European Journal of Law and Public Administration
ISSN: 2360-6754 | e-ISSN: 2559-7671
Covered in: Erih Plus; HeinOnline; CEEOL; RePEc; CrossRef; Google Scholar; KVK; WorldCat; ICI Journals Master List - Index Copernicus; EBSCO

2022, Volume 9, Issue 1, pages: 104-111 | https://doi.org/10.18662/eljpa/9.1/175

Third Party Litigation Funding – between Business Opportunity and Facilitating Access to Justice

Maria DUMITRU-NICA[1]

[1] Associate Professor PhD, Faculty of Law and Administrative Sciences, „Ştefan cel Mare" University, Suceava; Lawyer, Iaşi Bar, Romania.

Abstract: On the one hand, the financial support that a litigant can obtain in order to bear the costs that litigation would entail would considerably facilitate the party's access to justice, but, on the other hand, precisely this difficult situation in which can find a litigant, can also be seen as a business opportunity for specialized companies that aim to make investments under the most conveniant conditions.
The present article proposes a brief analysis of some aspects regarding a new trend in today's litigation funding which, at least at first sight, proves to be attractive and interesting: third party litigation funding.

Keywords: *third party litigation funding; litigation finance contracts; ICC Rules of Arbitration; pactum de quota litis.*

How to cite: Dumitru-Nica, M. (2022). Third Party Litigation Funding – between Business Opportunity and Facilitating Access to Justice. *European Journal of Law and Public Administration*, *9*(1), 104-111. https://doi.org/10.18662/eljpa/9.1/175

1. Traditionally, the costs of litigation, whether it takes place in a state court or in an arbitral court, are borne by the litigating parties. Often, they reach values that prove to be prohibitive for the parties, limiting their access to justice. But, what for the litigating parties represents a real difficulty, was seen as an opportunity by the business people. In other words, in the difficulty of the litigating parties, the investors saw the chance to develop a business. In this context, at the end of the 1980s and the beginning of the 1990s (Perry, 2017 p. 1365), a new litigation financing technique appeared - Third party litigation funding (hereinafter „TPLF").

2. TPLF is a way of financing litigation by which a third party, foreign to the cause, offers financial support to its client (the plaintiff or the defendant) to cover the expenses that are involved by litigation, in exchange for a percentage of the gain obtained by the client through the court decision/arbitral award judgment or through the agreement of the parties (Morpugo, 2011). If the beneficiary of the funding loses the case, then the funder doesn't receive anything and thus loses the investment made.

Third-party funders can provide both passive and active funding. Predominant in Europe and, in particular, in the UK, passive financing refers to the situation where the role of the funder is reduced to bearing the costs that litigation entails, assuming the risk of losing the investment in the event that the cause is lost by its client, while the control over the management of the litigation remains in the hands of the latter (Veljanovski, 2011). However, it is considered that, in practice, the situation of a highly passive financing is unlikely because third party funders are the ones who, generally, draft the contractual clauses so that the financing is carried out in several distinct stages and control can be exercised at least through subsequent withdrawal from funding if certain conditions change and the cause is no longer worth the continued investment (Solas, 2019).

In contrast, active funding refers to the situation where the funder provides capital and expertise for the management of the cause and it involves a significant level of control from his side. Basically, the funder is an administrator/manager of the claim, who will also provide other auxiliary services such as, for example, identifying experts and maintaining contact with them (DeStefano, 2014 323-324]. Funders expect to have a substantial involvement in the techniques used to approach the lawsuit, in the selection of the lawyers or in the settlement that the parties would like to reach [DeStefano, 2014 323-324]. For example, the Australian High Court has recognized for the funders the possibility to take control of certain aspects of litigation, such as choosing the lawyers, who considered the funder to be

their client (Steinitz, 2011, p. 1279). Regarding the concerns about the danger that would appear by taking over the control by the funder, the Australian High Court has held that this danger is removed through the court supervision and the application of ethical rules (Steinitz, 2011, p. 1280).

In both cases, we appreciate that the funder, before entering into a litigation finance contract with a particular client, conducts a thorough case study to see what the chances of winning are and whether the investment he wants to make is worthwhile. To reach a conclusion, he will take into account several factors such as the amount of expenses that the investment would involve, the investment recovery period, the risks involved in concluding a particular TPLF contract, etc. (Ungureanu, 2015, p. 128). The process of selecting the lawsuits that deserves to be funded is much more laborious in commercial litigation, such as in investment arbitrations, because the funding companies also examine political factors, the strength of the plaintiff's legal arguments, the strength of the factual elements that support the arguments, the experience of the plaintiff's legal team as well as the defendant's ability to pay (Brekoulakis & Rogers, 2019, pp. 7-9).

3. The benefits of third-party litigation funding are substantial and mainly focus on one extremely important aspect: facilitating access to justice. Many cases with strong evidence would risk not reaching the courts/arbitration courts if there was no third party to undertake the financing and bear all the costs of litigation. However, such advantages come along with a number of problematic aspects. The recourse to such a method of financing should not lead to the undermining of the parties' control over their own disputes as a result of the funders' desire to exercise control over the decisions regarding the course of the disputes. As a consequence, the client-lawyer relationship could be altered and the lawyer's professional independence could be affected because of the permanent existence of an influence from a third party on the strategy that is to be addressed in the cause.

4. Initially, TPLF was used in commercial litigation, but it later extended to litigation regarding the claims of individuals, being used also in the case of litigation regarding bodily injuries, copyright violations, discrimination in employment (Perry, 2017, p. 1365).

In the United States of America, TPLF is divided, on the one hand, into the commercial sector, which focuses on commercial litigation such as the ones regarding intellectual property, antitrust, business contracts and

international commercial and investment arbitration (Steinitz, 2012, p. 460), and on the other hand, into the sector dedicated to consumers and their protection (Garber, 2010, p. 13). In the commercial sector, financing is usually granted to a company to cover the attorneys' fees and other costs involved in commercial litigation where the stakes are very high (Garber, 2010, p. 13). In the consumer sector, financing is granted directly to individuals who, as a rule, are in first contact with what litigation entails and who, in order to be eligible for financing, must already have a lawyer who has agreed to represent their interests (Garber, 2010, p. 9).

The content of the litigation finance contracts will be different depending on the sector in question. In the case of litigation finance contracts concerning commercial sector, the funder usually receives a percentage of the gain obtained by the client as a consequence of the favorable resolution of the dispute. However, it is considered that in this sector there is no unique/standard form of financing for all causes, but commercial financing is diverse and can materialize in different ways (Avraham & Sebok, 2019, p. 1135]. Regarding the litigation finance contracts concerning consumer field, the funder is paid based on a monthly interest rate which is determined according to the length of time until the case is resolved. Related to this, one of the main criticisms of TPLF is that the winning client often pays very high interest rates to the funder, so in the end he is being left with almost nothing from the gain brought by the favorable resolution of the dispute or by the settlement reached with the opposite party (Avraham & Sebok, 2019, p. 1137).

5. The conclusion of financing contracts with such an object is increasingly common and has generated the existence of a growing number of actors directly interested in the outcome of the litigation, other than the litigants and their attorneys. This context has multiplied the situations possibly generating conflicts of interest that may attract the violation of the obligation of independence and impartiality incumbent on those who settle the dispute (arbitrators or judges).

The existence of such a reality could not remain unnoticed. In order to prevent possible conflicts of interest, measures have been taken, it is true, for now only at the level of some arbitration courts. In this sense, starting with January 1, 2021, the new Arbitration Rules of the International Chamber of Commerce from Paris, adopted on October 8, 2020, by the Executive Council of the International Court of Arbitration of the International Chamber of Commerce from Paris, has entered into force (Petrescu & Stan, 2020). Among the brought amendments is the one relating

to „Disclosure of third party funders". Thus, as a result of the fact that the existence of third parties who finance the costs related to the arbitration procedure can generate situations of conflicts of interest likely to affect the independence and impartiality of the arbitrators, the new Arbitration Rules of the International Chamber of Commerce from Paris provided in the new paragraph 7 of article 11 the fact that „ each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration".

Such a provision is not something new to the body of the ICC Rules of Arbitration, but what was previously only a recommendation is now becoming an obligation of the litigants who have entered into TPLF contracts. In other words, the ICC Rules of Arbitration 2021 turn the recommendation made to parties to disclose the identity of third party funders into a genuine obligation.

6. The fact that TPLF is an increasingly widespread practice is also felt at the level of the European Union. In this sense, the European Parliament adopted the Resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)) (European Parliament, 2022). In the Introduction of the Resolution, the European Parliament notes a number of interesting aspects, such as the fact that TPLF „should go hand in hand with policies enhancing access to justice for claimants", as well as the need to establish some „common minimum standards at Union level, which address the key aspects relevant to TPLF, including transparency, fairness, and proportionality".

Thus, the European Parliament firstly recommends „the establishment of a system of authorisation for litigation funders". This recommendation is based on the need for funding to be made available only by entities that have undertaken to comply with the minimum standards and on the need to ensure claimants that they have effective opportunities to use TPLF. The next set of recommendations focuses on ethical issues, such as the need for litigation funders to „be obliged to respect a fiduciary duty of care requiring them to act in the best interests of a claimant", preventing potential conflicts of interest, considering contractual arrangements based on conditional funding to be void. Further, the European Parliament considers that the proportion of the amount that would be attributed to the litigation funder in the event of winning the litigation or in the event of

concluding a transaction should be limited. In consonance with the manner in which the ICC Rules of Arbitration have been amended relating to „Disclosure of Third Party Funders" [by inserting art. 11 paragraph (7), with the content reproduced above], the European Parliament considers that for the claimants and their lawyers should be established the obligation to present the financing agreements in court and to inform the court about „the existence of commercial funding and the identity of the funder". Last but not least, reference is also made to the degree of involvement that „supervisory authorities, courts and administrative authorities, as appropriate" should have in matters concerning TPLF, in the sense that they should have the „powers to address abusive practices by authorised litigation funders".

As an Annex to the Resolution of the European Parliament of 13 September 2022, there is a Proposal for a Directive of the European Parliament and of the Council on the regulation of third-party litigation funding, made up of 23 articles dealing with various aspects, such as „Approval of litigation funders' activities within the Union", „Powers of supervisory authorities and coordination between them", „Third party funding agreements and activities of litigation funders", etc.

7. In Romania, it is considered that, although unregulated, in principle, TPLF is not prohibited [Ungureanu, 2015 132], being distinguished from the pactum de quota litis which is not allowed by the provisions of art. 130 para. (1) of the The status of the profession of lawyer [Council of the National Union of Romanian Bar Associations, 2011]. According to art. 130 para. (2) of the Status of the profession of lawyer: „The pactum de quota litis is a convention concluded between the lawyer and his client before the final resolution of a case, a convention that exclusively fixes the totality of the lawyer's fees depending on the judicial outcome of the case, regardless of whether these fees consist of a sum of money, a good or any other value". As can be seen, the pactum de quota litis is distinguished from TPLF, the difference consisting in the fact that, in the case of TPLF, the funding comes from a third party, foreign to the litigation, who does not intervene in the relationship between lawyer and client, while in the case of the pactum de quota litis, the funding comes right from the party's lawyer (Ungureanu, 2015, p. 130).

From the perspective of romanian civil law, the litigation finance contract is an unnamed, consensual, aleatory contract (Stanciu, 2017). In other words, according to art. 1174 para. (2) from the Civil Code, such a contract is formed by the simple agreement of the parties and to be considered validly concluded, it must meet the general conditions imposed

by law for the validity of any contract (Ungureanu, 2015, p. 132). According to art. 1168 from the Civil code, the general rules regarding contracts will be applied to the litigation finance contracts (Chapter I of Book V of Title II of the Civil Code with the marginal title „The Contract"), and if the latter prove to be insufficient, „the special rules relating to the most similar contract" will be applicable. At the same time, given its aleatory character, it means that the litigation finance contract „offers at least to one of the parties the chance of a win and also exposes it to the risk of a loss, which depends on a future and uncertain event", in this case being about the third party funder.

Conclusions

A form of litigation funding used mainly in common law states, but also in some civil law states, as a way to ensure access to justice, TPLF is, at the same time, an opportunity for specialized companies that aim to invest in favorable conditions. It's a funding technique that is at its beginning, but it's on the rise and will certainly be talked about more and more in the future.

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