

Third party litigation funding

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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.