main aim of the claims transfer from the damaged cement purchasers to CDC SA was to shift the cost risk to an entity which in the opinion of the court did not show the required standard (of financial capacity, note of the Author) that at the time of entering

⁷⁶⁴ See GRUNEWALD, above at footnote 739, 543. (footnote of the original text and adapted to the editor style)

⁷⁶⁵ M COESTER and D NITZSCHE, above at footnote 274, 97-98, par 5.5

⁷⁶⁶ See the company's press release 'Higher Regional Court dismisses appeal in German cement cartel case', of 25 February 2015, available at <http://www.carteldamageclaims.com/wordpress/wp-content/uploads/2014/02/Press-release-cement-case-judgment-25-Feb-2015.pdf> (last vis. 4/2/2017).

into the contracts in 2008/2009 it had the financial capacity to cover the potential statutory adverse costs which could be awarded to the defendants.⁷⁶⁷ It is however important to note that ‘[d]espite the negative decision in the case at hand the Higher Regional Court nevertheless specifically confirmed that as a matter of principle damage claims resulting from competition law infringements can be transferred to a ‘claims vehicle’, subject to the conditions laid down in the judgment, i.e. a registration under the German Legal Services Act and sufficient provisions which avoid the risk that the defendants will not be able to recover their statutory reimbursable costs in case the damage action is lost’⁷⁶⁸.

The latter conclusion seems therefore more in line with the majority of German authors, which consider the TPLF contract valid, although there is uncertainty regarding its nature. The prevailing opinion is that the TPLF contract can neither be defined as a loan, nor as an insurance, but eventually as a ‘silent partnership’ (‘innengesellschaft’) between the funder and the claimant aimed at pursuing the joint goal of enforcing the claim in court⁷⁶⁹. TPLF indeed, unlike loans, is provided on a non recourse basis, and is backed only by the potential outcome of the case⁷⁷⁰. TPLF would moreover differ from insurances because there is no payment of a premium to the third party funder⁷⁷¹. The ‘silent partnership’ scheme would instead be more suitable because the claimant and the third party funder would be pursuing the same goal of ‘asserting plaintiff’s claim before the court, winning the lawsuit, seeking the payment from the defendant and enforcement of the judgment. The common goal of both is to achieve the highest possible award. The partnership is an undisclosed partnership, as only one partner, i.e. the plaintiff, is entitled to represent the partnership vis-à-vis third parties. The plaintiff asserts the claim in his own name and decides on all steps to be taken independently. Another reason why the financing contract creates a silent partnership--with the financing company as silent partner--as opposed to a normal partnership is that no partnership assets exist. After signing the financing contract,

⁷⁶⁷ Ibid.

⁷⁶⁸ Ibid.

⁷⁶⁹ See M COESTER and D NITZSCHE, at footnote 274, 94-95.

⁷⁷⁰ Ibid.

⁷⁷¹ Ibid

there are no assets that belong jointly to the financing company and to the plaintiff. Notwithstanding the conclusion of the financing contract, all the assets of the plaintiff and the financier are strictly separated. The financier contributes to the partnership through the assumption of all financial risks relating to the lawsuit, including any advance payments and final payments to be made after the final decision of the court, e.g. to the lawyers of the defendant in case the lawsuit is lost, with his contribution, he facilitates the lawsuit of the plaintiff. After the final court decision the partnership is liquidated ...⁷⁷².

3. Concluding Remarks. No particular concerns on the legality of TPLF

The discussions on the TPLF contractual form in France and Germany have come to similar conclusions that this contract should not be encompassed in an existing codified contractual form, but instead has to be reconstructed on a case-by-case basis. This approach is effectively consistent with the feature of TPLF of being a ‘bespoke transaction’, to be tailored depending on the specific needs of the parties at stake. Reporting the debates on the legality of TPLF in France and Germany has been important because their civil codes have historically represented a benchmark for the codifications of all the other civil law countries. It is therefore possible that similar arguments could be applied to the jurisdictions that have drawn inspiration from them, of course adapting such considerations to their own legal framework (including the regulations applicable to the lawyers). As however seen in Chapter 3.2, similar debates have taken place already in other jurisdictions, even where there are no local funders, which demonstrates how TPLF would be a global phenomenon that would be capable of going beyond the barriers of single jurisdictions. Among these, it is possible to recall that the initial discussions on the legality of TPLF took place in Spain⁷⁷³ and Italy⁷⁷⁴, where in both circumstances it was recognised that the main applicable civil law principles (above all, freedom to contract and access to justice) should not prevent the designing of legal TPLF schemes. While of course no definitive conclusions can be

⁷⁷² Ibid.

⁷⁷³ MO COJO, above at footnote 297, 362.

⁷⁷⁴ GM SOLAS, above at footnote 297. 266.

drawn on this point and much will depend on how operators would face the problems related to TPLF in practice, no general prohibitions would seem to apply to such transactions in these jurisdictions.

Chapter 8

Desirability of TPLF in the Post Lisbon European Union Legal System

In December 2009, following the troubled story of the failed Constitution of Europe, the Treaty of Lisbon entered into force after being signed by all of the European Member States. The Lisbon Treaty incorporates all previous treaties and marks the official birth of the European Union as a political entity, with its institutional autonomy and more prerogatives in terms of international law. In doing so, it has for the first time in its history truly moved from a mere market oriented structure and become a hybrid constitutional entity with many of the traditional national states features and prerogatives. This is reflected also in its new course in political economy, having the EU endorsed as a social market economy model, but also in its re-inforced position as a global actor. Most importantly for this work, it is moreover with the adoption of the Lisbon Treaty that human rights have acquired a new dimension in the EU, due to the entry into force of the EU Charter of Fundamental Rights ('EUCFR')⁷⁷⁵, which now has the 'same legal value as the Treaties. Moreover, article 52.3 of the 'EUCFR' states that the EU Court of Justice ('CJEU') shall consider the Charter provisions in the light of the 'ECHR' provisions and case law⁷⁷⁶. Human rights are now an integral part of the EU legal framework, which has thus made an important step forwards not only in their protection, but also in its overall constitutional development.

On a more specific level, after the entry into force of the Lisbon Treaty there have been several developments in legislation that have enlarged the possibility for European citizens to access justice and enforce their rights granted by the EU. Starting from these developments and considerations, we will then see in practice what could be the

⁷⁷⁵ Article 6 of the Treaty on European Union states that 'The Union recognizes the rights, freedoms and principles enshrined in the Charter of Fundamental Rights of 7 December 2000, adjusted December 12, 2007 in Strasbourg, which has the same legal value as the Treaties...'

⁷⁷⁶ 'Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights are equal to those conferred by this Convention. This provision shall not prevent Union law providing more extensive protection'. The ECHR provisions and jurisprudence have been so embraced by the EU legal order with the same meaning that they enjoy in Strasbourg, subject to the possibility that EU law recognises a higher level of protection.

role that TPLF would play in this context, and whether this would be desirable from a private and societal point of view. First of all, we will introduce this matter by starting from the general principle of access to justice and equality of arms under the ‘EUCFR’ and ‘ECHR’. It will then identify some key areas where access to justice was enlarged under EU law but where nevertheless some barriers (very often of national member states’ legislation derivation) prevent the actual enforcement of rights of EU derivation. In other words, recalling the economic model outlined above, and in light of the current legislation, we will discuss some areas where TPLF would most likely promote an optimal enforcement of litigious rights.

The second paragraph will instead assess the social desirability of TPLF under the EU main political economic principles as resulting from the entry into force of the Lisbon Treaty. More in particular, considering that TPLF could be both an efficient and equitable instrument, We will discuss how and to what extent it would be beneficial from a EU societal point of view in the light of the newly adopted model of the European ‘highly competitive social market economy’,⁷⁷⁷. It will moreover assess the societal desirability of TPLF with regard to the establishment of a European Area of Justice, very often entailing mechanisms to spur judicial cooperation in civil and commercial matters, but also to create alternatives to the ordinary court proceedings. It will be interesting to discuss this issue in relation to TPLF as the objective of these reforms was to promote the integration of the EU member states’ markets and legal systems by facilitating and/or removing the barriers to access justice and resolve civil and commercial disputes.

1. TPLF and the right of access to justice and equality of arms under European Union law

In the course of this thesis we have repeatedly mentioned that TPLF enhances access to justice and equality of arms of parties to a dispute, especially if impecunious. The economic model attempted to justify this assumption, and demonstrated that in certain situations this may also hold true for parties that could anyway afford the costs of a dispute, but nevertheless decide to share them with third entities. Access to justice is

⁷⁷⁷ Article 3.3 of the Treaty on European Union (‘TEU’)

however not a universally recognised value, but it is such only if a specific jurisdiction guarantees it by effective means to every citizen. We could think for example of a hypothetical jurisdiction where citizens are divided into social classes and only those of the upper class have the widest access to courts. This is not the case of course of any of the EU member states, although this right has quite a recent history in this legal system. Indeed access to justice has been for the first time ‘constitutionalized’ with the Lisbon Treaty at Article 47 of the ‘EUCFR’, which has to be interpreted in the light of the Article 6 of the ‘ECHR’ and the related jurisprudence. The right of access to justice, which is used interchangeably with ‘effective remedy’, generally refers to: the right to have an effective remedy before a tribunal; the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law; the right to be advised, defended and represented; and the right to obtain legal aid for those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice⁷⁷⁸. Equality of arms instead derives from the more general concept of ‘fairness’, and refers to the possibility for the different parties to a judgment to enjoy the same procedural rights and conditions⁷⁷⁹.

Access to justice in the EU has been put under threat due to a series of institutional and societal changes that have somehow weakened this fundamental provision. In particular, these changes have raised those barriers that already forty years ago Mauro Cappelletti had identified in his seminal work⁷⁸⁰, especially for impecunious claimants, the costs of litigation. This holds even more true in today’s EU, where the rule of law is a well-established principle. It is a matter of fact that, while the European institutions have tried to enlarge access to justice under EU law, its actual application has so far not given general positive results also because of these barriers⁷⁸¹. Actually, access to justice is probably one of those fundamental rights that needs a thorough re-

⁷⁷⁸ ME MÉNDEZ PINEDO, above at footnote 5. See moreover the *Explanations relating to the EU Charter of Fundamental Rights*, where reference is made to the relevant case law (ECtHR, *Airey v. Ireland*, No. 6289/73, 09 October 1979) of the ECHR.

⁷⁷⁹ Id.

⁷⁸⁰ Above all, see M CAPPELLETTI (ed), at footnote 1. More specifically on the mentioned point, see M CAPPELLETTI and B GARTH, above at footnote 321, 186.

⁷⁸¹ See, infra.

interpretation in the light of the historical moment⁷⁸². In this regard, also to provide a practical perspective for TPLF, we will now analyse three areas of EU law where it is widely known that access to justice is a concern. We will try to understand the reasons of this situation, by making reference also to the current European legislation, and verifying whether this could be regarded as a market failure in access to justice. If this is the case, we will then consider whether and how TPLF may improve this situation. Finally, each paragraph will also discuss what could be the societal repercussion of enhancing access to justice and equality of arms in single disputes.

1.1. TPLF and the European private enforcement of competition law

The private enforcement of EU competition law concerns the actions for damages brought by the victims of cartels or other anti-competitive behaviour. Chapter 5 (Par 1.2.1.2.) represented the situation in which the victims bring an action following the sanctioning decision of the European Commission or national competitive authorities (follow-on action). It is however worth mentioning that this could happen also even without a decision being enacted (stand-alone action), although this is much rarer due to the further complexities that such cases would present⁷⁸³. We are now going a bit deeper into these considerations on access to justice in the EU private enforcement of competition law by analysing more in detail the underlying legal framework, and how this may impact on access to justice.

1.1.1. The current European framework and the courts' interpretation: a market failure in access to justice?

The history of the EU's private enforcement of competition law has much to do with the enlargement of the right of access to justice under the Union's law. It dates back to 2001, when the CJEU, in *Courage v Crehan*, for the first time recognized that 'a party to a contract liable to restrict or distort competition within the meaning of Article 85 of

⁷⁸² ME MÉNDEZ PINEDO, above at footnote 5.

⁷⁸³ For example, in the stand-alone actions, unlike the follow-on ones, claimants have the burden of proof to show that a competition law infringement has been committed. See Art. 16 of the Directive on Actions for Damages.

the Treaty (now Article 101 TFEU) can rely on the breach of that provision to obtain relief from the other contracting party,⁷⁸⁴ A few years later, in the case of Manfredi, the Court recognized that ‘any individual can rely on a breach of Article 81 EC (now Article 101 TFEU) before a national court and therefore rely on the invalidity of an agreement or practice prohibited under that article … [to] claim compensation for the harm suffered …’⁷⁸⁵. In so doing the CJEU has recognized for the first time in the history of the EU the right of victims of anti-competitive behaviour to access justice and obtain compensation for the damages resulting therefrom. The European Commission, in the light of and in parallel with these cases, has triggered discussions on the necessity to have effective redress mechanisms for victims of cartels or other abusive practices at the EU’s level⁷⁸⁶. The result of these discussions has been the enactment of the Directive on Actions for Damages, which aims at facilitating the private enforcement of EU competition law, and in particular at fully compensating those who suffered harm from anti-competitive practices. The Directive on Actions for

⁷⁸⁴ Case C-453/99, *Courage v Crehan*, ECLI:EU:C:2001:465.

⁷⁸⁵ Joined Case C-295/04 to C-298/04, *Manfredi and others v Lloyd Adriatico Assicurazioni SpA and Others*, ECLI:EU:C:2006:461. There have been some other cases that have impacted on the ability of victims of anti-competitive behaviour to access justice. For example, see Case C-360/09 *Pfeiderer*, ECLI:EU:C:2011:389, where the CJEU ruled that EU legislation does not prohibit access to leniency documents by third parties seeking for damages. It must be noted, though, that the Directive on Actions for Damages has reversed this judgement (see art. 6.6.); and Case C-557-12 *Kone*, ECLI:EU:C:2014:1317 where the Court ruled that ‘Article 101 TFEU must be interpreted as meaning that it precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions’. This ruling, by indirectly endorsing the ‘umbrella theory’, enlarges the number of companies that can be held liable for anti-competitive harm and, thus, the amount of damages that can be claimed. See a case comment of M Veenbrink and CS Rusu, ‘Case C-557/12 *Kone AG and Others v ÖBB Infrastruktur AG*’ (2014) *The Competition Law Review*, Vol 10, Issue 1, 107.

⁷⁸⁶ It first enacted a Green Paper and then a White Paper on damages actions for breach of the EC anti-trust rules, acknowledging and developing what was stated in the Courage and Manfredi cases (see above footnote 777 and 778). It then drafted a Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU, which has recently been adopted by the European institutions and transposed by the member states.

Damages deals with many aspects related to access to justice and equality of arms, such as standing and access to evidence. However, unlike in the US (where victims of anti-trust violations are entitled to recover a trebled amount of damages), the European approach does not conceive of private damages actions as a tool for punishment of those who breach anti-trust rules⁷⁸⁷. This remains the sole responsibility of the EU Commission and National Competition Authorities, which find, investigate and sanction infringements in the public interest⁷⁸⁸. Nevertheless, private and public enforcement of competition law are meant to be complementary tools⁷⁸⁹, and follow on actions are certainly at the core of this relationship. While the case law on the matter is today quite settled and the legislation has now been mainly harmonised by the transposition of the Directive on Actions for Damages, it does not seem that recovering damages arising out of anti-competitive behaviour is being made effectively⁷⁹⁰. Indeed, the high (and uncertain) costs and risks of these types of disputes often discourage consumers and small businesses that have suffered financial losses as a consequence of cartels from filing their lawsuits. The quantification of individual harm deriving from market-wide competition law infringements⁷⁹¹, information asymmetries and lack of evidence due to the secret nature of cartels, high costs for lawyers and economists, and potentially high court fees are the common obstacles that these entities face in practice⁷⁹². Moreover, given that cartels often affect numerous (and most likely

⁷⁸⁷ Art. 3 of the Directive on Actions for Damages.

⁷⁸⁸ The main legal framework to look at, in this regard, is the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now art 101 and 102 TFEU).

⁷⁸⁹ F WEBER and MG FAURE, above at footnote 613.

⁷⁹⁰ RT WIESER, ‘Private v Public Enforcement of European Competition Law?: Relationship between effective enforcement of the law and individual justice’ (2016) *Durham theses, Durham University. Available at Durham E-Theses Online*, available at <http://etheses.dur.ac.uk/11641/> (last vis. 3.3.2017) See in particular par. 2.1., ‘The underdevelopment of private competition law enforcement in Europe’, also for some empirical evidence.

⁷⁹¹ In this regard, see the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07).

⁷⁹² T SCHREIBER and M SMITH, ‘The case for bundling antitrust damage claims by assignment’, *Concurrences*, n 3-2014, 23-26.

impecunious) victims, it is not uncommon that the structural asymmetry between claimants and defendants is accentuated⁷⁹³. In fact, in this type of claim, inequality of arms and legal uncertainty are high barriers to access justice, and often discourage risk-averse entities from enforcing their legitimate rights. It is well known for example that in follow-on actions, the ascertained cartel infringements are a (though rebuttable) presumption of harm⁷⁹⁴, and therefore theoretically there would be serious grounds for bringing legal actions. Other factors that increase the aversion to costs and risks of such claimants is the passing-on defence, which gives to ‘the defendant in an action for damages [the possibility to] invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law⁷⁹⁵. For these reasons, but also because the Directive on Actions for Damages has just entered into force, competition law damages claims are however to date very limited⁷⁹⁶. If we recall the economic model described above, we will indeed realise that in such claims most of the variables that affect the parties capability to sustain the costs and the risks of the claims are present, but also that prevent them from pricing exactly the value of their claim⁷⁹⁷. It moreover demonstrated this problem in practical terms in Chapter 5 Par. 1.2.1., where a comparison with the US system has been drawn.

⁷⁹³ Similar arguments hold true in ADR proceedings, in particular in those where one or more consumers try to challenge big companies’ misbehaviour. Indeed, in these cases TPLF seem to be the right answer to balance the (financial) asymmetry between the parties, and guarantee a fair dispute settlement. See MG FAURE, ‘CADR and Settlement of Claims. A Few Economic Observations’ (2014), in C HODGES and A STADLER (eds), *Resolving mass disputes. ADR and settlement of mass claims*, 38-60, Cheltenham: Edward Elgar, 2013.

⁷⁹⁴ Art. 16 of the Directive on Action for Damages.

⁷⁹⁵ Art. 13 of the Directive on Actions for Damages.

⁷⁹⁶ See Ch. 3 and 4 of BJ RODGER, at footnote 97.

⁷⁹⁷ This of course will depend also on the specific jurisdiction where the claim will be ultimately filed. It is interesting in this regard to recall the work BJ RODGER, at footnote 97, Part I, Ch. 2.

1.1.2. Addressing the market failure in the European private enforcement of competition law

European institutions⁷⁹⁸ and stakeholders⁷⁹⁹ are aware of the problem mentioned in access to justice, although the issue of external funding has not yet properly been addressed. In this regard, it is worth recalling that in the EU member states the lawyers' total contingency fees are prohibited, although there is often room for other fees that are nonetheless based on success⁸⁰⁰. It moreover seems that to date the LEI products to cover these damages and the related legal expenses do not exist⁸⁰¹, including those for the adverse cost risk⁸⁰². We have ultimately shown this in practical terms in the concrete case presented in Chapter 5 (par 1.2.1.2.), also by explaining how TPLF, in this field, may prove (and is already proving, though very limitedly) to be a very efficient method to address this market failure. This could be either in its more passive (financing the lawsuits' costs on a non-recourse basis)⁸⁰³ or active form (with the claim transfer)⁸⁰⁴. In the first case, it is likely that entrepreneurial claimant lawyers and/or consumer associations (or whoever has standing according to national laws) would do the work of 'book-building' among the potential claimants, plus all the normal legal activities (evidence related and other), eventually together with the economists that are called to quantify the damages. Third party funders would instead maintain all or part of the costs deriving from this work (including the expert fees) and bear the risk for the adverse costs (eventually entering into LEI agreements to cover them), in a way that all the risks and the costs could be optimally allocated. In the second case, it is likely that the third party funders would transfer the claims (to

⁷⁹⁸ For example, see considerandum n. 9, 14, 15, 46 and 47 of the Directive on Actions for Damages.

⁷⁹⁹ See, for example, A RILEY and J PEYSNER, 'Damages in EC Antitrust actions: Who pays the Piper?' (2006) *European Law Review*, Vol 31, 748.

⁸⁰⁰ See above Chapter 4, Par. 2.2.1., the discussions on the EU member states.

⁸⁰¹ See above Chapter 4, par 2.3.

⁸⁰² As mentioned above in footnote 491, also reporting some empirical study, generally in all of the EU member states the English rule on costs applies. The claimant thus as a rule faces the risk, in case of loss, of having to pay the expenses of the counter-party.

⁸⁰³ Chapter 4, par. 2.1.1.1.

⁸⁰⁴ Chapter 4, par. 2.1.1.2.

themselves or, most likely, to an SPV) and then enforce these against the original defendants (or anyhow organise this scheme on the victims' behalf and then maintain the costs in exchange for a share in the case proceeds in case of victory). In fact, the comparative overview shows that these practices already exist in continental Europe⁸⁰⁵, although to a limited extent, for example in Germany, Austria, Belgium and the Netherlands, carried out by entities such as Cartel Damage Claims⁸⁰⁶ or Deminor⁸⁰⁷. It has to be noted on this point that the European legislator, as a way to facilitate the enforcement of actions for damages, has explicitly mentioned the possibility of transferring claims to third parties, which can also access to evidence to prepare for their case⁸⁰⁸. It is also worth noting that these provisions, by the nature of the legislative means through which they have been enacted, are now binding on the European member states (at least in those states that, to date, have transposed the Directive). It is for this reason, and for reasons of practicality, that especially in the European market wide cartels, it is likely that the active TPLF model would be more of use, given that it would be necessary to represent diffuse interests of companies or individuals based throughout Europe. This model indeed helps to reunite more efficiently a multitude of claims into a single entity, and to represent them unitarily. It is moreover not to be excluded that some national legislation on collective redress, especially if the jurisdiction is recognised as efficient in this field and if the claimants are numerous, could also be applied⁸⁰⁹. This will of course depend on the actual implementation of national legislative acts that would enlarge the possibility of using collective redress mechanisms for European private enforcement actions. While at this point it is not possible to foresee in practical terms how and whether this will happen, it is nevertheless possible to note that the actual European (quasi) legislation, of which partial analysis will be provided for in the paragraph below on collective redress, does

⁸⁰⁵ Chapter 3, par. 2.

⁸⁰⁶ <http://www.carteldamageclaims.com> (last vis. 10.2.2017)

⁸⁰⁷ <http://www.deminor.com/drs/en/services/antitrust-damages-actions> (last vis. 10.2.2017)

⁸⁰⁸ Art. 2 (4) and 7.3, and consideranda 31 and 32 of the Directive on Action for Damages.

⁸⁰⁹ D GERADIN. 'Collective Redress for Anti-trust Damages in the European Union: Is this a Reality Now?' (2015) *George Mason Law Review*, Vol 22, N 5, 1079. For TPLF and collective redress see details in the following paragraph.

not exclude (and actually encourages) such an approach.

1.1.3. Repercussions at a societal level

In the light of the above discussions, there seems therefore to be little doubt that TPLF, both in its active and passive form, will play a significant role in this the EU private enforcement of competition law, as it is actually already happening. Moreover, TPLF would effectively complement the public enforcement of competition law⁸¹⁰, in consideration of the fact that TPLF also has a deterrent effect on potential violators. If companies are aware that the victims of their anti-competitive behaviour may be able to take advantage of further financial (and organisational) resources of third parties, they will be incentivised to take more care to avoid liability, and so harm would potentially not be spread to society. This holds even more true if it is considered that the victims of such anti-competitive behaviour are often cost and risk averse claimants, and that the wrongdoers are, instead, often strong defendants. In this regard, it is worth noting that TPLF may effect redistribution in an area that is affected by socially harmful behaviour such as cartels and abuse of dominance, which directly reduce social welfare through higher prices, lower outputs and other abuses of property rights.

1.2. TPLF and the European collective redress mechanisms

Collective redress is often regarded as one of the legal areas where access to justice and equality of arms is more of a concern, and for this reason the debate on funding has already been addressed for some time⁸¹¹. In such actions, by definition, a multitude

⁸¹⁰ See F WEBER and MG FAURE, above at footnote 613.

⁸¹¹ In the European context see C VELJANOVSKI, above at footnote 371; C HODGES, ‘Collective Redress in Europe: The New Model’ (2010) *Civil Justice Quarterly*, Vol 370; S VOET, ‘The Crux of the Matter: Funding and Financing Collective Redress Mechanisms’ (2014), in B HESS, M BERGSTRÖM E STORSKRUBB (eds) *EU Civil Justice. Current Issues and Future Outlook*, Hart Publishing, 201. This has however long been discussed at a global level. See, inter alia, DR HENSLER, ‘Financing Civil Litigation: The US Perspective’ in M TUIL and L VISSCHER (eds), above at footnote 393, 155; M LEGG, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions. The Need for a Legislative Common Fund Approach’ (2011) *Civil Justice Quarterly*, Vol 30, n 1, 52; V MORABITO, ‘Federal Class Actions, Contingency Fees, and the Rules Governing Litigation

of claimants (often with small claims) join their forces to bring forward their claims against strong defendants that have committed widespread wrongs, which often have also social repercussions. For these reasons, these problems are likely to be even more accentuated than single actions; to the extent that they by definition create more organisational and practical difficulties⁸¹².

1.2.1. The current European framework: a market failure in access to justice?

The European institutions are aware of this private and social problem and have commenced a debate that has then brought a Communication on collective redress and then a Recommendation for member states⁸¹³. In the latter, in particular, the European institutions have set forth a series of principles that European member states are recommended to adopt as way to create homogeneous national systems for collective redress. It is interesting to see that in this soft legislation for the first time the issue of funding has been thoroughly addressed at a European level⁸¹⁴. On the one hand, the approach towards the possibility of public funding appears to be definitely negative⁸¹⁵. Public funding for collective redress, in any case, would not have been probably realistic in a scenario of general spending review and cuts to legal aid⁸¹⁶. On the other

Costs' (1995) *Monash University Law Review*, Vol 21, N 2, 231; TD ROWE JR, 'Shift Happens: Pressure on Foreign Attorney-fee Paradigms from Class Actions' (2003) *Duke Journal of Comparative and International Law*, Vol 13, 125; and J WALKER, S KHOURI and W ATTRILL, 'Funding Criteria for Class Actions' (2009) *University of New South Wales Law Journal*, Vol 32, N 3, 1036.

⁸¹² S KESKE, A RENDA, and R VAN DEN BERGH above at footnote 560. This article deals with this issue only with regard to mass litigation.

⁸¹³ See above at footnote 453.

⁸¹⁴ This discussion has been reported especially in par. 3.9 of the Communication on Collective Redress.

⁸¹⁵ The European 'Commission does not find it necessary to recommend direct support from public funds, since if the court finds that damage has been sustained, the party suffering that damage will obtain compensation from the losing party, including their legal costs'. Par 3.9.2. of the Communication on Collective Redress.

⁸¹⁶ The public funding in collective action has however been discussed. The issue basically concerns whether devoting public resources to high risk and costly litigation would be justified. Public aided

hand, discussions on private incentives have been influenced by the fear of abuses that, according to the European Commission, have occurred in the US with contingency fees in class actions⁸¹⁷. This is the reason why the approach towards similar fee schemes tends to be negative⁸¹⁸, and treble damages are excluded⁸¹⁹. In a context where moreover the loser-pay rule on costs is encouraged⁸²⁰, it seems unlikely that such actions would be brought forward with self-organisation and own funding by the classes of claimants. TPLF seems therefore to represent the main possibility to enforce at least those big collective actions that require significant organisational and financial efforts to be filed, such as the multi-jurisdictional disputes against large defendants. It is however to be recalled that, as the Dexia example in the Netherlands recalled above⁸²¹ it demonstrates, certain collective redress mechanisms are already being relied upon by entrepreneurial lawyers able to raise funding from different sources and

claimants, especially if no mechanism of control on the merits ex ante is foreseen, could indeed 'quasi-free-ride' on state resources in order to challenge more powerful defendants. In this context, these defendants would be in a very inopportune situation, as the costs for defending might equal or even exceed the costs of settling (this phenomenon is often referred to as 'Legal Aid blackmail'). In this scenario, therefore, the public could be a 'double loser', in the sense that it might have to devote resources to an initiative that is not meritorious, or anyway spur claimants' moral hazard. The lawyers themselves might even motivate this behaviour, insofar as they have a financial interest in bringing the case forward, especially if paid on an hourly basis. However, it must not be under-estimated that legal aid is a fundamental aspect of the right to a fair trial, and has been established that the ECHR right to a fair trial includes also highly complex cases. On the matter, see D COLLINS, above at footnote 684, 211. As with regard to the ECHR case law see *Airey v Ireland* [1979] ECHR 6289/73 [26]. See also *Steel and Morris v United Kingdom* (2005) ECHR 68416/01 in which the denial of legal aid in a defence against defamation was held to violate the right to a fair trial under Art 6(1) of the ECHR.

⁸¹⁷ See, Communication on Collective Redress, par 3. For a general analysis on the problems of abuses in class actions and contingency fees, see L BRICKMAN, *Introduction to Lawyer Barons: What Their Contingency Fees Really Cost America*, Cambridge University Press, 2011; A SHAJNFELD, 'A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements' (2009-2010) *New York Law School Law Review*, Vol 54.

⁸¹⁸ Recommendation on Collective Redress, Article 30.

⁸¹⁹ Recommendation on Collective Redress, Article 31

⁸²⁰ Art. 13 of the Recommendation on Collective Redress and par. 3.9.3. of the Communication on Collective Redress.

⁸²¹ Chapter 3, par. 2.5.

at the same time enforce such actions in favourable jurisdictions, such as the Netherlands⁸²².

1.2.2. Addressing the market failure in the European collective redress

In light of the previous discussions, and more in general recalling the discussions on the economics of litigation presented in Chapter 5, the enforcement of collective actions in the European context without TPLF would not be without difficulties. For this reason, it is likely that funders will more and more look at such areas, and that the use of TPLF will increase. In this regard, it is worth recalling some potentially applicable provisions on TPLF, which has been set forth in the Recommendation on Collective Redress⁸²³. The first principle that is at stake is provided for in par. 14 of the Recommendation on collective Redress: ‘The claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action.’ Being the collective redress mainly (although not necessarily) aimed at obtaining redress for consumers, the European legislator wants to ensure transparency concerning who is ultimately supporting it. This transparency might be necessary to prevent different abuses/costs *ex ante* in the modalities described in the subsequent paragraphs 15, 16 and 32, which so state: ‘15. The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party: (a) there is a conflict of interest between the third party and the claimant party and its members; (b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure; (c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail. 16. The Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party: (a) to seek to influence procedural decisions of the claimant party, including on settlements; (b) to provide financing for a collective action against a defendant who is a competitor of the fund

⁸²² See E SOERJATIN, above at footnote 288.

⁸²³ Chapter 6, par 1.5. It is thus to be noted that these provisions being only soft-law, will necessarily require to be implemented by the national member states, and are now not binding.

provider or against a defendant on whom the fund provider is dependant; (c) to charge excessive interest on the funds provided. ... 32. The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties'.

1.2.3. Repercussions at a societal level

The analysis of the above mentioned soft legislation shows how the approach of the European institutions seems not only aimed at preventing the costs that TPLF may impose on individuals (claimants and defendants), but also at a societal level⁸²⁴. This initial (soft) regulation is not binding and will have to be implemented with autonomous legislations in single member states. It is thus not possible at this moment to have a concrete assessment of its proportionality. This does not however have to conceal that, as mentioned in the introduction of this paragraphs, collective redress often aims at fighting widespread wrongs with a social dimension (think about the cases of the deceitful bank and the polluter mentioned at the beginning of par 2. of Chapter 5), and that thus such actions would be socially beneficial. It is well known that this type of wrong-doings (and other similar ones) are not uncommon at all in the EU legal context, and for this reason the Recommendation on Collective Redress has indeed attempted to promote collective mechanisms⁸²⁵. It is moreover worth anticipating that these social wrongs also seem to counter the new social market

⁸²⁴ This approach is also endorsed in the Communication on Collective Redress: 'par. 3.9 Direct third-party financing of collective actions is seen as a potential factor driving abusive litigation, unless it is properly regulated. ... Third-party financing is an area which needs to be designed in a way that it serves in a proportionate manner the objective of ensuring access to justice. The Commission therefore takes the view in the Commission Recommendation that it should be made subject to certain conditions. An inappropriate and non-transparent system of third party financing runs the risk of stimulating abusive litigation or litigation that does little to serve the best interests of litigants.'

⁸²⁵ See Recommendation on Collective Redress, considerandum 7, which lists the main areas of interest for collective redress: 'consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection.'

economy objectives resulting from the Lisbon Treaty⁸²⁶, and that the European institutions – due to their limited competences – often struggle to fight. If we recall the mentioned discussions on the positive externalities of TPLF⁸²⁷, it is therefore not difficult to see how this could help in preventing such wrongs through effective enforcement and optimal deterrence.

1.3. TPLF and European cross border litigation

Cross border civil and commercial litigation is also an area where access to justice and equality of arms are often a concern due to the further barriers to access justice it poses to companies and individuals. Issues such as the differences in languages, legal and business cultures, sometimes the 'protection' of local defendants by national courts, often discourage not only the resolution of disputes, but also the deal-making process. The recent economic globalization and financial crisis have moreover further limited the possibility for states to devote resources to those services - like the administration of civil and commercial disputes – that traditionally occupied large chapters in the state budgets. In this context, we have already mentioned that in the Judiciaries of Western states there have been general cuts on spending (also in legal aid⁸²⁸), parallel increases in court costs or other reforms that have diminished the role of the state in civil and commercial justice⁸²⁹. The intertwining of these factors generally makes civil and commercial cross border dispute resolution more complex and, thus, more expensive.

1.3.1. The current European legal framework: a market failure in access to justice?

The concerns mentioned regarding access to justice and equality of arms in cross border civil and commercial litigation hold even more true in the EU context. The fragmentation of the national civil and procedural legal systems, and the differences in legal cultures and languages, are very much accentuated in this legal and economic

⁸²⁶ See below par 2.

⁸²⁷ Chapter 5, par 2.1.

⁸²⁸ A FLYNN, N BYROM and J HODGSON, above at footnote 108.

⁸²⁹ See above Chapter 4, par 1.3.2.

context. For the reasons mentioned, the efforts made by the European institutions to enhance access to justice in cross border dispute resolution – also as means to achieve a more effective integration - are copious⁸³⁰. However, access to justice in the European cross-border civil and commercial litigation remains a concern, and stakeholders still struggle to find effective solutions⁸³¹. This is a problem not only for single disputes, but also because the difficulties in solving cross border civil and commercial disputes are often regarded as a barrier to true integration⁸³².

1.3.2. Addressing the market failure in European cross border litigation

For the reasons mentioned , there seems to be room to think that the European cross-border civil and commercial litigation is another area where TPLF could intervene to enhance access to justice. In this context, moreover, due to the very large work of

⁸³⁰ See a very comprehensive document for the policy actions taken in this field: Judicial cooperation in civil matters in the European Union - A guide for legal practitioners, available at <https://publications.europa.eu/en/publication-detail/-/publication/a9da11b8-0a6a-491e-8ae9-a0ff9d7e8535/language-en> . (last vis. 10.2.2017). Inter alia, see: Directive on Civil and Commercial Mediation, 2008/52/EC; Directive on consumer ADR, 2013/11/EU; Regulation (EU) on consumer ODR No 524/2013; Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006.

⁸³¹ These were the considerations in a recent high-level conference on access to justice in the European context ‘Ensuring cross-border justice for all in the EU: sharing practices and experiences from the ground’, held on the 9–10 November 2016 in Bratislava. Conference report available at http://fra.europa.eu/sites/default/files/fra_uploads/cross-border-justice-bratislava-conference-report_en.pdf (last vis. 10.2.2017)

⁸³² Inter alia, see the considerandum n 5 of the Directive on Civil and Commercial Mediation, 2008/52/EC, stating ‘The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extra-judicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services’.

harmonization carried out by the European institutions⁸³³, it is likely that sophisticated legal entities such as third party funders would not find many difficulties in promoting the most efficient dispute resolution procedures. Think for example – in the light of the discussions concerning the impact of TPLF on settlements⁸³⁴ - to the role potentially playable by third party funders in the civil and commercial mediation sphere, especially in levelling the playing field with strong defendants⁸³⁵. In this regard, it is worth noting that most of the legislation enacted in this sphere aims indeed at providing efficient (cheaper, quicker and definitive) dispute resolution procedures.

1.3.3. Repercussions at a societal level

The efforts made by the European institutions in the context of the European cross-border civil and commercial litigation are due to the fact that the barriers to access justice are not only a problem for solving single disputes. The potential costs of facing a cross-border dispute are, *per se*, a barrier to the access to other EU markets. It is indeed also in this spirit that the European institutions have put much effort into promoting a European Area for Civil and Commercial Justice, as a means to achieve proper integration. The legislation enacted to this end⁸³⁶ was indeed aimed at making intra-European civil and commercial dispute resolution cheaper and more efficient through a series of ADRs and other instruments, although this legislation still finds difficulties in its application⁸³⁷. The fact that parties may not know about these

⁸³³ See some of the legislation enacted to this end above at footnote 830.

⁸³⁴ Chapter 5, par 1.2.3.1.1.

⁸³⁵ The Civil and Commercial Mediation in the European Union has recently been harmonised by the Directive 52/2008, but which still finds limited application. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, Brussels, 26.8.2016 COM(2016) 542 final ('Mediation Report'), available at <http://publications.europa.eu/en/publication-detail/-/publication/234da71d-6ebb-11e6-b076-01aa75ed71a1/prodSystem-cellar/language-en/format-PDF> (last vis. 10.2.2017)

⁸³⁶ See above footnote 826 and 828.

⁸³⁷ See the Mediation Report above at footnote 831.

instruments, that lawyers may still have a traditional national background and that defendants may be better off to defend themselves in national courts, may in this case prevent these instruments from being commonly used. TPLF, in this context, having the interests aligned with claimants, may address their rational apathy, promote more meritocracy in the market for European legal professionals, and change the incentives for defendants through deterrence. If this happened, it would not be difficult to see in general how TPLF would enhance the price-performing ratio of dispute resolution, also with regard to European-wide claims on private enforcement and collective redress. It is for this reason that the external positive effects of deterrence of potential wrongs and effective access to justice and efficient dispute resolution may also have a positive effect, obviously speaking in general terms, in terms of European integration. A company may feel more comfortable to trade across the borders if it knows that it would not face the costs to access to justice and solve a dispute, and contracting parties may have fewer incentives to do wrong if the probability of facing a dispute was higher.

2. TPLF and the European Union social market economy

The entry into force of the Lisbon Treaty has marked not only an historical turning point with regard to human rights, but also in terms of economic and social policy. Article 3.3 of the TEU states that ‘[t]he Union shall ... work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment’. With this statement the EU, after years of debates, has endorsed a more socially oriented policy⁸³⁸, and, most importantly, it has for the first time in its history

⁸³⁸ As result of this choice, in the Lisbon Treaty the competition policy has been ousted from the EU fundamental objectives, and ‘relegated’ to the Protocol on internal market and competition (number 27) annexed to the Treaty. The reason for this choice seems to be based on the fact that the voters in some Member States, particularly in France, did not agree with the (especially Anglo-Saxon) ultra-liberal position which emphasized excessively free competition, as it would have threatened the foundations of the Welfare State. JL BUENDIA SERRA, ‘Escribir derecho con renglones torcidos: política de competencia y servicios de interés económico general en el Tratado de Lisboa’ (2008) *Anuario de la*

truly moved from a mere market oriented structure⁸³⁹. The hope, as recognized by many authors⁸⁴⁰, is that this provision would boost the social aspects of the European Union, although at the moment not too many concrete actions have been taken in this regard.

competencia, n 1, 129. In particular, the French position shown concerns against an ‘amalgam of competition, financial activities, financial interests of the kingdom’, and it is for this reason that they considered it necessary to require ‘that free and undistorted competition does not appear among the objectives of the Treaty but as an instrument for the functioning of the internal market’. J JOUYET, ‘Faut-il une nouvelle politique européenne de concurrence?’ (2008) *Concurrences*, 1.

⁸³⁹ This is of course the result of an evolutionary path that has started, at least, with the Maastricht Treaty. In this regard, it is worth noting also the increase in powers of the Parliament, which has gradually given more democratic legitimacy to the EU. Then, of course, a fundamental role has been played also by the recognition of human rights with the Nice Charter, which, while it had been signed in 2001, it has officially entered into force only with the Lisbon Treaty. The socio-economic policy, instead, has been long discussed before the enactment of the Lisbon Treaty, and it has been of central importance in its enactment. Some (of Anglo-Saxon background) talked about inadequacy of this socially oriented system to protect the existing *acquis* on competition, apart from hampering the future development of the EU legislation on competition. A RILEY, ‘The EU Reform Treaty and the competition protocol: undermining EC competition law’ (2007) *European Competition Law Review*, Vol 28, n 12, 703. Others claimed that this would have increased the powers of the Member States to distort competition through subsidies or other measures. P DE PASQUALE, ‘Libera concorrenza ed economia sociale nel Trattato di Lisbona’ (2009) *Diritto pubblico comparato ed europeo*, n 1, 81. However, as noted by the Director General of the Legal Service Commission Michel Petite in a letter to the Financial Times, the principle of an economy based primarily on competition has never been an objective of the European Union, except in the Constitution that failed to enter into force a few years earlier. See, <http://www.ft.com/cms/s/0/72f53bd8-244a-11dc-8ee2-000b5df10621.html> (last vis. 10.2.2017). The original text in fact referred to ‘a system ensuring that competition is not distorted in the internal market’.

⁸⁴⁰ See for instance: C BARNARD and S DEAKIN, ‘Social Policy and Labor Market Regulation’, in E JONES, A MENON and S WEATHERHILL, *The Oxford Handbook of The European Union*, Oxford University Press 2012, 551; D DAMJANOVIC, ‘The EU Market Rules as Social Market Rules: Why the EU can be a social market economy’ (2013) *Common market Law Review*, Vol 50, Issue 6, 1685; R O’GORMAN, ‘The EHCR, the EU and the Weakness of Social Rights Protection at the European Level’ (2011) *German Law Journal*, Vol 12, n 10.

2.1. The current European social scenario

The situation of economic constraint that has followed the recent financial crisis is in fact affecting the states' social policies and the Welfare states at a global level, although not homogeneously⁸⁴¹. In the EU its effects are particularly felt because of its hybrid constitutional structure, which does not provide it with the right instruments to react effectively and/or enact the effective social measures which Europeans desire. In particular, it is to be noted how the social market economy objectives set out in article 3.3 of the TEU are directly put under threat by some well-known and debated negative externalities. It is common knowledge that one of the causes that have determined the recent financial crisis has been the moral hazard of financial operators and the lack of proper financial control (also at a European level). As instead with regard to the objective of reaching 'a high level of protection and improvement of the quality of the environment', it seems to be a challenge that states (and, even less, the EU) might not be able to tackle alone. These epochal challenges are evidently the result of myriads of different behaviour problems that, summed all together on a global scale, have engendered enormous negative externalities that no single state action or policy could probably internalise effectively. Moreover, while in these cases there is an evident social loss, collective legal actions are not brought forward and redress is often not obtained even in single cases⁸⁴². In the EU therefore the analysed externalities not only prevent citizens from accessing justice to enforce their legitimate rights, but also prevent more general objectives of public social policy from being effectively achieved. In so doing, not only access to justice but also some collective or diffused interests are jeopardised by the same barriers, even though all Western states have more or less reformed their legal systems in order to attempt to overcome them⁸⁴³.

⁸⁴¹ K FARNSWORTH and Z IRVING (eds), *Social policy in challenging times, Economic crisis and welfare systems*, Bristol: Policy Press.

⁸⁴² The market failure is represented by the fact that the social costs of certain types of behaviour are not internalised in the products or services of this type of injurers.

⁸⁴³ With particular regard to access to justice at an EU level, a very interesting debate on the economic analysis of these barriers has been carried out with regard to collective redress in the seminar 'Collective Redress in Europe - Why?' held at the British Institute of International and Comparative Law on 19th June 2014. It is possible to have an idea of the contents discussed therein in the Working

European institutions have discussed how to address these externalities both with public intervention and private bargaining⁸⁴⁴ in the debate concerning collective redress⁸⁴⁵, which however gives the possibility of understanding the institutional position on a more general scale. While the European institutions have put significant efforts to promote the rights of victims of socially abusive behaviour, its approach – from a law and economics point of view – does not seem sufficient to guarantee access to justice and the enforcement of these rights in practice, as moreover noted in the paragraph 1.2.2. above. The fear is that, apart from the problems of lack of enforcement powers at a public EU level, the economic incentives for individuals or companies to enforce such actions would not be well distributed, and the difference in this regard with the US system has for example been evident in the recent Volkswagen emission scandal⁸⁴⁶. The problem in such cases is that neither 'state' enforcement and redistribution, nor deterrence could be fully effective, which equals the scenario where wrongdoers would not have committed wrong and/or EU citizens have no right to be compensated for wrongs.

Apart from having difficulties in acting as a single political actor in defence of the European consumers, the EU legal framework on the matter seems to make it difficult for private actors to efficiently obtain redress. On the one hand, the European Commission's approach towards the possibility of deploying public capital for the funding of mass claims appears to be definitely negative⁸⁴⁷. While it is uncertain whether this could be done efficiently in the EU (although the Canadian experience

Paper 1/2014 'Collective Redress in Europe - Why?', available on http://www.collectiveredress.org/documents/165_wp_1_2014.pdf (last vis. 10.2.2017)

⁸⁴⁴ As known, traditionally the law and economics scholarship addresses the problems of solving externalities through state intervention and private bargaining solutions. L KAPLOW and S SHAVELL, above at footnote 332, 1693.

⁸⁴⁵ See above par. 1.2.

⁸⁴⁶ See J EWING, above footnote 6.

⁸⁴⁷ Par. 3.9.2. of the Communication on Collective Redress: 'the Commission does not find it necessary to recommend direct support from public funds, since if the court finds that damage has been sustained, the party suffering that damage will obtain compensation from the losing party, including their legal costs.'

with the Fonds d'aide aux recours collectifs demonstrates that it is potentially possible to do so) the situation of economic contingency would probably discourage the enactment, or even the promotion, of social measures of this type⁸⁴⁸. On the other hand, the approach towards other private solutions has been quite negative, too. These discussions have been influenced by the fear of abuses that, according to the European Commission, have occurred in the US⁸⁴⁹. This is the reason why the approach towards contingency fees tends to be very negative⁸⁵⁰. Moreover, the incentives for individuals

⁸⁴⁸ Enacting social measures, by definition, would impose a cost on its administration (see above at footnote 313). It must however be noted that there would not even be a problem of legal basis. As known the EU legislative power in the field of justice has grown considerably (in the civil and commercial, but also in the criminal sphere). From a substantive point of view, as matter of example, I can recall the operate of the CJEU in enlarging access to justice in the private enforcement of competition law matters, as outlined in the previous par. 1.1.. A good level of harmonisation has been reached also from a procedural point of view. In fact, there has been a copious amount of legal acts that have aimed to harmonise and modernize, directly or indirectly, this field of law at EU level after the entry into force of the Amsterdam Treaty. Article 65 of this Treaty, now article 81 of the TFEU, is in fact commonly referred to as the EU civil procedural law turning point, having attracted this subject in the ‘First Pillar’ and linked it to the principles of freedom of circulation, and having expressly declared the will to improve these systems in order to achieve the realisation of the internal market. For the legal acts enacted in this sphere see above footnote 822. As for the competence in criminal matters, it should be briefly recalled that the Lisbon Treaty has in fact for the first time foreseen a legal basis for legislating in substantial criminal matters at art 83 TFEU. These actions have however concentrated on the aspects of access to justice which do not require much pro-active social action of the EU, which are in fact still of competence of the national member states. Justice is in fact, according to Article 4.2 of the TFEU, a shared competence. Access to justice, more specifically, is regulated at Article 67 of the TFEU where it is stated that ‘1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. … 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.’ In any case, should the EU want to take action in this field, there seem to be potentially at least two very important legal bases: the principle of subsidiarity (article 5 of the TEU) and the flexibility clause (article 352 of the TFEU).

⁸⁴⁹ See Communication on Collective Redress, par 3. For some literature analysing the matter, above footnotes 577 and 814.

⁸⁵⁰ In particular, in par 30 of the ‘EU Recommendation on Collective Redress the European Commission has recommended to the member states to prohibit contingency fees, although their importance in the enforcement of rules on collective actions has been demonstrated. See L LESKINEN, ‘Collective Actions: rethinking funding and national cost rules’ (2011) *Competition Law Review*, Vol 8, 87. However, it must

to bring actions are even more limited by the fact that trebled damages are basically not envisaged in the EU, where instead injunctive and compensatory mechanisms are promoted⁸⁵¹. In this regime it is however difficult to understand how the claimants, that in such actions are generally classes of impecunious and disorganized consumers, would first be able to organize themselves, then sustain the high costs for lawyers and experts for the massive case preparation work, besides bearing the risks for adverse costs in case of loss, given that in all of the European jurisdictions, in one way or another, the losers-pay rule applies⁸⁵². Therefore, in the cases' costs analysis it is necessary to take into account the defendant's costs that might have to be paid if the case is lost⁸⁵³.

2.1.1. TPLF and the European social sphere

In this context, the considerations made in the paragraph related to the societal dimension of TPLF may allow us to think that this practice could have beneficial effects with regard to the social objectives of the 'EU, ideally with its redistributive⁸⁵⁴ and/or deterrence⁸⁵⁵ features. This would hold even more true if it will be demonstrated that more litigation engendered by TPLF would ultimately result in injurers paying in full the damages they create⁸⁵⁶ and/or not doing wrong. In this regard, it is interesting

be noted that the legislation in certain Member States is not clear, and leaves room for fees that may have the same result. See Chapter 4, par 2.2.1.

⁸⁵¹ At a EU level see, for example, the Directive on Actions for Damages, art. 3, with regard to the private enforcement of competition law; and Recommendation on Collective Redress, Art. 31, with regard to collective redress.

⁸⁵² This is actually also recommended by the European Commission in the Recommendation on Collective Redress, Art. 13, and in the Communication on Collective Redress, par. 3.9.3.

⁸⁵³ While the claimant's costs are more predictable, insofar as the party contracts with his own lawyer and is privy at least to the criteria applied to calculate the fees, the same cannot be said for the defendants' costs. This makes claimants even more risk averse, especially in large claims, and this makes it now more understandable why such actions are not being filed.

⁸⁵⁴ See above Chapter 5, par. 2.1.1.1.

⁸⁵⁵ See above Chapter 5, par. 2.1.1.2.

⁸⁵⁶ As a matter of example, it is worth recalling art. 3 of the Directive on Private Actions.

to recall the two cases (deceitful banks and polluters) analysed in the beginning of the paragraph related to the societal dimension of TPLF, and see how these specific problems affecting the European social sphere could be addressed in a scenario with TPLF. For those wrongs already committed¹ TPLF may enhance redistribution and/or effective enforcement. Considering that this may enhance deterrence, in the future the banks would more likely avoid charging illegal interest on their clients' bank account, or the potential polluters would not throw their waste in the environment, if they are aware that a third party funder may one day finance a mass lawsuit against them, or purchase the claim and enforcing it himself, make them worse off. Overall, this may enhance social welfare also because the EU citizens would be happier to live in a system where wrongs are effectively repaired and/or prevented. Evidently the same results could be ideally achieved also if access to justice could be maintained by other means, like with lawyers' funding or legal expenses insurances⁸⁵⁷. However, the legal and economic overview, and the current EU and member states legal framework would suggest that these would not be sufficient, but at least that TPLF may complement them in an effective way.

2.1.2. Repercussions at a private level

In the paragraphs related to the positive externalities of TPLF and in the previous paragraph we discussed how TPLF could potentially contribute to social justice or, more in general, social welfare, especially when its potential benefits would be aggregated. On a private level, instead, the benefits for the individuals and companies could be measured only in terms of potentially more redistribution (thus, gains from more claims brought thanks to TPLF), more deterrence (thus, less losses) and more

¹1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. 2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest. ...’.

⁸⁵⁷ JPB DE MOT, MG FAURE, and LT VISSCHER, ‘Third Party Financing and its Alternatives: An Economic Appraisal’, in VAN BOOM WH, above at footnote 3, 31.

price-performing dispute resolution (lower costs). If we recall the objectives set out in the Recommendation on Collective Redress ('consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection,'⁸⁵⁸) it is not difficult to see where TPLF could bring improvements at a private level. These could be, for example: making sure that consumers that have suffered from higher prices due to anti-competitive or other deceitful behaviour would be compensated for the higher price they paid, or otherwise making sure that they will not pay higher prices in future through deterrence; making sure that inhabitants of a given polluted area have their environment cleaned and/or be compensated for the losses to their activities (such as agriculture, etc.), or otherwise deter other potential polluters from doing so; and so on. This of course would hold true if it could be confirmed that TPLF would ultimately result in injurers paying in full the damages they create, and/or not doing anymore wrong and/or compensate the states and the victims for their wrongs.

2.2. TPLF and the European integration

It is well known that the European integration process has started with the removal of barriers for the circulation of goods, services, capital and people, as a way to create a Single European Market⁸⁵⁹. The neo-functionalism idea underlying this choice is that companies and individuals, pushed by profit-making motivations, would have traded across their national borders, but at the same time they would have been tying their civil and commercial relationships with other European citizens. In the view of the European forefathers, creating a Single European Market was a functional step to achieve a true political integration that could guarantee peace and well-being to its citizens⁸⁶⁰. It has already been reported in this regard that, in the intentions of the EU institutions, access to justice and dispute resolution in this sphere are a key to maintain

⁸⁵⁸ Considerandum 7.

⁸⁵⁹ In general see above Chapter 2.2.5. and to in particular for further arguments on the topic see C BARNARD at footnote 98.

⁸⁶⁰ A STONE SWEET and W SANDHOLTZ, 'Neo-functionalism and Supranational Governance' (April 6, 2010). Available at SSRN: <https://ssrn.com/abstract=1585123>.

the market functions, to the extent that a conflict over an allocation of goods or services, capital and citizens would prevent their ‘optimal allocation’⁸⁶¹. An inefficient and ineffective legal system gives less legal certainty to the trade across borders, and therefore deters potential infra-state transactions. We have moreover already discussed that certain externalities affecting European states are not being effectively addressed, which would also be due to lack of competences for the EU to act as a single political actor⁸⁶². There is therefore room to think that such market failure in access to justice may have negative repercussions also on the integration of the European member states and markets.

The concerns related to the integration of the European member states and markets have significantly increased after the recent financial crisis. On the one hand, European companies and individuals have faced (and are still facing) unprecedented economic constraints, which are further limiting their possibilities to trade. On the other hand, the EU legal regulatory and enforcement structure has demonstrated that it is not able to tackle certain externalities happening at a European level, which have also caused the crisis⁸⁶³. In other words, these two features prevent the optimal enforcement of laws at a European level, with negative repercussions for the European member states and markets integration. We mentioned that the European institutions are aware of this market and state failure and, especially after the enactment of the Amsterdam Treaty, have enacted a series of legislative acts aimed at creating a Single Area for Justice⁸⁶⁴. These reforms very often entailed mechanisms to spur judicial cooperation in civil and commercial matters, also creating alternatives to the ordinary court proceedings. These changes have been motivated by the fact that the resolution of disputes through court proceedings often goes unappreciated, either for their disproportionate costs and/or for their length not aligned with market needs. The ultimate goal was thus to establish a common regulatory framework that could have facilitated the resolution of cross-border disputes, and with it the trade across the member states, so to stimulate the European integration process. It is moreover worth noting that after the crisis the EU

⁸⁶¹ See above par 1.3.3.

⁸⁶² See above par 1.1.3. and 1.2.3.

⁸⁶³ See footnote 2.

⁸⁶⁴ See above at footnotes 826 and 828.

has implemented a series of reforms that aimed at fighting certain externalities that could jeopardise the basis of its effective integration. Among all, it is worth for example recalling the creation the European System of Financial Supervision ('EFSF'), which aims 'to upgrade the quality and consistency of national supervision, to strengthen oversight of cross-border groups, to establish a European single rule-book applicable to all financial institutions in the financial market, as well as to prevent and mitigate systemic risks to the financial stability of the European Union'⁸⁶⁵. In this specific example, such reforms attempted to create an effective regulatory and supervisory system for the financial system as reaction to the consequences of the sub-prime crisis, which have caused the externality of the financial crisis, eventually to prevent this happening again.

These reforms being very recent, it seems too early to assess whether would they be capable of achieving the scopes they purported to. It is however to be noted that certain barriers to an efficient allocation of resources, and therefore to the European legal system and market integration, would be difficult to be addressed only by the mentioned measures or similar ones. On the one hand, there would still be high costs to solve disputes, for example: the lawyers' fees, which cannot be bargained totally because of the prohibition to the PQL; and the adverse costs' risk, which applies in almost all European jurisdictions. On the other hand, the 'EFSF' (as one of the few examples of how the EU has attempted to fight one of the many EU wide externalities) seems to lack effective regulatory and enforcement powers (e.g. sanctions), but mainly aims at supervising and coordinating the European member states' financial authorities.

2.2.1. The current European integration scenario

The general law and economics discussions would bring us to think that TPLF in the context of European integration could contribute to enhance access to justice in single cases, but also to the fight and/or prevention of negative externalities at a societal level. As noted in the previous paragraph, the EU has put significant efforts to promote a

⁸⁶⁵ T PAPADOPOULOS, 'European System of Financial Supervision', in R WOLFRUM (ed) *Max Planck Encyclopedia of Public International Law*, Oxford University Press (2014).

legal system where dispute resolution could be cost efficient, and the externalities could be fought at a more centralised level. While however these changes were introduced only few years ago, it was mentioned that – in the light of the existing regulatory framework - probably these alone could not be sufficient to achieve the goals mentioned . In the case of dispute resolution, the efficient allocation of litigation costs and risks in scale may obviously lead to lower the price-performance ratio to solve disputes (including by promoting a more meritocratic, transparent and efficient legal market), and therefore be more desirable⁸⁶⁶. In the context of the fight against externalities, it could contribute to have a more cost-effective regulatory and enforcement system, to the extent that it would contribute to sanction and/or deter potential wrongdoers, and thus internalize potential externalities⁸⁶⁷. In other words, the considerations made in the paragraph related to the societal dimension of TPLF, if applied to European legal and market integration, would bring one to think that a wider presence of TPLF would benefit such a process both in its physiological process, and in its potential pathologies. As with regard to the first, TPLF would do so by deterring eventual breaches of civil and commercial relationships and externalities affecting the European legal system. As with regard to the potential pathologies, it would do so by better allocating in scale the litigation costs and risks, and by making all wrongdoers pay for their wrongs with effective enforcement of the laws.

2.2. Repercussions at a private level

In the previous paragraph we attempted to define what would be the potential benefits that a wider presence of TPLF would have in the European integration process. This would happen because this practice, by efficiently and effectively resolving conflicts at European level, would avoid such costs representing a barrier for integration. Having a well functioning legal and litigation system would indeed make sure that individuals and companies would ideally be more comfortable to trade in a context where disputes can be solved without (or, at least, with lower) costs and risks, or even deterred in their onset. At the same time, the same features could help in preventing and/or sanctioning

⁸⁶⁶ See above Chapter 5, par 2.1.2.1.

⁸⁶⁷ See above Chapter 5, par 2.1.2.2.

certain externalities, with reduction in costs both on a private and at a societal level. On a private level, the European citizens and businesses would benefit from having more quality and lower prices to solve their disputes, to have them enforced effectively or otherwise to allocate their resources with fewer risks in the internal market. As with regard to businesses, it is not to be forgotten (as moreover seen in the case of the pharmaceutical company in Part II, par 2.1.2.2.) that TPLF is proving to be an efficient and additional corporate finance instrument. In this regard, it is worth noting how additional liquidity and or cost and risk hedging instruments may also benefit companies from a budgetary point of view, giving them the opportunity to unlock and monetise an asset that so far has not been considered as such, or at least to avoid the costs and hedge the risks arising from it.

3. Concluding remarks. What future for TPLF in the European Union?

The entrance into force of the Treaty of Lisbon has been accompanied by enthusiastic predictions about the European future, especially after having overcome the impasse that followed the failure of the Constitution for Europe. This optimism has however soon faded due to the repercussions that the financial crisis has had in the European context, limiting the capability of states and individuals to obtain capital in the markets, increasing the aversion to costs and risks of individuals and companies and increasing the number of disputes. Part III attempted to discuss how TPLF – in the light of the legal and economic analysis presented in Part II - could be both privately and socially beneficial in the European perspective, provided of course that the potential regulatory issues would also be addressed. Obviously being in an initial phase of this market more empirical evidence will be needed to confirm the assumptions made throughout this Part, and in this regard one can see a very vast field of research that may need much more deep attention from scholars and practitioners. For this reason, also as a way to conclude this Part, I want to put forward some considerations on the future TPLF in the European perspective. This would moreover help in briefly recalling the main arguments analysed throughout the course of this thesis, and to introduce the final conclusions.

3.1. A European private perspective for TPLF

After having been experienced for some time and then prohibited during the Ancient Rome period, it is only a few years since TPLF started to re-emerge on the European continent. Throughout the course of this Part III, while I did not conceal some concerns regarding its applicability, I concluded that this practice could ultimately be both legal and desirable. It is moreover possible to consider that— given the current regulatory conditions - it is likely that this market will develop fast in the coming years. As with regard to the legality of TPLF in the European perspective, I first provided an initial report of the main issues surrounding TPLF in two main civil law countries in Chapter 7. To this discussion I have then added some elements on the desirability of TPLF in Chapter 8, par 1, with regard to the right of access to justice and equality of arms in the EU. Moreover, I analysed the market failure in access to justice in the three specific legal areas, where I have also shown that the European institutions have already provided some legal indications for the third party funders (and other actors). Think for example, in the context of private enforcement of the European competition law, of the rules that have facilitated those who succeeded (by reason of purchase or assignment) in the claim to bring it forward and access the competition authorities' files to do so⁸⁶⁸. In this regard, in the same paragraphs related to the private desirability, I have also discussed the potential societal repercussions, showing how TPLF could be beneficial in both ways at the same time. For this reason I adopted a symbolic method/structure⁸⁶⁹, showing the intertwinement of the private and social desirability in a context where TPLF would be present. I have however not normatively discussed again how it would be possible to promote a desirable litigation market, having done so thoroughly in Chapter 6, where I have also analysed some of the EU and member states' legislation. I therefore make reference to this Chapter for the future 'normative' discussions on TPLF and a desirable litigation market in specific terms, not claiming of course to have analysed them exhaustively. In this regard, and also as way to start providing some indications for future research, I see as the main limit of this thesis the

⁸⁶⁸ Directive on Competition law Actions for Damages, Art. 2.4.

⁸⁶⁹ In the third sub-paraphraphs (1.1.3., 1.2.3. and 1.3.3.) of the paragraphs related to each single area where access to justice is lacking in single disputes I have explained the social repercussions; vice versa, in the third sub-paraphraphs (2.2.1.3. and 2.2.2.3.) of the paragraphs related to the two main European social and market/institutional goals I have explained the private desirability.

generality of the discussions. The study underlying these discussions has effectively been useful to define a systemic perspective for TPLF, but might not be very detailed with regard to specific problems. This lack of exhaustiveness has been given also by the fact that since the market changes are very recent, the literature and other empirical evidence is also limited, if not, on certain points, absent. I reported several of these discussions throughout this Part III, but much more work of research (for example, in the fields of civil law, procedural law, law and economics, lawyers' deontology, etc.) will be needed to fill these gaps, also to enhance legal certainty on this instrument in specific disputes.

3.2. A European societal perspective for TPLF

The entry into force of the Lisbon Treaty has made an important step forward not only with regard to access to justice (or, in general, to human rights), but also to the social sphere. I indeed mentioned that this Treaty has for the first time laid the foundations for a European 'highly competitive social market economy', thus for the first time moving forward from a mere market-oriented structure⁸⁷⁰. I moreover mentioned that the achievement of some social objectives of the EU has been deeply jeopardised by the financial crisis, and that the hybrid European legal system does not allow tackling certain European social matters effectively⁸⁷¹. In this context, I discussed how TPLF could also lead to some improvements also at a European social level, in a certain subsidiary way⁸⁷², while enhancing access to justice in single disputes. The definition

⁸⁷⁰ See above par 2.

⁸⁷¹ Ibid.

⁸⁷² This is indeed quite coherent with the idea of the social market economy endorsed at a European level, where the public and individuals would be supposed to cooperate to strike a fair balance between equity and efficiency. The inspiration for this concept has been drawn from the Catholic social doctrines applied to the social market economy, which interestingly enough see as a pivotal point social justice. See L ROOS, 'Catholic social doctrines', in RH HASSE, H SCHNEIDER and K WEIGELT, *Social Market Economy History, Principles and Implementation – From A to Z*, Edited by, English Edition, 2008 Ferdinand Schöningh, Paderborn, Germany, 100. Available at http://www.kas.de/wf/doc/kas_12855-544-2-30.pdf (last vis. 11.2.2017)

It is interesting to make reference, in this regard, to the discussions by Cappelletti on what was called the 'third wave' of reforms in access to justice. This well-known author referred to such measures as an

of the potential social benefits seems however to be not an easy task, considering that I referred to quite general concepts to measure them, and much more theoretic speculation and empirical research will be needed to confirm or deny this.

Also as a way to introduce the main conclusions of this thesis, while the categorisations made have been useful for taxonomic purposes, I have to note how, having treated these problems in a general way, it is limited by the lack of empirical evidence and specificity. The main assumptions made (namely, that in certain areas of European interest TPLF could enhance social justice through redistribution and deterrence, on the one hand, and more cost-effective enforcement and price performing dispute resolution, on the other) would therefore require further research to be confirmed and/or adapted to specific contexts. In this regard, it is moreover to be recalled that the negative externalities of TPLF could decrease and/or jeopardise social justice or the social welfare standards in a given context⁸⁷³, and that appropriate regulation may be needed to prevent and/or sanction this, especially when the market is more mature.

'access-to-justice approach', in particular for their feature of attacking 'access barriers in a more articulate and comprehensive manner'. At the time he wrote his works it was however obviously possible to foresee such market *and* procedural failure in access to justice, and for this reason he had foreseen a series of state reforms that could enhance access to justice as a means to achieve a more just society at proportionate costs. What I have instead attempted to represent in this book, in line moreover with some authoritative academic views (In particular I am referring to J MOLOT, above at footnote 11), is that this could be achieved by the (litigation) market.

⁸⁷³ See above Chapter 6, par. 2.2.

Chapter 9

Conclusions

1. Introduction

This thesis has attempted to provide a first comprehensive contribution on the law and economics of TPLF, and to frame it into the European perspective. More particularly, the first Part, with a comparative legal and factual approach, has attempted to report the main legal discussions surrounding TPLF in the common law and civil law jurisdictions where this has emerged more significantly. This analysis has ultimately been helpful to acknowledge the existence of a phenomenon in continuous and fast growth, and to understand the main legal issues underlying this practice. In this context, while the literature has already widely discussed the common law issues potentially impacting on TPLF, I have tried to discuss the main legal and factual issues necessary to assess its legality also in the civil law perspective. The second Part, instead, has built on these considerations to explain in more rational terms: how this phenomenon has emerged and how it is likely to develop in the wider litigation market; what could be its private and societal repercussions; and what sort of regulation might be necessary to improve its desirability. In this context, while the existing literature has provided many contributions with respect to the law and economics of TPLF, this Part has attempted for the first time to ‘make order’ out of all of them, both for its private and for the societal dimension, and of the potentially applicable regulatory measures. Finally, the third Part, after discussing more in detail the legality of this instrument in the European perspective, has attempted to show how this could be beneficial in the European context from both a private and a societal point of view, considering some existing and well-known market failures in access to justice. While the literature had already provided some interesting discussions on the legality and desirability of TPLF in this context, this thesis has attempted to build on them to provide a systemic perspective for the future assessment of TPLF in the European and/or civil law systems.

In the next paragraph I will try to report the main findings of these discussions by answering the research questions formulated at the beginning, which will also be a way to retrace the research path I have followed, and the methodology that has been applied

in each Part. After this analysis, I will present some policy recommendations concerning the problems at stake with specific regard to the EU legal system. Generally speaking, before entering into these discussions, I want to note how the research on TPLF in/and the litigation market (and, thus, the subsequent theoretical speculations) has been limited by the fact that they are in an early phase, and not much data were available. This is therefore the first limit of this thesis, which however - having attempted to provide an initial systemic perspective – it constitutes a good starting point for anyone that would like to focus on some specific aspects of it. Apart from this main limit, after the policy recommendations I will also report some more specific limitations of the research carried out, and make suggestions for further research. After this, I will ultimately draw some concluding remarks on TPLF in a more global perspective.

2. Answers to the research questions

2.1. There is a fast growing litigation market where TPLF is playing a pivotal role. TPLF is basically legal in both common law and civil law jurisdictions, although some limitations may apply

The first research question concerned whether there was a TPLF phenomenon that had emerged, which was at the basis of the same idea of making a research on this topic, and whether TPLF was legal. In other words, the aim was to discover whether litigation was funded on an occasional basis, or if instead there were more general causes that determined a 'business phenomenon' that needed deeper attention, specifically with regard to its legality. This research question has been answered in Part I, where I have applied a comparative legal and factual approach aimed at describing the 'world' of TPLF and the litigation market as it is. The answer to this question, as better explained further, is that TPLF is effectively playing a pivotal role in the litigation market, where however other actors are involved (mainly litigation lawyers and insurers), and that is basically legal in both common law and civil law jurisdictions, although some limitations may apply.

To answer this research questions, I have collected – without claims of exhaustiveness - the main legal facts (case law, regulation and other) and doctrinal discussions surrounding TPLF, which have been helpful to figure out the current status of this

market. I have started these discussions from the early civil law and common law jurisdictions, briefly showing that the funding of litigation by third parties was already largely done in both of them. I have however noted how some abuses, the spreading of Christian views (that saw litigation as ‘social evil’) and the fear that the judiciary could be ‘corrupted’ by such practices, have led to their prohibition and/or abandonment⁸⁷⁴. I have then attempted to show how, starting from the establishment of the liberal states and of the rule of law, the view that litigation represented a ‘social evil’ started disappearing, because the institutional framework became more robust (and separated)⁸⁷⁵. Already in this period the (in)utility of the prohibitions to fund litigation in the Common law jurisdictions was questioned, as these mainly went against those impecunious claimants that could not pay for legal counsel⁸⁷⁶. In the civil law jurisdictions, the civil codes and/or bar regulations have instead largely reiterated the PQL, while some jurisdictions have started abolishing the RL for the sake of facilitating business transactions⁸⁷⁷. It is then with the advent of the welfare state, and more in particular with the introduction of legal aid, that the view on the funding of litigation has finally changed, having been devised as a means to ensure access to justice for everyone and therefore enjoy an array of social rights⁸⁷⁸. In the second half of the XX Century we also assisted then to a gradual abolition and/or relaxation of the main prohibitions to fund litigation⁸⁷⁹, while other global interrelated trends seem to have stimulated a market demand for alternative ways to access justice and solve disputes, including the use of TPLF⁸⁸⁰.

In the Chapter 3 I have then shown with more specific factual and legal arguments how TPLF is taking shape at a global level, focusing on those jurisdictions where this business has more or less largely appeared and received more attention. This analysis has shown that TPLF has emerged mainly in some common law jurisdictions, although

⁸⁷⁴ Chapter 2 Par 1.

⁸⁷⁵ Chapter 2 Par 2.1. See in particular the words of Jeremy Bentham.

⁸⁷⁶ Chapter 2 par 2.3.

⁸⁷⁷ Chapter 2 par 2.2.

⁸⁷⁸ Chapter 2 par 2.4.

⁸⁷⁹ Ibid.

⁸⁸⁰ Chapter 2 par 2.5.

it is slowly expanding into (European) civil law ones, and that this shows that its legality – at least in general terms – should not be an issue. I have found confirmation of these assumptions in the various cases, regulatory instruments and doctrinal discussions which took place in the common law and civil law jurisdictions analysed, namely: Australia, Canada, England and Wales and the US, on the one hand; and a series of European continental jurisdictions, on the other. This Chapter has moreover provided the opportunity to discuss some 'objective' factors that seem to have determined the emergence of TPLF, i.e. those regulatory conditions which make access to justice and dispute resolution more difficult. In particular, I have noticed that TPLF has emerged more in those jurisdictions where contingency fees are totally prohibited, the 'English Rule' on costs applies, there are high upfront costs, and so on. In the common law context I indeed noticed that TPLF has initially emerged in Australia, Canada, England and Wales where all of these conditions apply, where it has emerged relatively later in the US (at least in the corporate segment), where lawyers were already maintaining their claims by means of contingency fees, where the American rule on costs applies and where the financial market was already providing finance for consumer personal injury claims and law firms. I have nonetheless noticed how TPLF in this context is emerging in high-stake commercial litigation with high upfront costs, as an efficient corporate finance instrument, but also (in its 'active form') in mass claims, an area which has indeed traditionally (and not without concerns) been maintained by lawyers through contingency fees.

With regard to the civil law context I have analysed a series of jurisdictions in the European continent, most of which being part of the EU. The general comment is that TPLF is steadily gaining ground also in these territories, although slower than in the common law areas. More specifically, I have reported some evidence that TPLF is gaining ground already in several European jurisdictions with civil law traditions, namely Germany, Austria, Switzerland, Belgium, the Netherlands and France, and that funders might also be looking at potential deals also in others, such as Italy and Spain. It has moreover been the chance to see the limits for lawyers (due to the prohibition to enter into PQL) and insurers (which, as seen in the Allianz case in par 2.1., may be in a situation of conflict of interest with existing defendant clients) to maintain litigation. I have ultimately identified a series of factors that may have slowed down the growth of TPLF in this area: lack of legal certainty (which in the civil law jurisdictions with

codified traditions is more of an issue than in the common law ones); the fact that funders are mainly based in common law jurisdictions and have mainly a background of common law and international commercial litigation; the differences in languages and legal cultures, etc. I have nonetheless concluded that, in the light of some regulatory conditions applying in this context ('English Rule' on costs, prohibition for lawyers to enter into PQL etc.), it is likely that TPLF will soon develop more extensively in this context. In general, I have ultimately concluded that TPLF is basically legal in both common law and civil law jurisdictions, although some more specific limitations (of national derivation) may apply.

2.2. TPLF has emerged after the liberalization of the litigation market because it is efficient, and it could work in a way that can be both privately and socially beneficial

The series of legal and factual arguments provided for in Part I have led to a 'thesis' that a new business practice and, more generally, a litigation market, have emerged. It is for this reason that the logically consequent (second) research question was aimed at discovering the reasons why TPLF (and the litigation market) has emerged (or, from another point of view, why it has not emerged before), and the modalities in which it is likely that it will develop in the private and societal spheres. The answer to this research question, as better explained below, is that TPLF has emerged after the liberalization of the litigation market because it is efficient, and it could work in a way that can be both privately and socially beneficial.

The research questions mentioned have been answered in Part II, where I have applied some existing legal and economic theories to describe this phenomenon (TPLF in/and the litigation market), and how it is likely that it will develop. The law and economics analysis helped not only to answer the research question but also, with a more normative approach, to potentially address its use at the best. These discussions have started by tracking the historical cycle concerning the relationships between property rights and litigation, showing how these have evolved in parallel in most of the western states. In this context, the establishment of the liberal concept of property, of the rule of law and of the independence of the judiciary have initially laid the basis, together to the principle of free will, for a market economy where property rights could be freely transferred as a way to create wealth. The welfare states have then restricted the

‘absolute’ feature of private property of liberal derivation, limiting it with more general objectives of public interest, as a way to guarantee effective equal opportunities for all. In this context, it has been found how the right of access to justice has become the ‘door-key’ for the enjoyment not only of those fundamental rights of liberal derivation, but also those social rights that aim at providing equal opportunities to all or, more generally, to ‘level the playing field’. It is for this reason that states had devised legal aid to fund litigation by state means and implemented other reforms to facilitate access to justice and dispute resolution. I have moreover found that in this period the prohibitions to fund or otherwise maintain litigation started being abolished, including to allow states (or other foundations, trade unions, associations) to maintain impecunious’ people claims. Relying on some mainstream law and economics theories, I thus attempted to discuss how these changes in legislation and case law can be deemed as a process of liberalisation of the litigation market, allowing the emergence of a new asset class, i.e. litigious rights. The law and economics literature on how property can be created has indeed discussed for a long time how new forms of property can be created where there are liberalisations of certain markets or privatisation of state assets. This analysis has thus helped to show why the bargaining over litigation was not done before. I have however noted that this was not enough to justify why TPLF had emerged, and in this context I have then found that there have been a series of global phenomena that have affected access to justice and dispute resolution at a global level, namely by increasing the main barriers to do so, the litigation costs and risks. I have ultimately concluded that the recent financial crisis has further increased these barriers, moreover making (potential or actual) parties to a dispute more cost and risk adverse, besides increasing the volume of disputes. I discussed how these trends would have created a market failure in access to justice, where TPLF would have emerged as an instrument allowing the sharing of costs and risks of litigation in exchange for a share of litigious (property) rights. In this context, I noticed how TPLF could be framed within the more general phenomenon of the sharing economy. These discussions have however left doubts about why other existing players (for example, litigation lawyers and insurers) could not have been sharing the litigation costs and risks as a way to guarantee access to justice as well. This issue has been considered by analysing the actual schemes that all of these actors use to maintain litigation for profit, in the light of the existing regulatory frameworks impacting on them. This analysis has allowed to discover that certain limitations

binding on lawyers and insurers may prevent (or, otherwise, make it inopportune for them) to maintain litigation. Such a limitation, *rebus sic stantibus*, does not apply to third party funders, which have thus a potentially wider field of operation than other actors, although there might be certain conflicts in their relationships with parties, lawyers and insurers that may have to be addressed with appropriate contractual schemes or regulation. Apart from the limits binding on other actors, I have concluded that TPLF would have emerged also because third party funders, as 'repeated' players in litigation, would be more capable of bearing and/or managing litigation costs and risks in scale than 'one-shot' parties. These discussions have ultimately allowed understanding why TPLF has emerged as a 'stand-alone' industry, different from other capital providers with respect to its unique feature of extracting and/or creating value from litigation.

As a way to justify the latter assumption, in Chapter 5 I have engaged in an economic analysis of TPLF, aimed at discussing in more detail the private incentives of this practice, but also its societal repercussions. The development of the De Morpurgo basic economic model on TPLF (which started from Shavell's basic formula of litigation) has ultimately helped to show that parties enter into such transactions because they have different perceptions and capability of bearing the litigation costs and risks. The discussions on the private dimension of TPLF have finally explained the reason why TPLF has emerged in the corporate segment, where the financial constraints may not necessarily be an issue, as this instrument 'enlarges its pie of opportunities'. At this point, I have wondered what could have been the societal projection of TPLF, also considering that access to justice - recalling the two principles of justice of Rawls - is both a fundamental liberty and a key to arrange social and economic inequalities. Starting from this consideration, I have wondered how – in the context of a market failure in access to justice - TPLF could not only be efficient, but also equitable, values that the welfare economists see often in contrast. It is for this reason that the discussions on the societal dimension of TPLF started with an 'antithesis' to the main 'thesis' that TPLF would be privately beneficial. The 'antithesis' was represented by the fact that the traditional law and economics literature, and in particular Shavell, find that the private and social incentives to litigate are often misaligned, if not in contrast. As a way to better understand this matter, I engaged in the analysis of the societal repercussions of TPLF, under the main law and

economics 'umbrella' concept of positive and negative externalities, discussing how these could affect individuals and states. In particular, with regard to the discussions concerning the positive externalities of TPLF, it has been found how this instrument could potentially make redistribution and deterrence more effective, while contributing to more cost-effective regulatory and enforcement systems, and to price-performing dispute resolution. I have then analysed what could have been the negative externalities of TPLF, discussing how these may affect the funded claimants (for example in the case of an undue withdrawal from funding), the defendants (in terms of vexatious litigation), or the legal system (in terms of frivolous disputes that would put undue costs on it). At the end of these discussions I could not reach any final conclusion on the societal desirability of TPLF, mainly because the market is at an early phase and there is not much evidence that goes in one direction rather than in another. I have nevertheless mentioned that if the potential negative externalities of TPLF could be internalised by state intervention or private bargaining, this instrument may ultimately be desirable at a societal level, and potentially contribute to social justice or, even, social welfare. I have ultimately considered that, by making enforcement effective and dispute resolution efficient, TPLF would not only be addressing a market failure in access to justice, but also a failure of the government in optimally enforcing its laws. Finally, from a more general welfare economics perspective, it has been ultimately noted how the financial incentives of TPLF could be socially desirable and contribute to a socially optimal resolution of externalities, provided of course that its potential negative externalities could be internalised.

It is for the reason mentioned that in Chapter 6 I have engaged in the normative law and economics discussions on TPLF in/and the litigation market. In other words, after having described/made the 'thesis' that TPLF would be privately beneficial, after having denied this 'thesis' with the 'antithesis' that the private and social incentives to litigate diverge (if not contrast), this Chapter starts to introduce the 'synthesis' on how it would be possible to improve the social desirability of TPLF in the litigation market through state intervention and private bargaining. The conclusions of these discussions were that there are already in place a series of measures that may internalise such negative externalities (or other abuses) of TPLF, but that more may be necessary when the market matures, especially in the consumer segment.

2.3. TPLF is basically legal and desirable in the European context and it is likely that its use will increase in the coming years

After having analysed the law and economics of TPLF in/and the litigation market, I have concluded in Part II by discussing some regulatory conditions that may make TPLF both privately and socially desirable. While of course these were quite theoretical speculations, in Part III I wondered – if TPLF could be so - why this was not largely used in a concrete legal system, the European one. The answer to this research question, as better explained below, is that TPLF is basically legal and desirable in the European context and it is likely that its use will increase in the coming years.

This exercise has proved to be quite interesting because in the EU it is often claimed that access to justice (in those disputes relying on rights of European derivation, but not only) is a concern, although this right has recently been ‘constitutionalised’ in the Lisbon Treaty. It is moreover a system that, due to a hybrid constitutional structure, does not manage to tackle certain European-wide social issues, notwithstanding the fact that the same Lisbon Treaty has for the first time laid the basis for a social market economy. In this context, I indeed decided to test TPLF as – in light of the general economic considerations - I suspected that it could bring improvements both in the context of the right of access to justice and equality of arms in single disputes and with regard to the social market economy objectives. This said, the initial doubt concerning these hypothetical private and societal improvements was raised with regard to the fact that TPLF is not largely used in the European countries, mostly with a civil law background. For this reason, I have initially provided a series of explanations for this situation: the fact that litigation funders may be first concentrating in common law jurisdictions as these would be more familiar to them (as litigation lawyers are mainly trained in common law and international dispute resolution), that such dispute resolution is generally deemed more efficient and less complex than the claims based on civil law (due to the codified systems of the latter, which makes them more complex and less certain); that the lack of debate (and, thus, of legal certainty) on TPLF in the European/civil law context may have slowed this business down, and so on. In this regard, the debates on the legality of TPLF recently occurred in France and Germany., Interestingly enough the ‘two souls’ of modern civil law systems (which nevertheless have both Roman origins), have come to the conclusion that if certain

cautions are taken, TPLF should be legal in this context. After having come to a positive (though, obviously, cautious) conclusion on the legality of TPLF in the European/civil law jurisdictions, I have assessed its desirability with regard to the specific EU context, both in the private (EU right of access to justice and equality of arms) and in the societal spheres (social market economy). As with regard to the first, I have assessed the desirability of TPLF with regard to three specific areas of European legislation where it is often claimed that access to justice is a concern, concluding – in the light of the existing regulatory framework - that TPLF may enhance the EU right of access to justice and equality of arms. As with regard to the second, I discussed the externalities of TPLF with regard to some more general principles of economic policy of the EU as resulting from the recent establishment of a social market economy. In this context, I have ultimately concluded that TPLF may contribute through its positive externalities to both the social and to the market dimensions of the EU, although it is something that will have to be assessed carefully in due course, and obviously provided that certain regulatory conditions would be addressed.

3. Policy recommendations

After having analysed TPLF with a comparative factual and legal approach, this thesis made a contribution with regard to the private and societal desirability of TPLF, both in general terms and in the specific European legal system. The policy recommendations I am going to make will thus mainly focus on this legal system, which will help both to have a conclusion that is more coherent with the objectives of this thesis, and to make it more pragmatic and potentially more realisable. I do not however exclude that similar considerations could be applied – mutatis mutandis – to similar legal systems, or to legal systems that may want to draw from it. Having moreover already addressed many regulatory aspects related to TPLF in the litigation market⁸⁸¹, I will here limit myself to provide some general indications on how such measures could be implemented at their best.

Any discussion concerning the regulation of TPLF in the EU will have to take into consideration that this practice seems to be basically legal in this context, and may be

⁸⁸¹ In particular in Chapter 6, but also in the concluding remarks of Chapter 3.

potentially beneficial at a private and a societal level. Moreover, any discussion will have to consider that - this market being at an early phase - on the one hand there is no evidence that it may lead to negative externalities or other socially undesirable effects; and, on the other, that in this context the legal system as resulting from the entry into force of the Lisbon Treaty is quite solid, although some further legal certainty could enhance the development of this market and prevent some negative externalities and/or abuses of TPLF. Starting from this second point, it may probably be desirable if the EU legislator(s) would take action to enact measures, eventually only of 'soft law'⁸⁸², to clarify some points concerning the legality of TPLF. This would not only help to enhance legal certainty, but also promote a consistent and sound approach to such business. In this regard, moreover, promoting (European wide) programs of legal and economic research in this sphere may potentially be beneficial to enhance the knowledge of this practice among operators, thus more legal certainty. All of these discussions will always have to take into consideration that the financial incentive of TPLF seems to be aligned with an optimal allocation of litigious rights, and thus makes the litigation market very competitive, which may or may not be socially beneficial. In the light of this argument, the assessment of the first point made above – that TPLF is, in principle, legal and desirable - would thus have to be considered in the light of both its positive and negative effects in a general way. For this reason, it would probably be desirable that such legislation would be enacted at an EU level, and not by single states. The latter may indeed further exacerbate complexity, and thus limit access to justice in the EU context.

On a more specific level, the legality and desirability of TPLF will have to be assessed also with regard to the incentives it gives to parties in private bargaining, and in particular in the light of the claimant-lawyer-funder-insurer relationship. I have indeed highlighted a series of issues that may jeopardise this relationship, especially in those cases where there would be impecunious and not sophisticated claimants. In such context, probably, regulation or controls (ex ante and ex post) could be desirable as a way to protect the impecunious and/or unsophisticated claimants' position, also with regard to the lawyers and their independence. It is moreover important, in order to have a better access to justice (in terms of more meritorious claims brought forward), that

⁸⁸² See Chapter 6, par 1.5.

such measures would also address moral hazard and adverse selection towards litigation funders. In this regard, however, it is to be borne in mind that such problems are more likely to arise now that the market is not competitive, and thus probably there could be a need for immediate action in this regard. As mentioned, since such problems are potentially capable of affecting all European citizens, it would be preferable that regulatory action in this sphere would be taken at a EU level, especially for the consumer segment⁸⁸³. It is finally worth noting that European citizens and companies however may need TPLF also to support them in their global deals, which would thus require interaction between regulators and courts in a broader way.

4. Limitations & further research

The main objective of this thesis, to provide a first initial systemic perspective on the law and economics of TPLF in the European perspective, represents per se a main limit of the work carried out and presented therein. The discussions have indeed been quite general and very often have left questions open, due to the fact that the TPLF and the litigation markets are at an early phase, and that there is not much evidence that would confirm the arguments proposed. In this regard, one limitation is that I have decided to explore those jurisdictions where: TPLF has emerged with a certain impetus and received attention from different local institutional and professional actors, and where access to justice is recognised as a fundamental value. There are however other jurisdictions at a global level that are starting to discuss and welcome⁸⁸⁴ (or not⁸⁸⁵)

⁸⁸³ This is also the conclusion of Van Boom, above at footnote 3.

⁸⁸⁴ See the liberal approach of the Hong Kong courts towards maintenance and champerty in the cases *Unruh v Seeberger* (2007) 10 HKCFAR 31, para 85, and *Geoffrey L. Berman v SPF CDO I, Ltd. And Others* (HCMP 1321/2010). See moreover in Dubai the case *Vannin Capital PCC PLC v (1) Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai (4) KBH Kaanuun Limited (5) Bank Sarasin-Alpen(ME) Limited (6) Bank J. Safra Sarasin Ltd (Formerly Bank Sarasin & Co Limited)* [2014] CFI 036

⁸⁸⁵ *Persona Digital Telephony Limited & Sigma Wireless Networks Limited and The Minister for Public Enterprise, Ireland and the Attorney General and, by order, Denis O'Brien and Michael Lowry* [2017] IESC 27. In this case the Irish Supreme Court concluded that TPLF is unlawful by reason of the rules on champerty.

TPLF in the moment in which this thesis is being written (although often with regard to international arbitration only⁸⁸⁶), and therefore future researches could certainly be enlarged also to these. Obviously any future research aimed at reporting any other more specific legal and factual data, especially with regard to the comparative overview of the Chapter 3, will be welcomed.

Similar considerations can be made with regard to the limitations of the law and economics analysis of TPLF and/in the litigation market. Since this is a first attempt to provide a systemic view on the private and societal desirability of TPLF, the fact that the TPLF and the litigation market are at an early phase has certainly not helped in this regard. This is certainly the main limit of this Part, which I hope the future researches will help in overcoming. More specifically, it will be interesting to deepen (but, also, to deny) the discussions on the liberalisation of the litigation market, and how this would have allowed the emergence of a new asset class consisting of litigious rights. It will be moreover interesting to discuss TPLF, always with a law and economics approach, in the context of the sharing economy, especially to see the incentives it gives to fragment property and create alternative (possibly, efficient) bundles of property rights while applying the models discussed (or other). These researches will most likely also have to find (further) ways to address the conflicts concerning the client-lawyer-funder-insurer relationships in specific jurisdictions and/or claims, while the business practices will be more likely to try to devise efficient models applicable in concrete cases. The generality of the discussions moreover prevented looking into the specific regulatory matters limiting and/or preventing lawyers and insurers to contend in the market for litigious rights, which seems to be also a very wide direction for research (and business practices).

As instead with regard to the economic analysis of TPLF, the Shavell basic formula of litigation and the De Morpurgo basic model on TPLF have been a solid starting point to define the various incentives that parties have in single transactions. These discussions have however been limited by the fact that these were purely theoretical

⁸⁸⁶ See the Singaporean Bill 38 of 2016, enacted on January 10, 2017, approving the proposed legislative amendments to introduce a legal framework for third party funding (TPF) in international arbitration in Singapore.

Available at

<https://www.parliament.gov.sg/sites/default/files/Civil%20Law%20%28Amendment%29%20Bill%2038-2016.pdf> (last vis. 16.3.2017).

speculations, although the fact that third party funders would be already operating (and making good money!) already constitutes evidence that this practice works effectively. In this regard, however, we would welcome any empirical research aimed at reinforcing (but also, why not, denying) the arguments on the efficiency of TPLF, especially in the corporate segment. It could be discussed, for example, whether a company with many (potentially good) claims may be better off creating its own litigation funding arm, and not to delegate this to third party funders. Similar arguments also work with regard to the societal dimension of TPLF, where indeed I limited myself to provide theoretical discussions on the desirability of TPLF, without reaching a possible conclusion based on empirical evidence in this regard. For this reason, obviously any empirical research aimed at confirming one argument rather than the other would be welcome. In particular it will be interesting to see empirical evidence (but also theoretical speculations and specific models for certain type of disputes) concerning, for example: whether TPLF indeed increases litigation (or not)⁸⁸⁷; whether it induces more settlements and for higher amounts (or not)⁸⁸⁸; whether it increases deterrence⁸⁸⁹, thus decreasing wrongs, and redistribution⁸⁹⁰; in relation to all of these, whether it increases or not the states' costs for the administration of justice or also for deterrence⁸⁹¹; but also, from a more theoretical point of view, what would be the impact of TPLF with regard to social justice⁸⁹². The normative legal and economic considerations have also been limited by the small number of legislative measures on TPLF, already enacted, and thus by the lack of practical examples to define what such regulatory measures could be. While of course I attempted to 'grasp' elements from the discussions concerning similar instruments (for example, lawyers' contingency fees or LEI), I think there is still room for improvement in terms of indicating other instruments that may potentially be of help (especially when the TPLF and the litigation market are more mature).

⁸⁸⁷ Chapter 5, par 2.2.2. and 2.3.3.

⁸⁸⁸ Chapter 5, par 1.2.3.1.1. and 2.3.3.

⁸⁸⁹ Chapter 5, par 2.1.1.2.

⁸⁹⁰ Chapter 5, par 2.1.1.1. and 2.3.1.

⁸⁹¹ Chapter 5, par. 2.1.2.1. and 2.3.3.

⁸⁹² Chapter 5, par 3.

The discussions on TPLF and the European perspective, being a practical 'test' of the assumptions made in Part I and II, suffer from the same general limit of these two, that since TPLF and the litigation market are at an early stage, that the available data were very limited. In this context these problems were actually further exacerbated by the fact that this practice has indeed emerged less than in other (common law) jurisdictions. Having realized that one limit for this business could have been the legal uncertainty concerning such transactions, I have reported the French and German discussions on the legality of TPLF. These legal systems not being my own, I limited myself to reporting the debates that took place there, not adding much to these if not the categorisation offered. I nevertheless formulated a series of questions for the other civil law jurisdictions, that I am sure the literature will find interesting to answer both in general terms and with regard to specific jurisdictions. These discussions will most likely aim to confirm (but, why not, also to deny) the legality of TPLF in general terms, but also in specific models and disputes. Knowing the typical civil lawyers approach⁸⁹³, it is likely that the academic discussions will probably go along with the practice, and thus it will be interesting to see how these will evolve in this context. In this regard, further discussions should be welcomed also because they would enhance the legal certainty on this method for the practitioners, and thus to foster this business. The same holds true with regard to the desirability of TPLF in the private and societal European dimensions, where indeed I could not find much data or other evidence supporting the argument that TPLF was desirable. I have indeed based my considerations on the current regulatory framework and not, for example, on the actual claims already brought forward due to TPLF, or on effective deterrence, redistribution, etc. In this regard, having moreover focused my discussions on some specific areas of EU law and policy, it will be interesting to see some contributions confirming or denying such an approach in these areas, but also in other more specific ones.

5. Concluding remarks. TPLF, the litigation market and the Jack Ma's '30-30-30' indication for the future of global economy

The positive aspects of free markets are generally recognised in their inner capability to allocate goods, capital, services and human resources efficiently, and to spur

⁸⁹³ See M BUSSANI above at footnote 277.

innovation and growth, with ultimately lower prices and better services for consumers. We nonetheless discussed that externalities prevent free markets from allocating resources efficiently, thus leaving room for market failures, which legislators around the world try to tackle with different means. In the course of this thesis we have seen that similar considerations can be made also for the litigation market where TPLF would be widespread. We attempted to demonstrate how leaving a financial incentive for third party funders would therefore lead to both private and social benefits at the same time, although we also discussed how TPLF would also potentially lead itself to negative externalities and/or abuses. In this regard, we basically discussed a series of state and private bargaining measures that could prevent these from happening, or eventually sanction them. In the light of these considerations, we have ultimately seen that TPLF in a concrete legal context could be beneficial from both a private and societal point of view, and that there are no serious concerns regarding its legality.

At the end of this very interesting introspection on the rising TPLF (and litigation) market I want to conclude with a more global perspective on this business, recalling a recent interview given by Jack Ma, the Executive Chairman of the Ali Baba group, to the World Economic Forum Annual Meeting of 2017. At the end of a one-to-one interview in the second day of meetings he decided to share advice on understanding the next global priorities, which we report in its entirety here: ‘The next 30 years are critical for the world,’ he said. ‘Every technological revolution takes about 50 years.’ In the first 20 years, we witnessed the rise of technology giants like eBay, Facebook, Alibaba and Google. This is ‘good, Ma said, but now we need to focus on what comes next. ‘The next 30 years’, should be about handling ‘the implications of this technology’, he argued. ‘The most important thing is to make the technology inclusive – make the world change. Next, pay attention to those people who are 30 years old, because those are the internet generation. They will change the world, they are the builders of the world. Third, let’s pay attention to the companies who have fewer than 30 employees. So, 30 years, and 30 years old, and 30 employees, that way we can make the world much better’⁸⁹⁴. These considerations, while very general, seem to conceal some very interesting indications on the future of TPLF and, in general, the

⁸⁹⁴ R CHAINY, ‘These 3 trends will define your future, says Jack Ma’, World Economic Forum, 19 January 2017, available at <https://www.weforum.org/agenda/2017/01/jack-ma-three-trends-define-future/>

litigation market, in relation to the current global economic trends.

The first indication concerns the fact that the next 30 years will have to be dedicated to handling the implications of technologies such as eBay, Facebook, Alibaba and Google, companies that have disrupted their respective markets for goods, services and information. They have benefited from the modern IT tools to remove barriers to global trade, connecting efficiently and effectively people and companies from any side of the globe. They have however potentially increased the possibility of conflicts, being these physiological to each transaction, but also due to the further availability of information that they engender. This should not be considered as undesirable as, from a moral point of view, the idea that litigation would be an evil is not anymore part of modern legal cultures. It is now commonly accepted that conflicts are a physiological part of the relationships between individuals, businesses and states, and that their resolution – as thoroughly discussed in this thesis - can engender socially desirable outcomes.

The second indication concerned the actual 30 years' old 'technological' generation, which in the opinion of Jack Ma will also contribute, with its innovative and socially oriented appeal, to make a better society. We already have evidence of this in those IT and other start-ups that aim at solving widespread social problems also consisting of market failures⁸⁹⁵ and, with specific regard to litigation, to those technologies that will (or already are) being devised to make an efficient legal and litigation market⁸⁹⁶. It is not difficult to see how the companies that would be involved in this type of business could also contribute to address the market failure in access to justice by avoiding some litigation related costs and risks. The market offers already several examples of these: internet platforms that purport to reduce and/or avoid the transaction and

⁸⁹⁵ J PHILLS and L DENEND, Social Entrepreneurs Correcting Market Failures, 2005, Case No.SI72A and Case No.SI72B, available at <https://www.gsb.stanford.edu/faculty-research/case-studies> (last vis. 4.5.2017). It is in this context that it has recently been recognised that social entrepreneurship may be regarded as the 'second invisible hand', based on others-interest rather than to self-interest. FM SANTOS, A Positive Theory of Social Entrepreneurship, INSEAD Faculty & Research working Paper, 44, available at <https://sites.insead.edu/facultyresearch/research/doc.cfm?did=41727> (last vis. 4/5/2017).

⁸⁹⁶ M SKAPINKER, 'Technology: Breaking the law', *Financial Times*, April 11, 2016, available at <https://www.ft.com/content/c3a9347e-fdb4-11e5-b5f5-070dca6d0a0d> (last vis. 11.2.2017)

organization costs in mass claims by joining the claimants on-line⁸⁹⁷; internet platforms for dispute resolution on-line⁸⁹⁸; artificial intelligence for legal research⁸⁹⁹; companies that compare the track record of lawyers before certain judges in given cases⁹⁰⁰; and so on. These companies, and any other company who have fewer than 30 employees, are in the words of Jack Ma's third indications those that will make technology inclusive, and potentially accessible to anyone. In this regard, it is worth noting that such companies could be capable of benefiting from the change in incentives to allocate and use property rights that the sharing economy seems to give. An interesting direction for such businesses will be indeed to try to make money while fragmenting and better allocating (also by making use of IT tools) the existing property rights, rather than endorsing the traditional capitalistic approach of appropriation of property. What will be the implications for access to justice and dispute resolution is difficult to predict, although it is certainly an area that to date – as discussed throughout this thesis – presents large market failures, and thus high potential in terms also of business.

⁸⁹⁷ <https://www.weclaim.com>

⁸⁹⁸ <http://www.ejust.fr>

⁸⁹⁹ <http://www.rossintelligence.com>

⁹⁰⁰ <https://premonition.ai>

Bibliography

1. ABRAMOWICZ M, ‘On the Alienability of Legal Claims’ (2005) *Yale Law Journal*, Vol 114, n 4.
2. ABRAMS D and CHEN DL, ‘A Market for Justice: A First Empirical Look at Third Party Litigation Funding’ (2013) *University of Pennsylvania Journal of Business Law*, Vol 15.
3. ADAMS AM, ‘The Legal Profession: A Critical Evaluation’, (1989) *Dickinson Law Review*, Vol 93, 643.
- 4.AITKEN L, ‘Before the High Court: ‘Litigation Lending’ After Fostif’ (2006) *Sydney Law Review* Vol 28, 171.
5. AITKEN L, ‘Champerty, Statutory Assignment and the Liquidator or Trustee in Bankruptcy’ (1995) *Corporate & Business Law Journal*, Vol 8, 225.
6. AKERLOF GA, ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’ (1970) *Quarterly Journal of Economics*. The MIT Press, Vol 84, n 3, 488–500.
7. ALESSI R and MANNINO V, ‘La circolazione del credito: Cessione, factoring, cartolarizzazione’, Vol I, in L GAROFALO and M TALAMANCA eds, *Trattato delle Obbligazioni*, Padova: Cedam, 2008.
8. ANDERSEN TM and MAIBOM J, ‘The Big Trade-Off between Efficiency and Equity - Is it There?’ (2016). *CEPR Discussion Paper*, n DP11189. Available at SSRN: <https://ssrn.com/abstract=2766484>.
9. ANDERSON G, 'The Trendtex principle in Australian law: context and recent developments' (2016) *The University of Western Australia Law Review*, Vol 40, n 2.
10. ANDREWS NH, ‘Accessible, Affordable, and Accurate Civil Justice - Challenges Facing the English and Other Modern Systems’ (2013) *University of Cambridge Faculty of Law Research Paper*, n 35,. Available at SSRN: <http://ssrn.com/abstract=2330309>.
11. ANGELINI V, ““Metuendus ingratus” (Avvocato e cliente in una pagina di Quintiliano)” (1989) *Studi de Sarlo*, Milano.
12. ARANGIO - RUIZ V, *Il mandato in diritto romano*, Napoli, 1949.

13. ASSER C, *Het Nederlands Burgerlijk Wetboek Vergeleken met het Wetboek Napoleon*, 2nd ed., Van Cleef, 1838.
14. ATTU L, ‘Before-the-event legal expenses insurances’, in PIROZZOLO R (Ed.), *Litigation Funding Handbook*, The Law Society, London, 2014.
15. BAPPELBAUM B, ‘Lawsuit Loans Add New Risk for the Injured’, *New York Times* (Jan. 16, 2011), http://www.nytimes.com/2011/01/17/business/17lawsuit.html?pagewanted=all&_r=0
16. BARKER GR, ‘Third Party Litigation Funding in Australia and Europe’, *Centre for Law and Economics - ANU College of Law, Working Paper* n. 2, 2011.
17. BARNARD C and DEAKIN S, ‘Social Policy and Labor Market Regulation’, in JONES E, MENON A and WEATERHILL S, *The Oxford Handbook of The European Union*, Oxford University Press 2012, 551.
18. BARNARD C, *The Substantive Law of the EU - The Four Freedoms*, Oxford University Press, 2013.
19. BARRY S, ‘Capital Law launches its own £50m litigation fund’, *Wales Online*, 1 Feb 2016. Available at <http://www.walesonline.co.uk/business/business-news/capital-law-launches-50m-litigation-10813816>.
20. BARTON JH, GOLDSTEIN JL, JOSLING TE and STEINBERG RH, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*, Princeton University Press, 2008.
21. BATOR FM, ‘The Anatomy of Market Failure’ (1958) *Quarterly Journal of Economics*, Vol 72, n 3, 351.
22. BAUMOL WJ, ‘On Taxation and the Control of Externalities’ (1972) *American Economic Review*, Vol 62, Issue 3, 307.
23. BEALE H, *Chitty on Contracts*, Sweet & Maxwell, London, 31st ed.
24. BEBCHUK LA, ‘Litigation and Settlement Under Imperfect Information’, (1984) *Rand Journal of Economics*, Vol 15, 404.
25. BENCH NIEUWVELD L and SHANNON V, *Third-Party Funding in International Arbitration*, Alphen Aan Den Rijn: Kluwer Law International, 2012.
26. BENTHAM J, *Defense of Usury*, 1787.
27. BERGIN PA, *Litigation and Globalisation*, Address by the Honourable Justice P. A. Bergin to the New Young Lawyers Litigation seminar, Sydney, 31 March

- 2007, available at
<http://www.austlii.edu.au/au/journals/NSWJSchol/2007/5.pdf>.
28. BERNARD A, *La rémunération des professions libérales en droit romain classique*, Domat-Montchrestien, Paris 1936.
 29. BIONDI B, *Il diritto romano cristiano*, Vol III, Milano 1954.
 30. BLACKSTONE W, *Commentaries*, Book IV, Ch. 10, par 11. Available at <http://lonang.com/library/reference/blackstone-commentaries-law-england/>.
 31. BLAIR RD and PAGE WH, 'Speculative' Antitrust Damages (1995) *Washington Law Review*, Vol 70, 423.
 32. BLANC-JOUVAN X, 'Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration' (2004) Cornell Law School Berger International Speaker Papers. Paper 3, available at http://scholarship.law.cornell.edu/biss_papers/3
 33. BOARDMAN M, 'Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation' (2012) *Journal of Law, Economics and Policy*, Vol 8, 673.
 34. BOGUS CT, 'The Death of An Honorable Profession' (1996) *Indiana Law Journal*, Vol 71, 911.
 35. BONE RG, 'Modeling Frivolous Suits' (1997) *University of Pennsylvania Law Review*, Vol 145, n 3.
 36. BOULIER W, 'Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts' (1995) *Hofstra Law Review*, Vol 23, Issue 3.
 37. BOWCOTT O, 'Elvis Presley case highlights growth of third party funding to back legal claims', *The Guardian*, 30 November 2012, available at
 38. BOWIE N, 'The Law: From a Profession to a Business' (1988) *Vanderbilt Law Review*, Vol 41, 741.
 39. BOWLES R and RICKMAN N, 'Asymmetric Information, Moral Hazard and the Insurance of Legal Expenses' (1998) *Geneva Papers On Risk and Insurance*, Vol 23 196, 197.
 40. BRADLEY WENDEL W, 'Alternative Litigation Financing and Anti-Commodification Norms' (2014) *DePaul Law Review*, Vol 63, 655.
 41. BRICKMAN L, *Introduction to Lawyer Barons: What Their Contingency Fees Really Cost America*. Cambridge University Press, 2011.

42. BRUNS A, ‘Das Verbot der quota litis und die erfolgshonorierte Prozeßfinanzierung’ (2000) *Juristenzeitung*, 236
43. BRUNS A, ‘Third-Party Financing in the Perspective of German Law—Useful Instrument for Improvement of the Civil Justice System or Speculative Immoral Investment?’ (2012) *Journal Of Law, Economics And Policy*, Vol 8.
44. BUCHANAN JC, ‘The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change’ (1994) *Valparaiso University Law Review*, Vol 28, 563.
45. BUEHLER DE, ‘Jurisdictional Incentives’ (2012) *George Mason Law Review*, Vol 20, 105.
46. BUENDIA SERRA JL, ‘Escribir derecho con renglones torcidos: política de competencia y servicios de interés económico general en el Tratado de Lisboa’ (2008) *Anuario de la competencia*, 129.
47. BURGER WE, ‘The Decline of Professionalism’ (1995) *Fordham Law Review*, Vol 63, 949.
48. BUSSANI M, *Libertà contrattuale e diritto europeo*, Torino, 2005.
49. CAIN T, ‘Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater’ (2014) *Chicago-Kent Law Review*, Vol 89, n 11.
50. CALAMANDREI P, *Opere Giuridiche*, Vol 3, 183-210, Naples, Morano; M. Cappelletti ed., 1968.
51. CALHOUN GM, *The Growth Of The Criminal Law In Greece*, Berkeley, 1927.
52. CALIHAN RB, DENT JR and VICTOR MB, *The Role Of Risk Analysis In Dispute And Litigation Management*, American Bar Association, 2004.
53. CAPPELLETTI M (ed), *Access to justice*, Milano, Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1978, [European University Institute]. The Florence Access-to-Justice Project.
54. CAPPELLETTI M and GARTH B, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) *Articles by Maurer Faculty*, paper 1142, in <http://www.repository.law.indiana.edu/facpub/1142>.
55. CAPPER D, ‘The Contingency Legal Aid Fund: A Third Way to Finance Personal Injury Litigation’ (2003) *Journal of Law and Society*, Vol 30, 66-83.
56. CARTER T, ‘Cash Up Front: New Funding Sources Ease Financial Strains on Plaintiffs Lawyers’, (2004) *American Bar Association Journal*, Vol 90, 34.

57. CASSENS WEISS D, 'Dewey Refinances Its Debt in \$125M Bond offering' (April 19, 2010) *Aba Journal*, available at http://www.abajournal.com/news/article/dewey_refinances_its_debt_in_125m_bond_offering/
58. CEBALLOS A, 'Third party litigation funding: will it increase access to justice in Canada?', *The Lawyer's Weekly*, Ottawa/Toronto, 7 March 2008.
59. CHAINY R, 'These 3 trends will define your future, says Jack Ma', World Economic Forum, 19 January 2017, available at <https://www.weforum.org/agenda/2017/01/jack-ma-three-trends-define-future/>
60. CHEN DL, 'Can markets stimulate rights? On the alienability of legal claims' (2015) *RAND Journal of Economics*, Vol 46, n 1, 23.
61. CHEN W, *A Comparative Study of Funding Shareholder Litigation*, Springer Singapore, 2017, 264 p.
62. CHRISTENSEN RS, 'Roosters in the Henhouse? How Attorney-Accountant Partnerships Would Benefit Consumers and Corporate Clients' (2012) *Journal of Corporate Law*, Vol 21, 911.
63. CLAUDE RP, 'The Classical Model of Human Rights Development', Vol 6, N 32, in CLAUDE RP (ed) *Comparative Human Rights*, Baltimore and London: Johns Hopkins University Press, 1976.
64. CLAY T, preface to DE FONTMICHEL M, 'Le faible et l'arbitrage' (2013) *Economica*, n 577.
65. COESTER M and NITZSCHE D, 'Alternative Ways to Finance a Lawsuit in Germany' (2005) *Civil Justice Quarterly*, Vol 24.
66. COHEN JH, *The law: business or profession?*, New York: Banks Law Publishing Co., 1916, 205.
67. COJO MO, 'Third-Party Litigation Funding: Current State of Affairs and Prospects for its Further Development in Spain' (2014) *European Review of Private Law*, Vol 22, Issue 3.
68. COLEMAN JL, 'Risks and Wrongs' (1992) *Harvard Journal of Law and Public Policy*, Vol 15, 646
69. COLEMAN JL, 'The Practice Of Corrective Justice', (1995) *Arizona Law Review*, Vol 37, n 15, 26.
70. COLLINS D, 'Public Funding of Multi-Party Litigation' (2010) *Manitoba Law Journal*, Vol 31, 211.

71. COOTER R and SUGARMAN SD, ‘A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract’, in W. OLSEN (ed), *New Directions In Liability Law*, 174, 1988.
72. COOTER R and ULEN T, *Law & Economics*, Berkeley Law Books. 6th edition, 2016.
73. COOTER R, ‘Commodifying Liability’, in *The Fall and Rise of Freedom of Contract*, FH Buckley ed., 1999.
74. COOTER R, ‘Towards a Market in Unmatured Tort Claims’ (1989) *Vanderbilt Law Review*, Vol 75 383;
75. COPPOLA G, *Cultura e potere, Il lavoro intellettuale nel mondo romano*, Giuffré, Milano, 1994.
76. CORDOPATRI F, *L'abuso del processo*, I, CEDAM, 2000.
77. COSTIGAN GP, *Cases and other authorities on the legal profession and its ethics*, 2d ed., 1933, 643-649.
78. COUTURE WG, ‘Securities Regulation of Alternative Litigation Finance’ (2014) *Securities Regulation Law Journal*, Vol 42, 5.
79. CROFT J, ‘Litigation Finance Follows Credit Crunch’, Jan. 27, 2010, Financial Times, available at <http://www.ft.com/cms/s/0/7c98c38a-0ab1-11df-b35f-00144feabdc0.html>.
80. DAMJANOVIC D. ‘The EU Market Rules as Social Market Rules: Why the EU can be a social market economy’ (2013) *Common Market Law Review*, Vol 50, Issue 6, 1685.
81. DANA JD and SPIER KE, ‘Expertise and Contingency Fees: The Role of Asymmetric Information in Attorney Compensation’ (1993) *Journal of Law, Economics and Organization*, Vol 9, 349.
82. DANOVİ R, *Compenso professionale e Patto di quota lite*, Giuffré, Milano, 2009.
83. DAUGHETY AF and REINGANUM JF, ‘Secrecy and Safety’, (September 2003). <http://ssrn.com/abstract=440580>.
84. DAUGHETY AF and REINGANUM JF, ‘Settlement’, in SANCHIRICO CW (ed), *Encyclopedia of Law and Economics*, (2nd Ed.), Vol. 8 - Procedural Law and Economics, Edward Elgar Publishing Co., 2012.

85. DAUGHETY AF and REINGANUM JF, 'The Effect of Third-Party Funding of Plaintiffs on Settlement' (2013) *Vanderbilt Law and Economics Research Paper*, n 13-8.
86. DE MARINI AVONZO F, *I limiti alla disponibilità della "res litigiosa" nel diritto romano*, Giuffré, Milano, 1967.
87. DE MORPURGO M, 'A Comparative Legal and Economic Approach to Third-party Litigation Funding' (2011), in *Cardozo Journal of International and Comparative Law*, Vol 19, 343.
88. DE MOT JPB, 'Sequential Trials and the English Rule' (2012) *European Journal of Law and Economics*, Vol 34, n 1.
89. DE PASQUALE P, 'Libera concorrenza ed economia sociale nel Trattato di Lisbona' (2009) *Diritto pubblico comparato ed europeo*, n 1, 81.
90. DE STEFANO BEARDSLEE M, 'Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?' (2014) *DePaul Law Review*, Vol 63, 305, 320.
91. DE STEFANO BEARDSLEE M, 'Non-Lawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup' (2012) *Fordham Law Review*, Vol 80, Issue 6.
92. DELZANNO C, 'Faire du contentieux un investissement financier' (2013) *Droit & Patrimoine*, n 225, May 2013.
93. DETHLOFF N, 'Verträge zur Prozessfinanzierung gegen Erfolgsbeteiligung' (2000) *Neue Juristische Wochenschrift*, 2228.
94. DOWD K, 'Moral Hazard and the Financial Crisis' (2009) *Cato Journal*, Vol 29, 141.
95. DRANGE M, *Peter Thiel's War On Gawker: A Timeline*, Forbes, 21 June 2016. Available at <http://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#67bd38bb7e80>.
96. DZIENKOWSKI JS and RJ PERONI, 'Conflicts of Interest in Lawyer Referral Arrangements with Non-lawyer Professionals' (2008) *Georgetown Journal of Legal Ethics*, Vol 21, 197.
97. EGGERS CR and TRAUTNER T, 'An Exploration of the Difference Between the American Notion of "Attorney-Client Privilege" and the Obligations of

- "Professional Secrecy" in Germany' (1994) SPG *International Law Practicum*, Vol 7, 23.
98. EMONS W, 'Conditional versus Contingent Fees' (2004) *University of Bern Discussion Paper*, n 04.08. Available at SSRN: <http://ssrn.com/abstract=550301>.
99. ENGSTROM NF, 'Attorney Advertising and the Contingency Fee Cost Paradox' (2013) *Stanford Law Review*, Vol 65, n 633.
100. EVANS DG, 'The Economic Impacts of Marijuana Legalization', in *The Journal of Global Drug Policy*, Vol. 7, Issue 4.
101. EWING J, 'In the U.S., VW Owners Get Cash. In Europe, They Get Plastic Tubes', *New York Times*, Aug. 15, 2016, available at https://www.nytimes.com/2016/08/16/business/international/vw-volkswagen-europe-us-lawsuit-settlement.html?_r=0.
102. FARNSWORTH K and IRVING Z (eds), *Social policy in challenging times, Economic crisis and welfare systems*, Bristol: Policy Press.
103. FAURE MG and DE MOT JPB, 'Comparing Third Party Financing of Litigation and Legal Expenses Insurance' (2012) *Journal of Law, Economics and Policy*, Vol 8, n 3, available at SSRN: <http://ssrn.com/abstract=2168438>.
104. FAURE MG and VISSCHER LT, 'The Role of Experts in Assessing Damages - A Law and Economics Account' (2011) *European Journal of Risk Regulation*, Vol 3, 376.
105. FAURE MG, 'CADR and Settlement of Claims. A Few Economic Observations' (2014), in C HODGES and STADLER A (eds), *Resolving mass disputes. ADR and settlement of mass claims*, pp. 38-60, Cheltenham: Edward Elgar, 2013.
106. FAURE MG, HARTLIEF T and PHILIPSEN NJ, 'Funding of Personal Injury Litigation and Claims Culture: Evidence from the Netherlands' (2006) *Utrecht Law Review*, Vol 2, n 2, available at SSRN: <http://ssrn.com/abstract=984182>.
107. FEJÖS A and WILLETT C, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) *European Review of Private Law*, Vol 24, Issue 1, 33.
108. FLUME W, *Allgemeiner Teil des Bürgerlichen Rechts, Zweiter Band -- Das Rechtsgeschäft*, Berlin/Heidelberg/New York, 1979, 3rd ed.

109. FLYNN A, BYROM N, HODGSON J, *Access to Justice: A Comparative Analysis of Cuts to Legal Aid*, Report of the Monash Warwick Legal Aid Workshop hosted by Monash University with the support of the University of Warwick, Monday 21 July 2014, available at http://www2.warwick.ac.uk/fac/soc/law/research/centres/cjc/researchstreams/comparative/monash_access_to_justice_-_legal_aid_report_jan_2015.pdf
110. FRISCHKNECHT A and SCHMIDT V, 'Privilege and Confidentiality in Third Party Funder Due Diligence: the positions in the United States and Switzerland and the resulting expectations gap in international arbitration' (2011) *Transnational Dispute Management*, Vol 8, Issue 4.
111. FRISTON M, *Civil Costs Law and Practice* (2nd ed), Jordans.
112. GALANTER M and CAHILL M, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements' (1994) *Stanford Law Review*, Vol 46, 1339.
113. GALANTER M, 'Law Abounding: Legalisation Around the North Atlantic' (1992) *Modern Law Review*, Vol 55, n 1.
114. GALANTER M, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) *Law and Society Review*, Vol 9, 95.
115. GARBER S, 'Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns' (2010) *Rand Corporation occasional paper*. Available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_O_P306.pdf.
116. GAROUPA N and GOMEZ LIGUERRE C, 'The Syndrome of the Efficiency of the Common law' (2011) *Boston University International Law Journal*, Vol 29, n 287.
117. GENNAIOLI N and SHLEIFER A, 'The Evolution of Common law' (2007) *Journal of Political Economy*, Vol 115, n 1, 43-68.
118. GERADIN D, 'Collective Redress for Antitrust Damages in the European Union: Is this a Reality Now?' (2015) *George Mason Law Review*, Vol 22, n 5, 1079.
119. GERBER RJ, *Lawyers, Courts, and Professionalism*, Greenwood Press, New York, 1989.

120. GIESEL GM, 'Alternative Litigation Finance and the Attorney-Client Privilege' (2015). *Denver University Law Review*, Vol 92, n 1, 2015.
121. GIURATI D, *Come si fa l'avvocato*, Livorno, 1897.
122. GLENN HP, 'Costs and Fees in Common law Canada and Quebec', available at http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf.
123. GOODMAN B, 'Four Areas of Legal Ripe for Disruption by Smart Startups' *Law Technology Today* 16 December 2014, available at <http://www.lawtechnologytoday.org/2014/12/smart-startups/>.
124. GREEN BA, 'The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate', (2000) *Minnesota Law Review*, Vol 84, 1115.
125. GREEN S, 'Debate on the Ethical Issue of Investing in Lawsuits', *Financial Times*, 13/11/2011.
126. GRUNEWALD B, 'Rechtsschutzversicherungen und alternative Prozessfinanzierungen' (2001) *Anwaltsblatt*, 541.
127. HARRISON JL, 'Private Antitrust Enforcement in the United States and the European Union: Standing and Antitrust Injury' (2011). Available at SSRN: <http://ssrn.com/abstract=1932741>.
128. HASHWAY JW, 'Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws' (2012) *Roger Williams University Law Review*, Vol 17, 753.
129. HAY BL, 'Contingent Fees and Agency Costs' (1996) *The Journal of Legal Studies*, Vol. 25, n 2, 503-533.
130. HAY BL, 'Contingent Fees, Principal-Agent Problems, and the Settlement of Litigation' (1997) *William Mitchell Law Review*, Vol 23, Issue 1, Article 7.
131. HELLWIG HJ, 'EU-Harmonisierung--Globalisierung--Kommerzialisierung Anwaltschaft quo vadis?' (2000) *Anwaltsblatt*, 205.
132. HENSLER D, HODGES C and TULIBACKA N, 'The Globalization of Class Actions' (2009) *Annals of the American Academy of Political and Social Science*, Vol 622, 149.

133. HENSLER DR, 'The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding' (2011) *George Washington Law Review*, Vol 79, 306.
134. HENSLER DR, 'Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?' (2014) *De Paul Law Review* Vol 63, 499.
135. HESSELINK MW, 'Unconscionability, Unfair Exploitation and the Nature of Contract Theory - Comments on Melvin Eisenberg's 'Foundational Principles of Contract Law' (2013), *Centre for the Study of European Contract Law Working Paper Series No. 2013-03; Amsterdam Law School Research Paper No. 2013-07*.
136. HODGES C, 'Collective Redress in Europe: The New Model' (2010) *Civil Justice Quarterly*, Vol 370.
137. HODGES C, CREUTZFELDT N, STEFFEK F and VERHAGE E, 'ADR and Justice in Consumer Disputes in the EU', Project Report. *The Foundation for Law, Justice and Society*, 2016, Oxford.
138. HODGES C, PEYSNER J and NURSE A, 'Litigation Funding: Status and Issues' (2012) Oxford Legal Studies Research Paper, n 55, available at SSRN: <https://ssrn.com/abstract=2126506>.
139. HODGES C, VOGENAUER S and TULIBACKA M, *The Costs and Funding of Civil Litigation. A Comparative Perspective*, Hart Publishing, 2010, 212.
140. HODGES C, VOGENAUER S and TULIBACKA M, *The Costs and Funding of Civil Litigation. A Comparative Perspective*, Hart Publishing, 2010, 212.
141. HOLDSWORTH AE, 'The Experience in England', in PFENNINGSTORF W, SCHWARTZ AM (eds), *Legal Protection Insurance*, American Bar Foundation, Chicago, 1986, 14.
142. HOLDSWORTH WS, 'The History of the Treatment of Choses in Action by the Common law' (1920) *Harvard Law Review*, Vol 33.
143. <https://www.theguardian.com/law/2012/nov/30/elvis-presley-third-party-legal-claims>
144. HYDE J, 'MoJ not minded to regulate third-party litigation funding', *Law Gazette*, 25 January 2017, available at <https://www.lawgazette.co.uk/law/moj-not-minded-to-regulate-third-party-litigation-funding/5059536.article>.
145. IRTI N, *L'età della decodificazione*, Giuffrè, Milano, 1979.

146. JACKSON R, *Review of Civil Litigation Costs: Final Report*, The Stationery Office, 2009.
147. JOHNSON E JR, ‘Justice, Access to: Legal Representation of the Poor’, in SMELSER NJ and BALTES PB (eds), *International Encyclopedia of the Social and Behavioral Sciences*, 2001, 8048.
148. JOUYET J, ‘Faut-il une nouvelle politique européenne de concurrence?’ (2008) *Concurrences*, 1.
149. KAKALIK JS and PACE NM, ‘Costs and Compensation Paid in Tort Litigation: Testimony Before the Joint Economic Committee of the U.S. Congress’ (1986) P-7243-ICJ, July 1986.
150. KALAJDZIC J, CASHMAN PK and AM LONGMOORE, ‘Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding’ (2013) *American Journal of Comparative Law*, Vol 61, n 2, 93.
151. KAPLOW L and SHAVELL S, ‘Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income’ (2000) *Journal of Legal Studies*, Vol 29, 821.
152. KATZ AW and SANCHIRICO CW, ‘Fee Shifting in Litigation: Survey and Assessment’ (2010) *University of Pennsylvania Institute for Law and Economics Research Paper*, n 10-30.
153. KAUFMANN C and MIRIAM G, ’Implementing Social Justice: Eliminating Poverty as a Legal Mandate?’ (2007) *NCCR Trade Regulation Working Paper No. 2007/18*, Available at SSRN: <https://ssrn.com/abstract=1088704>.
154. KELLEN Z, ‘Sharing Property’ (2016) *University of Colorado Law Review*, Vol 87, n 2
155. KESSEDJIAN C (ed.), *Le financement de contentieux par un tiers*, Paris, Pantheon-Assas Paris II, 2012.
156. KIDD J and ZYWICKI T, ‘Does Increased Litigation Increase Justice in a Second-Best World?’, in F BUCKLEY (ed), *The American Illness*, Yale University Press, 2012.
157. KIDD J, ‘To Fund or Not to Fund: The Need for Second Best Solutions to the Litigation Finance Dilemma’ (2012) *Journal of Law, Economics and Policy*, Vol 8, 7.

158. KILIAN M, 'Alternatives to Public Provision: The Rule of Legal Expenses Insurance in Broadening Access to Justice: The German Experience' (2003) *Journal of Law and Society*, Vol 30.
159. KINSEY KA and STALANS LJ, 'Which "Haves" Come Out Ahead and Why?' in KRITZER HM and SILBEY S (eds), *In litigation: do the 'haves' still come out ahead?* 1–2, 2003, 138.
160. KIRSTEIN R and RICKMAN N, 'FORIS Contracts: Litigation Cost Shifting and Contingent Fees in Germany' (2001) *CSLE Discussion Paper*, n 4, available at <http://econpapers.repec.org/paper/zbwcsledp/200104.htm>
161. KIRSTEIN R and RICKMAN N, 'Third Party Contingency contracts in settlement and litigation' (2004) *Journal of Institutional and Theoretical Economics*, Vol 160, n 4, 555.
162. KLEIN HAARHUIS C and VAN VELTHOVEN B, 'Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands' (2011) *Journal of Empirical Legal Studies*, Vol 8, Issue 3.
163. KORNÈ MD, *Pactul de quota litis e valabil*, Bucarest, 1897.
164. KREDER JA and BAUER BA, 'Litigation Finance Ethics: Paying Interest' (2013) *Journal of the Professional Lawyer*, Vol 1.
165. KRITZER HM and SILBEY S (eds) *In Litigation: Do The "Haves" Still Come Out Ahead?* Vol 1–2, 2003.
166. KRITZER HM, 'The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World' (1999) *Law and Society Review*, Vol 33, 713.
167. LA PORTA R, LOPEZ DE SILANES F and SHLEIFER A, 'The Economic Consequences of Legal Origins' (2008) *Journal of Economic Literature*, Vol 46 n 2, 285.
168. LAWTON JD, 'The Imposition of Social Justice Morality in Legal Education' (2016) *The Indiana Journal of Law and Social Equality*, Vol 4, n 457.
169. LEGG M, TRAVERS L, PARK E and TURNER N, 'Litigation Funding in Australia', *UNSW Law Research Paper*, 2010, n 12. Available at SSRN: <http://ssrn.com/abstract=1579487>.
170. LEGG MJ, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions. The Need for a

- Legislative Common Fund Approach' (2011) *Civil Justice Quarterly*, Vol 30, 52.
171. LEIGH J, 'Litigation Funding Begins to Take Off' (2009) *National Law Journal*, available at <http://www.therecorder.com/id=1202435963894/Thirdparty-Litigation-Funding-Begins-to-Take-Off?slreturn=20170108063958>
172. LESKINEN L, 'Collective Actions: rethinking funding and national cost rules' (2011) *Competition Law Review*, Vol 8, 87.
173. LEWIS R, 'Jackson and Before-the-Event Insurance: A Missed Opportunity or a Pitfall Avoided?' (2010). Available at SSRN: <https://ssrn.com/abstract=1695084>.
174. LINDEMAN R, 'Third-Party Investors Offer New Funding Source for Major Commercial Lawsuits' (March 5, 2010) *Daily Report For Executives - Bureau Of National Affairs*.
175. LOCKE J, *Second Treatise on Civil Government*, 1689.
176. LORDE MARTIN S, 'The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed' (2004) *Fordham Journal of Corporate & Financial Law*, Vol 10, Issue 1, Article 3.
177. LYON J, 'Revolution in Progress: Third-Party Funding of American Litigation' (2010) *UCLA Law Review*, Vol 58.
178. LYTTON TD, 'Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits' (2008) *Texas Law Review*, Vol 86, 1837.
179. MACKINNON FB, *Contingent Fees for Legal Services: Professional Economics and Responsibilities*, Transaction Publishers, 1964.
180. MAHONEY P, 'The Common law and Economic Growth: Hayek Might Be Right' (2001) *Journal of Legal Studies*, Vol 30, n 2, 503-25.
181. MARCUSHAMER IM, 'Selling Your Torts: Creating a Market for Tort Claims and Liability' (2005) *Hofstra Law Review*, Vol 33.
182. MAROTTA V, 'Una nota sui causarum concinnatores' (2006) *Rivista Storica dell'Antichità*, Vol 36.
183. MARTIN SL, 'Financing Litigation On-Line: Usury and Other Obstacles' (2002) *Depaul Business Law Journal*, Vol 1, 85.

184. MARTINEZ DE AGUIRRE C, 'La Transmisión Activa y Pasiva de Obligaciones en el Derecho Navarro' (1997) *Revista Jurídica de Navarra*, Vol 27, 9.
185. MATTEI U, 'Access to Justice. A Renewed Global Issue' (2007) *Electronic Journal of Comparative Law*, Vol 11, n 3.
186. MAUBACH N, *Gewerbliche Prozessfinanzierung gegen Erfolgsbeteiligung*, Bonn, 2002, 41.
187. MC DONALD O, WINTERS I, HARMER M, 'The Market For 'BTE' Legal Expenses Insurance' (2007) *Ministry Of Justice*, Vol 51, n 48.
188. McGOVERN G, RICKMAN N, DOHERTY J, KIPPERMAN F, MORIKAWA J and GIGLIO K, *Third-Party Litigation Funding And Claim Transfer: Trends And Implications For The Civil Justice System*, Rand - Institute For Civil Justice Program, Conference Proceedings, 2010. Available at http://www.rand.org/pubs/conf_proceedings/CF272.html.
189. MC LAUGHLIN JH, 'Litigation Funding: Charting a Legal and Ethical Course' (2007) *Vermont Law Review*, Vol 31.
190. MÉNDEZ PINEDO ME, 'Access to justice as hope in the dark in search for a new concept in European law', in *International Journal of Humanities and Social Science* (2011) Vol 1 n 19.
191. MILLER GP, 'Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard' (2003) *University of Chicago Legal Forum*, Vol 2003, Issue 1, Article 13.
192. MILLER GP, 'Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent' (2003) *The Review of Litigation*, Vol 22, 557.
193. MILLER GP, 'Some Agency Problems in Settlement' (1987) *The Journal of Legal Studies*, Vol 16, n 1, 189.
194. MILLMAN JL, 'Structuring A Legal Claims Market To Optimize Deterrence' (2016) *New York University Law Review*, Vol 91, 496.
195. MITCHELL POLINSKY A and RUBINFELD DL, 'Aligning the Interests of Lawyers and Clients' (2003) *American Law and Economics Review*, Vol 5, n 1, 165.

196. MOLITERNO JT, ‘Broad Prohibition, Thin Rationale: The “Acquisition of an Interest and Financial Assistance in Litigation” Rules’ (2003) *Georgetown Journal of Legal Ethics*, Vol 16, 223.
197. MOLOT JT, ‘A Market in Litigation Risk’ (2009) *University of Chicago Law Review*, Vol 76, 367.
198. MOLOT JT, ‘Litigation Finance: A Market Solution to a Procedural Problem’, (2010) *Georgetown Law Journal*, Vol 99, 65.
199. MORABITO V and WAYE VC, ‘The Dawning of the Age of the Litigation Entrepreneur’ (2009) *Civil Justice Quarterly*, Vol 28, n 3.
200. MORABITO V, ‘Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs’ (1995) *Monash University Law Review*, Vol 21, 231.
201. MORRISS AP, YANDLE B and DORCHAK A, ‘Choosing Hmtl to Regulate’ (2005) *Harvard Environmental Law Review*, Vol 29, 179, 1.
202. NASCIMBENE B and BERGAMINI E (eds), *The Legal Profession in the European Union*, Kluwer Law International, 2009.
203. NEUBERGER D, *From Barretry, Maintenance and Champerty to Litigation Funding*, Harbour Litigation Funding First Annual Lecture, Gray’s Inn, 8 May 2013, available at <https://www.supremecourt.uk/docs/speech-130508.pdf>.
204. NEWMAN P (ed), *Kaldor Hicks Compensation*, in Palgrave Dictionary of Economics and the Law, 2 (E-O), 2002.
205. NICOLA PC, *Efficiency and Equity in Welfare Economics*, Lecture Notes in Economics and Mathematical Systems, Springer, 2013th Edition.
206. NITZSCHE D, *Ausgewählte rechtliche und praktische Probleme der gewerblichen Prozesskostenfinanzierung unter besonderer Berücksichtigung des Insolvenzrechts*, München, 2002, 56.
207. NOTARAS A, ‘Law firms: to list or not to list?’, *International Bar Association*, Friday 10th September, 2016. Available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e2d1bfa3-e5c7-49e5-8e4f-7171c31c119e>.
208. O’GORMAN R, ‘The EHCR, the EU and the Weakness of Social Rights Protection at the European Level’ (2011) *German Law Journal*, Vol 12, n 10.
209. OGUS A, *Regulation: Legal Form and Economic Theory*, Hart, 2004.

210. PAPADOPoulos T, ‘European System of Financial Supervision’, in WOLFRUM R (ed) *Max Planck Encyclopedia of Public International Law*, Oxford University Press (2014).
211. PARLOFF R, ‘Have You Got a Piece of This Lawsuit?’ *Fortune* (May 31, 2011, 5:00 AM).
212. PERLINGIERI P, *Della cessione dei crediti*, in Comm. cod. civ., a cura di Scialoja-Branca, Bologna-Roma, 1982,
213. PESCANI P, *Honorarium. Studi sul Lavoro nel Diritto romano*, Trieste, 1961.
214. PHILLS J and DENEND L, ‘Social Entrepreneurs Correcting Market Failures’, 2005, Case No.SI72A and Case No.SI72B, available at <https://www.gsb.stanford.edu/faculty-research/case-studies>.
215. PICHE C, ‘Public Financiers as Overseers of Class Proceedings’, paper presented at the 2015 NYU Fall Conference: Litigation Funding.
216. PIGOU AC, *The economics of welfare*, Fourth edition, Macmillan, London, 1960.
217. PINDYCK R and RUBINFELD D, *Microeconomics*, 7th ed International, 2009.
218. PIROZZOLO R (Ed.), *Litigation Funding Handbook*, The Law Society, London, 2014.
219. POLINSKY MA and SHAVELL S, ‘The Economic Theory of Public Enforcement of Law’, (2000) *Journal of Economic Literature*, Vol 38.
220. POSNER RA, *Economic Analysis of Law*. By 1 Boston: Little, Brown and Company, 1973, pp. xi, 415.
221. PURI P, ‘Financing of Litigation by Third-Party Investors: A Share of Justice?’ (1998) *Osgoode Hall Law Journal*, Vol 36, n 3, 515.
222. RADIN M, ‘Maintenance by Champerty’ (1935) *California Law Review*, Vo 24, Issue 1, Art 6.
223. RADIN MJ, ‘Justice and the Market Domain’, in JW CHAPMAN and JR PENNOCK (eds), *Markets And Justice*, Nomos XXXI, 1989.
224. RADIN MJ, ‘Market-Inalienability’ (1987) *Harvard Law Review*, Vol 100, 1849.
225. RADIN MJ, *Contested Commodities*, Cambridge, Massachussets, Harvard University Press, 1996.

226. RAISER T, 'Legal Insurance', in NJ SMELSER and PB BALTES (eds), *International Encyclopedia Of The Social And Behavioral Sciences*, 2001, 8638, 8638.
227. RAKESH MOHAN J, *International Business*, Oxford University Press, New Delhi and New York, 2009.
228. RASCHE G, 'Prohibitions on assignment, a European civil code and business financing' (2002) *The European Legal Forum*, Vol. E, n 3, 133.
229. RAWLS J, *A Theory of Justice*, Harvard University Press, 1971.
230. REDEKER K, 'Freiheit der Advokatur—heute' (1987) *Neue Juristische Wochenschrift*, 2613.
231. REGAN F, 'The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expenses Insurance' (2003) *Journal of Law and Society*, Vol 30.
232. REGAN F, 'Whatever Happened to Legal Expenses Insurance?' (2001) *Alternative Law Journal*, Vol 26.
233. REGAN F, 'Why Do Legal Aid Services Between Societies? Re-examining the Impact of Welfare States and Legal Families', in REGAN F, PATERSON A, GORIELY T and FLEMING D (ed.), *The Transformation of Legal Aid: Comparative and Historical Studies*, Oxford University Press, 1999, 179.
234. REGAN JR MC and HEENAN PT, 'Supply Chains and Porous Boundaries: The Disaggregation of Legal Services' (2010) *Fordham Law Review*, Vol 78, 2137.
235. REICHEL D, 'The Law of Maintenance and Champerty and the Assignment of Choses in Action' (1983) *Sydney Law Review*, Vol 10, n 1, 166.
236. RENNPFERDT M, 'Lex Anastasiana'. *Schuldnerschutz im Wandel der Zeiten*, Göttingen, 1991.
237. RICARDO D, *On the Principles of Political Economy and Taxation*, London, John Murray, 1817 (1 ed).
238. RICHMOND DR, 'Other People's Money: The Ethics of Litigation Funding' (2004-2005) *Mercer Law Review*, Vol 56, 649.
239. RILEY A and PEYSNER J, 'Damages in EC Antitrust actions: Who pays the Piper?'(2006) *European Law Review*, Vol 31, 748.

240. RILEY A, 'The EU Reform Treaty and the competition protocol: undermining EC competition law' (2007) *European Competition Law Review*, Vol 28, n 12, 703-707.
241. ROBERTSON CB, 'The Impact of Third-Party Financing on Transnational Litigation' (2011) *Case Western Reserve Journal of International Law*, Vol 44, 159.
242. ROBERTSON CB, 'Transnational Litigation and Institutional Choice' (2010) *Boston College Law Review*, Vol 51, 1081.
243. RODAK M, 'It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effects on Settlement' (2006) *University of Pennsylvania Law Review*, Vol 155, 503.
244. RODGER BJ (ed.), *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU*, Kluwer Law International, 2014.
245. RODGERS A, SCOTT P, SANZ A and BROWN DM, 'Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know' (December 2016) *The Antitrust Source*, 2, available at <http://www.nortonrosefulbright.com/files/20161201-emerging-issues-in-third-party-litigation-funding-what-antitrust-lawyers-need-to-know-145438.pdf>
246. ROGERS CA, 'Gamblers, Loan Sharks & Third-Party Funders' in CA ROGERS, *Ethics In International Arbitration*, Oxford University Press, 2014, 177.
247. ROOS L, 'Catholic social doctrines', in HASSE RH, SCHNEIDER H and WEIGELT K, *Social Market Economy History, Principles and Implementation – From A to Z*, Edited by, English Edition, 2008 Ferdinand Schöningh, Paderborn, Germany, 100.
248. ROSENBERG D and SHAVELL S, 'A model in which suits are brought for their nuisance value' (1985) *International Review of Law and Economics*, Vol 5, Issue 1, 3.
249. ROSSOS JP, 'Access to Justice: Using Third Party Financing to Fulfill the Promise of Class Action Litigation' (2009), Canadian Class Action Review, Vol 5, n 1, 100.
250. ROWE JR TD, 'Shift Happens: Pressure on Foreign Attorney-fee Paradigms from Class Actions' (2003) *Duke Journal of Comparative and International Law*, Vol 13, 125.

251. ROWLES-DAVIES N and COUSINS J QC, *Third Party Litigation Funding*, Oxford University Press, 2014, 320 p.
252. RUBIN PH, 'Third Party Financing Of Litigation' (2011) *Northern Kentucky Law Review*, Vol 38, n 4,
253. RUGER JP, 'Health and Social Justice. The Lancet' (2004) Vol 364, 1075-1080.
254. SABATHIER S, 'Les espoirs suscités par la remise en cause du caractère réel du contrat de prêt' (2005) *Revue Trimestrielle de Droit Commercial*, n 5, 29.
255. SANCHIRICO WC, 'Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View' Journal of Legal Studies, June 2000. Available at SSRN: <https://ssrn.com/abstract=198825>.
256. SANCHIRICO WC, 'Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View', (2000) *Journal of Legal Studies*. Available at SSRN: <https://ssrn.com/abstract=198825>.
257. SANCHIRICO WC, 'The Continuing Debate on Equity and Efficiency in the Law: A Counter-Response to Kaplow and Shavell' (2000) *UVA Law School, Law-Economics Research Paper No. 00-19*. Available at SSRN: <https://ssrn.com/abstract=241573>
258. SANTOS FM, A Positive Theory of Social Entrepreneurship, INSEAD Faculty & Research working Paper, 44, available at <https://sites.insead.edu/facultyresearch/research/doc.cfm?did=41727> (last vis. 4/5/2017).
259. SANTUCCI G, 'In tema di Lex Anastasiana' (1992) *Studia et Documenta Historiae et Iuris*, Vol 58, n 58.
260. SCHÄFER HB, 'The Bundling of Similar Interests in Litigation. The Incentives for Class Actions and Legal Actions Taken by Associations' (2000) *European Journal of Law and Economics*, Vol 9, 183.
261. SCHEPKE J, *Das Erfolgshonorar des Rechtsanwalts*, Tübingen, 1998, 117.
262. SCHREIBER T and SMITH M, 'The case for bundling antitrust damage claims by assignment' (2014) *Concurrences*, n 3.

263. SEBOK AJ, 'The Inauthentic Claim' (2011) *Vanderbilt Law Review*, Vol 64, n 1, 61.
264. SHAJNFELD A, 'A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements' (2009-2010) *New York Law School Law Review*, Vol 54.
265. SHANNON V, 'Harmonizing Third-Party Litigation Funding Regulation' (2015) *Cardozo Law Review*, Vol 36. Available at SSRN: <http://ssrn.com/abstract=2419686>.
266. SHAPIRO JS, 'Trade, CO₂, and the Environment' (July 1, 2014). Available at SSRN: <https://ssrn.com/abstract=2374883>
267. SHARKEY CM, 'Economic Analysis of Punitive Damages: Theory, Empirics, and Doctrine', in J ARLEN (ed), *Research Handbook On The Economics Of Torts*, NYU Law and Economics Research Paper No. 12-02. Available at SSRN: <https://ssrn.com/abstract=1990336>.
268. SHAVELL S, 'A model of the optimal use of liability and safety regulation' (1984) *Rand Journal of Economics*, Vol 15, 271.
269. SHAVELL S, 'The optimal structure of law enforcement' (1993) *Journal of Law and Economics*, Vol 36, 255-287.
270. SHAVELL S, 'The social versus the private incentive to bring suit in a costly legal system' (1982) *Journal of Legal Studies*, Vol 11, 333.
271. SHAVELL S, *Foundations of Economic Analysis of Law*, 2004.
272. SHELTON DL, *Soft Law. Handbook Of International Law*, Routledge Press, 2008.
273. SHENKER JC and COLETTA AJ, 'Asset Securitization: Evolution, Current Issues and New Frontiers' (1991) *Texas Law Review*, Vol 69, 1369.
274. SHUKAITIS MJ, 'A Market in Personal Injury Tort Claims' (1987) *Journal of Legal Studies*, Vol 16, 329.
275. SILVER C, Litigation Funding versus Liability Insurance: What's the Difference? (2014) *DePaul Law Review*, Vol 63, Issue 2, 617.
276. SKAPINKER M, 'Technology: Breaking the law', *Financial Times*, April 11, 2016, available at <https://www.ft.com/content/c3a9347e-fdb4-11e5-b5f5-070dca6d0a0d>.

277. SMITH A, *An Inquiry into the Nature and Causes of the Wealth of Nations*, London: Library of Economics and Liberty, 1776 (1904 ed).
278. SOERJATIN E, 'Collective redress. Should we be going Dutch?' (2017) *Harbour View*, Summer 2017, available at <https://www.harbourlitigationfunding.com/wp-content/uploads/2017/06/HV-Summer-2017-Collective-redress-Going-dutch-E-Soerjatin.pdf>
279. SOLAS GM, 'Alternative Litigation Funding: A Comparative Overview and the Italian perspective' (2016) *European Review of Private Law*, Vol 24, Issue 2.
280. SPIRO PS, 'Equity Versus Efficiency in the Design of the Tax Mix' (2012). Available at SSRN: <https://ssrn.com/abstract=2270323>.
281. STEINITZ M and FIELD A, 'A Model Litigation Finance Contract' (2014) *Iowa Law Review*, Vol 99, 711.
282. STEINITZ M, 'The Litigation Finance Contract' (2012) *William & Mary Law Review*, Vol 54, 455.
283. STEINITZ M, 'Whose Claim Is This Anyway? Third Party Litigation Funding', (2011) *Minnesota Law Review*, Vol 95, n 4.
284. STIGLER GJ, 'The Optimum Enforcement of Laws' (1970) *Journal of Political Economy*, Vol 78, 526.
285. STONE SWEET A and SANDHOLTZ W, 'Neofunctionalism and Supranational Governance' (April 6, 2010). Available at SSRN: <https://ssrn.com/abstract=1585123>.
286. STRÖBEL S, *FORIS Beteiligungs-AG, BRAK-Mitt.*, Bundesrechtsanwaltskammer-Mitteilungen, 1998, 264.
287. STUERWALD C, *An Analysis of Allianz' decision to discontinue its litigation funding business*, at <http://www.calunius.com/news/news.aspx>.
288. SUNDARARAJAN A, 'From Zipcar to the Sharing Economy', *Harvard Business Review*, January 3, 2013. Available at <https://hbr.org/2013/01/from-zipcar-to-the-sharing-eco> (last vis. 7.2.2017).
289. SUSSKIND R, *The End of Lawyers*, Oxford University Press, 2010.
290. TARUFFO M (ed), *Abuse of procedural rights: Comparative standards of procedural fairness*, Kluwer Law International, 1999.

291. TETLEY W, 'Mixed jurisdictions: common law vs civil law (codified and uncodified)' (2000) *Revue de droit uniforme*, Vol 3, 605.
292. TROTTER MH, *Profit and the Practice of Law: What's Happened to the Legal Profession*, Athens Georgia, University of Georgia Press, 1997.
293. TUJL M L VISSCHER (eds), *New Trends in Financing Civil Litigation in Europe. A Legal, Empirical and Economic Analysis*. Cheltenham: Edward Elgar, 2010.
294. TZANKOVA IN, 'Funding of Mass Disputes: Lessons From the Netherlands' (2012) *Journal of Law, Economics & Policy*, Vol 8, 549.
295. UMBECK J, 'Might Makes Rights: A Theory of The Formation and Initial Distribution of Property Rights' (1981) *Economic Inquiry*, Vol 19, Issue 1.
296. VAN BOOM WH (ed), *Litigation, Costs, Funding and Behaviour. Implications for the Law*, Routledge, 2017.
297. VAN BOOM WH, 'Insurance Law and Economics: an Empirical Perspective', in MG FAURE and F STEPHEN, *Essays In The Law And Economics Of Regulation, In Honour Of Anthony Ogas*, 2008.
298. VAN BOOM WH, 'Juxtaposing BTE and ATE - on the Role of the European Insurance Industry in Funding Civil Litigation' (2009) *Rotterdam Institute of Private Law Working Paper*.
299. VAN CALSTER G, 'Do not kick them while they are down. Vulture funds in private international law', in ANDRÉ-DUMONT AP, DE MEULENEERE I and PIJCKE AS (eds.) *The increasing impact of human rights law on the financial world pages*, Cahiers AEDBF/EVBFR Vol 28, 53-67.
300. VARIAN HR, *Microeconomic Analysis* (Third ed.), New York, Norton, 1992.
301. VEENBRINK M and RUSU CS, 'Case C-557/12 *Kone AG and Others v ÖBB Infrastruktur AG*' (2014) *The Competition Law Review*, Vol 10, Issue 1, 107.
302. VELCHIK JEFFERY MK and ZHANG Y, 'Islands of Litigation Finance (2017) *Harvard John M. Olin Center For Law, Economics, And Business Fellows' Discussion Paper Series*, Discussion Paper No. 71 04/2017.

303. VELJANOVSKI C, ‘*Third Party Litigation Funding in Europe*’ (2012), *Journal of Law, Economics and Policy*, Vol 8, 408.
304. VENTRY DJ, ‘Equity vs. Efficiency and the U.S. Tax System in Historical Perspective’ (2009) in JJ THORNDIKE and DJ VENTRY JR, eds, *Tax Justice: The Ongoing Debate*, 25, 2002.
305. VOET S, ‘The Crux of the Matter: Funding and Financing Collective Redress Mechanisms’ (2014). in B HESS, M BERGSTRÖM E STORSKRUBB (eds) *EU Civil Justice. Current Issues and Future Outlook*. Hart Publishing, 201.
306. WAGNER W, ‘When All Else Fails: Regulating Risky Products Through Ton Litigation’ (2007) *Georgetown Law Journal*, Vol 95, 693.
307. WALKER J, KHOURI S and ATTRILL W, ‘Funding Criteria for Class Actions’ (2009) *University of New South Wales Law Journal*, Vol 32, 1036.
308. WAYE VC, ‘Conflicts of Interest between Claim holders, Lawyers and Litigation Entrepreneurs’ (2007) *Bond Law Review*, Vol 19, 225.
309. WAYE VC, ‘Trading In Legal Claims: Law, Policy & Future Directions in Australia, UK & US’, 2nd ed, Presidian Legal Publications, Adelaide 2008;
310. WEBER F and FAURE MG, ‘The Interplay between Public and Private Enforcement in European Private Law: Law and Economics Perspective’ (2015) *European Review of Private Law*, Vol 4, Issue 4, 525.
311. WEBER O, ‘Social Finance and Impact Investing’ (October 11, 2012), 2. Available at SSRN: <http://ssrn.com/abstract=2160403>.
312. WHEELER ME, ‘Antitrust Treble-Damage Actions: Do They Work?’ (1973) *California Law Review*, Vol 61, n 6.
313. WHYTOCK CA, ‘Domestic Courts and Global Governance’ (2009) *Tulane Law Review*, Vol 84, 67.
314. WHYTOCK CA, ‘The Evolving Forum Shopping System’ (2011) *Cornell Law Review*, Vol 96, 481.
315. WIESER RT, ‘Private v Public Enforcement of European Competition Law? : Relationship between effective enforcement of the law and individual justice’ (2016) Durham theses, Durham University. Available at Durham E-Theses Online: <http://etheses.dur.ac.uk/11641/> (last vis. 3 March 2017)
316. WIJKANDER H, ‘Correcting Externalities through Taxes on Subsidies to Related Goods’ (1985) *Journal of Public Economics*, Vol 28, Issue 1, 111.

317. WILKINS E, 'Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act' (2013) *Berkeley Journal of Employment and Labor Law*, Vol 34, n 1, 2013.
318. YEAZELLE SC, 'Brown, the Civil Rights Movement, and the Silent Litigation Revolution' (2004) *Vanderbilt Law Review*, Vol 57, 1975.
319. YOUNG EA, 'Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation after Kiobel' (2014) *Duke Law Journal*, Vol 64, 2015.
320. YOUNG G, 'Two Setbacks for Lawsuit Financing: But the Practice is Still Alive' (2003) *New Jersey Law Journal*, 21.
321. ZACKS EA, 'The Moral Hazard of Contract Drafting' (2015) *Florida State University Law Review*, Vol 42, n 991.
322. ZERVAS G, PROSERPIO D and J BYERS, 'The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry', *Boston University School of Management Research Papers*, n 2013-16. Available at SSRN: <http://ssrn.com/abstract=2366898>.

Other publications

323. AMERICAN BAR ASSOCIATION - COMMISSION ON ETHICS 20/20, White Paper on Alternative Litigation Finance, 1, 1. Available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2011_1212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.
324. AMERICAN BAR ASSOCIATION, COMMISSION ON ETHICS 20/20, *Informational Report to the House of Delegates*.
325. AMERICAN TORT REFORM ASSOCIATION ('ATRA'), Comments, Alternative Litigation Financing Working Group, Issues Paper 'Issues Paper Concerning Lawyer's Involvement in Alternative Litigation Financing' available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/comments_on_alternative_litigation_financing_issues_paper.authcheckdam.pdf

326. BURFORD, Annual Report, 2015 and 2016, available at <http://www.burfordcapital.com/investors/financial-reports-and-presentations/>
327. BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *Texaco/Chevron lawsuits (re Ecuador)*, available at <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>.
328. EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *Study on the functioning of judicial systems in the EU Member States*. Facts and figures from the CEPEJ questionnaires 2010-2012- 2013-2014, Strasbourg 14 March 2016, available at http://ec.europa.eu/justice/newsroom/files/scoreboard/2016_cepej_study_-_part_1_indicators.pdf.
329. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE, *Handbook on European law relating to access to justice*, 2016, available at http://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf.
330. GEORGETOWN LAW – CENTRE FOR THE STUDY OF THE LEGAL PROFESSION, *Report on the State of the Legal Market*, 2017, available at <http://legalsolutions.thomsonreuters.com/law-products/solutions/peer-monitor/complimentary-reports>.
331. *Handbook on European law relating to access to justice*, European Union Agency for Fundamental Rights and Council of Europe, 2016, available at http://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf.
332. HOGAN LOVELLS LLP, *At what cost? A Lovells multi jurisdictional guide to litigation*, 2010, available at <http://www.chrysostomides.com/assets/modules/chr/publications/16/docs/LitigationCostsReport.pdf>
333. HOGAN LOVELLS, *Global Currents: Trends in Complex Cross-Border Disputes*, 2014, available at <https://www.hoganlovells.com/en/events/global-currents-trends-in-complex-cross-border-disputes>.
334. LE CLUB DES JURISTES, *Financement du proces par les tiers*, Juin 2014. http://www.leclubdesjuristes.com/wp-content/uploads/2014/01/CDJ_Rapport_Financement-proc%C3%A8s-par-les-tiers_Juin-2014.pdf

335. OECD, ‘What makes civil justice effective?’, *OECD Economics Department Policy Notes*, n 18 June 2013, available at <http://www.oecd.org/eco/growth/Civil%20Justice%20Policy%20Note.pdf>.
336. PRICEWATERHOUSECOOPERS, 2013 International Arbitration Survey, *Corporate choices in International Arbitration Industry perspective*, available at <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.
337. R RUSHCLIFFE COMMITTEE, *Report of the Committee on Legal Aid and Legal Advice in England and Wales* (1945) (CMD 6641), London: H.M.S.O.
338. RIAD, *The Legal Protection Insurance Market in Europe*, October 2015, <http://riad-online.eu/news-publications/market-data/>.
339. US CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, ‘Selling Lawsuits, Buying Trouble: Third Party Litigation Funding In The United States’, October 2009.
340. US CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, ‘Stopping the Sale on Lawsuits: a Proposal to Regulate Third-Party Investment in Litigation’, October 2012.

Valorisation addendum

The focus of this thesis is to study Third Party Litigation Funding (TPLF) from a comparative legal and economics point of view, and to discuss what could be its perspective in the European context. The results of this study can be used in both professional and academic contexts, but also by policy makers and other stakeholders, in the European context and beyond. For this reason, in this valorisation addendum the academic, professional and social values of this thesis are presented.

i. Relevance

The possibility of funding litigation to secure access to justice or otherwise valorise litigious assets is an idea of which the implementation has the potential for changing the equilibrium of dispute resolution at a global level. While TPLF has initially emerged mainly in common law jurisdictions, recent facts show that this is also expanding in civil law ones, which means in almost every jurisdiction worldwide. From the point of view of geographical extension and legal culture therefore the potential relevance of this research seems quite far-reaching. From a more functional point of view, even if this instrument finds its pivotal function for claimants with high-stake claims and limited resources, this study has shown that claimants with sufficient resources and defendants could also benefit from the use of TPLF. The thesis has moreover shown that, given the competitive constraints it poses on other actors in the litigation market, TPLF is likely also to influence how small disputes are dealt with. Finally, it has shown that the potential externalities of TPLF have the capability to affect other fields, more or less related to the resolution of disputes in single cases. The relevance of this research is thus potentially very wide also in these terms, although, since this work has been quite generalised, it has left many questions open. For example, the historical and comparative overview has shown that TPLF nowadays is basically legal in all of them, although some limits may apply. We identified these main limits in maintenance and champerty in common law, and the ‘pactum de quota litis’ and the ‘redemptio litis’ in civil law. During the course of these chapters we have moreover had the chance to see that other issues may arise, which so far have not

received any specific and incontrovertible answer. This consideration, coupled with the nature of the topic, leads us to think that this research is relevant not only for academic discussions, but also for its practical implementation, from both a professional and more general social point of view. The way in which these issues will be addressed will obviously depend not only on the regulatory framework impacting on funding transactions, but also on the type of actors involved, and on the type of legal culture where such transactions would take place. For example, in the common law jurisdictions it is likely that legal precedents will shape TPLF contracts more than in the civil law ones, while in the latter – especially in the absence of other regulations – academia could possibly play a larger role and fill the gap. As with regard to its more general social relevance, the externalities of TPLF allow us to think that policy-makers at some point will have to step into the discussions, and some indications in this regard have been already provided for in Chapter 6 and in the policy recommendations. In this regard, we have seen that, *de iure condito*, some indications are already present in existing civil codes and civil procedural codes or other regulation, including those provisions that historically have aimed at preventing certain abuses of similar practices. The reporting and discussion of (some of) these provisions will thus be relevant for the actual and future practice, not only in the European perspective but also more generally. *De iure condendo*, instead, the many challenges that not only the administration of justice but society as a whole is facing, allow us to think that this thesis could be relevant in several fields, from policy making, to businesses, and to other stakeholders willing to tackle negative externalities. The support for litigation could for example be a means to deter and/or sanction wrongs in the private or environmental spheres, which evidently are global issues by excellence, of interest not only for legal operators. It is however worth noting that, this market being at an embryonic stage, it is difficult to foresee what actors and institutions will most likely benefit from this financial support. Much will obviously depend on the current rules on standing, but certainly policymakers could think of enlarging these rules to more actors as a way to improve deterrence and/or enforcement of laws, and to provide appropriate incentives to third party funders to tackle certain negative externalities that national states alone are unable to.

ii. Target groups

The findings of this thesis are of interest to several target groups in addition to the academic community and legal or financial operators. Also companies, policymakers, local or international organisations, groups of individuals may have an interest in knowing how their claims may be supported by a third party from a financial or other point of view. The academic community will evidently have great interest in this universal topic, given the wide variety of questions it opens, from substantial to procedural law, from financial regulation to lawyers' deontology and ethics. The answers will not necessarily be given by academics with just a legal or economic background; it is indeed likely that other sciences, such as statistics, would have an interest in exploring the effects of an increase in the probability to face a dispute, from different points of view. On the other hand, this study will be of utmost importance for policy-makers, which may draw on it to enact legislation that could affect the incentives to litigate depending on its own policy goals. While this thesis could not provide specific models or methods to configure these policies, it has nevertheless laid down some initial legal and economics considerations to do this in the future. Evidently from another perspective these considerations would be of relevance for operators in this industry willing to know whether certain legal fields could benefit from market solutions (such as , but not only TPLF) to improve their efficacy. This holds true not only for the main actors in the litigation market, but also for other businesses that may facilitate the enforcement of certain rights. It is not difficult to see already in actual practice how a series of legal tech start-ups are providing solutions to redress even situations with similar small claims. It is possible in this regard to think of those claim management companies that offer online services to efficiently claim for damages arising out of delays in flights, for car accidents and other. The knowledge of the legal and economic concepts contained in this thesis could for this reason be of interest also for other people willing to innovate in the legal industry with similar enterprises. Big businesses will also evidently benefit from the findings of this thesis, namely to optimise the management of their on-going litigation, but also to better assess in the future the litigation risk of their transactions. More specifically, general counsels, in house lawyers and/or chief financial officers could benefit from the economic findings of this thesis to assess the value, costs and risks of actual or potential claims, and understand whether, and to what extent, the intervention of a third

party may be beneficial. Finally, several local or international organisations, especially if having standing for certain claims, may also benefit from the information presented in this thesis to finance or otherwise better organise their claims, for example in the environmental or other spheres of general social relevance.

iii. Activities and products

The findings of this thesis can be useful for several reasons. Part of them have already been published in legal journals, such as the European Private Law Review and Contratto e Impresa Europa, and the entire thesis will - after a few adjustments - be submitted for publication as a book. The findings can moreover be used, as mentioned, by policy makers for future regulation of TPLF or, more generally, for how litigation can be funded. Chapter 6 in particular constitutes a good starting point to discuss whether and how TPLF can be regulated to improve its use in the wider litigation market. They moreover constitute a useful instrument for the practice, also in the immediate term. This could be both from a legal and an economic perspective, meaning it could help to structure funding transactions legally, given the analysis of the various issues underlying the practice, and efficiently, given the economics discussions on the incentives that parties have to enter into such an agreement. Obviously in this regard a caveat is needed, that being TPLF, a 'bespoke' solution, would require further effort to be adapted to concrete situations.

iv. Innovation

The studies presented in this thesis are unique with respect to the practice(s) of funding litigation in European/civil law jurisdictions, and attempted to develop some existing discussions on TPLF in the common law. They are also so far unique in respect of some law and economics arguments, for example with regard to the liberalisation of the litigation market and the emergence of litigious assets as a new asset class or, in some respect, with regard to the discussions on the externalities of TPLF. More generally, also the 'systemic' view on this practice presents some innovative aspects per se, helpful to discuss the matter in a more orderly way, given however the existing and solid basis of the mainstream law and economics literature. The innovative features of this thesis could thus represent not only an interesting benchmark for future research, but also a useful practical tool for any of the target groups described above.

v. Implementation

The implementation of the findings of this thesis will hopefully happen in concrete terms in future professional practice in the context of funding or otherwise valorise actual and potential claims. Considering that this thesis will be made public, it could also be useful for the professional activity of others. The interaction with other target groups mentioned, such as academics, local or international organisations and businesses will moreover be useful to implement the recommendations in practice. In this regard, not only traditional means (such as legal journals, conferences, etc.) could be of help for their dissemination but also - with due distinction - social media.

Curriculum

Gian Marco Solas (born in Oristano on the 25 of January 1986) graduated in law cum laude at the University of Cagliari in 2011. During this undergraduate path, thanks to a series of Erasmus scholarships, he had the opportunity to study in several universities, *inter alia* the Fordham Law School in New York, the Higher School of Economics in Moscow and the Mykolas Romeris University in Vilnius. These periods of research were helpful for writing a masters thesis on ‘Due Process in Competition Law: A Comparative Analysis’, which has been awarded the prize ‘Cossiga’ and a scholarship for the College of Europe in Bruges. Here Gian Marco obtained an LL.M. on European Legal Studies with merits. After this masters award he engaged in several working experiences in national and international business law firms, at the European Commission, in a civil and commercial mediation body, as consultant for an investment project in Africa and in a series of litigation funding transactions. While pursuing his joint Ph.D. from Maastricht Law School and the University of Cagliari with a dissertation on ‘Third Party Litigation Funding: A Comparative Legal and Economic Analysis and the European perspective’ he has moreover been a visiting scholar at New York University to conduct research on the US aspects of legal/litigation finance, and worked as a teaching assistant/research associate. In this capacity, besides publishing several articles in international legal journals, Gian Marco attended, participated in and/or contributed to organising several conferences and seminars on European, Comparative and International law matters. After the PhD defence, he will join Omni Bridgeway, the most experienced and one of the biggest litigation funding companies in the world.