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**THIRD PARTY LITIGATION FUNDING  
A COMPARATIVE ANALYSIS**

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*To my family, my girlfriend, my friends and the European Union;  
For their essential and irreplaceable support*

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# **THIRD PARTY LITIGATION FUNDING**

## **A Comparative Analysis**

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## List of Abbreviations

- ABA: American Bar Association
- ADR: Alternative Dispute Resolution
- 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
- EU: European Union
- FSA: UK Financial Services Authority
- ICA: International Court of Arbitration
- ICC: International Chamber of Commerce
- LASPO: Legal Aid, Sentencing and Punishment of Offenders
- LEI: Legal Expenses Insurance
- LFA: Litigation Funding Agreement
- PQL: Pactum de Quota Litis
- RIAD: Rencontres Internationales des Assureurs Défense
- RL: Redemptio Litis
- TPLF: Third Party Litigation Funding
- UK: United Kingdom
- US: United States
- WTO: World Trade Organisation

## 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 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 disputes<sup>1</sup>. It is however since a few years that access to justice seems 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 resources<sup>2</sup>.

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<sup>1</sup> A particular mention in this regard should be made to Mauro Cappelletti, whose studies on access to justice across western welfare states are still a landmark piece of research. M CAPPELLETTI (ed), *Access to justice*, Milano, Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1978, [European University Institute]. The Florence Access-to-Justice Project.

<sup>2</sup> 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, being them more and more required to have a major involvement in disputes they are endorsed with. In practice this entails applying fees alternative to the more common hourly-based fees, very

There is reason to think that the intertwining 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 legislations 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 to guarantee the right of access 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, I decided to focus my attention on a new business practice that is thrilling for its capability to change the equilibriums of access to justice and dispute resolution at a global level. It is since a few years that 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 change for a percentage of the recovery, only in case of victory, sometimes even transferring the claim. This new business practice is now commonly referred to as 'Third Party Litigation Funding' (TPLF)<sup>3</sup>, and it is often mentioned

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often based on success in disputes. 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> (last vis. 7.2.2017).

<sup>3</sup> 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 un-descriptive. 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](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](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 preexisting contractual relationship with one of the



in relation to the emergence of a market in litigation<sup>4</sup>. TPLF has emerged 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

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parties, such as an indemnitor or a liability insurer'. I want however to note that in what seems to be the first monographic publication 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, Pantheon-Assas Paris II, 2012. In a very recent book edited by Professor Van Boom of the University of Leiden (in English language), the chosen nomenclature was instead 'third-party funding'. 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).

<sup>4</sup> 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. V WAYE, 'Trading In Legal Claims: Law, Policy & Future Directions in Australia, UK & US', 2nd ed, Presidian Legal Publications, Adelaide 2008; M ABRAMOWICZ, 'On the Alienability of Legal Claims' (2005) *Yale Law Journal*, Vol 114, n 4. It is worth noting that this market seems to be contended by few different actors whose services may be, at least to a certain extent, substitutable. For example, it has been argued that defence TPLF is the equivalent of after the event insurance, as it would serve the same market function to cover the litigation costs and hedge the litigation risks of the defendant. 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 United Kingdom and Sweden, are moreover considering pushing LEI as 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 - 20, 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.

some significant scholarly contributions on the legality of TPLF, there haven't been so far many authors that have provided a systemic view on this practice. For this reason I decided to write this thesis which 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 of TPLF in both common law and civil law jurisdictions.

## 2. Problem definition and basic terminology

I want to introduce this thesis with the definition of the main issues at stake, providing an initial insight on the status of the literature and how this work attempts to develop it. Considering that I will be dealing with a series of new legal problems, the definitions that follow aim at initially (and, therefore, in general terms) explaining what are the main issues discussed throughout this thesis.

### 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 stepped into this market since only a few years. In the introduction to these paragraphs TPLF has been described as the professional practice of funding the dispute costs and risks in change for a percentage of the recovery, only in case of victory, sometimes entailing the transfer of the claim. For this reason, I propose a quite 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 change of a share of the recovery, only in case of victory, eventually transferring the claim<sup>5</sup>. This definition evidently entails a number of issues that I will address throughout the course of this work. I will try to see how this 'professional' practice has emerged in the recent years, and what the regulatory conditions that have shaped its application are. It is not difficult to see already in the above

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<sup>5</sup> This definition appears to be a decent 'summa' of the existing academic definitions and description of the practice. See moreover above at footnote 3 a series of doctrinal indications in this regard.

definition two main distinct groups of practices: the first model (maintaining the claims' costs in change for a share of the recovery) 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, I want to note 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 or otherwise for litigious assets<sup>6</sup>.

TPLF will be referred to as single practice or also, more generally, as finance field; in this latter case, it can also be used as 'Litigation finance'. For explanatory purposes I want also to clarify that TPLF is encompassed within the main 'Legal Finance' field, which concerns any type of financing for legal activities. This may include for example from the loans granted to law firms for purposes other than their clients' litigation to the venture capital provided for to legal tech companies. In this regard, it is worth anticipating that I will attempt to define how TPLF would distinguish itself from other legal finance instruments, using as 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 the this would be qualified as TPLF. While this definition is not new in the literature, in this thesis I will try to 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'

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<sup>6</sup> It is indeed assumed that a new asset class has emerged, which could be object of bargaining. See 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.

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. In the beginning of this thesis I will analyse how these prohibitions and/or limits have emerged, how have these 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, I will use the term ‘Pactum de Quota Litis’ (or ‘PQL’) to refer to those fees totally or partially based on a fraction of the recovery, 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 to enter into such agreement for lawyers and other personnel involved in the Judiciary devised in the ancient Rome times. This prohibition has then been reiterated in basically in all of the civil law jurisdictions, either in the civil codes and/or in the bar regulations. I will moreover use the term ‘Redemptio Litis (or ‘RL’) 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 interests, or to get nothing if they simulated a donation. This prohibition/limit has then been reiterated in some modern civil codes while in other it has been repealed as a way to favour business transactions.

As with regard to the common law jurisdictions’ prohibitions and/or limits, I 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 change 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

jurisdictions<sup>7</sup>, 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 mainly civil law background, will be a good benchmark to answer the above questions.

For reasons of comprehensiveness, it should be moreover recalled that litigation could also be funded or otherwise maintained by means of other funding methods, 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 funding methods. In this thesis I will start from this literature and the related categorisations, to develop it further and try to give a systemic perspective, although limitedly to TPLF. In this context, it will be interesting to see how and to what extent TPLF could be 'a market solution for a procedural problem'<sup>8</sup>, and in what circumstances it could be more efficient than other funding methods.

### 3. Structure, research questions and methodology.

In the previous paragraph I have introduced to a series of 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 of guiding the reader through these concepts. More in particular, this thesis starts with an historical analysis of TPLF, and then continues with factual and legal analysis aimed at describing the current status of this instrument. These discussions will try to answer some specific research questions that I present in the headings of the sub-paragraph that follow, within which I will also define the specific methodology applied and the reasons why I used it, rather than other methodologies. I will finally indicate some limitations of the

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<sup>7</sup> 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>.

<sup>8</sup> JT MOLOT, 'Litigation Finance: A Market Solution to a Procedural Problem', (2010) *Georgetown Law Journal*, Vol 99, 65.

research, which at the same time constitute 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

In the previous Paragraph 1 I have briefly introduced the assumption that there would be a new TPLF market phenomenon, which has not emerged before, at least to this extent. This is the reason why this work starts with an historical overview (Chapter 2) concerning the way in which, historically, litigation has been funded or otherwise maintained by third parties. This Chapter will start with the analysis of the Ancient Greece and Roman periods, and then continue with the Middle age England. This will be the chance to see not only how litigation was funded, but also the historical reasons that have led to the prohibitions potentially applicable also nowadays. It will then analyse their evolution through the era of codification in civil law jurisdictions, and then more in general in the liberal and welfare states, where the prohibitions and/or limits to fund litigation have started being questioned. It will then end up with the modern globalisation era, analysing the factors that have changed the scenario for dispute resolution. Chapter 3 will instead present a comparative overview of the various practices, legislation, case law and literature regarding the ways in which third parties maintain other people's disputes for profit in the current scenario. 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. All of these jurisdictions moreover guarantee access to justice as 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. In this regard, the comparative legal and factual analysis seems to be the most appropriate method of research, although of course TPLF being in an early stage, the legal and factual elements could be limited.

## **Chapter 2**

### **A Historical Overview**

Intermeddling 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 to mingle 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 remark 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 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 age England, the intermeddling 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 mentioned prohibitions could not be instead a barrier to access justice for impecunious claimants began being casted. However, it is only with the advent of Welfare States 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 hurdle to access justice, and legal aid became a fundamental pillar in all the modern western states' constitutions. Litigation, especially in the US, became being used also a means to achieve public policy objectives, and the view that it was a societal evil started fading. Legislators around the world, in a way or another, began to loosen the strict legislations prohibiting third parties to fund or otherwise maintain litigation, also as way to enhance access to justice.

It is since a few years, especially after the globalization and the recent financial crisis<sup>9</sup>, that the possibility for third parties to fund or otherwise maintain litigation seems to be gaining another dimension. Indeed, the cuts to 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 the legal history, neither in the civil law nor in the common law jurisdictions.

## 1. Intermeddling 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 the Ancient Greek and Rome, as the 'cradles' of the classical culture and more in particular of the civil law legal tradition, and then on the 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 to the reader 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.

### 1.1. Ancient Greece

Appearing in courts with the support of other people has been a sign of dignity and power since the ancient Greece times; he who could not enjoy such support was regarded as

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<sup>9</sup> See J CROFT and M STEINITZ, above at footnote 2.



‘miserable wretch in the literal sense of both words’<sup>10</sup>. The reform of Solon in Athens, that allowed kind men to accompany in court such wretch friendless people<sup>11</sup>, 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 ‘sykophantes’, 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 reasons<sup>12</sup>.

## 1.2. Ancient Rome

It is during the ancient Rome period that the foundations of the modern system of access to justice were laid down. For this reason an introductory analysis of this period is of 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 potentially impacting 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 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

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<sup>10</sup> M RADIN, ‘Maintenance by Champerty’ (1935) *California Law Review*, Vol. 24, Issue 1, Art 6, 48 – 52.

<sup>11</sup> GM CALHOUN, *The Growth Of The Criminal Law In Greece*, Berkeley, 1927, 72.

<sup>12</sup> See C HODGES, J PEYSNER and A NURSE, above footnote 7.

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’<sup>13</sup> - 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 like 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’<sup>14</sup>. However, this law did not foresee any sanction, not even the nullity of the fee agreement, and the mentioned legal experts continued charging onerous fees for their advice<sup>15</sup>. For this reason the Emperor Augustus edited the Lex de Cincia so to prohibit them to charge any fee for their activity, condemning the transgressors to pay four times what was required to clients<sup>16</sup>. 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 limitedly to maximum 10.000 sesterii<sup>17</sup>. Providing legal advice became a normal working activity, which responded to both public and private interests and, as such, remunerated by the clients within the limits of the law. This law, though, did not address the issue of payments commensured to 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 seem to be detectable in a passage of Ulpianus<sup>18</sup>, which has been interpreted as that the lawyers could not agree with their clients ‘suspensa lite’ (before that the dispute was settled) to do a ‘societatem futuri emolumenti’ (share and assign

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<sup>13</sup> V MAROTTA, ‘Una nota sui causarum concinnatores’ (2006) *Rivista Storica dell’Antichità*, Vol 36.

<sup>14</sup> P PESCANI, *Honorarium. Studi sul Lavoro nel Diritto romano*, Trieste, 1961.

<sup>15</sup> A BERNARD, *La rémunération des professions libérales en droit romain classique*, Domat-Montchrestien, Paris 1936, 91.

<sup>16</sup> V ANGELINI, “Metuendus ingratus” (Avvocato e cliente in una pagina di Quintiliano)’ (1989) *Studi de Sarlo*, Milano.

<sup>17</sup> The lawyers that violated this provision were sanctioned to pay four times the sum that they charged illegally. A BERNARD, above at footnote 15, 92.

<sup>18</sup> Digest 50.13.1.12.

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 to the modern PQL<sup>19</sup>, 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 proceeds<sup>20</sup>.

### 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 intermeddling 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 claims before the legal action was filed, referred to as ‘*cessio actionis*’. The transaction of the first type was void<sup>21</sup>, and the defendant could require to staying the proceeding using this argument as defence<sup>22</sup>. The *cessio actionis* was instead quite common during the Empire: people used to transfer claims to most powerful persons, the so-called ‘*potentiores*’ or ‘*honoratiores*’, also to draw on their social position and their

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<sup>19</sup> V ARANGIO - RUIZ, *Il mandato in diritto romano*, Napoli, 1949, p 116.

<sup>20</sup> C. 2.6.5. See G COPPOLA, *Cultura e potere, Il lavoro intellettuale nel mondo romano*, Giuffrè, Milano, 1994.

<sup>21</sup> 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 to a dispute the assignment of the ‘*res litigiosa*’ once the ‘*denuntiatio*’ was brought. The term ‘*res litigiosa*’ has both a substantial and procedural nuances; it refers to any ‘*res*’ 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.

<sup>22</sup> Digest 50, 13, 1, 12

power to influence the courts (which were usually composed by lower social rank officers)<sup>23</sup>. 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 donation<sup>24</sup>.

The interpretation of the RL, and the distinction with the PQL, has not found a unanimous interpretation between legal historians yet, and the reasons vary from the fear of increase in dispute to abuses to the detriment of the parties involved<sup>25</sup>. More in particular, some early commentators believed that the rationale of this figure was the protection of the assignor from their lawyers and procurators’ potential abuses; in so doing, these authors perorate a contiguity between the PQL and the RL<sup>26</sup>. Others, more recently, believed that the sole scope of this rule was to protect the debtor from the vexations of the redemptores litium, in the sake of the more general feeling of ‘favor debitoris’<sup>27</sup> that characterised the Roman legislation on obligations at those times<sup>28</sup>. 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 times<sup>29</sup> - the redemptores litium – shows that the RL was autonomous from the practice of legal counselling (and the related abuses to the clients)<sup>30</sup>. As the Lex

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<sup>23</sup> This practice was referred to as ‘cessio in potentiorum’, and prohibited in some constitution of Honorius and Theodosius (C. Th. 2.13.1 and C. 2. 13. 2) of the 422 AD.

<sup>24</sup> C.4.35.22.

<sup>25</sup> M RENNPFERDT, ‘Lex Anastasiana’. *Schuldnerschutz im Wandel der Zeiten*, Göttingen, 1991, 37 - 41.

<sup>26</sup> Ibid., 34, footnote 226 reporting the most authoritative authors supporting this opinion.

<sup>27</sup> In particular, see B BIONDI, *Il diritto romano cristiano*, vol. III, Milano 1954, 216.

<sup>28</sup> M RENNPFERDT, above at footnote 25, 34 footnote 226 and 49 footnote 298, reporting the most authoritative opinions in this regard, to which this author seem 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.

<sup>29</sup> 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.

<sup>30</sup> M RENNPFERDT, above at footnote 25, 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

Anastasiana states, these were purchases of claims through ‘cessionones’ (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 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’<sup>31</sup>, the term PQL seems to have acquired the symbolic dimension that we all attribute 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 that lawyers begin vexatious legal actions and, also relying on their high social rank, bring these forward eventually with the aim to calumniate 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 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 adversaries<sup>32</sup>. In another passage the ‘redemptores causarum’ were accosted 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 it<sup>33</sup>. The fomentation of disputes had therefore some relevance in the Ancient Rome and, together with the RL, was regarded with suspect 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 temerity<sup>34</sup>.

The advent of Christianity then certainly influenced the way in which justice was administered up to the middle age. Trials were in itself 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 grounded claims. Moreover, justice

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the ‘Käufer fremder Prozesse’ (purveyors of other people’s claims).

<sup>31</sup> Glossa *Immensa* ad C.2.6.5 (fol. 379)

<sup>32</sup> Radin assimilates the ‘calumniatores’ to the Ancient Greece ‘sykophants’. M RADIN, above footnote 10, 53.

<sup>33</sup> D.1.16.9.2. For a comment on this matter, see V MAROTTA, above at footnote 13.

<sup>34</sup> F CORDOPATRI, *L’abuso del processo*, I, CEDAM, 2000.

became more and more a public affair, managed by the Emperor or his officers. The possibility to intermeddle in other peoples' disputes, for profit or otherwise, was therefore very much limited in those times<sup>35</sup>.

### 1.3. Intermeddling in litigation in medieval England. Maintenance and champerty

The middle ages were instead the 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 the 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 a 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 customary law of northern France<sup>36</sup>. The first reference to the tort of champerty, though, has been found in the Statute of Westminster I, where it is possible to

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<sup>35</sup> An exception can be found in trial by battle, which was a quite common method to settle disputes Western Europe during the early Middle Ages, when the Church did not consolidate its influence yet due to the Gregorian reforms of the 11<sup>th</sup> century. In this case, accusers were 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 10, 58-59. For some discussions on the intermeddling 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.

<sup>36</sup> 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 10, 59 – 61, also for the evolution of the roles of attorneys and narratores.

recognize the embryo of today's figure<sup>37</sup>. 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 profit<sup>38</sup>. 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 conduce a sort of private war between landowners, which used it as a way to increase their estates. As such, maintenance embraced champerty, and was so prohibited<sup>39</sup>.

The analysis on the prohibitions to the intermeddling 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'<sup>40</sup>. 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 crime<sup>41</sup>. 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 heritage<sup>42</sup>. 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'

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<sup>37</sup> Statute of Westminster of 1275 (3 Edw. I), Ch. 25: 'None shall commit Champerty, to have Part of the Thing in Question'.

<sup>38</sup> See M RADIN, above at footnote 10, 62.

<sup>39</sup> M RADIN, *Ibid.*, 63. Moreover, it is to be noted that the practices of champerty and maintenance 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.

<sup>40</sup> 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.

<sup>41</sup> W BLACKSTONE, *Ibid.*, par 12 on maintenance.

<sup>42</sup> 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 10, 56.

would not have been meant as calumnia 'because it was not clearly the maintenance of a wrongful action'<sup>43</sup>.

Finally, the common law historical prohibitions to certain assignments of 'choses in action', as 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 task<sup>44</sup>. For 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 them<sup>45</sup>. 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'<sup>46</sup>.

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<sup>43</sup> M RADIN, *Ibid.*, 59

<sup>44</sup> One of the most important work 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 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.

<sup>45</sup> *Ibid.*, 1018.

<sup>46</sup> AJ SEBOK, above at footnote 6, 80, citing an historical argument reported in *MNC Credit Corp. v. Sickles*, 497 S.E.2d 331, 333-34 (Va. 1998), 569-70



## 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 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 14<sup>th</sup> and 17<sup>th</sup> centuries<sup>47</sup>. 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, which 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 diminishment 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

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<sup>47</sup> 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 manutenere, 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.

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 phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands’<sup>48</sup>.

With regard to the assignment of choses in action, as the recourse to common law courts was unsuccessful, assignees began to recur to courts of equity, which started to approve such agreements<sup>49</sup>. 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’<sup>50</sup>; a series of statutory provisions were enacted in order to allow the assignment of patents, bonds or bills for debt<sup>51</sup>.

## 2.2. The age of codifications: reiteration 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

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<sup>48</sup> J BENTHAM, *Defense of Usury* (1818) London: Payne and Foss, available at <http://www.econlib.org/library/Bentham/bnthUs2.html> (last vis. 6 feb 2017). See in particular Letter XII, Maintenance and Champerty, 7.

<sup>49</sup> See W S HOLDSWORTH, above at footnote 44, 1020.

<sup>50</sup> AJ SEBOK, above at footnote 6, 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).

<sup>51</sup> Supreme Court of Judicature Act 1873 s. 25(6). Later updated by s.136 of Law of Property Act 1925.

French sovereigns adopted the prohibition to the PQL respectively in 1345 and 1560<sup>52</sup>. The most significant change in the legal history concerning the intermeddling 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 Code the prohibition for lawyers to be paid on a PQL basis was for the first time codified at article 1597, which reiterated the prohibition and extended also to other personnel somehow involved in the Judiciary<sup>53</sup>. 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 that those involved in the judiciary relied on their public function to intermeddle abusively in private affairs was a guarantee of impartiality and independence of the judiciary machine.

The Code Napoléon moreover addressed the abuses to justice that might occur at the ends of any private, by reiterating the RL as the ‘retrait litigieux’, codified at the article 1699<sup>54</sup>. 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 a way or another<sup>55</sup> - 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

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<sup>52</sup> R DANОВI, *Compenso professionale e Patto di quota lite*, Giuffrè, Milano, 2009, at 12-21. See, also, A BRUNS, above at footnote 35, 531-533.

<sup>53</sup> ‘Les juges, leurs suppléants, les magistrats remplissant le ministère public, les greffiers, huissiers, avocats, défenseurs officieux et notaires’.

<sup>54</sup> ‘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.

<sup>55</sup> 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](http://scholarship.law.cornell.edu/biss_papers/3).

European) civil law jurisdictions<sup>56</sup>, the same cannot be said for the RL. Indeed, this provision is present in some civil codes, such as for example the French and in the Spanish<sup>57</sup>, while in others it has been repealed in the sake of the freedom of commerce. For example, the Italian legislator abrogated the ‘retrato litigioso’ in the Commercial Code of 1882 as a way to facilitate business transactions<sup>58</sup>. Moreover, even if it was present in the civil codes entered into force before the reunification of Italy<sup>59</sup>, it was not proposed in the Italian Civil Code enacted in 1942 and still in force<sup>60</sup>. Another example can be found in the Netherlands, where this provision had been abolished in the civil code of 1838 for the same reason<sup>61</sup>.

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<sup>56</sup> See, for example, art. 3.3 of the European Code of Conduct for lawyers, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_CoCpdf1\\_1382973057.pdf](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 ‘crediti 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 it 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 KORNE, *Pactul de quota litis e valabil*, Bucarest, 1897.

<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> 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.

<sup>60</sup> As confirmed by the early Italian republican jurisprudence. See Corte d’Appello di Napoli, 22 of July 1946, in *Dir. Giur.* 1947, 75 (maxim).

<sup>61</sup> C ASSER, *Het Nederlands Burgerlijk Wetboek Vergeleken met het Wetboek Napoleon*, 2nd ed., Van Cleef,

### 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 contrariety 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 intermeddle in litigation started being permitted<sup>62</sup>. Courts in fact soon recognised that these offences were a reminiscence of the English feudal regime, which of course was not a problem of the US<sup>63</sup>, and began loosening the field of application of maintenance and champerty so to allow lawyers to charge contingency fees<sup>64</sup>. The ethics and the opportunity of charging contingency fees (and, more in general, to finance litigation) has long been discussed also at those times<sup>65</sup>. While in England and Wales, due to the mentioned background, opposition to contingency fees has been 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 chose in action. The perception towards the prohibitions

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1838, 520.

<sup>62</sup> See discussion reported in *Sprint Communications Co v APCC Services Inc* 128 S Ct 2531 (2008), 2538.

<sup>63</sup> 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.'

<sup>64</sup> See *Stanton v. Embrey* (1877) 93 U. S. 548, 'The proposition (i.e. that contingent fees are legal) is one beyond legitimate controversy.'

<sup>65</sup> 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, 205-210.

to fund litigation was 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’, unlawful<sup>66</sup>. 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 intermeddling of wealth or officialdom for publicity or profit’<sup>67</sup>. 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 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’<sup>68</sup>.

#### 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 being intended as a ‘key-door’ for the obtainment of any other right, including those of 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, although with different approaches in common law and civil law jurisdictions<sup>69</sup>. 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 rights<sup>70</sup>. As such, it was meant as a means to stimulate a fairer redistribution of resources: without the possibility of accessing courts to enforce legitimate

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<sup>66</sup> In re *Gilman’s Adm’x*, 167 N.E. 437, 439 (N.Y. 1929).

<sup>67</sup> *Gilman’s*, 167 N.E. at 439-40.

<sup>68</sup> *Casserleigh v. Wood*, 59 P. 1024, 1026 (Colo. App. 1900).

<sup>69</sup>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.

<sup>70</sup> M CAPPELLETTI, above at footnote 1.

legal positions, the rights to housing, social assistance, education, labour, and social care rights could have remained dead letter. Legal aid movements, foundations and associations mushroomed throughout the western world, and the right to 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 mentioned social goals, but also finally changed the vision that people had of litigation, not anymore ‘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”<sup>71</sup>. In the UK, for example, the introduction of legal aid – which was recommended in the 1945 Rushcliffe Report<sup>72</sup> – 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 growing<sup>73</sup>. 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 socially useful way to resolve disputes, particularly the injury claims arising from our mechanized society’<sup>74</sup>. Moreover, the prohibitions on assignment have been gradually repealed or abandoned, though some exceptions survive<sup>75</sup>. In the same years, in England and Wales, the criminal provisions

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<sup>71</sup> SC YEAZELLE, ‘Brown, the Civil Rights Movement, and the Silent Litigation Revolution’ (2004) *Vanderbilt Law Review*, Vol 57, 1975, 1990-97.

<sup>72</sup> RUSHCLIFFE COMMITTEE, *Report of the Committee on Legal Aid and Legal Advice in England and Wales* (1945) (CMD 6641), London: H.M.S.O.

<sup>73</sup> 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).

<sup>74</sup> FB MACKINNON, *Contingent Fees for Legal Services: Professional Economics and Responsibilities* (1964), 210. As consequence of this change in mentality, in the US the encouragement of private litigation as 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 since long time. See ME WHEELER, ‘Antitrust Treble-Damage Actions: Do They Work?’ (1973) *California Law Review*, Vol 61, n 6.

<sup>75</sup> See AJ SEBOK, above at footnote 6.

attached to the torts of champerty and maintenance have been abolished by the Criminal Law Act<sup>76</sup>, 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 justifiable<sup>77</sup>. In Australia, the first derogation to the doctrines of champerty and maintenance by means of law has been introduced in 1995<sup>78</sup>. Similar discussions have taken place in Canada during the early 2000's<sup>79</sup>. 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 another<sup>80</sup>. However, the legal profession has undergone a process of liberalisation that has somehow eroded the scope of these provisions<sup>81</sup>, allowing alternative lawyers' fees<sup>82</sup> 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 mentioned changes in regulatory frameworks have undoubtedly paved the way for the emergence of the modern practices for funding or anyhow supporting litigation, although per se might not explain why TPLF has emerged. There have been other factors that certainly may have facilitated this process, like the economic globalization<sup>83</sup>, and the recent financial

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<sup>76</sup> C. 58, § 14.

<sup>77</sup> § 13 and 14 of the Criminal Law Act.

<sup>78</sup> L AITKEN, 'Before the High Court: "Litigation Lending" After Fostif' (2006) *Sydney Law Review*, Vol 28, 171, 177.

<sup>79</sup> *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.

<sup>80</sup> See above subparagraph 2.2., and in particular footnote 71.

<sup>81</sup> 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 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 example, Case C-94/04 and C-201/94, *Cipolla and Others*, ECLI:EU:C:2006:758; Case C-35/99 *Arduino*, ECLI:EU:C:2002:97. In these cases, the European Court of Justice deemed regulations on lawyers' fees as inconsistent with the EU's principles on free movement and competition.

<sup>82</sup> 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.

<sup>83</sup> Economic globalization is here meant as the result of precise policy choices enacted at a global level to favour



crisis<sup>84</sup>. The policies that have favoured the economic globalisation, relied on the idea - developed starting with Adam Smith<sup>85</sup> and Ricardo<sup>86</sup> - that freer trade areas enhance the wealth of nations by stimulating a more 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 mentioned 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 years<sup>87</sup>. 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 courts<sup>88</sup>. In this scenario, it seems that we are assisting to a sort of 'privatization' of

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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.

<sup>84</sup> J CROFT and M STEINITZ, above at footnote 2.

<sup>85</sup> A SMITH, *An Inquiry into the Nature and Causes of the Wealth of Nations*, London: Cannan (ed.), 1776

<sup>86</sup> D RICARDO, *On the Principles of Political Economy and Taxation*, London: Murray (ed.), 1817

<sup>87</sup> See <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/> (last vis. 7.2.2017).

<sup>88</sup> 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->

civil and commercial Justice, which, from a state monopoly, in the last decades has become more of a private market-oriented affair. ADR have 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’<sup>89</sup>. The 2014 Hogan Lovells report on trends in cross-border disputes clearly demonstrates how an increase in demand generates an increase in costs for these services<sup>90</sup>. The 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 a minor costs<sup>91</sup>. 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 few 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 costs<sup>92</sup>.

Apart from the economic globalization, also the recent financial crisis seems to have played

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[resolution/assets/pwc-international-arbitration-study.pdf](#) (last vis. 7.2.2017).

<sup>89</sup> 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.

<sup>90</sup> 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).

<sup>91</sup> 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](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2007.03.31.pdf) (last vis. 7.8.2017).

<sup>92</sup> 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, p 376-396. In particular, see S. IV.2.

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 in particular, 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 aid<sup>93</sup>, and parallel increases in court costs<sup>94</sup>. These changes have increased the barrier to 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 disputes<sup>95</sup>, although the demand for legal services has not gone in parallel and actually the legal market is suffering from fierce competitive constraints<sup>96</sup>. In fact, a significant number of multinational companies even decide to withdraw from arbitration proceedings for lack of economic resources, while others more and more often recur – in order of importance - to alternative lawyers' fee schemes, TPLF or LEI<sup>97</sup>. The situation of economic contingency increased risk aversion, and has resulted in further barriers to access to justice, or anyhow dispute resolution<sup>98</sup>. In this scenario, the individuals and companies that have survived the financial crisis have been experimenting alternative ways to carry out their businesses with less 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 immediately<sup>99</sup>.

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<sup>93</sup> 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 [http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice/14385\\_monash\\_report\\_single\\_pages.pdf](http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice/14385_monash_report_single_pages.pdf) (last vis. 7.8.2017).

<sup>94</sup> 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)

<sup>95</sup> PRICEWATERHOUSECOOPERS, above at footnote 88.

<sup>96</sup> GEORGETOWN LAW – CENTRE FOR THE STUDY OF THE LEGAL PROFESSION, above at footnote 2.

<sup>97</sup> PRICEWATERHOUSECOOPERS, above at footnote 88.

<sup>98</sup> M STEINITZ, above at footnote 2, 1283.

<sup>99</sup> 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 that some changes in legislation and case law have allowed the bargaining over litigation. As a way to confirm this assumption, the following Chapter it will be discussed – 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 pathway for the future debate.

- a) The practices of conscious intermeddling 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.
- 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 intermeddling in disputes.
- c) The various prohibitions to intermeddle 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 means to enjoy a wider array of rights, both of liberal and of social nature, and to pursue redistributive purposes. In this regard, legal aid represents the state attempt to fund litigation as means to implement other rights, but also the first waiver to the prohibitions to intermeddle 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 for alternatives to face litigation without upfront costs and risks.

## 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 intermeddle 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 world<sup>100</sup>, although it is also expanding in the consumer segment. 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 since a few years TPLF is being experienced with some success in certain common law jurisdictions<sup>101</sup>, and in some (mostly European Union's) civil law countries<sup>102</sup>. 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 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 the factors that have determined its emergence are.

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<sup>100</sup> This is well explained in the letter sent from Burford, one of the most prominent litigation funders, to Chairman Grassley and Senator Cornyn, 25<sup>th</sup> of September 2015. See more in detail below in Section 2.4.

<sup>101</sup> See C HODGES, J PEYSNER and A NURSE, above at footnote 7; 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](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).

<sup>102</sup> See below par 2.5.

## 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 more in detail the mentioned changes in legislation and/or case law, 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 sophisticated<sup>103</sup>. 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 1995<sup>104</sup>. For this reason, the third party litigation funders started with insolvency cases, but soon have spread to other markets, including class actions<sup>105</sup>, also in security cases<sup>106</sup>. The Standing Committee of Attorneys-General's

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<sup>103</sup> 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).

<sup>104</sup> 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'.

<sup>105</sup> 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,

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 reimbursement of costs)’<sup>107</sup>. 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 abroad<sup>108</sup>.

#### 1.1.1. Champerty, maintenance and the Fostif Case.

Australia being a common law jurisdiction<sup>109</sup>, the figures of champerty and maintenance (and, eventually, barratry) are at the core of the legal discussions on this phenomenon. It is since the 1960's that the courts began retaining these figures ‘obsolete’<sup>110</sup>, although these

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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', VAN BOOM WH, above at footnote 3, 155.

<sup>106</sup> 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.

<sup>107</sup> Standing Committee of Attorneys-General, *Litigation funding in Australia*, Discussion Paper, May 2006, 4

<sup>108</sup> 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.

<sup>109</sup> 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).

<sup>110</sup> 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”’.



prohibitions still survive in some Australian state<sup>111</sup>. 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 *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 policy<sup>112</sup>. 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, choose the attorneys, decided with them the legal strategy, and settled with the defendants for the 75 % of the sum claimed. After dismissing a series of arguments raised by the appellants<sup>113</sup>, 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 abuse<sup>114</sup>. Therefore, courts should be allowed to stay the proceedings only insofar as any abuse of process has happened or it is likely to happen<sup>115</sup>. 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 abusive<sup>116</sup>, 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 back<sup>117</sup>, and have endorsed in different cases other types of funding agreements on the grounds that it enhances access to justice and efficiency in litigation<sup>118</sup>. They have moreover recognised that a wider control of litigation in the hands of litigation funders could enhance access to justice.

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<sup>111</sup> 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 108, 11.

<sup>112</sup> *Campbell's Cash and Carry Pty Limited v. Fostif Pty Ltd* (2006) 229 CLR 386.

<sup>113</sup> *Ibid.*, from par 87.

<sup>114</sup> *Ibid.*, par 266.

<sup>115</sup> *Ibid.*

<sup>116</sup> L AITKEN, 'Before the High Court: 'Litigation Lending' After Fostif' (2006) *Sydney Law Review*, Vol 28, 171.

<sup>117</sup> *Jeffery & Katauskas Pty. Ltd. v SST Consulting Pty. Ltd.* (2009) 239 CLR 75.

<sup>118</sup> *QPSX Ltd. v. Ericsson Australia Pty. Ltd.* (2005) 219 ALR 1.

In *Project 28 Pty (formerly Narui Gold Coast Pty Ltd) Ltd v Barr*<sup>119</sup> and *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd*<sup>120</sup> the control of the claim prosecution was ceded to third party litigation funders that invested in the claim in change of 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 of this ‘intermeddling’.

### 1.1.2. Local regulation and TPLF

In the previous sub-paragraph I mentioned that TPLF may have emerged to such a large extent in Australia because there would be some local regulation somehow barring claimants to enforce 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 as easily imaginable 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 file a class action in court<sup>121</sup>; the claimholders are in fact free to file a lawsuit as class action. However, even though the burden of the proof to bring 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 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 so 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’

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<sup>119</sup> [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.’

<sup>120</sup> *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* (2007) 158 F.C.R. 417.

<sup>121</sup> J KALAJDZIC, PK CASHMAN, AM LONGMOORE, above at footnote 105, 93, 97.

legal costs in case of loss, and the lack of legal aid for class actions<sup>122</sup>. 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 is going to fund, and the returns that is potentially going to make. 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 champerty basis<sup>123</sup>. A similar reasoning can be made for the After The Event insurance products, which are nearly absent in this market<sup>124</sup>. 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)<sup>125</sup>. 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 NL*<sup>126</sup> 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 Licence<sup>127</sup>. In *Brookfield Multiplex Ltd & Anor v International Litigation Funding Partners Pte Ltd & Ors*<sup>128</sup>, instead, the Federal Court in full composition adopted a more

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<sup>122</sup> Id.

<sup>123</sup> GR BARKER, above at footnote 108, 17. This issue is however being discussed thoroughly in the moment in which this book 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).

<sup>124</sup> C CAMERON, above at footnote 106.

<sup>125</sup> 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.

<sup>126</sup> *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45).

<sup>127</sup> For a comment on the matter see GR BARKER, above at footnote 108, 21.

<sup>128</sup> (2009) 260 ALR 643 ('*Brookfield*').

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’<sup>129</sup>. The Federal Government so 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 exists already since 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 actions<sup>130</sup>. The Canadian experience is very interesting because TPLF has adapted to two different legal systems: as known, most of the Canadian provinces and territories have common law traditions, while Quebec has mainly civil law ones<sup>131</sup>.

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

The mentioned differentiation in legal traditions evidently concerns also the limits and/or potential prohibitions to TPLF: in the common law jurisdictions maintenance, champerty

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<sup>129</sup> GR BARKER, above at footnote 108, 19-21.

<sup>130</sup> 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 105, 93, 113.

<sup>131</sup> More 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 uncoded)’ (2000) *Revue de droit uniforme*, Vol 3, 605.

(and, eventually, barratry) would apply, while in Quebec potentially the PQL and the RL<sup>132</sup>. 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 the success; while LEI are not commonly used<sup>133</sup>. 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)*<sup>134</sup>, an Ontario court gave account on 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, referring in particular, the court referred to *An Act Respecting Champerty* (the ‘Champerty Act’)<sup>135</sup>. The court goes through the history of these figures<sup>136</sup>, which was described as: ‘maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with 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’<sup>137</sup>. In particular, the court focuses on the ‘improper motive’, which retains a

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<sup>132</sup> HP GLENN, ‘Costs and Fees in Common law Canada and Quebec’, available at [http://www-personal.umich.edu/~purzel/national\\_reports/Canada.pdf](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).

<sup>133</sup> *Ibid.*, 7, par 2.

<sup>134</sup> *McIntyre Estate v. Ontario (Attorney General)*, (2002) 61 OR (3d) 257 (CA).

<sup>135</sup> 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 of maintenance and champerty (and, eventually, barratry).

<sup>136</sup> 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.

<sup>137</sup> In *McIntyre Estate v. Ontario (Attorney General)*, (2002) 61 OR (3d) 257 (CA), 26.

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 justice<sup>138</sup>.

As instead with regard to the jurisdiction of Quebec not only there haven't 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 managed<sup>139</sup>. 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 contrariety<sup>140</sup>, others have found it as beneficial for access to justice. In a recent case, a judge in Ontario, a funding arrangement was not approved at first instance as it was deemed champertous<sup>141</sup>. The improper motive, in this case, was that the funding agreement might have over compensated the funder in a non reasonable 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 percentage of any recovery, less legal fees and other costs<sup>142</sup>. The same issue was however taken from the same lawyers before different judges in a different case<sup>143</sup>. 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) retaining it beneficial as it could promote access to justice<sup>144</sup>.

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<sup>138</sup> 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.

<sup>139</sup> See the following par. 1.2.2.

<sup>140</sup> 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.

<sup>141</sup> *Metzler Investment GMBH v. Gildan Activewear Inc.* (2009), 81 C.P.C. (6th) 384 (SCJ).

<sup>142</sup> *Ibid.*, 12

<sup>143</sup> *Dugal v. Manulife Financial Corporation*, O.J. No. 1239 (S.C.J.) [2011].

<sup>144</sup> *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.

### 1.2.2. TPLF and Canadian class actions. Regulatory issues and the Fonds d'aide aux recours collectifs

TPLF is playing an important role also in Canadian class actions, where it has been judicially approved ex ante since 2009<sup>145</sup>. It has been reported that, unlike the Australian market, the funding agreements are mainly indemnity agreements, generally with minor disbursement for the funder<sup>146</sup>. The reason would be that in Australia class counsels are prohibited from acting on contingency fee basis, and so they could not bring the case forward unless a third entity sustains at least its costs, if not the fees<sup>147</sup>. Therefore, the reason to recur to funding agreements, in Canada, is basically to cover the (high) potential adverse costs in case of loss, also because representative plaintiffs are responsible for these both in Quebec and Ontario<sup>148</sup>, if the class action is unsuccessful, while class members are not<sup>149</sup>. In this context it has moreover been found that generally funders tend not to influence at all the legal strategy of the lawyers<sup>150</sup>. 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' of litigation<sup>151</sup>. This issue indeed brings to 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

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<sup>145</sup> *Hobshawn 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.).

<sup>146</sup> J KALAJDZIC, PK CASHMAN, AM LONGMOORE, above at footnote 105, 93, 117.

<sup>147</sup> *Ibid.*

<sup>148</sup> For example S. 31 (2) of the *Ontario Class Proceedings Act, 1992*.

<sup>149</sup> 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.).

<sup>150</sup> *Id.*

<sup>151</sup> J KALAJDZIC, PK CASHMAN, AM LONGMOORE, above at footnote 105, 93, 119.

beneficial for the case strategy<sup>152</sup>. Another very interesting case for assessing the evolution of TPLF in Canada is *Bayens v. Kinross Gold Corp.*<sup>153</sup>, 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 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 of the class: *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. (To speak colloquially, the concern is that insulated from an adverse costs award and with a modest individual claim to

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<sup>152</sup> 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.

<sup>153</sup> *Bayens v. Kinross Gold Corp.*, 2013 ONSC 4974, Court file no.: 12-CV-448651CP. July 26, 2013.



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’ 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)<sup>154</sup>.

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 is much lower than in corporate claims, and such control may prove to be a guarantee against potential abuses by the funders. More in general, it is worth noting that class actions are certainly a

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<sup>154</sup> Id., par 41.

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 with the intervention of a third entity, financially endowed and with high 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 efficiently managed scheme of public financing to 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 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 means<sup>155</sup>. In fact, apparently the Fonds efficiently combines the guarantee of access to justice provided for by the state, and the economic sustainability, generally peculiar of the private sector. Moreover, although indirectly, it serves also the important function of supervising the class action activities, provide analysis of all cases and so also statistics relevant for a better administration of justice in Quebec<sup>156</sup>. The Fonds in ten years has taken 776 decisions on applications for funding, and funded more than one third of these<sup>157</sup>.

### 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

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<sup>155</sup> C PICHÉ, 'Public Financiers as Overseers of Class Proceedings' (2016) *New York University Journal of Law & Business*, Vol 12, 779, § IV.

<sup>156</sup> *Ibid.*, § V.

<sup>157</sup> See the Fonds' website: <http://www.farc.justice.gouv.qc.ca/> (last vis. 26.8.2017)

recently described it as the ‘the life-blood of the justice system’<sup>158</sup>. 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 has fastened starting from the 2000’s, and somehow culminated in the 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’)<sup>159</sup>, making (also) the point regarding TPLF, promoting its use as necessary tool to implement access to justice at proportionate costs. This holds 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 in the scene; they have already set up an Association<sup>160</sup> and launched a Voluntary Code of Conduct to self-regulate their activity<sup>161</sup>. 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)<sup>162</sup> costs to society<sup>163</sup>.

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<sup>158</sup> D NEUBERGER, above at footnote 73, 52.

<sup>159</sup> 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 takes 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.

<sup>160</sup> 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.

<sup>161</sup> 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.

<sup>162</sup> J PEYSNER, ‘England and Wales’, in C HODGES, S VOGENAUER and M TULIBACKA, above at footnote 106, 289.

### 1.3.1. From the Criminal Law Act of 1967 to the reforms of justice of the 1990's and 2000's. Opening the floor 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 floor for TPLF. The first stated that 'any distinct offence under common law in England and Wales on maintenance (including champerty)' should be abolished<sup>164</sup>. It then follows as: ' (1) [n]o person shall, under the 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'<sup>165</sup>. 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

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<sup>163</sup> 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)

<sup>164</sup> The Criminal Law Act, 1967, c. 58, p. 13 (1).

<sup>165</sup> *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 159, Ch 11, p 123-124.

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 1990s<sup>166</sup>. After the 2000s their use has multiplied as it was stated that the CFAs success fees – but, also, the After-The-Event (ATE) legal expenses insurance premiums - could be charged to the counter party, rather than to the lawyers' own client<sup>167</sup>. However, the introduction of such fees came not without problems, and it particular gave rise to a 'cost war' with liability insurers that were concerned about the increases in their disbursements<sup>168</sup> (although the introduction of CFAs has certainly pushed the legal expenses insurance market). Nevertheless, these methods for funding litigation suited more 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 aid<sup>169</sup> has certainly helped the favourable perception towards the possibility to fund litigation<sup>170</sup>, but also more in general<sup>171</sup>.

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<sup>166</sup> 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 159, 61.

<sup>167</sup> Access to Justice Act, § 27 and 29.

<sup>168</sup> D MARSHALL, above at footnote 166, 63.

<sup>169</sup> See above footnote 4.

<sup>170</sup> 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).

<sup>171</sup> 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).

### 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 case *Arkin*<sup>172</sup>, when the Court of Appeal explicitly considered and approved this access-to-justice oriented practice<sup>173</sup>. 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

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<sup>172</sup> *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 (26 May 2005).

<sup>173</sup> As mentioned, this case has been preceded by an evolution in public policy regarding access to justice, aimed at incentivising alternative funding arrangements as 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 (ed), see above at footnote, 159. 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.

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 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’, 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 Defence*<sup>174</sup>, 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 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

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<sup>174</sup> [2008] EWHC 526 TCC at [103] (following *Underhill J in Mansell v Robinson* [2007] EWHC 101)

unenforceable: see, for example, *Papera Traders Co Ltd v Hyundai (Merchant) Marine Co Ltd* (No.2) [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 the mentioned 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 to 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 unmeritorious 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 unreasonably<sup>175</sup>, 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 drafting<sup>176</sup>’. In this regard, some elements to the discussion can be found in the recently enacted Association of Litigation Funders’ Code of Conduct, which states that in the litigation funding agreements (‘LFA’) it will have to be

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<sup>175</sup> R JACKSON, above at footnote 159, Ch 11, 118.

<sup>176</sup> *Ibid.*, 119.



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’<sup>177</sup>, 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 to meet the obligations deriving from the LFA. Capital adequacy is generally a requirement asked 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 consumers<sup>178</sup>. However, in the Association of Litigation Funders’ Code of Conduct the funders stressed the importance to have adequate financial resources to meet their obligations, to abide by disclosure obligations regarding their capital adequacy, and undertake to be audited by a specialized firm<sup>179</sup>. 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)<sup>180</sup>. 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 litigation which they fund. The extent of the funder’s liability should be a matter for the 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’<sup>181</sup>.

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<sup>177</sup> Code of Conduct for Litigation Funders, above at footnote 161.

<sup>178</sup> R JACKSON, above at footnote 159, Ch 11, 121.

<sup>179</sup> Code of Conduct for Litigation Funders, above at footnote 161, par 9.

<sup>180</sup> R JACKSON, above at footnote 159, Ch 11, 122-123.

<sup>181</sup> *Ibid.*

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; ...'<sup>182</sup>. 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 noting 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'<sup>183</sup>. 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 includes also a budgetary control<sup>184</sup>. Another fundamental change that has followed the Lord Jackson recommendations is the reintroduction of the principle that success fees and ATE LEI premiums are not recoverable

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<sup>182</sup> Code of Conduct for Litigation Funders, above at footnote 161.

<sup>183</sup> 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 159, Ch 2, 12-23. See, also, R JACKSON, above at footnote 159, Ch 4.

<sup>184</sup> 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 (ed), see above at footnote, 159, Ch 4, 43-60.

as costs from the counterparty, but have to be paid by the winning client<sup>185</sup>, thus making the case potentially costlier. The post Jackson reforms instead did not address any specific issue related to the BTE LEI<sup>186</sup>, which has been a method for funding litigation since 1974 in England and Wales<sup>187</sup>. 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 seem to differ from these other methods to fund litigation anyhow, as for the moment professional third party litigation funders are mainly targeting high value corporate claims<sup>188</sup>. In this regard, it is moreover worth noting that it was added another possibility for lawyers to maintain their cases, by allowing them to charge fees in proportion to the amount of damages recovered (Damages Based Agreement, DBA)<sup>189</sup>. DBA and CFA seem thus to leave room for lawyers to compete – at least to a certain extent – with TPLF.

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<sup>185</sup> D MARSHALL, see above at footnote 166, 61; R PIROZZOLO, 'After-The-Event insurance', in R PIROZZOLO (ed), see above at footnote 159, 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.

<sup>186</sup> Lord Jackson, after acknowledging the diminishment of the eligibility field for legal aid, has encouraged the use of such policies for small businesses and householders, although he did not any specific recommendation. See, R JACKSON, above at footnote 169, 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 169, 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).

<sup>187</sup> A E HOLDSWORTH, 'The Experience in England', in W. PFENNINGSTORF, A M SCHWARTZ (eds), *Legal Protection Insurance*, American Bar Foundation, Chicago, 1986, 14.

<sup>188</sup> CFA, ATE and DBA are moreover further limited also with regard to the type of claims.

<sup>189</sup> R MULHERON, 'Damages-based Agreements', in R PIROZZOLO (ed), see above at footnote 169, 108. See moreover above footnote 181 with regard to the CFA.

#### 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 significantly<sup>190</sup>. Some argue that the reason for this relative delay could be the uncertainty concerning the legislations potentially impacting on TPLF, considering that the relative prohibitions and/or limits are not regulated at a federal level and differ significantly from a state to another<sup>191</sup>. 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 contracts<sup>192</sup>, while 11 states prohibit barratry by statute<sup>193</sup>. This might certainly have slowed the funders to enter the market, especially with regard to internal 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-lawyers<sup>194</sup> as stated in Rule 5.4 of the ABA Model Rules of Professional Responsibility<sup>195</sup>. As the rule itself

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<sup>190</sup> 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.

<sup>191</sup> 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.

<sup>192</sup> 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.

<sup>193</sup> 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.

<sup>194</sup> M STEINITZ, above at footnote 2, 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.

<sup>195</sup> 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

states, this prohibition aims at protecting lawyers' independence, but also to preventing non-lawyers to practice law somehow<sup>196</sup>, or soliciting clients on behalf of lawyers<sup>197</sup>. 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<sup>198</sup>. The large use of contingency fees in the US seem to be also the reason why the LEI market is not very much developed<sup>199</sup>, but also because with the American rule on costs an insurance agreement to hedge the adverse costs in case of loss would have no sense<sup>200</sup>.

#### 1.4.1. The US legal and litigation finance market

While commercial TPLF in the US has developed only recently, it is since some time that a series of external financing solutions for litigation have developed, and the market is now quite variegated. The possibility for lawyers to recur to external financing has traditionally been quite controversial in US legal scholarship and jurisprudence, and has been deeply

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[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/chrono\\_list\\_state\\_adopting\\_model\\_rules.html](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).

<sup>196</sup> 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 lays in protecting the lawyers' monopoly on the exercise of the legal profession.

<sup>197</sup> 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'.

<sup>198</sup> This holds true in particular 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.

<sup>199</sup> MG FAURE and JPB DE MOT, above at footnote 4, 12.

<sup>200</sup> 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 prepays, 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.

influenced by the regulatory framework(s) impacting on the lawyers. All of the state bar regulations indeed address a large series of issues related to this; a long standing discussion has concerned for example the possibility to advance of the litigation expenses<sup>201</sup>. In this regard, the possibility of foreseeing a complete ban to advance such sums seems to be not realistic<sup>202</sup>, as the lawyers may indeed have to advance such expenses for reasons of practicality. In the Canons of Professional Ethics remaking, 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 reimbursement<sup>203</sup>.' This provision evidently responds to reasons of practicality, but it is said also to have the effect of preventing lawyers from spurring frivolous litigation<sup>204</sup>. 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 creditor of his client and may conduct the litigation in his interests rather than the client's one. It must be however noted that this scenario, practically, might not be too different from the case in which the lawyers charges a contingency fee. The situation would be different when the lawyers take loans for the purpose of maintaining lawsuits (or, also, expand their activities), and secure them with their own or their law firms' assets, including future incomes<sup>205</sup>. This possibility evidently may have ethical impacts with regard to personal

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<sup>201</sup> JA KREDER and BA BAUER, 'Litigation Finance Ethics: Paying Interest' (2013) *Journal of the Professional Lawyer*, Vol 1, 9.

<sup>202</sup> GP MILLER, 'Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent' (2003) *The Review of Litigation*, Vol 22, 557.

<sup>203</sup> ABA CANONS OF PROFESSIONAL ETHICS, 'Canon 42' (1908)

<sup>204</sup> GP MILLER, above at footnote 202, 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).

<sup>205</sup> 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.'

conflicts of interest, client confidentiality, and the lawyer's independent judgment<sup>206</sup>, 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'<sup>207</sup>. The concern in this case would be that if the lawyer keeps an interest in the dispute, the client could not terminate its relationship with him, should this become pathologic. For this reason, the lawyers generally cannot pledge any client's recovery fraction as collateral for the loans or anyhow jeopardise the sum deriving from the award or settlement, although there might be exceptions<sup>208</sup>.

There is moreover another problematic issue that concerns the passing of loan interests through as litigation expense in the case where a lawyer applies for a loan to deal with certain cases<sup>209</sup>. 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 clients<sup>210</sup>. Even if there is

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<sup>206</sup> Kentucky Bar Association, Ethics Op. KBA E-420, I (2002)

<sup>207</sup> Model Rules Of Professional Conduct Remaking 1.8(i) (2012)

<sup>208</sup> See, for example, North Carolina State Bar, 2006 Formal Ethics Op. 2 (2006): '[A] lawyer 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).

<sup>209</sup> JA KREDER and BA BAUER, above at footnote 201, 21

<sup>210</sup> 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'rs 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.').

the client's consent, the agreement should nevertheless be 'fair, reasonable, customary, and at a lawful [interest] rate'<sup>211</sup>. Finally, another provision aimed at preventing the lender to influence the lawyers' professional judgement is the mentioned prohibition on fee-sharing with non-lawyers<sup>212</sup>, although it seems that practically funders 'circumvent' this prohibition by funding directly the claimant<sup>213</sup>. 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 lawsuits<sup>214</sup>.

#### 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 basis<sup>215</sup>. 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 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, 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

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<sup>211</sup> The Sup. Court of Tex. Prof'l Ethics Comm., Op. 465 (1991) (g)

<sup>212</sup> Model Rules Of Prof'l Conduct R. 5.4(a) (2012).

<sup>213</sup> 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).

<sup>214</sup> S GARBER, above at footnote 3. AMERICAN BAR ASSOCIATION - COMMISSION ON ETHICS 20/20, footnote 3, 6.

<sup>215</sup> 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](http://www.nytimes.com/2011/01/17/business/17lawsuit.html?pagewanted=all&_r=0) (last vis. 27.8.2017)



the 1990's to provide funding for such expenses<sup>216</sup>, and also have reunited into an association, the American Legal Finance Association ('ALFA'), which sets forth the industry's best practices and represents the funders before government and other authorities<sup>217</sup>. 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. 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 interests are usually higher than what charged by banks in normal consumer loans<sup>218</sup>. 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 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 maximum 20,000 \$), and this financing is backed by the claim, certainly not a traditional collateral<sup>219</sup>. These firms usually pay 'up-front' expenses<sup>220</sup>, 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 costs<sup>221</sup>. 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, or other, he

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<sup>216</sup> 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.

<sup>217</sup> See the website <http://www.americanlegalfin.com> (last vis. 28.8.2017)

<sup>218</sup> S GARBER, above at footnote 3, 9.

<sup>219</sup> S GARBER, above at footnote 3, 13; DR RICHMOND, above at footnote 193, 650; SL MARTIN, 'Financing Litigation On-Line: Usury and Other Obstacles' (2002) *Depaul Business Law Journal*, Vol 1, 85.

<sup>220</sup> T CARTER, 'Cash Up Front: New Funding Sources Ease Financial Strains on Plaintiffs Lawyers', (2004) *American Bar Association Journal*, Vol 90, 34.

<sup>221</sup> 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.

will be only interested in a share of 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 not<sup>222</sup>. The main issue concerning consumer loans is probably that funders might rely on their strong contractual position to impose unfair conditions on consumers<sup>223</sup>. It has been argued, in this regard, that imposing proper federal regulation for these firms, like for banks and other financial institutions, could address this concern<sup>224</sup>. 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 constrictions leading to sign the loan agreements, and the various ethical reasons deriving from the client-lawyer relationship<sup>225</sup>. The lack of federal regulation also engenders diverging jurisprudence: some courts have already held consumer loans contracts valid and enforceable<sup>226</sup>, while others did not, usually for violation of doctrines of maintenance and champerty<sup>227</sup>.

#### 1.4.1.2. Finance for law firms

The second segment, which has been in place since some time, encompasses a series of

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<sup>222</sup> 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 macroeconomic perspective, corporate litigation funding is much more likely to impact on the quality and quantity of litigation. M DE MORPURGO, above at footnote 6, 359.

<sup>223</sup> 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 219.

<sup>224</sup> T CAIN, above at footnote 193.

<sup>225</sup> JH MCLAUGHLIN, 'Litigation Funding: Charting a Legal and Ethical Course' (2007) *Vermont Law Review*, Vol 31, 646.

<sup>226</sup> 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).

<sup>227</sup> In *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 219-221 (Ohio 2003), p. 18, the court did not to 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 upon the fruits of litigation.').

funding instruments (as lines of credit and/or loans) for law firms<sup>228</sup>. The common feature of this segment is that all the funding instruments are provided for to law firms, whatever the activity are these for (including litigation), and 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 in 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 would 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'<sup>229</sup>. Even though it has 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 change of 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 anyhow 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 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 27<sup>th</sup> of August 2015 Charles E. Grassley, Chairman of the United States Senate Judiciary Committee, and John Cornyn, Chairman of the Subcommittee on the Constitution, have 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

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<sup>228</sup> S GARBER, above at footnote 3, 13.

<sup>229</sup> MB DE STEFANO BEARDSLEE, 'Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?' (2014) *DePaul Law Review* Vol 63, 305.

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 business<sup>230</sup>. Burford, represented by Sir Peter Middleton, Chairman, Christopher Bogart, CEO, and Professor Jonathan Molot, CIO, has promptly replied providing an interesting insight of this industry<sup>231</sup>. 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’<sup>232</sup>. As such, commercial TPLF is an industry not much different from others, and what changes is eventually the professionalism that 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 reporting also some of the debate concerning commercial TPLF. In particular, it states that most of the criticisms derive or grasp 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 phenomenon<sup>233</sup>. Burford does not miss to denote that in this report the Chamber

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<sup>230</sup> 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 27<sup>th</sup> of August 2015.

<sup>231</sup> 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 25<sup>th</sup> 2015, available in <http://www.burfordcapital.com/burford-submits-response-to-us-senators/> (last vis. 28.7.2017)

<sup>232</sup> 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.’

<sup>233</sup> U.S. CHAMBER OF COMMERCE - INSTITUTE FOR LEGAL REFORM, ‘Selling Lawsuits, Buying Trouble: Third Party Litigation Funding In The United States’, October 2009.

of Commerce ‘stands in stark contrast to the fact that its members are the users of litigation finance’. This position would indeed be only the one 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 in a stock exchange, and litigation into a commodity<sup>234</sup>. The ABA has instead adopted a more ‘wait-and-see’ approach<sup>235</sup>, 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’ interests<sup>236</sup>. Also the 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’<sup>237</sup>.

#### 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 object of a specific

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<sup>234</sup> 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](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)

<sup>235</sup> 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](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).

<sup>236</sup> 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 6.

<sup>237</sup> AMERICAN BAR ASSOCIATION - COMMISSION ON ETHICS 20/20, above at footnote 3, 10.

assessment in the case *Sprint Communications Co v APCC Services Inc*<sup>238</sup>. 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 to reject the APCC Services Inc. 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 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 claims<sup>239</sup>, 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 regard<sup>240</sup>, much depends on the court 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 to litigation funding through the 'Inauthentic Claim' theory of Professor Anthony Sebok<sup>241</sup>. 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

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<sup>238</sup> *Sprint Communications Co v APCC Services Inc* 128 S Ct 2531 (2008).

<sup>239</sup> *Benedict v Guardian Trust Co* 58 AD 302; 68 NYS 1082 (1901).

<sup>240</sup> 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.

<sup>241</sup> AJ SEBOK, above at footnote 6.

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 interrelations with maintenance, champerty and barratry on a case-by-case analysis<sup>242</sup>.

The case *Sprint Communications Co v APCC Services Inc* is interesting also because it allows noting that TPLF is stepping in a sector that in the US has traditionally been dealt with by means of lawyers' contingency fees<sup>243</sup>. 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 investment<sup>244</sup>. As such, the specific regulatory provisions that bind the lawyers should not be meant to apply to funders.

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<sup>242</sup> Ibid.

<sup>243</sup> Some literature on the matter can be found in Chapter 4, par 2.2.1.

<sup>244</sup> 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 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

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

TPLF has started being experienced in the European continental jurisdictions, although not as extensively as in the analysed common law ones. 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 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 could influence the way in which TPLF will be done 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 resolution<sup>245</sup>. While for these reasons it is likely that the emergence 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, it is worth exploring the initial steps that this practice has made therein.

### 2.1. Germany.

Germany is one of the European civil law jurisdictions where TPLF has developed earlier

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• 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.<sup>7</sup> See moreover below Part II, par 1.2.2.3.

<sup>245</sup> 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.



than others, although litigation has also been largely funded by legal expenses insurances during the last two decades<sup>246</sup>. This is probably the reason why TPLF has grown as long a 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 interests with parent company's insurance clients<sup>247</sup>. Apart from this, many other independent companies have provided funds directly to claimants<sup>248</sup>, like FORIS Finanziert Prozesse<sup>249</sup>, Legial<sup>250</sup>, and Exactor AG<sup>251</sup>. More 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)<sup>252</sup>, and the prohibition on PQL might have favoured the emergence of TPLF<sup>253</sup>. German legal scholars have already discussed the legal nature of

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<sup>246</sup> 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, 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.

<sup>247</sup> 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).

<sup>248</sup> 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).

<sup>249</sup> <http://foris-prozessfinanzierung.de> (last vis. 7.2.2017).

<sup>250</sup> <https://www.legial.de> (last vis. 7.2.2017).

<sup>251</sup> <http://www.exactor.de> (last vis. 7.2.2017).

<sup>252</sup> B HESS and R HUBNER, '*Germany*', in C HODGES, S VOGENAUER and M TULIBACKA, above at footnote 106.

<sup>253</sup> The same reasoning has been in fact done also with regard to LEI. See M DE MORPURGO above at footnote 6, 400. The highest German courts have repeatedly voided contingency fees on grounds of immorality. See A BRUNS, above at footnote 35, 531. M KILIAN, above at footnote 246, 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,

TPLF contracts<sup>254</sup>, which is quite a controversial issue. Some retain that such contracts would be void and therefore unenforceable as immoral and against public policy<sup>255</sup>. The negative approach has been somehow endorsed recently also by the Higher Regional Court ('Oberlandesgericht') of Düsseldorf, although on different public moral grounds<sup>256</sup>. However, the majority of the authors retain such 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 court<sup>257</sup>.

## 2.2. Switzerland.

TPLF in Switzerland has been practiced since 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 it<sup>258</sup>. However, even before this provision

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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 4, 14-15.

<sup>254</sup> 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.

<sup>255</sup> A BRUNS, above at footnote 35, 525, 534.

<sup>256</sup> 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), *Litigation, Costs, Funding and Behaviour. Implications for the Law*, Taylor & Francis Ltd, London & New York, December 2016, 202, and in particular par 2.1.

<sup>257</sup> See M COESTER and D NITZSCHE, 'Alternative Ways to Finance a Lawsuit in Germany' (2005) *Civil Justice Quarterly*, Vol 24, 94.

<sup>258</sup> § 41 of the Attorney Act of the Canton of Zurich (*Anwaltsgesetz des Kantons Zürich*), in force since January 1, 2005.

could take effect, the Federal Court repealed the mentioned provision deeming it a disproportionate obstacle to the freedom of commerce<sup>259</sup>, and so de facto promoted this practice. Since this decision TPLF has been commonly used in Switzerland, probably also because of the prohibition on contingency fees<sup>260</sup>.

### 2.3. Austria

Austria also is representing a growing market for TPLF, and some specialised litigation funding entities have already been funding cases since some years, also in the context of mass claims<sup>261</sup>. 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.<sup>262</sup>

### 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 seem to have drawn inspiration from the Lex Anastasiana of Roman origin<sup>263</sup>. 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 state<sup>264</sup>. It must be noted, however, that the

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<sup>259</sup> Federal Supreme Court Decision (*Bundesgerichtsentscheid* or 'BGE') 131 I 223.

<sup>260</sup> 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.

<sup>261</sup> For example LexDroit, <http://lexdroit.at> (last vis. 7.2.2017)

<sup>262</sup> Austrian Supreme Court, 27 February 2013, 6 Ob 224/12b.

<sup>263</sup> See Chapter 2, par 1.2.2.

<sup>264</sup> 12 Juillet 2015 - Loi relative à la lutte contre les activités des fonds vauteurs, in [www.ejustice.just.fgov.be/cgi/article\\_body.pl?language=fr&pub\\_date=2015-09-11&numac=2015003318&caller=summary](http://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 /EVBF Vol 28, 53-67.

Belgian Legislator seem not to have reiterated 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 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 website<sup>265</sup>, 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 since very long time<sup>266</sup>, and it coexists efficiently with other methods for funding litigation, like state legal aid and legal expenses insurances<sup>267</sup>. TPLF is widely accepted in the Netherlands, especially because the common

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<sup>265</sup> <http://www.carteldamageclaims.com/cdc-what-we-do/> (last vis. 7.2.2017)

<sup>266</sup> 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. 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 106, 408, citing the case Hoge Raad HR 13 October 2006, LJN AV6956, NJ 2007. See moreover, in the context of intellectual property cases, VRENDENBARG 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.

<sup>267</sup> 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.

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, and deeming litigation only as *extrema ratio*<sup>268</sup>. Instead, contingency fees are generally not permitted to lawyers<sup>269</sup>, 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 court<sup>270</sup>. 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 out<sup>271</sup>. 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 class<sup>272</sup>. 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 claims<sup>273</sup>. 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 CDC<sup>274</sup>. The cartel involved eight companies from different

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<sup>268</sup> M TUIL, above at footnote 106, 404.

<sup>269</sup> 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.

<sup>270</sup> MMP VAN DER GRINTEN, 'The Netherlands: Policy Observations', in C HODGES, S VOGENAUER and M TULIBACKA, above at footnote 106, 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.

<sup>271</sup> IN TZANKOVA, above at footnote 267, 578.

<sup>272</sup> 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 270, and in particular par 2.

<sup>273</sup> 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).

<sup>274</sup> COMP/38695 — *Sodium Chlorate*.

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 only<sup>275</sup>. 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 anticompetitive behaviours or other abuses which require collective action can join and bring them forwards to recover the damages occurring from such abuses<sup>276</sup>. 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 addressed<sup>277</sup>.

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 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 case<sup>278</sup>. However, the report does not agree with this interpretation to the extent that such reduction should not apply in the case where, like in TPLF, the fee is decided in advance. In 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 light of the principle of contractual freedom stated at article 1107 of the French Civil Code, the parties should be meant free to conceive a

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<sup>275</sup> C DELZANNO, ‘Faire du contentieux un investissement financier’ (2013) *Droit & Patrimoine*, n 225, May 2013.

<sup>276</sup> <https://www.weclaim.com>

<sup>277</sup> 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](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).

<sup>278</sup> Civ. I, 23 nov. 2011, n° 10-16770, P+B.

contractual relationship which unifies the provisions of the different contracts applicable to the specific case<sup>279</sup>. The report goes on by analysing 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' deontology<sup>280</sup>.

## 2.7. Other European 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 them<sup>281</sup>. 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 in general, civil law) legal roots and the common legal framework provided for by some European Union legislation and case law 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 since 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 resolution systems, and the growing aversion to litigation

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<sup>279</sup> LE CLUB DES JURISTES, above at footnote 292, 18.

<sup>280</sup> Ibid., p. 25, and p 32.

<sup>281</sup> 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.

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 examined jurisdictions, 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 (also because it has 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

The 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) 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 change 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 a reminiscence of the English feudal system and that are not anymore justified on grounds of public policy. It is however to be noted that these limits very often still remain in place as general rule 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 reiterated by the courts, prohibiting parties to enter 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 needed<sup>282</sup>.

### 3.2. Legality of TPLF in the civil law jurisdictions

The 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 that would 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) to get 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 would be run by lawyers or, anyway, the latter would have 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 Union<sup>283</sup>. 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 price they paid for the claim plus interests. 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 has been repealed as a way to favour business transactions (i.e. Italy and the Netherlands)<sup>284</sup>.

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<sup>282</sup> See for example V SHANNON, above at footnote 191.

<sup>283</sup> See above at footnote 81, the cases Cipolla and Arduino.

<sup>284</sup> See above at par 2.2. of the Chapter 2.

As final remark 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 mentioned main rules, but obviously also others that may be typical of each jurisdiction. As a matter of example, it is possible to recall the Rule 5.4 of the ABA Model Rules of Professional Responsibility in the US, preventing lawyers to share their fees with other parties<sup>285</sup>, 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 Court<sup>286</sup>. More in general, it is finally worth noting how this Chapter 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 compensations 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 conflicts of interest with existing defendant clients (it could be the case of insurers, think about the case Allianz described in par 2.1., but also of typical defendant lawyers).

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<sup>285</sup> Par 1.4.

<sup>286</sup> Par 2.2.

## **Chapter 4**

### **Conclusions**

#### 1. Introduction

This thesis has attempted to provide a first comprehensive contribution on the main legal issues and facts underlying TPLF. More in particular, the comparative legal and factual analysis 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 concerning 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. 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 be also a way to retrace the research path I have followed, and the methodology that has been applied. Generally speaking, before entering into these discussions, I want to note how the research has been limited by the fact that TPLF is 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 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, I will also report some more specific limitations of the research carried out, and suggestions for further research.

2. 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 limits may apply.

The research questions set forth at the beginning concerned whether there was a TPLF market phenomenon that had emerged, which was at the basis of the same idea of making a research on this topic, and whether this instrument was legal. In other words, on the one hand, 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. On the other hand, the research aimed at clarifying whether this practice was legal under the main civil law principles and other applicable regulation. These research questions have been

answered in Chapter 2 and 3, where I have applied a comparative legal and factual approach aimed at describing the ‘world’ of TPLF in/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 it is basically legal in both common law and civil law jurisdictions.

To answer these 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 the 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 abandonment<sup>287</sup>. 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’ has started disappearing, also because the institutional framework became more robust (and separated)<sup>288</sup>. 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 counsels<sup>289</sup>. 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 in the sake of facilitating business transactions<sup>290</sup>. It is then with the advent of welfare states, and more in particular with the introduction of the 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 rights<sup>291</sup>. 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 litigation<sup>292</sup>, while other global interrelated

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<sup>287</sup> Chapter 2 Par 1.

<sup>288</sup> Chapter 2 Par 2.1. See in particular the words of Jeremy Bentham.

<sup>289</sup> Chapter 2 par 2.3.

<sup>290</sup> Chapter 2 par 2.2.

<sup>291</sup> Chapter 2 par 2.4.

<sup>292</sup> Ibid.

trends seem to have stimulated a market demand for alternative ways to access justice and solve disputes, including the use of TPLF<sup>293</sup>.

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 on the issues concerning its legality. This analysis has shown that TPLF has emerged mainly in some common law jurisdictions, although it is slowly expanding into (European) civil law ones. I have found confirmation of this assumption 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. More 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, 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 to 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 class actions, an area which has indeed been traditionally (and not without concerns) been maintained by lawyers through contingency fees.

As 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. More specifically, I have reported some evidence that TPLF is gaining ground already in Germany, Austria, Switzerland, Belgium, the Netherlands and France, and that funders might be looking at potential deals also in others, such as Italy and Spain. It has moreover been the

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<sup>293</sup> Chapter 2 par 2.5.

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 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 emersion 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 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 also in this context. More in general, I have concluded that the legality of TPLF will have mainly to be considered under the following rules: 1) in common law, maintenance and champerty; 2) in civil law, the PQL and, where applicable, the RL, although some more specific considerations will have to be done in each jurisdictions with regard to other regulation potentially applicable.

### 3. Limitations & further research

The main objective of this thesis, to provide a first initial systemic perspective on the legal aspects of TPLF, 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, also due to the fact that the TPLF and the litigation market are at an early phase, and that there is not much evidence available. In this regard, one limitation is that I have decided to explore those jurisdictions where: TPLF has emerged 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 welcome<sup>294</sup> (or not<sup>295</sup>) TPLF in the moment in which this thesis is being written

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<sup>294</sup> 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). See the more 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*

(although often with regard to international arbitration only), 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.

#### 4. 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 innovation and growth, with ultimately lower prices and better services for consumers. At the outset of this thesis we may conclude that similar considerations can be made also for the litigation market where TPLF would be widespread. After 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 an advice to understand the next global priorities, which we report entirely 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

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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

<sup>295</sup> 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.

make the world much better'<sup>296</sup>. These considerations, while very general, seem to conceal some very interesting indications on the future of TPLF and, more in general, the 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 handle the implications 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 physiologic 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 disputes are a physiologic part of the relationships between individuals, businesses and states, and that their resolution – as thoroughly discussed I 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 in market failures<sup>297</sup> and, with specific regard to litigation, to those technologies that will (or already are) being devised to make an efficient legal and litigation market<sup>298</sup>. 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

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<sup>296</sup> R CHAINEY, '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/>

<sup>297</sup> 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 the 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).

<sup>298</sup> 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)



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 organization costs in mass claims by joining the claimants on-line<sup>299</sup>; internet platforms for dispute resolution on-line<sup>300</sup>; artificial intelligence for legal research<sup>301</sup>; companies that compare the track record of lawyers before certain judges in given cases<sup>302</sup>; 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 to benefit 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 – present large market failures, and thus high potential in terms also of business.

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<sup>299</sup> <https://www.weclaim.com>

<sup>300</sup> <http://www.ejust.fr>

<sup>301</sup> <http://www.rossintelligence.com>

<sup>302</sup> <https://premonition.ai>

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