Francesca Pellegrini

Understanding Litigation Funding

Comparative Perspectives on Regulation, Market Behaviour, and Economic Consequences

Sezione Giuridica

Collana del Dipartimento di Sociologia e Diritto dell'Economia Università di Bologna

FrancoAngeli

COLLANA DEL DIPARTIMENTO
DI SOCIOLOGIA E DIRITTO DELL'ECONOMIA
ALMA MATER STUDIORUM – UNIVERSITÀ DI BOLOGNA

SEZIONE GIURIDICA

Tutti i volumi pubblicati sono sottoposti a un processo
double blind peer review che ne attesta la qualità scientifica

 ISBN 9788835177470

Copyright © 2025 by FrancoAngeli s.r.l., Milan, Italy. ISBN 9788835177470

Francesca Pellegrini

Understanding Litigation Funding

Comparative Perspectives on Regulation, Market Behaviour, and Economic Consequences

Sezione Giuridica

Collana del Dipartimento di Sociologia e Diritto dell'Economia – SDE Università di Bologna

FrancoAngeli

 ISBN 9788835177470

This book is published as part of the project PRIN 2017 NAFWC8 *"The essential, and competitive, role of specialised courts and alternative dispute resolution mechanisms in financial law as a precondition for the attainment of social desirable levels of public and private enforcement. Lessons from history in administrative and business law and the future of judicial review in European financial law in light of European and national fundamental rights"*, Principal Investigator Prof. Marco Lamandini.

Francesca Pellegrini, *Understanding Litigation Funding. Comparative Perspectives on Regulation, Market Behaviour, and Economic Consequences*, Milano: FrancoAngeli, 2025
Isbn: 9788835177470 (eBook)

The digital version of the book is published in Open Access at www.francoangeli.it.

Copyright © 2025 by FrancoAngeli s.r.l., Milan, Italy. ISBN 9788835177470

Table of Contents

Justice delayed is justice denied.
William Ewart Gladstone

 ISBN 9788835177470

 ISBN 9788835177470

La Collana

Ubi societas, ibi jus. Questo antico adagio romano dimostra oggi tutta la sua validità nell'indicarci quanto sia cruciale, per la scienza e per l'agire pratico, collegare fra loro i cambiamenti sociali studiati dalla sociologia e il diritto che cerca di dare loro una regolazione normativa. I contatti e l'influenza reciproca tra diritto e sociologia stanno crescendo di continuo e i docenti dell'una come dell'altra disciplina sono scientificamente persuasi della loro scelta. L'auspicio è che il dipartimento di sociologia e diritto dell'economia possa esercitare un influsso non trascurabile su alcuni campi della ricerca e della riflessione scientifica di settore, talora soddisfatti del loro status quo (con un atteggiamento spesso isolazionista), talora troppo ancorati alla distinzione tra conoscenza dei principi astratti e conoscenza e fruizione dei fatti e delle pratiche sociali. Già da tempo sono emerse connessioni e mediazioni tra principi e realtà in una proficua reciproca fertilizzazione che è il contrassegno essenziale della posizione culturale del dipartimento; vale a dire una concezione della conoscenza che non è puro e semplice rispecchiamento di una realtà statica fuori e indipendentemente dall'uomo-cittadino ma attività, non solo teorica, essa stessa aspetto della realtà in trasformazione. È così che la conoscenza dei nessi reali, nella dialettica fra le diverse forze umane e le forme di società, assume una sua dignità autonoma, caratteristica del dipartimento. Contro ogni assolutizzazione del metodo di ogni scienza particolare, contro ogni restrizione degli orizzonti e l'impoverimento contenutistico di certa scienza ufficiale. Ciò non toglie che il diritto e la sociologia possano rivendicare la diversità dei metodi di indagine e degli strumenti conoscitivi propri ma al contempo comporta che nella sussidiarietà reciproca possano 'vivere' all'interno dei contesti socio-economici imprimendo il loro rispettivo impulso.

Entrambi possono estroflettere le proprie forze per riconoscere e concorrere a superare le necessità delle collettività e i loro impulsi indifferibili. Si pensi ad esempio alle materie di studio come l'autorità e la famiglia, l'impresa e la società, il lavoro e l'economia, l'imposizione fiscale e la solidarietà sociale, la società attiva e la società acquiescente, l'industria e l'ambiente con i relativi contrasti, il potere della comunità e quello del singolo, il sistema bancario-creditizio e le relative connessioni.

Oggi sembra stiano per cadere o per lo meno oscillano pericolosamente i presupposti di ogni legge eppure la legge risulta una condizione cronica della società contemporanea, dando luogo a situazioni talora paradossali talora sfuggenti all'interno delle quali l'uomo continua a vivere. Sembra essere messo in discussione il legame della legge con il territorio, ma al contempo il legame ritorna quasi in un moto perpetuo sicché il diritto continua a irradiarsi con ordini, condizionamenti, decisioni mentre la società tenderebbe a sottrarsene o a rovesciarli, perché la legge pretende una sorta di eternità dei principi che la sottendono mentre la società non vorrebbe essere sottratta ai flussi del tempo con intenzioni infuturanti progettuali autonome. È questa una delle tipiche occasioni in cui scienze sociologiche e giuridiche consentono di affrontare 'insieme' e contemporaneamente nuovi campi di possibilità costruttive, in una molteplicità ordinata che assicura la non contraddittorietà logica della possibilità della sua costruzione. Il diritto e la sociologia non sono ricavabili uno dall'altra ma possono riscontrarsi coincidenze proficue nell'equilibrio continuo delle procedure di libera scelta, pensando simultaneamente gli apparenti opposti, ordine-arbitrarietà, possibilità-necessità, affermazione-negazione. Costituiscono l'uno l'altrimenti dell'altra e al contempo la prossimità dell'altra al primo, senza mai sentirsi identici, pur integralmente affidati al lavoro di restaurazione degli istituti. Dispersioni e disaggregazioni possono assillarli, essendo entrambi essenza di se stessi, ciò che rende raro equivocarli, ma si influenzano reciprocamente nell'esposizione con cui si fanno conoscere e con cui sono stati.

Entrambi superano l'astratta separazione tra tempo vero e tempo apparente e sono dediti al presente per comprenderlo e sostanziarlo, abbracciando la vita in sé con la chiarezza che ne divide e ne rapporta le diverse dimensioni.

Sono discipline che realizzano 'il possibile', oltre ogni errante radice, nell'idea del dover essere della pienezza del presente e quindi entrambe contengono principi universali disincarnati da ogni terra e da ogni luogo, liberi dalla crescente instabilità del termine stesso di Stato.

Gli studiosi del dipartimento conoscono la necessità delle domande e la difficoltà frequente delle risposte, ma il domandare e il rispondere sono per loro elementi di una stessa dimensione e quotidiana abitudine di assumerli come un unico contesto.

Domanda e risposta sono due termini incommensurabili, e gli studiosi del dipartimento lo sanno, perciò sono attenti a non sprofondare nella dimensione della domanda, quando è riconosciuta priva di scopo e perciò inutile, avendo come fine la verità in quanto *próblema*. Così non percorrono vie di fuga, auspicando che la verità prenda forma, se non oggi, un'altra volta, con la pazienza di ottenerla.

È così che il dipartimento di sociologia e diritto dell'economia può essere inteso come labirinto protettivo degli studiosi rivolti al possibile delle risposte, anche se spesso si celano.

Nella fondamentale proposizione di far coincidere esistenza e costruibilità di cose nuove, con approfondito vaglio critico, nell'equilibrio delle due discipline, aperte una all'altra con lucidità.

Il dipartimento è dunque la forma di accoglienza che facilita e nutre il successo della ricerca, attività istintiva e fertile dei suoi componenti che insieme reagiscono al controllo esercitato sulle questioni dall'abitudine; con le loro narrazioni plurali tra il caos dei diritti, le istituzioni, le tradizioni giuridiche e sociali, i soggetti politici in cerca di legittimazione, i poteri nascosti che così tanto ricordano la crisi attuale, le nuove patrie, le tendenze isolazioniste, l'essere in relazione.

Ed è il luogo dell'ascesa di giovani intraprendenti che con le loro intuizioni creano una grande realtà, né impaludata né burocratica, vero riferimento in una globalità sempre più frammentata, in attesa del futuro, con coraggio morale in tempi squilibrati e storti di società subalterne e dilatate.

Sociologia e diritto dell'economia si sono accostate l'una all'altro nell'ambito di un nuovo dipartimento per la specifica funzione morale e sociale delle discipline e del ruolo dei loro studiosi. L'idea del 'compito' delle due discipline è stata centrale per il loro accostamento; tanto da sembrare strettamente legata e finanche suggerita da un'idea morale della società e del sistema giuridico. A questa idea si è affiancata poi la volontà di una intensa attività pubblica e di una altrettanto viva produzione scientifica.

La prossimità tra sociologi e giuristi ha messo in luce il valore politico delle norme e definita la loro funzione in relazione al sistema sociale ed economico e ha sottolineato il differente grado di adeguatezza pubblico-politica in vista della loro applicazione. Si sono trovati così a lavorare gomito a gomito numerosi intellettuali, in una schiera che ha riunito nella figura dello studioso attitudini di vita e vocazioni in una misura in parte anche lontana dalla tradizione accademica. Le due discipline hanno una propria unità intrinseca, guidate da propri principi originali ma le accomuna uno spirito che è lo sforzo di contrastare con puntuali riferimenti e analisi ogni decadenza, ogni sincretismo sui tempi attuali, articolando un senso nuovo dell'uomo in sé, del mondo, del dualismo tra l'uno e l'altro, del dinamismo societario, della conoscenza della verità sulla condizione umana individuale e collettiva.

L'accostamento delle due discipline può rappresentare l'opportunità di possibili novità nel metodo o nella attualità delle ricerche che sono gli elementi che intendono caratterizzare la Collana, aperta ai lavori anche di sperimentazione, o nella messa a fuoco del *proprium* di ogni disciplina, tutti considerati come compito e come responsabilità di ogni studioso. È questa la risposta a studi mistificatori e sedicenti scientifici di alcuni anni passati che enunciavano il crollo di tutti i principi e di tutte le regole. Questa Collana ha una funzione ordinante, regolatrice e costruttiva nel nostro sistema sociale, economico e giuridico, e vuole essere espressione di un sistema di valori economici, giuridici e sociali subito associati al concetto di persona umana senza restringere l'orizzonte scientifico a una sola epoca storica. È così che le cose possono 'svelare' la loro esistenza a chi le interroga seriamente, visitandole più volte, senza tuttavia svelare del tutto da dove vengono.

Risulta chiaro che la Collana contiene due punti di vista, entrambi necessari, nella comprensione della realtà, ma differenti e vuole superare le difficoltà o le perplessità che

un loro avvicinamento ha più volte suscitato, soprattutto per la diffidenza di alcuni studiosi, nonostante siano coscienti della ormai imprescindibile natura interdisciplinare della ricerca, che si tratti di interdisciplinarietà interna o esterna; anche perché soltanto così si evita sicuramente che ogni scienza rifletta esclusivamente su se stessa e sul proprio ruolo e non prenda in considerazione riflessi, relazioni, interferenze che non possono non stimolare.

La Collana del dipartimento costituisce perciò il punto d'incontro speculativo tra le culture degli studiosi afferenti alla struttura e ha l'ambizione di avvalorare i loro apporti dediti al ritrovamento del senso vero della realtà; così ad esempio il giurista va oltre i classici confini dell'interpretazione della legge che non ne esauriscono obbligatoriamente il compito scientifico e il sociologo va oltre i confini delle regole sociali vigenti in una certa collettività, analizzandone il senso, le funzioni e le finalità di cambiamento della collettività stessa.

Risulta così che le due discipline, diritto e sociologia, possono affrontare nuovi argomenti tra scienza e politica, sottolineando la centralità del concreto rispetto all'astratto in una concludenza armoniosa.

1. Introduction

I. The Complexities and Global Implications of Third-Party Litigation Funding

The discourse surrounding third-party litigation funding (TPLF) has burgeoned into a contentious debate across the global legal landscape[1]. TPLF now occupies a central position in discussions about the evolving nature of justice, as opposed to it being a mere peripheral or niche issue, primarily because of the current state of litigation which is earmarked characterized by increasing litigation costs and financial constraints. The debate centres around the dichotomy that TPLF presents, as, while some champion it as a ground-breaking tool that broadens access to justice, others view it as a potential threat that could turn legal proceedings into commodities, introduce conflicts of interest, and exacerbates transparency deficits in legal proceedings[2]. This discourse is made all the more complex given heightened sensitivities regarding the integrity of judicial process post the introduction of such dubious influx of third-party financial interests, which for some is a major source of concern, since it is large perceived as being an active threat to impartiality and fairness, that are the bedrocks of justice.

With the increasing relevance of TPLF in today's legal world and its further transcendence into the alternative dispute resolution method as well[3], this debate has now gone beyond the boundaries of any single jurisdiction and has assumed a truly global dimension, with policymakers, scholars, and practitioners in jurisdictions as diverse as the European Union, the United States, and various

1. Alec J. Manfre, *The Debate over Disclosure in Third-Party Litigation Finance: Balancing the Need for Transparency with Efficiency*, in *Brooklyn Law Review*, 86, 2020, 561.

2. Charles Silver and David A. Hyman, *Third-party Litigation Funding: Panacea or More Problems?*, in *University of Texas Law*, Legal Studies Research Paper, 2023.

3. Maria João Mimoso, Joana Lourenço Pinto, *The Third-Party Funding in Arbitration: A Challenge in Times of Crisis*, in *European Journal of Marketing and Economics*, 4(2), 2021, 1-12.

Asian countries contemplating and grappling with the implications of TPLF. The challenges confronting European policymakers, in particular, are reflective of the broader struggle, particularly concerning the regulatory framework, which is striking the correct balance between allowing TPLF to flourish as a mechanism for enhancing access to justice and simultaneously striking the correct balance[4]. Thus, it is evident that the foundational challenge is about finding the balance in achieving the optimal level of regulation, since an overregulated system is most likely to impede the positive potential of TPLF and prevent it from functioning as a beneficial instrument for the litigant's lacking money. At the same time, the lack of complete control or regulation may become a prerequisite for various abuse forms, including the exploitation of vulnerable litigants and neglecting their wellbeing in the interest of gaining profit.

In its simplest form, TPLF refers to the agreement in which an entity or person not involved in the case gives financial support to one of the litigants against the high expenses involved in the entire legal process[5]. This seemingly straightforward concept is underpinned by a complex and multifaceted framework that has been elaborately explained by the leading entities. For instance, the most relevant, illustrative definition of the term can be found in the Task Force of the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London in their seminal April 2018 Report[6]. According to this definition, TPLF refers to an agreement by an entity that is a non-party to the dispute to provide a party, an affiliate of that party, or a law firm representing the party with funds or any other material financial support to cover for all the legal expenses incurred in the proceedings. The TPLF provider here expects remuneration or reimbursement in the existing civil, commercial, or criminal dispute. This reimbursement is based on contingency of the outcome of the dispute, though it may also be structured through a grant or in return for a premium payment.

This definition is notable not only for being precise, but also, for taking into account the entire array of opportunities for the operationalization of TPLF. In this connection, its transactional nature is evident in various ways. Firstly, it is important to note that such an approach implies that the service provider is motivated by the desire to gain profit. With the TPLF, the scenario is different

4. Rachael Mulheron, *Third-party Funding, Class Actions, and the Question of Regulation: A Topical Analysis*, in *Mass Claims*, 5, 2022.

5. Maya Steinitz, *Whose claim is this anyway-Third-party litigation funding*, in *Minnesota Law Review*, 95(4), 2011, 1268.

6. *The ICCA Reports No. 4: ICCA-Queen Mary Task Force Report on Third-Party Funding* (*ICCA*), *arbitration-icca.org/icca-reports-no-4-icca-queen-mary-task-force-report-third-party-funding* (accessed 11 August 2024).

than in the case with the pro bono legal services, where funding is not contingent upon the level of expectations. In other words, while both third-party funders and pro bono lawyers assist people involved in disputes, the former do it for money. They can purchase a part of the resulting sum or agree on a fixed award if the initial claim is successful. In this case, it is transformed into an available asset that can be bought and managed on the market.

However, the introduction of profit-making interests in the judicial process raises profound ethical and procedural questions[7]. The possibility of conflict of interest becomes highly probable where the financial stake of the third-party funder is sufficient to influence decisions, such as those concerning the choice of counsel, the selection of a strategy for the litigation, or the timing and terms of settlement offers. Moreover, the fact that the terms of TPLF arrangements are usually not revealed in full to the opposing party and the court, obstructing their assessment of the nature and extent of the third party's financial and other involvements, only exacerbates those concerns.

This notion is expounded by Christopher Hodges, John Peysner, and Angus Nurse in their seminal work, *Litigation Funding: Status and Issues*, where the authors define the mechanism as a form of transactional funding that is used to generate a contingent claim for the funder on the outcome of the legal process[8]. In other words, the emergence of litigation funding codes a purely pecuniary relationship between the funder and the recipient of the services. The foundation of the novel practice is the exchange of funds for a contingent interest in the trial. In this way, the reality of litigation funding hinges upon its commercial and tactical nature.

The practical characteristics of the practice are explained by Blackstone Chambers, a reputable set of barristers' chambers in the UK, as the funding provided for the purposes of conducting legal processes by the third parties, contingent upon the recovery in the trial. Consequently, Blackstone Chambers' perspective underscores the actual functions of litigation funding, which is predicated on the anticipated recovery on the part of the funder[9]. In other words, the practicality of the practice emphasizes the purpose of funding, which is obligatory in all cases, and in conjunction with the commercial decision to pursue the strategy of litigation funding, supportive of the fact that the novel practice is

7. Poonam Puri, *Financing of litigation by third-party investors: A share of justice*, in *Osgoode Hall Law Journal*, 36, 1998, 515.

8. Christopher Hodges, John Peysner and Angus Nurse, *Litigation funding: Status and issues – faculty of law*. Available at: *www.law.ox.ac.uk/sites/default/files/migrated/litigation_funding_here_1_0.pdf* (accessed: September 10, 2024).

9. Jennifer A. Trusz, *Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, in *Georgetown Law Journal*, 101, 2012, 1649.

a financial instrument to support and increase the prospects of the trial, is also paramount. The likelihood that the funds enable vulnerable parties to commence litigation that would otherwise not be feasible is also valid.

The perspective of Burford Capital, one of the flagship stakeholders in the litigation finance industry is useful because it underscores the procedural characteristics of the approach. According to Burford Capital, litigation funding is a novel arrangement in which the third party agrees to give financing to the plaintiff that will enable them to pay the legal costs as long as they will reap a part of the proceeds, is valuable[10]. This aspect of the definition is useful because it shows the instrumental prerequisites of the practice. In the article, *Whose Claim is This Anyway? Third-Party Litigation Funding*, by Professor Maya Steinitz the following definition is provided, which adds new points to the authors of this work's understanding[11]. Litigation funding is the provision of financial support by a third party to any party of a lawsuit in exchange for participation in obtaining the compensation for the lawsuit. This explanation highlights the involvement of a party in litigation in terms of financial relationships, so its role in influencing the legal process increases significantly. First, Steinitz's definition of litigation funding shows that the money source has stake interest, in other words, such actors isolated themselves from the conflict but became financially interested in its outcome. Second, this insusceptible description of litigation funding leads to new questions concerning the ownership and control of claims, as well as shows new potential risks in terms of financial interests.

Thus, it is evident, that litigation funding is a complex and multi-dimensional phenomenon in the legal world, which reflects the interaction of investments and legal strategies. Estimating it in terms of various definitions from different sources, one can state that it is characterized by the participation of third parties who give their money to implement certain legal actions. At the same time, they receive a financial stake in the outcome of the litigation. Of course, this point of view allows people to receive significant advantages in terms of the availability of justice. However, it also complicates the legal framework, changing the activity of an increasing number of people. That is why it is possible to say that the given phenomenon remains rather controversial, which is why it is actively discussed by different experts in legislative issues.

The divergence of opinion on TPLF is informed by the broader tensions that characterize the law-commerce interplay. On one hand, proponents of TPLF

10. Anne M. Rodgers, Peter Scott, Arnaud Sanz, *Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know*, in *The Antitrust Source*, 2016, 1-16.

11. Maya Steinitz, *Whose claim is this anyway-Third-party litigation funding*, in *Minnesota Law Review*, 95, 2010, 1268.

contend that it serves an indispensable purpose in enabling access to justice[12]. Arguably, in the absence of TPLF, litigants would be prevented from pursuing their claims due to the prohibitive legal expense. Pro-TPLF advocates also contend that TPLF helps to level the playing field by allowing the under-resourced parties to the litigation to have the resources to fight the matter to a conclusion. On the other hand, critics of TPLF warn that the commodification of legal claims could violate one of the central principles of the judicial process, fairness. Accordingly, TPLF, if not appropriately regulated, could inject intolerable distortions into the litigation process, such that its outcomes are driven by pecuniary interests rather than by the matters in contention. On the premise of the contentious debate on TPLF, it is self-evident that there arises a necessity for a cautious and sophisticated regulatory approach[13].

Consequently, because TPLF is a double-edged sword, presenting significant opportunities and challenges in equal measure. Indeed, on one hand, TPLF holds the latent power to radically transform the pursuit of justice by allowing the provision of legal funding to litigants who otherwise would be barred from realising their claims. On the other hand, however, it presents a myriad of ethical, legal, and practical concerns that demand careful control and regulation. Internationally, the tensions that revolve around TPLF demonstrate that it is an innovative phenomenon that presents crucial advantages alongside unacceptable risks. As such, the formation of a legal framework that harnesses TPLF's benefits while addressing its risks is a worthy and challenging task to all stakeholders in the justice system.

II. The Historical Evolution and Doctrinal Foundations of Third-Party Litigation Funding

The concept of third-party litigation funding is closely connected with the ancient legal principles of *champerty* and *maintenance*. They developed in medieval England and were intended to prevent third parties from intervening in any litigation they were not a party to. The primary reason for new provisions was a fear that the involvement of third parties would ultimately lead to the disturbance of the judicial process[14]. According to these principles, **champerty** can be defined as an agreement in which a person not having any serious interest

12. Marco de Morpurgo, *A comparative legal and economic approach to third-party litigation funding*, in *Cardozo Journal of International and Comparative Law*, 19, 2011, 343.

13. Maya Steinitz, *Whose claim is this anyway-Third-party litigation funding*, in *Minnesota Law Review*, 95, 2010, 1268.

14. David S. Abrams, Daniel L. Chen, *A market for justice: a first empirical look at third-party litigation funding*, in *University of Pennsylvania Journal of Business Law*, 15, 2012, 1075.

in a lawsuit is asked to finance the litigation of the parties to receive a share of the firm's judgment or settlement[15]. At the same time, **maintenance** is a broader provision that can involve any support or useful steps taken on behalf of a party without any interest in the process. Thus, both doctrines appeared with an intention to protect the interest of equity and the public[16]. Moreover, Iuliano states that modern issues discussed by lawyers remain almost identical to those where agreements with solicitors that may be considered bad and undesirable unless spirits are prompted and excited for the benefit of themselves.

In historical perspective, such application of doctrines had the effect of practically banning any kind of third-party involvement in litigation. The severity with which such arrangements were viewed by the English common law had a strong rationale, as it considered them to be unethical, and often outright dangerous, the continuance of unnecessary dispute. The main source of concern on behalf of third-party involvement was their profit-oriented nature, which threatened to undermine the case for justice itself with perverse motives and unreasoning litigation. However, this extreme could not be maintained forever, especially as it became increasingly clear that the cost of justice was often the primary obstacle to its proper administration.

As such, the view of the legitimacy of third-party litigation arrangements began to soften. A formal end to maintenance and champerty was put with the Criminal Law Act 1967, which did away with criminal and civil liabilities associated with these doctrines in the United Kingdom. Among other things, this piece of legislation can be viewed as a part of the more general shift that characterized this era away from the strict formalism of the law toward a more liberal point of view. This era abolished the outright prohibition of third-party involvement, replacing it with a far-removed allowance conditioned by strict regulation.

The development of TPLF as a legitimate form of funding first became prominent in England in the 1990s. The House of Lords concluded in *Giles v. Thompson*[17] that a funding arrangement involving TPLF could be lawful as long as there was no breach of public policy or corruption of justice. This represented a turning point in legal perceptions of TPLF. The funding mechanism was now recognized as capable of empowering deserving but otherwise under-resourced litigants while the integrity of the judicial system continued to be maintained. However, it was in the 2000s that the litigation funding industry experienced a

15. Collin Flake, *Third-party funding in domestic arbitration: champerty or social utility?*, in *Dispute Resolution Journal*, 2015.

16. Ronen Avraham, Abraham Wickelgren, *Third-party litigation funding-A signaling model*, in *DePaul Law Review*, 63, 2013, 233.

17. Giles v. Thompson [1994] 1 AC 142 (HL).

significant surge in both activity and credibility. A number of events and judicial decisions helped to endow the industry with the requisite level of legitimacy. A long line of appellate authority made it clear that the mere fact of having received third-party-provided litigation finance in exchange for a share of the proceeds would not suffice for the funding agreement with the third party to be considered unlawful or unenforceable. The way was thus cleared for broader and more general use of TPLF.

During this time period, several events occurred which helped to increase the perceived credibility of the industry:

- While a number of new litigation funders or brokers began to appear on the market, the number of hedge funds interested in backing commercial litigation also increased significantly[18].
- There was a consultation by the Office of Fair Trading that endorsed litigation funding in private actions for breaches of competition law. It was the first time that the UK government had endorsed litigation funding[19].
- The most senior civil judge in the UK expressed extra-judicial support for litigation funding, provided that it was regulated[20].
- A very high-profile and high-quantum professional negligence claim was bankrolled by a litigation funder[21]. Due to the significant amount of coverage this case received in the media it helped to show the viability of TPLF.
- While the CJC had initially said in 2005 that litigation funding would only be regarded as *a last resort means of providing access to justice*, in 2007 it said that it would be an *acceptable option for mainstream litigation*, providing it was properly regulated[22].
- A Legal Response Initiative report that said that a provision in the Solicitors Code of Conduct 2007 that would have prevented a solicitor from referring a personal injury claim client to a litigation funder was quietly dropped[23].

Majorly, litigation funding is not about helping the historically impecunious, but has transformed to be an industry that serves large corporation seeking to

18. Rachael Mulheron, *Third-party Funding of Litigation: A Changing Landscape*, in *Civil Justice Quarterly*, 27, 2008, 314-16.

19. Office of Fair Trading, *Private Actions in Competition Law: Effective Redress for Consumers and Business*, Discussion paper, 2007, 27-28.

20. Sir Anthony Clarke MR, quoted in *Drive for transparency on third-party funding*, in *The Law Society Gazette*, February 14, 2008.

21. Stone and Rolls Ltd (in liq) v Moore Stephens (a firm) [2007] EWHC 1826 (Comm).

22. *The Funding of Litigation: Alternative Funding Structures: A Series of Recommendations to the Lord Chancellor*, June 2007, 53, and recommendation 3.

23. Rule 9.01(4) of the Solicitors' Code of Conduct 2007, *Referrals of business*.

remove the litigation costs from their balance sheets. The evolution of TPLF has been supported by the presence of oversight bodies which are found in the United Kingdom; the Association of Litigation Funders. Generally, this regulatory committee was set up so as to make funders adhere to their specified code of conduct which states the ethical standards they are supposed to adhere to.

Over the course of the last few years, TPLF has grown to be increasingly popular across a range of locales, including but not limited to the UK and the EU. The fact that its development has reached the mentioned rates indicates that the approach to regulating TPLF has to remain as balanced as it is currently, embodying the increased recognition of the risk involved on the one hand and the remarkable potential for TPLF to democratize the process of reaching justice to some extent. The process of TPLF becoming a legal practice in the global context and, therefore, requiring incessant regulation to manage the increasing number of aspects attached to it, can be described as a pivotal one since it shows a pronounced shift from the exclusionary doctrines epitomized by champerty and maintenance at which TPLF started. The further development of TPLF should be based on the principles of careful but essential regulation that will make it possible for TLPF to reach its full potential and be a remarkable boon to the litigants across the globe.

III. Navigating the Emerging Global Regulatory Landscape of Litigation Funding

The regulation of litigation funding is still nascent, but the need for a coherent framework in which this tool could be timely and effectively applied becomes increasingly apparent. Furthermore, it has become evident that the global litigation funding scene is disjointed because its adoption in various regions reflects certain cultural, legal, and other specificities. In the United Kingdom, for example, litigation funding is regulated by the Association of Litigation Funders, which has drafted a Code of Conduct[24]. This Code is designed to ensure transparency, accountability, and other important factors, like assuring that the third-party funder does not have a conflict of interest[25].

However, the legal environment that the United Kingdom has is not without its problems, as demonstrated by the *Excalibur Ventures LLC v. Texas Keystone Inc. case*[26]. Here, it is evident that an insufficiently regulated litigation funding

24. Kaira Pinheiro, Dishay Chitalia, *Third-Party Funding in International Arbitration: Devising a Legal Framework for India*, in *National University of Juridical Sciences Law Review*, 14(2), 2021.

25. Rachael Mulheron, *England's Unique Approach to the Self-Regulation of Third-party Funding: A Critical Analysis of Recent Developments*, in *The Cambridge Law Journal*, 73(3), 2014, 570-597.

26. Excalibur Ventures Llc v Texas Keystone Inc & Ors [2013] EWHC 2767 (Comm).

market can escalate problems and turn relatively tense legal situations into fiascos. The High Court specifically noted that because the third-party funder had operated with no standard against which its behavior could be measures, its actions had reached unacceptable levels[27]. This suggests that national regulations need to be well-developed and robust if the benefits of litigation funding are to be had without compromising the integrity of the legal system. As the United States' classification in terms of an environment for litigation funding regulation is one of the most varied and disjointed. While states of New York and California have their own codes, the situation in other states is much less complete. There is no comprehensive federal legislation, preventing the development of a coherent framework[28]. The American Legal Finance Association has developed industry standards, but without legislative backing, they are essentially useless. This state of affairs results in insufficiently standardized legal frameworks to ensure that all actors involved in the litigation funding process have access to certain protections[29].

Australia, meanwhile, boasts one of the oldest litigation funding markets in the world. The litigation funding market in the country is not challenged by regulatory risks because it is based on the precedent of the case of Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd and is currently regulated by the Corporations Act 2001. The Act regulates what third-party funders can and cannot do, introducing a sound framework in which litigation funding operates. To ensure that the regulations set forth are properly abided by, the Australian Securities and Investments Commission oversees compliance by third-party funders. Decidedly, Australia is in a best-case scenario for the regulation of litigation funding; its framework is robust and has been properly road-tested over the past decade and is one of the leading notably advanced ones.

Judging by the depth and the breadth of these frameworks already put in places, China's and India's, relatively underdeveloped, can be classified as such because of the general wariness towards trading in legal claims and the perceived negative impacts of a more robust litigation funding market. However, despite these and somewhat limited experience regarding problems with litigation funding, the overall international environment regarding litigation funding is gradually approaching a more coherent state.

There is a significant variation in the approaches to litigation funding in Asia.

27. Robert B. Fuqua, *How Litigation Funders Have Improved the Quality of Settlements in America*, in *Harvard Negotiation Law Review Online*, 2020.

28. Andrew F. Daughety, Jennifer F. Reinganum, *The Effect of Third-Party Funding of Plaintiffs on Settlement*, in *The American Economic Review*, 104(8), 2014, 2553-2554.

29. Fiona McKenna *et al.*, *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, in *New York University Journal of Law & Business*, 12, 2015, 635.

Hong Kong and Singapore have taken a welcoming stance, especially in relation to arbitration. The Third Parties Funding for Arbitration and International Arbitration Proceedings, enacted as an amendment to the Arbitration and Mediation Order, 2017, in Hong Kong, and the International Arbitration (Amendment) Act, 2012 and the Civil Law Act, which have also been amended to include provisions on third-party funding in Singapore, mark a positive approach to dispute resolution in the jurisdictions. Meanwhile, China and India appear to have adopted a more restrictive or underdeveloped approach, indicating either caution related to the production of legal rights or considerations concerning its potential abuse[30]. The regulatory environments in different jurisdictions change over time, and they demonstrate that the approach to the funding of litigation in Asia is far from uniform. At the same time, it can be noted that litigation funding is a powerful mechanism that could both increase access to justice and enable the provision of professional legal services to smaller players in long lawsuits. However, the phenomenon also poses several risks related to conflicts of interest, information asymmetry, and ethics.

IV. Research Question

The main research question of this essay is: how do the regulatory frameworks of litigation funding differ across the EU, UK, USA and selected Asian jurisdictions and what impact do such differences have on market behaviour and economic consequences? By examining the regulatory environments of several differing jurisdictions, the present essay aims to determine the ways in which the differences in respective approaches to regulation impacts the functionality and circumstances at hand of litigation funding on a global scale.

V. Research Methodology

The study takes a combined approach to the issue, leveraging both doctrinal[31] and textual analysis[32] methodologies. In the framework of the former, the study will focus on examining the existing legal backgrounds, statutes, and regulations

30. Kaira Pinheiro, Dishay Chitalia, *Third-Party Funding in International Arbitration: Devising a Legal Framework for India*, in *National University of Juridical Sciences Law Review*, 14, 2021, 254.

31. Debashree Chakraborty, *Empirical (non-Doctrinal) Research Method and Its role in Legal Research*, in *Advances in Social Science, Education and Humanities Research*, 3, 2015, 25.

32. Jack Fox-Williams, *Doctrinal Legal Research: What Does It Entail and Is It Still Relevant to Law?*, Rochester, 2016, 52.

governing the use of litigation funding in the EU, UK, USA, and a range of Asian countries. Legal materials to be discussed will include statutory laws, rules, regulations, court decisions, into which the group of academic/secondary sources, such as scholarly articles, legal comments, and reports aimed to contextualize the issues, entered. Moreover, the text analysis will be supplemented by the analysis of various secondary sources, such as scholarly articles, legal commentaries or industry reports, in order to understand the main tendencies in the market and economic impacts of the introduced legal practices. Some ethnographical data would be the even more and better ways to study the cases of litigation funding.

The proposed study will address this gap in the literature by employing a combination of legal and economic analysis. On the one hand, the study will compare the existing regulations regarding alternative litigation financing, looking at how various jurisdictions treat the issue, what types of practices are allowed or otherwise regulated, and what differences exist in the approaches taken. On the other hand, the research will also look into the available economic data, such as the market reports from companies providing litigation funding and the case studies of litigation cases. By integrating these two types of analysis, the research will provide a detailed understanding of the differences in the regulations regarding litigation financing, their main trends in the markets, and the impacts they produce on the economy.

VI. Structure of Essay

- **Chapter 1: Introduction.** The chapter provides an introduction to litigation funding, its role in global legal systems, and the objectives of the study. An overview of the research methodology is presented, and the essay's structure is briefly explained, which allows for the anticipation of the following analysis in detail.
- **Chapter 2: Regulatory Frameworks in the European Union.** The chapter explores the development of litigation funding regulation in the EU, discusses existing directives and relevant cases. The balance between the enhancement of the access to justice principle and the alleviation of risks, such as potential conflicts of interest, is analyzed, and its effects on the market behavior and investor confidence are identified.
- **Chapter 3: The Legal Framework Of Litigation Funding In The UK.** Building on the discussion of the UK market, the chapter reviews the key cases involving litigation funding as a deciding factor and regulations that represent long-standing attempts to exert proper influence on the market. Based on the previous examples, the impact of regulatory changes on market leverage,

ethical concerns, and the A2J principle is considered, with a particular focus on transparency and the connection to conflict of interest.

- **Chapter 4: Examining The Regulatory Landscape Of Litigation Funding In The United States.** The chapter focuses on the description of the current fragmented regulatory situation within the US, considering both federal and state levels, as well as the role of existing market bodies and the effects of regulatory diversity on market behavior and efficiency from a perspective of ethics and access to justice principle.
- **Chapter 5: The Rise Of Third-Party Litigation Funding In The Asia-Pacific.** The chapter highlights litigation funding examples from China, Japan, and Singapore to identify the region-specific influences of both cultural differences and unique sets of laws and the role of stakeholders in the decision is discussed.
- **Chapter 6: Litigation Funding In A Global Context: Financial Risks, Technological Disruptions, And Social Impacts**. The chapter provides a global economic analysis of the effects of litigation funding on legal systems, including the implications for technological advancement coupled with access to justice, cost of litigation, and judgment realities, utilizing existing conventions. The impact of litigation funding on society is also considered.
- **Chapter 7: Conclusion And Recommendations For Policymakers.** The chapter summarizes the major conclusions made throughout the study, focusing on the need for a law-based approach. The recommendations provided for policymakers, attorneys, and funders suggest a strategy of action for balanced regulation.

2. Regulatory Frameworks in the European Union

I. Introduction

Litigation funding in the EU faces a complex regulatory landscape, combining both legislation and directives at the EU level, with individual national laws across member states alongside evolving case laws at both levels[1]. While some of these laws have adapted to accommodate the growth of litigation funding, other planned developments remain walled up in legislative processes that can take years[2]. This means that while the EU has made some progress towards ensuring regulatory scrutiny of AI, many long-overdue reforms are currently stuck in a legislative time-warp which is both crept and sticky with institutional inertia and political horse-trading[3]. These delays not just slow the maturation of third-party litigation funding (TPF) as a whole, but they obfuscate exactly how TPF may prove relevant to cross-border disputes.

TPF has developed into a valuable means of achieving access to justice, given the increasing complexity of cross-border litigation[4]. Once considered a sideshow in Europe, TPF is now among the most significant trends to manifest itself in European litigation strategy and has quickly taken root within collective actions where but for financial incentive constraints, individuals or small entities might not have no access had at all. Moreover, the growing demand for efficient cross-

1. AmCham EU, *Our position regulating third-party litigation funding*, available at: *www.amchameu.eu/system/files/position_papers/tplf_final.pdf* (accessed: September 7, 2024).

2. Julia H. McLaughlin, *Litigation funding: Charting a legal and ethical course*, in Vermont Law Review, 31, 2006, 615.

3. Christopher Hodges, John Peysner, Angus Nurse, *Litigation Funding: Status and Issues*, in *Centre for Socio-Legal Studies*, 2012, available at: *www.law.ox.ac.uk/sites/default/files/migrated/litigation_funding_here_1_0.pdf*.

4. ASL Law Firm, *Third-party funding (TPF): A new trend in international commercial disputes in Vietnam*, available at: *aslgate.com/third-party-funding-tpf-a-new-trend-in-international-commercial-disputes-in-vietnam/* (accessed: September 8, 2024).

border dispute resolution has exposed some serious systemic lacuna that need to be addressed at an amount of time and in a manner nothing short of immediate[5]. These jurisdictional tensions, procedural variations and financial impediments only complicate what is already a difficult cross-border litigation process to navigate.

If properly regulated, TPF can help alleviate this problem as well as give litigants a financial leg up while helping to establish justice. This is now putting a great financial and procedural pressure on businesses seeking redress across several member states, while the difficulties of navigating through different legal systems as well as language barriers between disputing parties and jurisdictional clashes are creating significant cost burdens for those that want to see justice done in multiple member states[6]. Inconsistent regulations across the EU prevent TPF from reaching its full potential, illustrating how successful TPF practices can be but for a lack of enforcement due to national laws.

For example, Germany provides a case in point for Europe on progressive regulation since it has promulgated clear third-party participation rules to support domestic litigation but not necessarily the kind of laws needed beyond its borders[7] thus setting an international law standard which other are encouraged regulators EU member alike can emulate. Its RDG-based (*Rechtsdienstleistungsgesetz*) model is a rule-based mechanism, stipulating preconditions under which third-party financing may be permitted[8]. The RDG is designed to demonstrate what a legislated ideal would accomplish–or if it both helped litigants and was an effective deterrent of abuses[9]. Such an initiative, which Germany has achieved successfully in this domain could help clear up uncertainty and restore confidence to litigants and funders alike.

The ECJ judgment in Case C-623/17 (*Privacy International v. Secretary of State for Foreign and Commonwealth Affairs*)[10] has had an indirect but significant

5. Yating Lin *et al.*, *Third-party funding in litigation and arbitration: A dichotomy in China's practice*, in *Kluwer Arbitration Blog*, Available at: *arbitrationblog.kluwerarbitration.com/2023/04/24/third-party-funding-in-litigation-and-arbitration-a-dichotomy-in-chinas-practice/* (accessed: September 8, 2024).

6. Jonathan Barnett, Lucas Macedo, Jacob Henze, *Third-party funding finds its place in the new ICC rules*, in *Kluwer Arbitration Blog*, available at: *arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/* (accessed: October 2, 2024).

7. Astrid Stadler, *German collective actions-is litigation funding in a dead end?*, in *Frontiers in Civil Justice*, Edward Elgar Publishing, 2022, 259-275.

8. David Markworth, *Debt collection services in Germany: A sector in turmoil*, in *Regulation of Debt Collection in Europe*, Routledge, 2022, 66-82.

9. Stefan Kirchner, *Legal Ethics in Germany*, in *Indonesian Journal of International & Comparative Law*, 2, 2015, 98.

10. C-623/17: Privacy International v Secretary of State for Foreign and Commonwealth Affairs.

impact on TPF. This decision is not explicitly a development on the litigation financing front, but it makes brief reference to some well-established access to justice principles and hints at the broader notion of cross-border cooperation in legal proceedings more generally. The decision emphasises the space for TPF to reinforce class actions in cases with cross-border aspects. It may therefore weigh legal certainty and judicial cooperation into the debate as clearer TPF rules are developed across Europe, to ensure litigants have equal access to resources in all corners of the EU.

This chapter will examine not only the development of EU laws related to the issue of TPF, but also how laws in different member state responses have evolved in concert with these EU level reforms as well as examine and analyse the loopholes that persist despite various reforms. We will also consider how developing case law, such as that of Privacy International could influence future regulatory measures, in turn becoming some kind of catalyst for the establishment a consistent body of rules which improve fairness and access to justice right across the Union.

II. Evolution of EU Regulations on Litigation Funding

In the first wave (Pre-2010) the regulations primarily focused on common financial and procedural harmonization points, few of which have directly impacted litigation funding. More specific recognition followed in the Development Phase (2010-2020) via directives such as the ADR Directive and revisions to Regulation Brussels I which indirectly influenced cross-border legal processes, including litigation funding. In this current phase (Post-2020) we see more proactive stance adopted by legislators, with initiatives such as Directive (EU) 2020/1828 on Representative Actions for the Protection of the Collective Interests of Consumers as well as the proposed directive on Responsible third-party funding of civil litigation. This sequence reinforces the EU's reaction to a shifting legal funding landscape and its effects on litigation finance as well access to justice[11].

a. Early Phase (Pre-2010)

The initial stages of EU regulation related to litigation funding, was characterized by relatively minimal regulatory oversight or recognition as a

11. Jérôme Saulnier, Ivona Koronthalyova, Klaus Müller, *Responsible private funding of litigation – european parliament*, European Parliamentary Research Service, available at: *www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf* (accessed: September 8, 2024).

specific niche in its own right. The EU laws during this time concentrated more particularly on the harmonization of civil procedural issues, and as a consequence of which certain aspects of litigation funding were indirectly impacted[12]. To that end, the introduction of Directive 2005/60/EC on anti-money laundering (AML), applying to a wider range of financial services providers overall, resulted in early compliance thresholds which indirectly applied also to litigation funders through provisions requiring them act with transparency and carry out their due diligence[13]. Nonetheless, this regulation was, at least until recently, or rather before the regulations we now have in the UK, generally largely broader and focused more on issues such as financial supervision or procedural matters than specifically about litigation funding.

Procedural uniformity across member states was the original impetus for regulation. Efforts like standardizing civil procedures were intended to promote effective cross-border legal processes, no less prominent within the same vein are collective actions or litigation financing first as a form of ADR, then later formal and integrated tools[14]. This also paved the way for future action, though this first step did not amount to a regulation directly addressing litigation funding. Global financial standards and anti-corruption initiatives were key external influences in this phase. As financial regulations evolved globally, the EU began to recognize the need for regulatory measures that could also encompass emerging areas like litigation funding, though these were not yet explicitly defined.

b. Development Phase (2010-2020)

During the development phase, litigation funding became increasingly sophisticated and there was a growing awareness of both its utility coupled with broader developments aimed at introducing collective redress mechanisms as well as more developed cross-border litigation rules[15]. Major legislation in this phase included the ADR Directive (Directive 2013/11/EU) and Brussels I Recast

12. Ea Valvi, *The role of legal professionals in the European and international legal and regulatory framework against money laundering*, in *Journal of Money Laundering Control*, *26*(7), 2023, 28-52.

13. David Muradyan, *The efficiency of the European Union's Anti-money laundering legislation: An analysis of the legal basis and the harmonisation of the EU Anti-money laundering legal framework*, in *Stockholm University Faculty of Law Publications*, 2022.

14. Adrian Dori, Vincent Richard, *Litigation Costs and Procedural Cultures – New Avenues for Research in Procedural Law*, in X. E. Kramer, B. Hess (eds.), *From Common Rules to Best Practices in European Civil Procedure*, Nomos/Ashgate, available at Social Science Research Network: *ssrn.com/abstract=2915067*.

15. Civil Justice Council, *A Self-Regulatory Code for Third-party Funding*, July 2010. Devised by working group consisting of Harbour Litigation Funding, Calunius Capital, Allianz, IMF Australia and Commercial Litigation Funding.

Regulation (Regulation No 1215/2012). These policies set the foundational blocks in place for transnational litigation and also had an indirect impact on the development of, and structuring within, commercial litigation funding arrangements by enhancing access to justice and standardizing jurisdictional issues[16].

As litigation funding became more recognized as enabling access to justice, there was a demand for structured and transparent ways of financing one's lawsuit. The ADR Directive advocated alternative dispute resolution, thereby inadvertently giving increased prevalence to litigation funding by promoting the availability of legal recourse. Similarly, the Brussels I Recast Regulation eased cross-border claims leading to a growth in models for funding international legal actions[17].

External considerations including worldwide litigation funding trends and economic factors affected the legal frameworks. The EU followed the US and Australian approach to litigation funding by acknowledging that with the increasing expansion of litigation funding there was a growing market gap in jurisdictions where it did not adequately flourish[18], particularly due to an increasing need for disciplines such as arbitration and litigation for high-value disputes or complex matters such as insurance dislocation. As a result, the presence of litigation funding would need to be recognized more substantially through regulatory measures.

c. Current Phase (Post-2020)

The current phase represents a more proactive stance by the EU activity as the litigation funders have begun to show some mannerisms by whispered mentions for legislation directly mentioning and regulating financial support. Important new development: and Directive (EU) 2020/1828 on Representative Actions for the Protection of the Collective Interests of Consumers. The Directive outlines a framework for collective redress, prevents abuses by making litigation funding transparent and fair through setting the rules of procedure governing withdrawal & settlement of consumer actions[19].

16. Xandra Kramer *et al.*, *The application of Brussels I (Recast) in the legal practice of EU Member States*, Asser Institute. Available at: *www.asser.nl/media/5018/m-5797-ec-justice-the-application-of-brussels-1-09-outputs-synthesis-report.pdf* (accessed: September 8, 2024).

17. Dieter Martiny, *The Recognition and Enforcement of Court Decisions Between the EU and Third States*, in *EU Civil Procedure Law and Third Countries*, Nomos Verlagsgesellschaft mbH & Co. KG, 2021, 127-146.

18. Michael Legg, *The Rise and Regulation of Litigation Funding in Australian Class Actions*, in *Erasmus Law Review*, 4, 2021, 221-234.

19. C. Hodges, *Collective Redress: The Need for New Technologies*, in *Journal of Consumer Policy*, 42, 2019, 59.

The demand for this direct type of regulation began to emerge from calls calling out the lack of transparency and potential abuses in litigation funding practices. The directive shows a recognition of new legal and economic realities, for which clear conditions were needed to promote fairness in adjudication and consumer protection[20].

External influences include global comparisons and economic pressures. The adoption of similar measures in other jurisdictions, combined with the rise of high-stakes and cross-border litigation, prompted the EU to introduce more explicit regulations. These factors prompted the case for a regulatory framework that was elastic enough to keep up with advanced models in litigation funding[21].

In summary, it should be clear that the development of EU regulation of litigation funding has moved from indirect consequences via wider economic and procedural harmonisation measures to more direct statutory controls.

III. The Evolution of EU Legal Frameworks on Third-Party Litigation Funding

To understand how TPF has evolved in the EU and winds up where it is today, a sense of its legacy will be required by looking as far back as early directives and regulations. The passage from initial guidelines to fully developed regulation shows the various stages of a regime, but it also gives us some idea of the harder issues that would arise were Netherlands or any other traditional legal jurisdiction, Australia is simply one example among many here, finally allowed TPF.

a. Directive 2009/22/EC on Injunctions for the Protection of Consumers' Interests (Injunctions Directive)

The Injunctions Directive, was the first in a string of measures to protect consumers from unfair commercial practices established in 2009. This power has enabled consumer organizations to bring court injunctions against such practices and in turn fostering collective remedies for the enforcement of rights. The Injunctions Directive did not deal directly with third party litigation funding but provided a legislative backdrop in which collective actions could operate[22]. In

20. D.A. Agulló, *Directive 2020/1828 on representative actions for the protection of the collective interests of consumers: an overview*, in UNIO–EU Law Journal, 8(1), 2022, 127-142.

21. Massaro Piletta, *The new directive on an EU-wide representative action and third-party litigation funding: An opportunity for European consumers?*, in *Revija Kopaoničke škole prirodnog prava*, 3(1), 2021, 95-117.

22. European Commission, Directive (EU) 2020/1828 of the European Parliament and of

doing so, the directive enabled consumer organizations to act as representative entities on behalf of others and thus implied a possibility for litigation funding which would enable them to better fund collective actions[23]. This aspect was not dealt with in any way by the Injunctions Directive, which did provide for a series of actual facilities without actually defining the involvement that third-party funders could play. As a result, there were no statutes to control or oversight the operation of TPF that created an astonishing amount of darkness regarding transparency and ethical concern.

b. Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes (ADR Directive)

In 2013 the ADR Directive was introduced with a view of promoting out-of-court settlements between consumers and sellers regarding disputes related to online purchases. The Directive established a model for Alternative Dispute Resolution (ADR) systems in resolving such conflicts and, hence lighten the case-load on national courts[24]. The ADR Directive, although as such was more focused on non-litigious settlement mechanisms (which encompassed what we define the type of cases which have led to TPF being relevant), it admittedly influenced not just how but also under what circumstances latter collective redress systems were established. The directive led the way to TPF being introduced in situations where traditional litigation might be avoided, by encouraging means of alternative dispute resolution[25]. The ADR Directive, therefore, did not provide any specific guidance on third party funders or the funding of ADR processes[26]. The consequence of this was that TPF itself unlike arbitration and mediation did not make it into any grand overarching ADR scheme nor be explicitly regulated, which created uncertainty around the means by which funders could engage with decision-making stages at an early stage in a claim.

the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

23. R. Avraham, A. Wickelgren, *Third-party litigation funding-A signaling model*, in *DePaul Law Review*, 63, 2013, 233.

24. M. Velicogna, *Cross-border dispute resolution in Europe: Looking for a new normal*, in *Oñati Socio-Legal Series*, 12(3), 2022, 556-581.

25. Maya Steinitz, *Whose claim is this anyway-Third-party litigation funding*, in *Minnesota Law Review*, 95, 2010, 1268.

26. Rita Portenti, *Three's a Crowd: The EU Should Safeguard Against Third-Party Funding*, in *Arbitration Law Review*, 15, 2024, 104.

c. Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Recast)

Efforts to redress this anomaly were made in the Brussels I Recast Regulation that took effect from January 2013, which harmonised rules for both determining jurisdiction and recognition and enforcement of decisions amongst EU member states. With the intention of easing the cross border legal activity and making execution of justice more efficient through technology. Also under the Regulation, TPF comes in from a side door–by addressing jurisdictional issues that often come up when dealing with cross-border disputes[27]. A clear, consistent approach to jurisdictional rules is vital for third-party funders supporting cases in multiple jurisdictions and will help support the enforcement of funding arrangements across borders[28]. TPF in cross-border litigation Clearly, this regulation did not focus on the role of TPF when it comes to transnational litigations. Therefore, it did not touch upon some issues that could arise in the enforcement of funding agreements or regulation of funders investing across multiple jurisdictions.

d. Directive (EU) 2020/1828 on Representative Actions for the Protection of the Collective Interests of Consumers

The Directive (EU) 2020/1828, effective from December of 2022 marks a substantial step forward regarding collective redress mechanisms. It provides that EU member-states have to set-up procedures for collective redress regarding the protection of the collective interests both in general and relative terms, regulating a more regular approach as part of system-based action within European legal framework[29]. The Directive does so by recognizing, for the first time in direct terms, third-party financial interest, notably with regard to collective actions potentially benefiting from funding. In this way, it also does a better job of incorporating into EU law the idea that TPF can be used by multiple claimants to bring claims in tandem[30]. Even though the directive has come a long way, it

27. Michiel Poesen, *Civil Litigation Against Third-Country Defendants in the EU: Effective Access to Justice as a Rationale for European Harmonization of the Law of International Jurisdiction*, in *Common Market Law Review*, 59(6), 2022.

28. J. Saulnier, K. Müllerwith, and I. Koronthalyova, *Responsible private funding of litigation – european parliament*, European Parliamentary Research Service. Available at: *www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf* (accessed: September 8, 2024).

29. Alexandre Biard, *Collective Redress in the EU: A Rainbow Behind the Clouds?*, in *ERA Forum*, 19, 2018, 189.

30. Diego Agulló, *Directive 2020/1828: A new era for "European class actions"?*, in UNIO EU

remains silent on how third-party funders should function. It defers to member states which means that TPF is regulated by such varying standards and practices across the EU. The Tribunal procures TPF on a case-by-case basis as well as the presence of third-party funders in the arbitration can vary between jurisdictions.

Overall, EU regulation has evolved towards a partial recognition of TPF but it still looks like this practice is waves away before testing the shores of regulatory sandbox. While the directives and regulations have established bedrock frameworks for collective action and cross-border litigation, they sometimes tend to miss out by not catering adequately with regard technology part funds[31]. Given that the EU is still a dynamic and evolving set of legal frameworks, further consideration on TPF regulation will be required in order to avoid these kinds of loopholes and allow its funding practices to find their place within such an extensive range of laws.

IV. Evolution of Third-Party Litigation Funding in the European Union: From Early Directives to Proposed Reforms

The legal landscape governing third-party litigation funding (TPF) in the European Union has evolved substantially over the past two decades. While the first legislative attempts did not directly attempt to regulate TPF, they inadvertently set up its emergence by focussing on civil justice mechanisms and cross-border litigation. It is indeed the case that these regulations helped shape some of collective redress mechanisms and consumer protections, contributing to TPF expanding indirectly. The evolution of early directives such as the Injunctions Directive (2009/22/EC) and the Brussels I Recast Regulation to more modern legislation including, for instance, new Directive (EU) 2020/1828 provides evidence that TPF is gaining significance also in collective redress actions and cross-border disputes[32]. These latest developments, and the more recent proposal of the *Responsible Private Funding of Litigation directive*, are a testament to

Law Journal The Official Blog, 2021. Available at: *officialblogofunio.com/2021/11/22/directive-2020-1828-a-new-era-for-european-class-actions/* (accessed: September 8, 2024).

31. Department of Enterprise, Trade and Employment, *Public Consultation on the Transposition of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC*, March 2021. Available at: *enterprise.gov.ie/en/consultations/consultations-files/public-consultation-on-the-transposition-of-directive-eu-2020-1828.pdf* (accessed: September 8, 2024).

32. Christopher Unseld, Anne Van Den Bergh, *The EU representative actions directive in Germany and the Netherlands: One small step or one giant leap for access to Justice?*, Hausfeld, February 27, 2024. Available at: *www.hausfeld.com/en-us/what-we-think/competition-bulletin/*

this recognition by EU law makers that there needs to be tailored regulation concerning TPF in general terms but also with peculiar contemplation on its nuances as it connects primarily towards international arbitration and investor-state disputes.

The evolution of these laws is very relevant to the broader trends in TPF and more generally how legal systems have been adjusting to fulfil cross-border litigation or investor-state arbitration.

a. The Transition from Early Legal Frameworks to Focused Regulation

The basic guidelines and rules such as Directive 2009/22 on injunctions and Directive 2013/11/EU on the Consumer ADR Directive have added momentum to legal consumer collective actions but did not focus directly on TPF[33]. Their main objective was to establish collective redress mechanisms and cross-border litigation, which indirectly served the purpose of enabling third-party funding. But, these directives did not set out clear principles in relation to third-party funders which created large gaps in the regulation.

In due course, however, it became evident that the existing legal frameworks were inadequate to deal with the formal complexities third-party funding arrangements had started to introduce – all the more so when litigation finance also began arising as an issue not only in relation to cross-border disputes but also collective actions. However, the landscape has changed with Directive (EU) 2020/1828 on representative actions now explicitly recognising TPF as part of collective redress mechanisms. However, this Directive still gave states too much leeway to determine the extent to which litigation funding needed regulation and failed entirely in addressing issues like transparency or ethical concerns that can often arise.

i. Directive 2009/22/EC (Injunctions Directive): Consumer Protections and Collective Redress

The Injunctions Directive (2009/22/EC) was one of the first pieces of legislation to intervene as a remedy for consumers against certain unfair commercial practices. The conversational counterpart of the rule, seeming to

the-eu-representative-actions-directive-in-germany-and-the-netherlands-one-small-step-or-one-giant-leap-for-access-to-justice/ (accessed: September 8, 2024).

33. Xandra Kramer *et al.*, *The application of Brussels I (Recast) in the legal practice of EU Member States*, Asser Institute. Available at: *www.asser.nl/media/5018/m-5797-ec-justice-the-application-of-brussels-1-09-outputs-synthesis-report.pdf* (accessed: September 8, 2024).

invite TPF in through the back door by allowing consumer organizations to apply for injunctions even though not dealing with third-party litigation funding. This was before any collective redress mechanisms, for which TPF would later become so central. This new ability to act collectively via the Injunctions Directive allowed claimants to cost share, with third party funders funding their side of the equation[34].

This directive's indirect contribution to TPF lies in its facilitation of collective actions, a common context where TPF is utilized. These developments made this space more attractive to third-party funders, who could increasingly play a role in supporting high-volume cases with wide-ranging impacts and high rewards. This made things easier for funders to sponsor since the costs and risks were shared among many claimants[35].

Nonetheless the Injunctions Directive did not provide for procedure in respect of third-party litigation funding It failed to look at the regulation of funders, leading to possible conflicts of interest and limited transparency in their funding arrangements as well as weak oversight over their financial stability. Only in later legislative efforts would these gaps be filled, as the perceived need for more robust regulation was underscored by TPF coming to take on a larger role.

b. The Impact of Cross-Border Litigation on the Development of TPF Regulation

i. Regulation (EU) 1215/2012 (Brussels I Recast): Facilitating Cross-Border Litigation

The successor to the Brussels I regulation, The Brussels I Recast Regulation continues in many but not all respects its predecessor this includes jurisdiction & enforcement matters in civil and commercial disputes. However, Its application to TPF is most visible in the case of cross-border disputes when there are high-stakes legal battles and it becomes critical for a party to explore Litigation Financing[36]. The regulation enables decisions made in each member state to be mutually accepted and implemented throughout the EU, offering increased security for funders active on a transnational litigation basis.

In terms of cross-border litigation, the Brussels I Recast regulation is an

34. Louis Visscher, Faure Michael, *A Law and Economics Perspective on the EU Directive on Representative Actions*, in *Journal of Consumer Policy*, 44, 2021, 455-482.

35. Marko Djinovic, *Procedural Costs and Third-Party Litigation Funding of Collective Redress under the Slovenian Collective Actions Set*, in *Pravni Letopis*, 2022, 117.

36. Xandra Kramer *et al.*, *The application of Brussels I (Recast) in the legal practice of EU Member States*, Asser Institute. Available at: *www.asser.nl/media/5018/m-5797-ec-justice-the-application-of-brussels-1-09-outputs-synthesis-report.pdf* (accessed: September 8, 2024).

important segment for TPF to take into account when evaluating whether a judgment will be enforced in another state. This harmonization of enforcement mechanisms across the EU mitigates risk for funders and is likely to make cross-border litigation more interesting to third-party-funders. Enforcement: while enforcement is straightforwardly addressed in the Brussels I Recast regulation, there is no mention of such thing as a role for third-party financiers[37]. The failure to regulate transparency, conflicts of interests and the liability for funders in a real/unreal scenario creates hypothetical adverse effects for litigators who enter into funding agreements without an awareness of their legal or financial responsibilities. Moreover, funders are exposed to a risk as different national regulations regarding TPF diverge across member states.

Additionally, although Brussels I Recast helps in the context of cross-border litigation, it does not relate to TPF as part of a multi-jurisdictional dispute. This exclusions has been controversial due to the way courts have upheld validity agreements and because this opens up a possibility for regulatory arbitrage where funders seek out loosest jurisdiction laws with respect to nonemergency market[38]. TPF regulations also still present many challenges, especially the dis-harmonization among EU Member States' TPF rules – whilst a cross-border case might miss harmonised jurisdictional provisions if not common legal frameworks have been granted to administer for such dispute.

ii. Directive (EU) 2020/1828 on Representative Actions for Consumer Protection: A Milestone for Collective Redress

Directive (EU) 2020/1828 is a major step forward in the EU's collective redress framework, mandating that member states set up Collective Action mechanisms until December 2022. A different approach from those that have gone before it, is the express recognition of EU access to justice which third party funding can bring for consumers who are priced out by this procured litigation process if unfunded.

It is a turning point in providing guidance as it specifically mentions TPF and the role of collective actions. This has the effect of directly incorporating TPF into collective actions as a required tool through which member states can now create mechanisms for third-party funders to participate in claims. This recognition

37. Jacqueline Gray, *Party Autonomy Under the New Brussels IIa (Recast) Regulation: Stalemates and Innovation*, in *Utrecht Law Review*, 18(1), 2022, 45-56.

38. T.M.C. Arons, *Cross-border dimension of collective proceedings in the Brussels Ibis regime: jurisdiction, lis pendens and related actions*, in *Research Handbook on the Brussels Ibis Regulation*, Edward Elgar Publishing, 2020, 1-39.

underscores the increasing use and reliance on TPF for complex and expensive litigation, especially where there are multiple claimants involved in one legal action.

Although Directive (EU) 2020/1828 recognises TPF, it does very little to provide the kind of regulatory scaffolding necessary. At the EU level, authority is fractured between a handful of weak regulators in each country – some with stronger rules, and others who spurned regulation altogether. A lack of universal standards on donor openness, financial oversight and conflicts of interest remains an issue too, particularly in cross-border situations where different sets or regulatory rules can be employed.

iii. Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes (ADR Directive)

The ADR Directive encouraged the use of ADR mechanisms for national consumer disputes, by relocating consumer's cases to OODR. Although that is not an outcome based on TPF in itself, the recommendation potentially led to a higher embrace of collective redress mechanisms which helped indirectly bolster litigation funding[39]. By promoting settlements, it illustrated the necessity of financial assistance in complex litigations that TPF may indeed provide. In doing so, however, it neglected to detail regulatory frameworks applicable directly to TPF specifically how this funding should be incorporated within dispute resolution processes.

c. Anti-Money Laundering Directives: An Unforeseen Influence on Litigation Funding

The EU's increasing move towards unified anti-money laundering (AML) regulations has also had an impact on the legal framework surrounding third party litigation funding. The Directive 2005/60/EC (the Third Anti-Money Laundering Directive), Directive (EU) 2015/849 (the Fourth Anti-Money Laundering Directive), and Directive (EU) 2018/843 (the Fifth Anti-Money Laundering Directive) introduced new obligations of transparency financial reestablishment which obliges to conduct a closer control. While the primary concern of these directives has been to combat money laundering and terrorist financing, they have had clear knock-on benefits for TPF both by providing

39. Jérôme Saulnier, Ivona Koronthalyova, Klaus Müller, *Responsible private funding of litigation – european parliament*, European Parliamentary Research Service. Available at: *www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf* (accessed: September 8, 2024).

certain regulators with formal obligations vis-a-vis those looking to aid litigants but also in ensuring that funders operate financially above board[40].

Thus, the AML regulations impose an obligation on third-party funders to make efforts to confirm that their agreements are untainted by criminality very much apropos of cross-border matters usually involving more than just one jurisdiction. However, the AML framework fails completely to capture some of the specific challenges inherent in TPF such as the potential for conflicts of interest between funders and litigants or the influence of funders on the legal strategy. Such regulatory gaps highlight a requirement for more nuanced regulation which articulates both the behaviour of TPF in cross-border litigation and national cases.

i. Directive 2005/60/EC (Third Anti-Money Laundering Directive)

The scope of the Third Anti-Money Laundering Directive, which was primarily directed at counter-fraud, whilst not directly affecting TPF, does have an impact via measures on transparency of funding sources. We even go so far as to suggest that many of the monies used in third-party litigation-funding are likely illicit funds, most probably given by intermediaries and recovered at a premium.

This directive creates recent details as to the necessity for a funder who wants privileges should be able to verify their funding has gone through legally rigorous source verification, thus this is a way of tangentially regulating the TPF scene. Funders must screen their funders and abide by money laundering rules. Unfortunately, the directive does not mention these specific dangers, but what we know about TPFs indicates that funders being able to influence litigation makes it even easier to commit financial crimes. The lack of specific TPF guidance might enable funding organisations to exploit legal gaps and choose not to fully comply with anti-money laundering regulations[41].

The third directive was accordingly replaced because the financial crime changes were increasing in complexity and there were more gaps that needed to be filled with an updated set of AML approaches. By 2008, with the post-2001 AML landscape taking shape and global financial markets under scrutiny as never before it was evident that an even more robust framework would be necessary if regulators want to effectively disrupt increasingly sophisticated money laundering

40. David Muradyan, *The efficiency of the European Union's Anti-money laundering legislation: An analysis of the legal basis and the harmonisation of the EU Anti-money laundering legal framework*, 2022.

41. I. Ganguli *et al.*, *The Third AML-Directive: Europe's Response to the Threat of Money Laundering and Terrorist Financing: Part I*, in *Banking Law Journal*, 126, 2009, 579.

methods by both established channels as well breakthroughs found in emerging new economic sectors such as litigation finance.

ii. Directive (EU) 2015/849 (Fourth Anti-Money Laundering Directive)

The Fourth Anti-Money Laundering Directive, which emanated from the Third Directive increased already stringent reporting and compliance obligations for financial entities, including litigation funders. It aims to plug the loopholes seen in existing framework, said with increased transparency being a top priority.

This increased transparency requirements of the Directive strengthens further TPF regulation, creating accountability for funders. We promote financial transparency which makes the money less likely to come directly from funders connected to organized crime or terrorist groups. Notwithstanding these improvements, the directive still lacks some tactical instructions for TPF market. Limited carve-outs for litigation funders make it all the harder to navigate, especially when cross-border elements come into play and there are a range of national regulations that may be relevant[42].

In addition, new risks were posed by the fast evolution of technology, including cryptocurrencies and virtual assets that have not been appropriately covered in the Fourth AML Directive. Increased use of litigation funding, particularly for cross-border claims and through online platforms called for a clearer regulatory approach to the changing landscape in this area.

iii. Directive (EU) 2018/843 (Fifth Anti-Money Laundering Directive)

The Fifth Anti-Money Laundering Directive added even more stringent regulations, implementing even more diligent due diligence on financial transactions. It targets the funding sources that anonymously are topical in TPF.

The mandate in question outlines how funders should conduct due diligence to keep track of what they are funding litigation and that all monies used for legal work is on the up-and-up. It also adds teeth to the enforcement process, creating a disincentive for funders skirting in legal grey areas. While this provision addresses the issue of transparency, it does not reflect that enforcement in relation to TPF costs could be problematic given these agreements are often multi-layered and involve numerous parties across multiple jurisdictions[43]. Given the absence of

42. Valsamis Mitsilegas, Niovi Vavoula, *The evolving EU anti-money laundering regime: challenges for fundamental rights and the rule of law*, in *Maastricht journal of European and comparative law*, 23(2), 2016, 261-293.

43. Patrícia Godinho Silva, *Recent developments in EU legislation on anti-money laundering and terrorist financing*, in *New Journal of European Criminal Law*, 10(1), 2019, 57-67.

strict nature of regulation around TPF, compliance can be a cumbersome task which especially becomes difficult in situations where there is international cross border aspects involved and wherein regulatory oversight may not be aligned similarly across all jurisdictions.

The Fifth AML Directive is still applicable but some of it has already been repealed this year. The demand for harsher anti-fraud prevention in the realm of financial transactions became apparent with the rising relevance of apparently digital assets such as cryptocurrencies. This revealed frailties within this structure that threatened to cause financial instability and a lack of transparency[44]. Consequently, additional regulatory changes were required to adapt to these new challenges and make sure that a financial system would adequately react not only yesterday but most importantly tomorrow on the wide variety of complexities brought by digital innovations in finance.

iv. Directive (EU) 2020/1828: A Landmark Development

The enactment of Directive (EU) 2020/1828 on representative actions signals a significant milestone in the EU landscape for collective redress and TPF. The directive specifically refers to third-party funding in collective actions and mandates that member states put procedures for establishing collective redress mechanisms into place by December 2022. Subject to be the function long ago recognized most as making justice for large scale consumer disputes, this directive represents arguably the matter that has ever been said about how TPF can link via access problems[45].

While that particular direction is a major development, there has not been detailed regulations on the facet of TPF[46]. Instead, it gives member states the opportunity to determine how TFP is dealt with. This results in a patchwork quilt of regulation with some countries hosting strong funder oversight mechanisms and others little to no regulations at all. The lack of a harmonized regulatory framework in the EU remains problematic, especially for cross-border cases that can lead to funders taking advantage from these differences.

44. Georgios Pavlidis, *Financial information in the context of anti-money laundering: Broadening the access of law enforcement and facilitating information exchanges*, in *Journal of Money Laundering Control*, 23(2), 2020, 369-378.

45. María Carlota Ucín, *How Can Business Best Approach Human Rights in Third-Party Litigation Funding? Guidelines for Future Regulations*, in *Erasmus Law Review*, 16, 2023, 102.

46. Susanne Augenhofer, Adrian Dori, *The proposed regulation of Third-party Litigation Funding-much ado about nothing?*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 20(5), 2023, 198-209.

d. Toward a Comprehensive Regulatory Framework: The Proposal for the Responsible Private Funding of Litigation Directive

The long-run European Union progression towards the financing TPF achieved a further momentous step during September 2022 when it received approval from The Parliament of Europe in support proposing Responsible Private Funding for Litigation (*Responsible Private Financing Directive*). The proposal seeks to fill the regulatory gaps that have been caused due to previous directives and set a level playing field for third-party funders across EU.

Its target would be to lay down some basic standards for the regulation of third-party funders, so as to promote transparency and also afford level treatment in addition a degree of accountability. Some key provisions in the proposed directive are:

- The reliance on a supervising authority to evaluate funders and ensure they comply with fiscal and ethical standards.
- Shared cost liability for both the payer and payees, in proceeding.
- Requirements for funders to have sufficient financial resources available with an assured ability to pay all claims.
- And fiduciaries owed by ad funders to the parties they back, such that litigants' interests will be safeguarded.
- Transparency duties to report funding deals with either judicial or administrative authorities;
- Caps to the financial stake of funders at 40% of any compensation awarded to a client, except in those extraordinary cases[47].

If implemented, this regulation would represent a significant improvement in EU TPF regulation by addressing numerous concerns about transparency and ethics but more importantly financial oversight. It would also create a harmonised legal foundation across the EU to prevent forum shopping and facilitate that funders operate according to defined industry standards in legally binding manner.

e. Future Considerations

That the legal framework for third-party litigation funding in the EU has developed piecemeal over time, driven by considerations of the need to create

47. Maria Dumitru-Nica, *Third-party Litigation Funding-between Business Opportunity and Facilitating Access to Justice*, in *European Journal of Law and Public Administration*, 9(1), 2022, 104-111.

collective redress mechanisms and challenges posed by cross-border or cross-system nature of multi-jurisdiction claims as well as concerns about transparency & accountability. Although the early guidelines were sufficient to govern collective actions and protect consumers, they did not take into account well enough the issues specific of TPF. These initiatives, Directive (EU) 2020/1828 especially together with the proposed by Responsible Private Funding of Litigation Directive are steps toward achieving a more robust and uniform regulatory framework for third-party funders in the EU[48].

In the next part of this chapter, we will discuss further about current EC directives and rules applicable to TPF as well as what adopting these proposals might mean for the future of litigation funding in EU. This analysis will provide a deeper understanding of the challenges and opportunities presented by the evolving legal landscape for TPF, with a focus on how these developments affect various spheres of legal practice, including cross-border litigation and investor–state arbitration.

V. Navigating the Complexities of Litigation Funding Regulation

A sequence of normative shifts across the legal and financial sectors has reconfigured litigation funding under EU law. Whilst litigation funding has not been subject to a regime of explicit, overarching or indeed any regulation in its own right, there is an armoury of EU laws with implications for the modern litigation funding, particularly in relation to financial markets, anti-money laundering (AML), and consumer protection.

a. The Collective Redress Directive (Directive (EU) 2020/1828)

In 2020 a more indirect way of funding litigation emerged with the Collective Redress Directive being adopted. This directive established collective redress mechanisms for consumers in situations of widespread infringements of EU laws causing mass harm. While not a regulations of litigation funding itself, the Act has some impact on funders by putting in place requirements about transparency, accountability and ethical management collectively funded claims.

New rules on collective redress featured a section setting requirements for litigation funders when involved in such cases, to ensure that their interests coincided with those of claimants and financial arrangements were disclosed. The

48. Massaro Piletta, *The new directive on an EU-wide representative action and third-party litigation funding: An opportunity for European consumers?*, in *Revija Kopaoničke škole prirodnog prava*, 3(1), 2021, 95-117.

directive has materially informed the participation of third-party funders in mass consumer litigation.

The Collective Redress Directive (Directive (EU) 2020/1828)) has introduced greater transparency and oversight over third-party litigation funding agreements by requiring that the involvement of funders in collective legal proceedings be disclosed. The rules contained in the new law, funders must disclose their connection to a case by stating that they are providing financial assistance and detail how this money is being used. The proposed regulation, designed to prevent conflicts of interest and undue influence by litigation financers over the course or outcome of litigations as well as the integrity with which claimants pursue their legal objectives[49].

In seeking disclosure of financial support, the directive protects claimants to assure that litigation remains doing right by those who have legitimate interests in it. It would also reduce the risk that funders will use legal strategy as a means of optimising their return at the cost to claimants' goals. In addition, by requiring transparency about third-party funding the oversight of judicial scrutiny is further increased and allows for public confidence in collective actions to be built on facts.

Increased oversight also includes ensuring that funders are prevented from taking too many fees or asking for an unfairly large percentage of any recovery. These regulations are put in place to find an equilibrium between access to justice through third-party funding and claimants who may be harmed by unfair practices.

b. Proposal for a European Regulation on Litigation Funding

In 2022, the European Parliament proposed that regulation of third-party litigation funding be established to address industry-wide concerns Unsurprisingly, these proposed regulations would directly affect litigation funders by imposing standards of transparency, fees and ethical conduct. It seeks to protect claimants from being preyed on by funders and also it tries to ensure that the control of legal proceedings is not overwhelmingly in favour of litigation funding[50].

It addresses concerns about funders trying to unduly influence litigation which allows for funding arrangements that are transparent and in this instance

49. Adrian Cordina, Eva Storskrubb, *The Future Regulation of Third-Party Funding in Europe*, Conference Report, June 22, 2022, Erasmus University of Rotterdam, in *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement Aflevering* 26 (2), 2022.

50. Di Francesca Locatelli, *Challenges and comparative perspectives on third-party litigation funding – judicium*, in *Rivista Judicium*, 2024. Available at: *www.judicium.it/challenges-and-comparative-perspectives-on-third-party-litigation-funding/* (accessed: September 8, 2024).

clear as well. This general direction of consumer protection and the legitimacy of legal proceedings in court has been made also within a wider policy objective on justice for all; there is no opportunity to facilitate financial abuse located[51].

This directly addresses the increasing regulatory problems with third-party funders unduly influencing litigation, and ensures funding arrangements are both clear and equitable. The proposal is meant to provide clear guidelines on the boundaries of funders' control and keep very situations in London, for instance, where a funder tells its client how they are going litigate their claim or puts pressure on them settle at a figure that might not be as high as what it would otherwise expect. The framework is made also to respect the independence of legal process so that our jurisprudence continues judged solely on its merits, and not simply by calculating what a third-party financier who will pay for or sell out justice.

A cornerstone of the proposal is around consumer safeguards, which considers that claimants in high-volume collective proceedings may be susceptible to exploitation if rigorous protections are not built into a system. The maintenance of the claimant's identity would be safeguarded by a requirement to disclose all terms and conditions on which funding has been obtained, in order to bring about a fairer balance between funders and parties so that there are no situation where third-party funded claims are operated but without any information as to what such an action will really cost them financially[52].

Moreover, this concentration on the soundness of legal processes forms part of a wider EU objective: ensuring access to justice. The importance of litigation funding is to build a necessary bridge for ordinary individuals and smaller entities, so they can afford the costs, risks and fees associated with pursuing court claims broadly considered untenable on their merits by legal aid. This has to be weighed against safeguards being in place to prevent abuse by the funder on one hand, or potential over zealously and accepting funders withdrawing funds due them.

i. The Proposed Regulation of Third-Party Funding and Its Impact on International Arbitration and Cross-Border Dispute Resolution

The European Parliament's new legal regime regulating third-party funding (TPF) in arbitral processes to be *implemented directly* across all EU Member

51. Tessa Trapp *et al.*, *Third-Party Legal Standing under European Union Law: A Comparative Review of Selected EU Law and National Implications*, in *Amsterdam Law School Research Paper*, 1, 2024.

52. Paulina Jedrzejowski, *Paying for conflict and resolution: Europe seeks further third-party funding regulation*, in *International Institute for Conflict Prevention & Resolution*. Available at: *www.cpradr.org/news/paying-for-conflict-and-resolution-europe-seeks-further-third-party-funding-regulation* (accessed: September 8, 2024).

States is without question one of the most significant developments yet for global arbitration and international dispute resolution. It targets to consolidate TPF regulation throughout EU Member States, and that there should be transparency, fairness and proportionality in funding arrangements. Proposed adoption of those provisions may have widespread impact on international arbitration, as the vast majority of case law in this area tends to emphasise party autonomy, confidentiality and procedural flexibility[53].

However, the spread of TPF to arbitration also gives rise to questions with respect to conflicts of interest in view of possible links financial and non-financial among either arbitrator on one side or another as well from those who administered arbitral proceedings. It said disclosure would help remove a funder's confusion about TPF arrangements involving a third party, avoid potential conflicts of interest. Demand was echoed even more soon after by new rules of institutions as the International Chamber of Commerce (ICC) and International Centre for Settlement of Investment Disputes (ICSID). The EU regulation is a logical extension of these efforts, building on this base and codifying the duty to disclose fully in any funded disputes). A well-intentioned requirement meant to foster transparency in the arbitral proceeding and, also, ensure that any idle greedy fellow who could be hiding behind funders is put on notice[54].

It also seeks to preserve the privacy that many working in arbitral practice cherish. This is why the only way to regulate this transparency-confidentiality trade-off – where regulation cannot eliminate one at the cost of another, but can limit how much we disclose about ourselves in order to protect confidentiality for others[55]. This is a balanced way and it becomes the key for arbitration to maintain its attractiveness as means of dispute resolution in particular on proceedings where more confidential commercial information was involved or high-complicated multi-jurisdictional claims.

This is a theme that appears in the EU Parliament proposal: third party funders might have undue influence over claimants, entailing corrosion of judicial independence. The draft law stipulates regulations on the content, the

53. Daniela Amarante, Diana Nunes, *News on third-party funding in the EU: The Parliament's recent proposal for a regulation*, in *International Arbitration Outlook Uría Menéndez*, 11, 2023. Available at: *www.uria.com/en/publicaciones/8498-news-on-thirdparty-funding-in-the-eu-the-parliaments-recent-proposal-for-a-re#:~:text=The%20EU%20Parliament%20has%20recently,potential%20effects%20for%20international%20arbitration* (accessed: September 8, 2024).

54. Rita Portenti, *Three's a Crowd: The EU Should Safeguard Against Third-Party Funding*, in *Arbitration Law Review*, 15, 2024, 104.

55. European Law Institute, *Third-party Funding of Litigation*, Project Period, (July 2022 – September 2024), *www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/third-party-funding-of-litigation/* (accessed: March 19, 2023).

style type and life cycle of a TPF-agreement in order to protect plaintiffs from abusive contracts. This will be achieved by creating a proposal which ensures funders are directed to conduct themselves correctly and not seek to influence the litigation process or coerce claimants in the early settlement of their claims for financial gain, introducing fiduciary duties on them as well as more stringent capital adequacy standards[56].

This is particularly important in the realm of international arbitration, where high stake disputes are common and legal issues can quickly get out of hand. If claimants are pushed or incentivized into decisions favouring the financial benefit of funders rather than legal merit, this undermines arbitration. To combat such a 'funder capture' of the arbitral process, monitoring bodies independent make their introduction as supervisory authorities necessary. However, the worry is that over-regulation might prevent TPF's running well and thus lead to a squeeze against justice methods leading funding options[57].

The consequence of the regulation of TPF is to promote access to justice, so that claimants and in particular those with limited financial means have a mechanism by which they can pursue claims. Worth noting is that TPF serves as the great equalizer and levels out the playing field for all parties to engage an arbitration without indirectly shouldering full or proportionate legal fees, expert costs or arbitrators' services by way of a third party. Sceptics counter that the very demanding conditions as laid down in the directive could exclude TPF, potentially limiting access to justice for smaller claimants, particularly from being able to pursue disputes at international arbitration[58].

This proposed amendment is within the context of ensuring legal processes in EU member states put claimants' rights ahead of the profit interests that apply to funders too. However, the arbitration community has voiced some concerns regarding these rules being overly burdensome and how they might infringe on party autonomy–a principle that is fundamental in pursuing an arbitral process[59].

56. Christopher Bogart, *Third-Party Financing of International Arbitration*, in *The Arbitration Review of the Americas 2017, Global Arbitration Review*, *globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2017/article/third-party-financing-of-international-arbitration* (accessed: March 19, 2023).

57. Manfredi Marciante, *Funding of Claims in Investor-State Dispute Settlements: Could Third-Party Funding Enhance Access to Justice?*, in *YSEC Yearbook of Socio-Economic Constitutions 2022: Funding of Justice*, Springer Nature Switzerland, 2023, 291-320.

58. Fernando Aguilar de Carvalho *et al.*, *Portugal. The Third-party Litigation Funding Law Review*, in *The Third-party Litigation Funding Law Review, Law Business Research*, 2020, 134-141.

59. International Council For Commercial Arbitration, Queen Mary University of London, *Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration*, 2018, 14-16, *cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf*.

Intervention by supervisory authorities or courts in TPF agreements may be regarded as an encroachment on the parties' autonomy to shape their proceedings as they wish. In international arbitration this is important, even more so because one of the virtues of being able to draft your dispute very specifically for a particular case, as in arbitration[60].

The introduction of EU-wide TPF regulation might also create some notable ramifications for cross-border arbitration, particularly with respect to situations where the arbitral seat is within the territory of an EU Member State but either the parties / their counsel or funders have connections from outside such a Union. The presumed universal applicability of the rules to all arbitral proceedings seated in a Member State could for its part question whether or not the regulation can effectively have such an extraterritorial effect[61]. For instance, will overseas third-party funders automatically come under the same regulatory guidelines? One issue that remains to be clarified is whether the arbitral tribunals will themselves enforce the terms of this Directive or this enforcement could only occur before domestic courts and administrative authorities.

In addition, the proposal may create a greater variance in how TPF is treated under arbitration law between EU Member States and jurisdictions like the United States or Australia, that have fewer restrictions on use of third-party finance. Given the contradictions, it is most likely that this regulation will make contravene with international arbitrations generally whenever there are multiple jurisdictions involved, making it a more complicated endeavour in such cases. There will, undoubtedly be tensions within arbitral institutions and between parties as to how legal standards are interpreted and applied which carries the potential for increased costs of time in some international arbitrations.

The proposed directive concerning TPF by the EU is a very positive development and reflects efforts to bring transparency, address conflicts of interest and ensure that third-party funders do not exercise inappropriate control. If applied, the directive would add transparency to arbitration proceedings and further validate the EU's dedication to consumer rights and their right for litigation. Nevertheless, any restriction imposed by the regulation might also limit capital available and undermine party autonomy with respect to TPF which has been gone up of concern over role of TPF in international arbitration[62].

60. Susanne Augenhofer, Adrian Dori, *The proposed regulation of Third-party Litigation Funding-much ado about nothing?*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 20(5), 2023, 198-209.

61. Michael Krestin *et al.*, *Third-Party Funding in International Arbitration: To Regulate Or Not To Regulate?*, in *Kluwer Arbitration Blog*, 2017, *arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/*.

62. International Council For Commercial Arbitration, Queen Mary University of London,

The balance between public interest and protecting the essence of arbitration will be integral to maintaining healthy commercial arbitral procedures in Europe, as the Commission mulls over what it learned from Parliament. Arbitration has emerged as the favoured method of resolution for cross-border disputes owing to its flexibility, confidentiality and party autonomy[63]. All this must be preserved by any regulatory framework designed to provide a fair and transparent landscape for third-party funding in arbitration across the EU and more widely.

VI. Prominent Litigation Funding Frameworks in Europe: Analysing the German and Dutch Models

The European Union is working on the problem of harmonising litigation funding regulations and as such there are differing state models in place which may provide some instructive examples about what a consumer jurisdiction might look like. Experiences in Germany and the Netherlands suggest how member states might develop disparate but effective ecosystems based partly on domestic needs as well their EU-level aims. National approaches like these highlight the diversity of legal cultures in Europe, but also demonstrate how a more general unified European law might come about. The EU can observe the operation of these national-level regimes and decides what works, in turn designing regulation that permits innovation whilst maintaining regulatory oversight. The German and Dutch experience demonstrates why more flexibility is needed for EU wide regulation of litigation funding given the differences between legal systems in its approach to ensure that it operates successfully[64].

a. The German Legal Framework: A Benchmark for Litigation Funding in Europe

In Germany, third-party litigation funding has evolved into a well-established practice since its introduction in 1999. While this new trend was initially greeted as a long overdue way to get around the restrictions imposed by German success fee regulations, legal finance has subsequently become entrenched in litigation

Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration, 2018, 1.

63. Jack Ballantyne, *EU parliament calls for regulation of third-party funding*, in *Global Arbitration Review*, 2022. Available at: *globalarbitrationreview.com/article/eu-parliament-calls-regulation-of-third-party-funding*.

64. Barry J. Rodger, *Germany and the Netherlands*, in *Research Handbook on Private Enforcement of Competition Law in the EU*, Edward Elgar Publishing, 2023, 458-503.

pipelines. The introduction of Section 4a to the German Act on the Remuneration of Lawyers in year 2008 made contingency fee agreements admissible subject under certain conditions and thus additionally legalized this system.

Thus, litigation funding in Germany now exists as part of the legal order, an arrangement verified by a number judicial decisions recognizing its partnership structure under the German Civil Code[65]. The courts have in general taken a neutral to favourable view of third-party funding, consistent with an institutional mind-set that has been emerging for some time. Nevertheless, the discipline can be somewhat complicated. Despite regulatory developments at various levels – be it domestically or internationally – there has been no sweeping progress to enforce more rules around litigation funding, and holes have continued in the oversight of the sector.

One of the main issues is around which fees funders can charge The enforced ceiling on the legislation is, though not statutory and cautiously polls to around 50 percent of recovery depending upon risk (with a say in the case) committed. As universal number states, there is no generalizable setting around it. The figure can change and still always faces opposition if overblown! As an example, the Higher Regional Court of Munich approves a 50-cess in one, typical case at second glance where the funder entered after failure[66].

Further, litigation funders are not regulated by public regulatory authorities such as the Federal Financial Supervisory Authority (BaFin) because they neither fall under being a bank nor an insurer. The absence of regulatory scrutiny in this area has caused some to worry about conflicts of interest, such as lawyers referring clients received for their own funding company – a situation that would run contrary to ethics codes.

But even without these and specific norms, the system is different from many other jurisdictions. The result is its cautious yet enabling approach to legal regulation, which acts as a risk model for innovation in litigation funding against a review of the judicial and ethical standards. The flexibility of the German system and still-evolving case-law approving models of third-party financing provide significant guideposts for other countries grappling with how best to manage an emerging phenomenon[67].

65. Dina Komor, *At a glance: Regulation of litigation funding in Germany*, in *Lexology*, 2023. Available at: *www.lexology.com/library/detail.aspx?g=b4ce6f44-0875-4125-99a5-c1dbf661353e* (accessed: October 21, 2024).

66. Tessa Trapp *et al.*, *Third-Party Legal Standing under European Union Law: A Comparative Review of Selected EU Law and National Implications*, in *Amsterdam Law School Research Paper*, 1, 2024.

67. Otabek Narziev, *Third-Party Funding in Global Arbitration: Balancing Access to Justice with Ethical Concerns*, in *Journal of Intellectual Property and Human Rights*, 3(8), 2024, 225-229.

Furthermore, Germany's regulatory framework for litigation funding, is specifically shaped by the Legal Services Act (*Rechtsdienstleistungsgesetz*), which also plays a pivotal role in the broader European discourse on third-party litigation funding (TPF). Despite early concerns about the influence of foreign litigation funders–particularly from the UK and US–seeking to invest heavily in the German market, the country has demonstrated a firm commitment to maintaining its distinct legal culture. The fear of an *American litigation style* infiltrating the German system was met with both scepticism and resistance, exemplified by a series of legal decisions[68].

For example, in response to a consumer organization looking for litigation funding from a professional funder, the Federal Court of Justice of Germany (Bundesgerichtshof) ruled that such practice was actually illegal 2018 and again in early this year. Much criticized by the lower instances and legal scholars, this decision illustrates German reluctance concerning litigation funding and the difficulties of finding one's way round in the German market. It was a sign that Germany would be difficult to bend under legal influences from outside and keep their regulatory principles.

But the landscape changed in 2021 with an important judgment handed down by the German Federal Court of Justice (BGH) on mass claims and litigation funding, paving new lime lines. The court ruled that a mass claims collection model is legal, overturning negative precedents from lower courts on follow-on cartel damages class actions. In direct contrast to judgments that illegalized such structures, the court ruled assignment of a multiple claims package to an SPV is not in breach of the RDG[69].

2021. This reform made it clear that debt collectors cannot be sued for bundled claims, not only in line with the Air deal judgment but also to encourage further development of more efficient collective redress mechanisms[70]. The case is of particular relevance to the broader EU discussion, as it demonstrates how Germany's legal framework can adapt to modern litigation needs while still preserving regulatory safeguards.

68. British Institute of International and Comparative Law, *Collective redress Germany*. Available at: *www.collectiveredress.org/documents/14_germany_report.pdf* (accessed: September 8, 2024).

69. Justus Herrlinger, Marcus P. Lerch, *Bundled debt collection for cartel damages: With the Round Timber Cartel "Out of the Woods"?*, in DLA Piper website, 2024. Available at: *www.dlapiper.com/en-cl/insights/publications/2024/09/bundled-debt-collection-sammelklage-inkasso-for-cartel-damages* (accessed: October 21, 2024).

70. Steven Friel, Jonathan Barnes, *Litigation funding – Germany*, Lexology, 2022. Available at: *woodsford.com/wp-content/uploads/2023/02/2023-Litigation-Funding-Germany.pdf* (accessed: October 21, 2024).

This ruling may be of even greater importance at an EU level given that it might serve as a guideline for other countries in Europe. It demonstrates a subtle approach to litigation funding which takes into account conflicting imperatives – the necessity for innovation in handling multi-claim disputes understood together with the requirement of regulatory supervision[71]. While the EU wrestles with dilemmas of their own on cross-border harmonization, Germany's operations can serve as a useful learning point in highly regulating TPF to ensure judicial commercialization does not get too far out of hand[72]. Thus, the Air deal case along with any necessary reforms of RGD could become a basis for consistent regulation on an EU level that offers balance between flexibility and resists legal shopping around amongst litigants in Europe[73].

b. The Netherlands: Pioneering Litigation Funding and Collective Redress Mechanisms

When it comes to mass claims and collective redress, the Netherlands has carved out a reputation as one of Europe most forward-thinking litigation funding markets. Over the last 20 years, it has been developed directly through case law and regulatory instruments which was a supportive factor for Third Party Litigation Funding to develop in this legal environment. Central to this evolution is the Dutch Collective Settlement of Mass Claims Act (*Wet Collectieve Afwikkeling Massaschade*), enacted in 2005, which has become a cornerstone of the Dutch legal system for handling large-scale collective settlements.

The WCAM enables settlement of mass claims on an opt-out basis if a properly approved agreement between the parties is agreed before (and then re-reviewed by) the Amsterdam Court of Appeal. It might encompass external funding – such as third-party, who foot the bill for litigation or settlement in exchange for a cut of any recovery. The Dutch Civil Code also approves litigation funding through Article 3:305a, which permits representative organizations to litigate on a group basis and motivates the use of TPF in collective actions.

71. Lena Hornkohl, *Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive (Germany)*, in *Journal of European Competition Law & Practice*, 2024.

72. US Chamber Institute for Legal Reform, *Third-party financing*. Available at: *institute forlegalreform.com/wp-content/uploads/2020/10/Third_Party_Financing.pdf* (accessed: September 8, 2024).

73. Alex Petrasincu, Manuel Knebelsberger, *Recent arbitration developments in Europe*, in Hausfeld website, August 31, 2021. Available at: *www.hausfeld.com/en-us/what-we-think/competition-bulletin/the-i-airdeal-i-ruling-german-federal-court-of-justice-strengthens-collective-redress-in-germany/* (accessed: September 8, 2024).

The way the Dutch have dealt with TPF is best demonstrated in one of their most famous cases: The settlement between Royal Dutch Shell Nigeria. Shell paid out €55m to settle one case concerning environmental damage in Nigeria under the auspices of the WCAM framework. It perhaps demonstrates particularly the importance of litigation funders in granting access to justice, especially where a dispute is sufficiently complex and cross-border that finding an alternative method to finance proceedings would be difficult. Fund, it is unlikely that the group of small farmers from Nigeria could have taken on a multinational like Shell. This case became a point of reference for international claims in the future and illustrated how TPF can be applied to fund collective redress on a grand scale[74].

This Act on Collective Damages Claims (WAMCA), also valid from 2020, complements the WCAM providing an even firmer basis in Dutch law for collective actions. The WAMCA increases the scope for representative bodies to bring follow-on damages claims before courts, with litigation funders central figures in those proceedings. The WAMCA was designed to create a much more comprehensive mechanism for dealing with class actions, requiring bodies representing claims groups to register claims and providing greater judicial oversight of funded claims in the public interest[75].

The Converium case[76] was also a milestone in Dutch litigation funding history. In this example, the Amsterdam Court of Appeal has given its approval for a €58 million settlement between Swiss reinsurance company Converium and various investors. The mass claim settlement approved by the court under the WCAM was a first-of-its-kind case in which Dutch jurisdiction over cross-border collective claims involving large groups of foreign parties seeking damages from jurisdictions such as Netherlands amongst others proved attractive thereby further underscoring that US corporations are not immune to transnational threats against their shareholder value and reputation for questionable conduct occurring beyond our shores. Crucially, litigation funders have played a critical part in facilitating these transnational redress efforts on the part of investors[77].

74. Xandra Kramer, I.N. Tzankova, Jos Hoevenaars, CJM Van Doorn, *Financing Collective Actions in the Netherlands*, Eleven International Publishing, 2024.

75. Xandra Kramer, *The Quest for Funding Under the Dutch WAMCA: Third-party Funding and the Viability of a Procedural Fund*, in *Emory International Law Review*, 38, 2024, 767.

76. Converium Case, Gerechtshof Amsterdam 12 November 2010 (Converium *et al.*); Gerechtshof Amsterdam January 17, 2012 (Converium *et al.*).

77. Business & Human Rights Resource Centre, *Nigeria: Shell settles lawsuit in the Netherlands for €15 million over oil spillages in Niger Delta*, January 3, 2023. Available at: *www.business-humanrights.org/en/latest-news/nigeria-shell-settles-lawsuit-in-the-netherlands-for-15-million-over-oil-spillages-in-niger-delta/* (accessed: September 8, 2024).

The Netherlands has a reputation as an international litigation funding centre due to these judicial instruments. WCAM, WAMCA and ancillary provisions in the Dutch Civil Code combined offer an integrated as well as modulated framework to respond flexibly to the growing need for TPF[78]. The development of TPF in Dutch courts demonstrates the capacity for third-party funders to make new claims available and aligns with changes we have seen from a decade ago on both sides of the Atlantic.

c. Emerging Reforms in Domestic Laws on Third-Party Funding: France, the Netherlands, and Italy

i. France: Gradual Recognition Amidst Regulatory Caution

France has previously viewed TPF cautiously. But the times are changing while slowly, with the introduction of EU Representative Actions Directive. The directive has spurred French authorities to create new rules, in part related to consumer safeguards. In France, a new court practice was developing around the legality of TPF in consumer collective actions since 2019.Although these have represented important steps forwards, the legal framework governing third party funding remains relatively new in France and additional changes need to be made so that TPF can take full advantage of its potential within the French regulatory environment.

ii. The Netherlands: A Pragmatic Yet Evolving Approach

As for TPF in collective actions, The Netherlands is one of more progressive European jurisdictions. The legal framework, including the Dutch Act on Collective Settlement of Mass Claims (WCAM)and more recently collective redress mechanisms have provided a favourable environment for litigation funding to flourish. The Dutch courts have had a pragmatic attitude and thus have given space for TPF arrangements to grow, especially in the context of mass-claims. Nevertheless, for someone who promoted sweeping TPF provisions in the EU one would have expected comparisons with other European countries suggest that substantially more could be done before TPF becomes a best practice example of holistic and encompassing regulation on third-party litigation funding.

78. Xandra E. Kramer, *The ELI-Unidroit Model European Rules of Civil Procedure: Key Features and Prospects of Costs and Funding of Collective Redress*, in *Mélanges en l'honneur du Professeur Loïc Cadiet*, LexisNexis, 2023, 823-835.

iii. Italy: Initial Steps Towards TPF Adoption

By contrast, Italy appears to be entering developing TPF regulations at an early stage. No TPF regulation currently exists, and the concept is in fact only just establishing itself within Italian jurisprudence. Since the EU directives have indirectly and involuntarily indicated to some courts that third party funding may serve as a valuable tool in specific instances, it implies that financing per se does not – objectively considered – contravene fundamental principles of fair trial, moves slowly toward acceptance by local state courts. Nonetheless, trailed by its neighbouring European nations who have proposed more leaden regimes of TPF insofar as their legislative efforts are concerned little will suffice to carve out a space for commercial activity where lacking.

To this end, although France, the Netherlands and Italy are making significant strides towards TPF inclusion within their domestic legal systems it would be premature to nominate these as models of best practice for regulating TPF. All, although unique, have difficulties striking the right regulatory balance between being too careful and opening up access to justice with third-party funding.

VII. Structural Deficiencies in the Current EU Litigation Funding Framework

There have been notable evolutions in the law of third-party litigation funding within the legal framework of European Union that has undeniably brought about great developments through directives like Directive (EU) 2020/1828 and Brussels I Recast Regulation. Nevertheless, the current architecture retains numerous fundamental gaps which diminish its effectiveness and uniformity among member states.

The most notable of these differences is that there are no pan-EU rules dedicated to litigation funding. The current patchwork of national laws and directives results in heterogeneous regulatory environments across the Union. This fragmented solution makes it possible for member states to apply and give a different meaning or transposition of EU Regulations leading to an uneven implementation of the litigation funding across jurisdictions. As an example, while several member states have chosen to introduce stringent rules on TPF, others adopt a more hands-off approach – creating immense regulatory voids.

More troubling, there is no requirement for disclosure of litigation funding agreements across the EU. In the absence of those transparency provisions, it is almost impossible to determine how funders have been able influence and/or shape litigation process without revealing any potential conflicts arising from interests

at stake that are different. Such opacity also shields the financial arrangements of claimants and funders – potentially allowing a funder's commercial interest to trump defendants' interests without recourse by restricting this abuse in individual as well as aggregate collective actions[79].

The current collective redress mechanisms already suffer from a lack of effective consumer protection and this is exacerbated by the fact that we are further limited in what we can say about specific settlements (due to non-disclosure agreements built into many settlements). Although the introduction of such a scheme is more reflecting the concerns re access to justice addressed by changed frameworks for collective action, there still remains likely permission backdoor permissions for predatory practices by litigation funders in consumer-oriented class actions. In the absence of effective regulatory control such protection would be denied to consumers who may already be fully appraised about perils flowing from third-party funding or funders are acting in claimant interest. This gap reflects a lack of true fiduciary duties on the part of funders which must now be remedied to prevent further undue harm being done upon many vulnerable claimants.

VIII. Conclusion

In fact, this transition of the EU's legal landscape on litigation funding has taken place in phases initially from an overarching regulatory model to a wider general framework conducive for different kinds financial services like AML directives and then targeted towards more focused regulations explicitly regulating litigation funds. Growing attention to transparency, accountability and anti-abuse themes in third-party funding complement differs from EU exploration of the demand side of cross-border legal claims. The rules of the game will keep changing, but some guidelines had to be equally adapted especially as tech improves or changes and funding model shifts.

79. Johan Skog, *Illusory Truths and Frivolous Claims: Critical Reflections on a Report on Litigation Funding by the European Parliamentary Research Service*, in *YSEC Yearbook of Socio-Economic Constitutions 2022*, Springer Nature Switzerland, 2023, 87-117.

 ISBN 9788835177470

3. The Legal Framework of Litigation Funding in the UK

I. Introduction to Third-Party Litigation Funding in the United Kingdom

In the UK, litigation funding has come a long way in somewhat over decades from concept on fringes to an established and increasingly mainstream industry. The expansion of the funding industry in England and Wales has been truly extraordinary. This represents an expansion of the sector and pay-for-performance has grown to hold approx. £2 billion in hedged assets with funders in the year 2022, which is an up from merely £198 million back in 2011/12[1].

In the past, there were significant legal barriers to litigation funding. Torts of maintenance and champerty both were perceived historically to be barriers to such funding agreements where such arrangements would have meant that not only were they controversial, but might be unenforceable. While the crimes and torts of champerty and maintenance were abolished by s 14(5)(a) Criminal Law Act 1967[2], the rule based on public policy against such contracts remained. The Court of Appeal did not start loosening these strings until 2002 with an exception to the prohibition in respect of litigation funding agreements (LFAs), so long as they were is not contrary to public policy or tending to prevent, discourage deter or unnecessarily impede persons from obtaining access to justice[3]. This pivotal decision marked the beginning of a transformative phase[4], which has seen the

1. Reynolds Porter Chamberlain LLP, *Litigation funders backing class action lawsuits as they put £2.2bn "war chests" to work*, June 20, 2022. Available at: *www.rpc.co.uk/press-and-media/litigation-funders-backing-class-action-lawsuits-as-they-put-22bn-war-chests-to-work/* (accessed: September 10, 2024).

2. U.K Criminal Law Act 1967, Chapter 58, Section 14.

3. Factortame (No.8) [2002] EWCA Civ 932.

4. Arkin v Borchard Lines Ltd [2005] EWCA Civ 655.

role of professional funders become recognized as *highly desirable* for promoting access to justice.

Although well understood, there are hard boundaries on the influence funders can wield. Akhmedova muddies the line between litigation funders as passive financiers and active parties[5], but it is also an example which draws out the boundaries of third-party control[6] especially where that control might tarnish or undermine judicial process. England and Wales have one of the most mature legal third-party funding markets globally with quality funders such as Augusta Ventures, Burford Capital or Therium. The Code of the Association of Litigation Funders (ALF) largely represents a self-regulated framework followed by those funders and includes: requirements for financial stability, conflict management clear ethical behavior[7]. Save for the However, it is a voluntary system of self-regulation are often poorly enforced[8].

Further, the recent Paccar decision[9] has brought new dimensions to the funding horizon. Together with increasing interest rates, this decision has apparently reduced the level of new cases being funded to a point where it indicates that the legal framework governing litigation funding is in need diagnosis across all its vital nuances. As the face of industry change will be, insight into how the legal framework governing it has evolved is also vital.

The current chapter aims to represent a clear understanding of the emergence of litigation funding laws and their developmental issues. In this respect, we will present an in-depth analysis of the historic development and the current legal regime and elaborate on the relevant historic events and their reflection on the modern understanding of the problem. In addition, we will discuss the existing legal regime and provide the description of some examples of cases and the possible future developments. In doing so, a better overview of the legal environment and recent development of third-party litigation funding will be provided.

5. David Capper, *Third-party litigation funding in family law cases: Akhmedova v Akhmedov*, Queen's University Belfast, 2021. Available at: *pure.qub.ac.uk/en/publications/third-party-litigation-funding-in-family-law-cases-akhmedova-v-ak* (accessed: September 10, 2024).

6. Akhmedova v Akhmedov [2020] EWHC 1526 (Fam).

7. Rachael Mulheron, *England's Unique Approach to the Self-Regulation of Third-party Funding: A Critical Analysis of Recent Developments*, in *The Cambridge Law Journal*, 73(3), 2014, 570-597.

8. Jason Geisker, Jenny Tallis, *Litigation funding in Australia: A year of review and change?*, in *Law Society of NSW Journal*, 46, 2018, 81-83.

9. R (on the application of PACCAR Inc and Ors) v Competition Appeal Tribunal and Ors [2023] UKSC 28.

II. The Significance of Litigation Funding in the United Kingdom

Generally, litigation funding is when a third party pays for either all or part of the legal proceedings and costs associated with bringing an action[10]. Given that the third-party funder puts the money forward in terms of financial support, there will be a fee to pay if and when they have been found, or settled in favour of, the successful claimant which is typically a set percentage or an agreed multiple on capital invested amount benefit pre-determined terms being met[11]. It seems that this arrangement is almost always done on a 'non-recourse' footing 'the funder will only recover if the claim succeeds and it has potentially huge consequences in terms of access justice and the strategic/playbook of legal disputes. It is important to have a broader understanding of this funding arrangement, not least of all to best determine and justify my thoughts and opinions on the matter[12].

The UK has thus developed a booming litigation funding industry which, more than any other country[13]. Litigation finance is a complex ecosystem that can be applied to multiple situations based on the requirements at hand. When applying for funding, there are typically three types of claimants:

1. Financially Strapped Claimants: Individuals or entities who have a valid claim, but are unable to afford to maintain the action due to lack of financial resources. As a result, litigation funding has become a lifeline for these individuals to carry on pursuing justice without having to pay too much upfront legal costs[14].
2. Resource-Strategic Claimants: These are claimants that have the financial capability to pay for litigation however, they refuse. But these players might better allocate their capital elsewhere, like toward growth instead of legal expenditures. Litigation funding is thus a tactical measure that enables those claimants to conserve their resources but also avail themselves of legal remedies.
3. Class or Representative Actions: The newest of the three categories, class actions are used to commence a legal proceeding for or against an organized group. These cases commonly include numerous claimants who are each claiming

10. Maya Steinitz, *Whose claim is this anyway-Third-party litigation funding*, in *Minnesota Law Review*, 95, 2010, 1268.

11. Paul H. Rubin, *Third-party financing of litigation*, in *Northern Kentucky Law Review*, 38, 2011, 673.

12. Marco de Morpurgo, *A comparative legal and economic approach to third-party litigation funding*, in *Cardozo Journal of International and Comparative Law*, 19, 2011, 343.

13. Joanna Shepherd Bailey, *et al.*, *Third-Party Litigation Financing*, in *Journal Of Law, Economics & Policy*, 8, 2011, 257.

14. Maya Steinitz, *Whose claim is this anyway-Third-party litigation funding*, in *Minnesota Law Review*, 95, 2010, 1268.

relatively trivial individual damages – so that it is not commercially viable for any one of them to fund their own case. This is where litigation funding comes in, to make these group actions possible and ultimately lead this way to securing justice for the groups which might not afford bringing claim on their own[15].

The blossoming finance sector in England and Wales is symptomatic of its essential role within contemporary legal mechanisms. The growth in this sector reflects both the increasing recognition of its value and the evolving demands of the legal marketplace. Academics have recently argued that litigation funding promotes access to justice, especially among claimants who might be otherwise intimidated by the high costs associated with bringing a lawsuit[16].

According to legal scholars, litigation funding and in particular third-party funding have changed the face of dispute resolution. Professor Christopher Hodges from the University of Oxford has made the valid point that the growth rates of the industry illustrate the increasing need for it as an instrument for achieving justice[17]. Thus, the third-party funding is effectively paving the road towards reducing or preventing injustice in intricate cases as well as in cases with high stakes or rewards, where a traditional model would be insufficient[18].

Additionally, this space is posited to enhance the very equivalence notion of judicial fairness from the traditionally unavailable financial capacity to the areas that are extremely difficult, such as group lawsuits. Overall, both the size of the UK litigation funding industry and the portion of the legal market that it serves imply that litigation funding in the UK is a key and developing feature of the legal architecture of England & Wales.

III. The Evolution of Litigation Funding in the United Kingdom: From Historical Obstacles to Modern Frameworks

The history of litigation funding in the UK is a convoluted one, consisting of a number of constraints and new rules with far-reaching judicial decisions

15. G.S. Swann, *Economics and the litigation funding industry: How much justice can you afford*, in *New England Law Review*, 35, 2000, 805.

16. Deborah R. Hensler, *The future of mass litigation: Global class actions and third-party litigation funding*, in *George Washington Law Review*, 79, 2010, 306.

17. Christopher Hodges, John Peysner, Angus Nurse, *Litigation funding: Status and issues – faculty of law*. Available at: *www.law.ox.ac.uk/sites/default/files/migrated/litigation_funding_here_1_0.pdf* (accessed: September 10, 2024).

18. Christopher Hodges, Stefan Vogenauer, Magdalena Tulibacka, *The costs and funding of civil litigation*, Hart/Beck, 2010.

and viewpoints that have contributed to the shaping of the legal finance market today. This journey starts from the historical legal doctrines of Maintenance and Champerty, which served as a significant impediment to the development of third-party funding of litigation[19]. Maintenance at first historically referred to the support of litigation by a third party who has no stake in its outcome. Champerty was a form of maintenance in which the third party receives a profit, maintaining a lawsuit to participate in the proceeds of any suit[20]. Throughout England, both maintenance and champerty, which involves a third party being paid to assist with a claim in exchange for a portion of any judgment, have long been illegal as preventing others from getting involved with litigation[21]. The concept behind them was to make sure that no one else could turn what could have turned out to be a successful lawsuit into a circus. On the other hand, in the UK, maintenance in the historical respect of support of litigation by a third party with no stake in the outcome and Champerty in which a third party is financed to participate in any judgment's proceeds have always been illegal not permitting others from interfering with litigation.

The new millennium saw a spate of legislative shifts that were meant to enhance access to justice and ultimately led the push toward opening up litigation finance[22]. Chief among these changes was the introduction of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which introduced significant changes to the UK's legal aid system, conditional fee agreements (CFAs), and after-the-event (ATE) insurance. conditional fee arrangements (CFAs), whereby lawyers could add a success fee to their standard fees[23]. This change in the law was intended to make legal representation more available for people who could not otherwise afford it making litigation funding a likely next step as courts become increasingly comfortable with its use. The amendment gave rise to the question of whether funding for litigation could come only from lawyers, or if some third-party funder can step into play[24]. The second great wave of reform, and with it a

19. George Robert Barker, *Third-party litigation funding in Australia and Europe*, in *Journal of Law, Economics and Policy*, 8, 2011, 451.

20. General Thurbert, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, in *Widener Law Journal*, 23, 2013, 229.

21. David Capper, *Three aspects of litigation funding*, in *Northern Ireland Legal Quarterly*, 70, 2019 357.

22. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

23. Zia Akhtar, *Conditional fees and the contingency fees distinction: a comparative study of the UK and US risk assessment for insurers in litigation*, in *European Insurance Law Review*, 2021, 54.

24. Peter Melamed, *An Alternative to the Contingent Fee-An Assessment of the Incentive Effects of the English Conditional Fee Arrangement*, in *Cardozo Law Review*, 27, 2005, 2433.

surge in popularity for litigation funding in the UK was ushered out by legislation over the decade.

Thus, the compatibility of litigation funding agreements with public policy in the UK was slowly changing by the end of 2000s[25]. The Court of Appeal stated in 2002 that this view is not entirely consistent with the then current public policy, as it was recognized that significant shifts had occurred from when Hall[26] and Bradshaw[27] were decided such developments could appropriately be addressed within an amended set off rules regime[28]. This shift reflected a general recognition of the legitimacy of litigation funding as well as introduced controls to ensure that claimants remained in control over their claims and so funders could not exercise undue influence on the courts.

This growth continued into the late 2000s and early 2010s, when some of the leading litigation finance firms, such as Burford Capital, Therium Capital Management, Vannin Capital, Woodsford Litigation Funding in particular, begun to solidify their positions within the market. A significant step was the establishment of the Association of Litigation Funders in 2010, which was a major advancement–a step towards self-regulation within the entire litigation funding sector. As defined by Zhang, the primary goal of ALFs is to ensure the enforcement of rules of practice, which guarantee that a funder is providing fair advice to their consumer and no undue pressure on the lawyers to comply with the way they are being represented[29]. This attitude, being absent from the more well-established core areas of the legal and finance markets, indicates some growing pains of the industry as well as increased scope of inter-sectoral integration[30].

The emergence of third-party litigation funding in the United Kingdom correlates with a complex and continuously changing pattern of the previous limitations of litigation funding, legislative amendments of constraints imposed on such funding, and judicial creations. Overall, the history of litigation funding in the UK reveals the instable balance between the needs for preserving the integrity of the law and the necessity to respond to modern demands on the justice system.

25. Nicholas Dietsch, *Litigation Financing in the US, the UK, and Australia: How the Industry Has Evolved in Three Countries*, in *Northern Kentucky Law Review*, 38, 2011, 687.

26. Wallersteiner v Moir (No 2) [1975] QB 373.

27. Bradshaw v McMullan, (1920) 2 I.R 412.

28. Factortame (No. 8) [2002] EWCA Civ 932.

29. Beibei Zhang, *Third-party Funding for Dispute Resolution*, Springer Singapore, 2021.

30. Rachel Mulheron, *England's Unique Approach to the Self-Regulation of Third-party Funding: A Critical Analysis of Recent Developments*, in *The Cambridge Law Journal*, 73(3), 2014, 570-597.

IV. Navigating the Shifting Landscape of Litigation Funding

The face of litigation funding in the UK will have changed by then, and 2023 stands out like a red rag to be subject not just judicial investigation but also legislative scrutiny[31]. The findings of the PACCAR case showed that there was a pressing economic necessity for an answer to whether any particular funding agreement in relation to litigation is enforceable[32]. Put those judicial effects together with non-judicial market developments, then it is a time when legislation needs to be passed in order that users of and dependents on one part of the justice system are able to work within clear rules and can find redress which will bring fairness for both funders as well as claimants without tipping the scales against overall what adjudication really is[33].

The expanding litigation funding market, populating as it is with new capital categories the largest sources being private equity and hedge funds points to a trend of increasingly complex structures in development. Another popular option is participating in secondaries transactions, where funders get to join a diversified portfolio and not just directly single-case financing[34]. These developments highlight the critical need for regulatory frameworks that are able to differentiate between risk profiles in different kinds of litigation assets and which protect market integrity. The growing frenzy over co-investment only obfuscates matters further, necessitating that not just these cases but the entire practice of litigation investment be replaced with a more enlightened legal regime.

This has prompted a similarly broad expansion in law firm financing, with funders moving beyond individual cases to also support law firms' day-to-day operations and strategic goals. It further reflects a higher-level legal understanding of the financial and contractual relationship between funders and funder-providers, something best illustrated by conflicts-interest. At the end of the day, investors are merely being further boxed into bad legal practices business models and there need to be more legislator oversight as to both at what point in litigation strategies will they start but also stop playing their roles.

Despite the insurance market offering a myriad of solutions when it comes to sharing risk in these arrangements, insurance still plays an important role in litigation funding and this is particularly so with new products like Judgment

31. Anna Dannreuther, Gareth Shires, R (on the Application of PACCAR Inc) v Competition Appeal Tribunal: Case Note [2023] UKSC 28, in *Mass Claims*, 2023, 117.

32. Institute for Legal Reform, *A New Threat: The National Security Risk of Third Party Litigation Funding*, November 2022. Available at: *instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf* (accessed: September 10, 2024).

33. Maya Steinitz, *The litigation finance contract*, in *William & Mary Law Review*, 54, 2012, 455.

34. *Ibidem*.

Preservation Insurance (JPI) & Causal Price Indemnity[35]. However, the more tailored insurance products become common practice, so there is an increasing need for legislative frameworks which ensure that such schemes do in fact provide adequate protection but without enabling responsible parties to evade their responsibility to compensate victims[36].

The black lining of regulation is now beginning to show – particularly in light of UK seemingly mirroring the upcoming US-led changes across the pond earlier this year which should set alarm bells ringing about what lies ahead. Those can now start to be phased in over time, with Europe knowing things are moving despite having nothing on the books at home. While the UK has not yet followed suit, 2022 proposals for regulations of third-party litigation funding from the EU suggests that a change in regulation is on its way and funders need to be ready. In Europe, future UK regulatory policy may need to be informed by legislative developments; a situation that will likely mean the hand of UK funders is forced as they are obliged to address national and cross-border duties in parallel[37]. These changes in the litigation funding market indicate tensions within how legal and legislative frameworks are attempting to account for these differences.

a. The PACCAR Decision and Its Impact on Third-Party Litigation Funding (TPLF) in the Competition Appeal Tribunal

The PACCAR ruling has significantly tipped the scales in favor of using third-party litigation funding (TPLF)[38], especially when it comes to competition law. In this case, the primary question for decision by the UK Supreme Court was whether litigation funding arrangements where funders take a share in damages could come within section 58AA Courts and Legal Services Act 1990 definition of DBAs[39]. This then cast LFAs under the restrictive regulatory purview in place

35. Sam Korte, Jonathan Stroud, *Insuring Judgments And The Disclosure Gap*, in *American University Law Review*, 73, 2024, 1057.

36. Zeqing Zheng, *The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation*, in *Georgetown Journal of Legal Ethics*, 34, 2021, 1383.

37. Robert Wheal, Oliver Dean, *The end of the regulatory vacuum in Europe and a new era for international arbitration in Ireland? Developments in third-party funding regulation*, White & Case LLP website, 2022. Available at: *www.whitecase.com/insight-alert/end-regulatory-vacuum-europe-and-new-era-international-arbitration-ireland* (accessed: September 10, 2024).

38. Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*, *The Cambridge Law Journal*, 83(1), 2024, 99-131.

39. David Capper, *Supreme Court holds that litigation funding agreement is a damages-based agreement. R (Paccar Inc) v Competition Appeal Tribunal [2023] UKSC 28*, in *Civil Justice Quarterly*, 43(1), 2024, 16-27.

for DBAs which made them unsuitable largely to most representative actions, in particular competition law where opt-out proceedings cannot be funded via a Damage-Based Agreement[40].

The decision rattled industry participants right away, particularly in the context of collective damages actions for opt-out claims before the Competition Appeal Tribunal (CAT) – a modern private enforcement arm where third-party funding often plays an essential role with disputes like those against Sony or MasterCard/Visa and Apple[41]. Based on the PACCAR ruling, these defendants challenged the LFAs as not covered by DBAs and therefore in breach of statutory prohibition. Nevertheless, the CAT decided that its inability to calculate intrinsic value from information (LFAs) having a high multiple of funding rather than determined directly by reference to proceeds of litigation was not proof enough for them being designated as DBA[42]. This gave funders some instruction on how to walk the tightrope, but forced amendments and renegotiation of existing agreements.

Although the effect of PACCAR was felt most heavily in competition law cases[43], its implications were wider-reaching for TPLF generally. The Supreme Court's decision raised wider and more fundamental questions about the enforceability of litigation funding agreements other than in competition law. For funders in commercial, financial and certain consumer disputes this now possibly includes whether the terms of their LFAs could amount to DBAs and be subject to a more rigorous regulatory regime. The ruling throws the standard financial arrangements of TPLF – funders typically receive a portion of damages awarded, possibly putting many current agreements at risk.

In practical terms, PACCAR forced the litigation funding industry to reassess its contractual models. While competition claims were the immediate focus, funders across various sectors have had to revisit their agreements[44], and legal clarity has become crucial to avoid falling afoul of DBA restrictions. The broader

40. Sebastian Peyer, *Time for Parliament to act? The PACCAR decision of the UK Supreme Court: R (on the application of PACCAR Inc and Others) (Appellants) v Competition Appeal Tribunal and Others (Respondents) [2023] UKSC 28*, in *Legal Studies*, 44(3), 2024,566-571.

41. Mike Scarcella, *Apple sued with Visa, MasterCard in card-fee antitrust case*, *Reuters*. Available at: *www.reuters.com/legal/transactional/apple-sued-with-visa-mastercard-card-fee-antitrust-case-2023-12-15/* (accessed: September 10, 2024).

42. Rupert Macey-Dare, *Preserving 3rd Party Funding in UK Competition Law Opt-Out Class Proceedings-Imminent Legislative Response to Detonate the "PACCAR Torpedo"*, 2023. Available at Social Science Research Network 4634289.

43. Sebastian Peyer, *Competition litigation funding*, in *Research Handbook on Private Enforcement of Competition Law in the EU*, Edward Elgar Publishing, 2023, 357-384.

44. Sean Keller, Jonathan Stroud, *Litigation Funding Disclosure and Patent Litigation*, in *Federal Circuit Bar Journal*, 33, 2024, 77.

legal uncertainty creates potential hurdles for TPLF, which is a vital mechanism for access to justice, particularly for claimants who lack the financial resources to pursue claims independently[45].

In an attempt to alleviate these difficulties, the Litigation Funding Agreements (Enforceability) Bill 2024 has been introduced which is carefully crafted to reverse the jurisprudence from PACCAR without introducing related woes and in such a way as it should save masses from their ignorance of law. If passed, the Bill would guarantee that litigation funding remains an integral means of providing access to justice in a wide array of litigations outside competition law and prevent LFAs being classified as DBAs[46]. Counsel for PACCAR settled their case against TPLF; it is an important decision that may influence either legislative reform which could shape how litigation funding operates in the UK, or indeed dissuade certain types of cases from being funded altogether.

b. The Impact of the PACCAR Decision on Damages-Based Agreements (DBAs)

As witnessed in the above discussion, the PACCAR decision essentially re-boots the legal framework for damages-based agreements (DBAs) in the UK and particularly alongside third-party litigation funding (TPLF). In Paccar the Supreme Court held that litigation funding agreements (LFAs), under which funders are to receive a percentage of damages awarded to the claimant, could potentially be caught by section 58AA of Courts and Legal Services Act 1990's statutory definition of DBA. The potential treatment of DBAs in this way, would thus have far-reaching consequences for the enforceability of such agreements and consequently their long-term future within litigation funding[47].

Before PACCAR, DBAs were classified as arrangements between a client and his or her lawyer where the fees of lawyers including from no win/no fee solicitors will be determined by whether compensation for damages claimed was successful: this could also take into account fixed/percentage form[48]. By comparison, LFAs were funded by a third party funder who pays for litigation in return for a slice

45. Sebastian Peyer, *Time for Parliament to act? The PACCAR decision of the UK Supreme Court: R (on the application of PACCAR Inc and Others) (Appellants) v Competition Appeal Tribunal and Others (Respondents) [2023] UKSC 28*, in *Legal Studies*, 44(3), 2024,566-571.

46. Viren Mascarenhas, Hasan Tahsin Azizagaoglu, *Third-Party Funding: The implications for international disputes; and what the UK can learn from the PACCAR decision*, in *The Quarterly Magazine of The Chartered Institute of Arbitrators*, 2, 2024.

47. Emilie Jones, *UK litigation funding bill delayed until summer 2025 at the earliest*, Pinsent Masons, 2024. Available at: *www.pinsentmasons.com/out-law/news/litigation-funding-bill-delayed-summer-2025* (accessed: September 9, 2024).

48. Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*, in *The Cambridge Law Journal*, 83(1), 2024, 99-131.

of the damages if successful. The two arrangements had previously been treated separately, under different regulatory regimes[49].

But the Supreme Court in PACCAR held that a substantial number of LFAs fit within the category and defined DBA as funders whose remuneration was conditional on success so long as it succeeded. Therefore, non-compliant LFAs the limit of free hold lands is unenforceable as restrictive under DBA Regulation s 2013. The judgment leaves a large number of litigation funding agreements open to challenge, as most LFAs in existence are not drafted in accordance with the DBA rules.

In addition, DBAs are regulated by the extensive provisions of the *DBA Regulations 2013* which place monetary limits on how much a percentage must be drawn in respect to such as fee; and what information must also be included within such an agreement. The rules have been drawn up to shield claimants from exploitative deals, especially where the lawyers involved receive a far greater share of any compensation. If LFAs now qualify as DBAs, the same possibility might soon apply to third-party funders. This could kill the litigation funding market as most funders would not be able to meet the DBA requirements or draw back because of return restrictions. The PACCAR Judgment has created a situation where many Funding Agreements might be revealed as unenforceable under UK law and the viability of TPLF in the UK is looking tenuous[50].

Additionally, another significant effect of PACCAR will be felt in opt-out collective actions and by competition claims. At the moment DBAs are not allowed in opt-out collective actions under law. Conversely, fees for solicitors acting as DBAs are paid out of the settlement we recover so that if a LFA is deemed to be funded under PACCAR it will not meet these proceedings and in turn impact access to justice by large numbers of claimants who would typically fund their collective actions via third-party funding[51].

The PACCAR decision could have a wider impact, making it more difficult for claimants in all forms of litigation to find funding. It would make it more difficult to structure agreements that comply with the DBA regulations and this could lead to a reduction in available funding, especially for higher-cost/complex

49. Rupert Macey-Dare, *Preserving 3rd Party Funding in UK Competition Law Opt-Out Class Proceedings-Imminent Legislative Response to Detonate the "PACCAR Torpedo"*, 2023. Available at Social Science Research Network 4634289.

50. Helen Fairhead, Emma Foord, *Litigation funding agreements (enforceability) Bill clears another hurdle*, Norton Rose Fulbright. Available at: *www.nortonrosefulbright.com/en/inside-disputes/blog/202404-litigation-funding-agreements-enforceability-bill-clears-another-hurdle* (accessed: September 9, 2024).

51. Ammar Tanhan, *Addressing the Costs Imbalance Resulting from Third-Party Funded Investment Claims*, in *Journal of International Arbitration*, 41(1), 2024.

litigation. This would unfairly impact those claimants with finite financial means who otherwise may not be capable of bringing their claims, even if funded by third-party funders.

At least part of this can be attributed to the fact that not long after Sir Nigel retired, legislation was enacted under which so- called litigation funding agreements (LFA) were purportedly validated as an exemption from DBAs in response to one of his rulings[52]. If it is passed, this measure would exempt LFAs from the DBA regime which means that the law of contract and property will once again be how they were in pre-PACCAR days making sure that these agreements are legal without having to meet any DBA requirements. For now, the PACCAR decision has forced funders to review and modify their contracts in an effort to mitigate exposure of nullification. This inconsistency in law may encourage the rise of new models for funding that are either more compliant with DBA regulations or non-compliant, participate outside their perimeters[53].

V. Litigation Funding Agreements (Enforceability) Bill 2024: Legislative History and Impact on UK Litigation Funding

The Litigation Funding Agreements (Enforceability) Bill 2024 is a vital piece of legislation in response to the substantial shifts that have taken place with litigation funding since last year's landmark PACCAR case. Brought forward in March 2024, the Bill is aimed primarily to put legal certainty on litigation funding agreements (LFAs) following a Supreme Court ruling last year that some LFAs might be considered damages-based agreement and hence unenforceable. The Bill has since been subject to political delays but holds vast potential in changing the third-party litigation funding (TPLF) landscape[54].

The Bill came about after the UK Supreme Court in PACCAR case decided that LFAs could easily fit within Lord Thomas's statutory definition of DBAs.

52. Bryan Cave Leighton Paisner, *After Paccar: A new approach to funding collective proceedings in the cat*. Available at: *www.bclplaw.com/en-US/events-insights-news/after-paccar-a-new-approach-to-funding-collective-proceedings-in-the-cat.html* (accessed: September 10, 2024).

53. Herbert Smith Freehills | Global Law Firm, *Government announces planned legislation to bolster litigation funding by reversing effect of Paccar*. Available at: *www.herbertsmithfreehills.com/notes/litigation/2024-03/government-announces-planned-legislation-to-bolster-litigation-funding-by-reversing-effect-of-paccar* (accessed: September 10, 2024).

54. Stewarts, *Uncertainty around litigation funding must not be swept under the rug*, 2024. Available at: *www.stewartslaw.com/news/uncertainty-around-litigation-funding-must-not-be-swept-under-the-rug/* (accessed: September 10, 2024).

This had far wider implications for litigation funding and also for collective proceedings following on competition law claims[55]. The Supreme Court ruling that granted LFAs to the jurisdiction of English regulations and nullified many such agreements left much time about what could take place in UK litigation financing[56].

Litigation funding by third parties has been instrumental in allowing claimants with modest means to seek legal redress, particular for large-scale group actions like the Post Office scandal. In the post-Brexit context, maintaining international attractiveness for legal services is vital and by re-establishing the LFA test as a legally certain criterion over which firms may gain enhanced status via voluntary adherence to it[57], the Bill aims to strengthen their competitiveness on global stage[58].

As the bill is intended to protect one of a key piece for access to justice – UK's litigation funding market. The Bill is a direct response to the fallout from the PACCAR ruling, which had threatened to wreak havoc on funding agreements across UK including in collective redress and competition law cases. If it passes, the Bill would also serve to maintain a constant stream of capital available for claimants by preventing LFAs from being caught in DBA restrictions[59]. However, its suspension post-election has left the litigation funding industry in a state of limbo. But further political backing for the Bill or similar could signal that legislative reforms might reappear in light of government reviews ongoing and a separate investigation by litigation funding body Civil Justice Council (CJC)[60].

55. House of Lords, *Litigation funding agreements (enforceability) Bill [HL]*. Available at: *lordslibrary.parliament.uk/research-briefings/lln-2024-0017/* (accessed: September 10, 2024).

56. Signature Litigation, *Lucy Keane discusses the CJC's review of Litigation Funding in Litigation Finance Insider*, 2024. Available at: *www.signaturelitigation.com/winners-and-losers-in-the-uk-governments-review-of-litigation-funding-lucy-keane-discusses-the-civil-justice-councils-review-of-litigation-funding-in-litigation-finance-insider/* (accessed: September 10 2024).

57. Jaime Aparicio García, *Legal Finance Analytics: a data-driven proposal of asset pricing litigation risk applied to international investment arbitration*, in Thesis DBA in Management and Technology, 2024.

58. Jamie Maples, Craig Watson, Charlotte de Vitry, *Third-party litigation funding – back on track or forging a new path?*, in *European Disputes Blog*, 2024. Available at: *european-disputes-blog.weil.com/england-uk/third-party-litigation-funding-back-on-track-or-forging-a-new-path/* (accessed: September 9, 2024).

59. Ammar Tanhan, *Addressing the Costs Imbalance Resulting from Third-Party Funded Investment Claims*. in *Journal of International Arbitration*, 41(1), 2024.

60. Viren Mascarenhas, Hasan Tahsin Azizagaoglu, *Third-Party Funding: The implications for international disputes; and what the UK can learn from the PACCAR decision*, *The Quarterly Magazine of The Chartered Institute of Arbitrators*, 2, 2024, 16-19.

a. Relevance and Relation to PACCAR: The Post Office Scandal and Access to Justice

The ruling had wide implications for access to justice matters, especially collective actions such as the Post Office litigation though it also raised relate issues about third-party funding in obtaining redress for wrongs[61]. It is an instance such as the Post Office scandal, where sub-postmasters were falsely accused of fraud and could only bring a claim with litigation funding support demonstrating how essential LFA arrangements are to class actions or indeed any large-scale collective redress.

The PACCAR judgment thus dramatically upset the direction of travel for litigation funding from a laissez-faire approach to strict statutory regulation on the grounds that LFAs should be classified as DBAs. The decision endangered a large number of financing agreements which could make it almost impossible for claimants to reach court, especially in opt-out collective proceedings where DBAs are banned[62]. Third-party funding via PACCAR posed a major threat to such large group claims as the Post Office scandal, which was funded with third party money for its litigation[63].

This Bill was at the heart of my speech in the Commons earlier this month, is now an answer to that challenge – and one that will ensure LFAs remain both enforceable and can continue to contribute towards prompter access to justice for claimants. The passage of the Bill would avoid a return to such disruption as was illustrated in PACCAR and provide clarity for future class actions.

i. Analysis of Potential Legal Developments

Whether this Bill will eventually become law is uncertain, but if it does, the position of LFAs as financiers in legal disputes should be ironed out and that would restore confidence to parties considering using third-party money for dispute resolution. Nevertheless, the regulatory environment of tomorrow could be another picture as more steps may come into force to better regulate it[64]. Both will be open

61. Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*. in *The Cambridge Law Journal*, 83(1), 2024, 99-131.

62. Hugh Sims *et al.*, *The Powers of Office-Holders*, in *Insolvency Practitioners*, Edward Elgar Publishing 2024, 124-185.

63. Sebastian Peyer, *Time for Parliament to act? The PACCAR decision of the UK Supreme Court: R (on the application of PACCAR Inc and Others) (Appellants) v Competition Appeal Tribunal and Others (Respondents) [2023] UKSC 28*, in *Legal Studies*, *cit.*

64. Oliver Blundell, *Stamping out Paccar: Mr Bates, the Post Office, and funded arbitration*, *Farrer & Co: Independent Lawyers in London, UK*, 2024. Available at: *www.farrer.co.uk/news-*

to views on more contentious issues such as restricting the recoveries funder can get back and retrospective application of the Bill[65]. The continued review by the CJC will undoubtedly influence any future regulatory regime with respect to third-party litigation funding in order to strike a balance between providing access of justice and ensuring funders do not take an unacceptable slice of claimant recoveries[66]. Passage of this legislation would help protect the UK litigation funding market from a financial perspective, as well ensure claimants are not deprived access to justice in large-scale claims. However, the development of third-party funding in the UK could continue to be influenced by other overarching regulatory developments as general reviews are part and parcel of case law-political discourse[67].

VI. Comprehensive Analysis of Key Judicial Decisions Impacting Litigation Funding: From Arkin to Post-PACCAR Jurisprudence

The path of litigation funding in the UK has seen a handful of landmark written judgments which have helped develop this nascent yet influential sector. Originally, the decision in *Arkin v Bochard Lines* gave funders some confidence by creating a so-called cap following an investor's liability to meet adverse costs[68]. The straightforward elegance of this principle, however, has since been reconsidered or even circumvented in some cases. The Court of Appeal in *Davey v Money* had reiterated that the Arkin cap was not an absolute rule but Snowden J had highlighted, when discussing cost liability on funders, that room for manoeuvre still existed as the litigation funding landscape has changed giving more scope to courts awarding full indemnity costs against funders[69]. It mostly adjusted expectations by signalling to funders that these could be at higher financial risk than they had thought.

The case of *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd*[70]

and-insights/stamping-out-paccar-mr-bates-the-post-office-and-funded-arbitration/ (accessed: 10 September 2024).

65. Rachael Mulheron, *The Funding of the United Kingdom's Class Action at a Cross-Roads*, in *King's Law Journal*, 2023, 1-27.

66. Johan Skog, *Illusory Truths and Frivolous Claims: Critical Reflections on a Report on Litigation Funding by the European Parliamentary Research Service*, in *YSEC Yearbook of Socio-Economic Constitutions 2022: Funding of Justice*, Springer Nature Switzerland, 2023, 87-117.

67. Rachael Mulheron, *Third-party Funding, Class Actions, and the Question of Regulation: A Topical Analysis*, in *Mass Claims*, 2022, 5.

68. Arkin v Borchard Lines Ltd & Ors | [2005] 2 Lloyd's Rep 187.

69. Davey v Money [2019] EWHC 997 (Ch), April 17 2019.

70. Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm).

provided an illustration of the additional layers to litigation and arbitration. Under the terms of this arbitration, costs were awarded by the arbitrator in contrast to English litigation against Essar and included a success fee for the funder. The High Court then considered the other tasks on which costs were incurred and upheld what arbitrators can award when they are reasonable in quantum and there is an arbitration nexus. Importantly, this decision is likely to give parties involved in arbitration proceedings a significant advantage as they may be able to recover third-party funding costs which would not otherwise have been recovered had the same claim proceeded through the court system.

This highlighted one of the divergences between litigation and arbitration, notably as regards security for costs. Unlike in arbitration, where tribunals typically do not have jurisdiction over non-parties to the arbitration agreement–including funders–courts have ordered funders to post security for costs in litigation[71]. The first point emphasizes the strategic calculus of parties and funders in deciding on litigation or arbitration to get a case funded.

In relation to disclosure, the *Akhmedova case* re-iterated that LFAs are not generally discoverable in High Court litigation (in contrast with the CAT). The CAT examines LFAs more stringently, particularly in class action cases where the Tribunal will commonly review funding arrangements before certifying a representative[72]. This extra layer of scrutiny from the CAT is another sign of how courts in litigation involving third party funding are becoming increasingly judicially astute to deal with modern complex collective proceedings.

Following the recent PACCAR decision, litigation funding arrangements have been back in focus – especially their enforceability. The CAT decisions in *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd*[73] and *Kent v Apple*[74] provide further guidance on when an LFA which calculates funders' returns as a multiple of the funding outlay rather than a percentage share of damages will not be construed to constitute what is effectively or substantially a Damages Based Agreement so that it remains enforceable.

The CAT further elaborated on this principle in Commercial and Interregional Card Claims I Limited v Mastercard Incorporated[75], confirming that LFAs which

71. MD Khairul Islam, *The impacts of third-party funding on cost decisions in investment arbitration*, in *Asia Pacific Law Review*, 32(1), 2024, 259-278.

72. David Capper, *Third-party funders' rights in financial provision proceedings*, in *Law Quarterly Review*, 140(2), 2024, 187-191.

73. Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd [2023] CAT 73.

74. Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd [2024] CAT 5.

75. Commercial and Interregional Card Claims I Limited v Mastercard Incorporated & Others, 1441/7/7/22.

contained a ceiling over funders reward compared to recovered proceeds were not DBA types of the funding agreements since it was an incidental element of the Agreement[76].

Together they demonstrate the changing skin of litigation funding jurisprudence in the UK. In particular, the legal landscape post-PACCAR serves to highlight how crucial it is for counsel to painstakingly draft amenable waivers by keeping abreast of these ever-changing standards. Defenders, litigants and their advisers should thus pay careful attention as the case law continues to evolve on what is permissible in funding.

VII. Litigation Funding in Arbitration: Key Considerations and Developments

The increase in the use of TPLF for arbitration mirrors that with respect to its being included in ordinary litigation. While TPLF agreements have been approved by the English courts in litigation, arbitration raises specific challenges and issues including doubts regarding applicable arbitration rules as well as inherent conflicts of interest. Amongst the international arbitration community, it is commonly believed that third-party funding can find a much more amenable home in an arbitral tribunal than through other forms of procedural platforms[77].

A ground-breaking Report issued in 2018 jointly by the International Council for Commercial Arbitration (ICCA) and a Task Force at Queen Mary University of London detailed extensively how third-party funding has reached new heights in arbitration. The report emphasized the explosive expansion of participants in the TPLF market, with increasing numbers of funders and funded cases as well as legal practitioners profiting from these arrangements[78]. The report also highlighted issues that arise in the arbitration process, including concerns for required transparency about funding arrangements as well as potential effects of these arrangements on aspects of procedure like who bears costs and arbitrator independence[79].

76. Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*, in *The Cambridge Law Journal*, 83(1), 2024, 99-131.

77. Rupert Macey-Dare, Litigation Funding Agreements (LFAs) for UK Opt-Out Competition Class Actions Post Sony- How Robust Are They? November 25, 2023. Available at Social Science Research Network: *ssrn.com/abstract=4644256 or dx.doi.org/10.2139/ssrn.4644256*.

78. International Council For Commercial Arbitration, *Report Of The ICCA-Queen Mary Task Force On Third-Party Funding In International Arbitration*, 2018. Available at: *cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf* (accessed: September 10, 2024).

79. Adedotun Onibokun, Bankole Sodipo, *An evaluation of third-party funding in commercial arbitration*, in *Journal of Sustainable Development Law and Policy*, 15(1), 2024, 263-285.

These challenges now have drawn responses from arbitral institutions as well as a number of professional bodies. In an update for the arbitration practicing community, the International Bar Association (IBA) Guidelines on Conflicts of Interest commonly used have been modified to take account of third-party funders[80]. These rules draw funders into arbitrations as if they were a true litigant with an economic stake in the resolution of the dispute itself. As a result, arbitrators must be able to evaluate potential conflicts of interest in cases where one party is funded by third parties[81]. This is part of a broader global move to provide more transparency and equity in arbitral proceedings where third-party funding exists.

Additionally, the Association of Litigation Funders (ALF) has created a Code of Conduct that establishes similar best practices to be followed by those litigation and arbitration fund recipients. The Code spells out the need for funders to have pool financial resources, govern conflicts of interest and behave[82]. Despite the fact that it is purely self-regulated and applicable only to subscribing members, the ALF Code has been referred in many arbitration disputes on a market consensus basis as part of an argument[83]. The adoption of the Code in arbitration is indicative of a requirement for an established, ethical and regulated funding environment; nonetheless questions remain as to whether such self-regulatory mechanisms are enforceable.

As compared to third-party funding in investment arbitration, there has been increasing use of the same, especially under treaties such as Energy Charter Treaty (ECT). With a rising recognition that third-party funding plays an important role in enabling access to justice for claimants who would otherwise lack the means to pursue claims, new international investment agreements are now taking aim at these issues. This is an evolution brings investment arbitration closer to embracing TPLF into its fold in a more pro-active and recognized manner[84].

80. Chiara Capalti, Giorgia Bizzarri *et al.*, *The revised IBA Guidelines on conflicts of interest: A call to action for parties and counsel?*, Kluwer Arbitration Blog, 2024. Available at: *arbitrationblog.kluwerarbitration.com/2024/05/07/the-revised-iba-guidelines-on-conflicts-of-interest-a-call-to-action-for-parties-and-counsel/* (accessed: September 10, 2024).

81. Jeremy Smith, *Age of Third-Party Funding: Time for States to Permit and Regulate Third-Party Funding in Arbitration*, 2024. Available at: *scholarship.shu.edu/cgi/viewcontent.cgi?article=2410&context=student_scholarship*.

82. Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*, in *The Cambridge Law Journal*, *83*(1), 2024, 99-131.

83. Gian Marco Solas, *Alternative Litigation Funding and the Italian Perspective*, in *European Review of Private Law*, 24(2), 2016.

84. Peiyao Su, *Disclosure Dilemmas and the Way Forward in Third-party Funding of International Investment Arbitration-From the Perspective of Building a Localized Disclosure System*, in *Advances in Economic Development and Management Research*, 1(3), 2024, 188-196.

The use of TPLF in arbitration represents one aspect of how since 1967 finance has increasingly found every perceivable opening into the pockets and behind closed doors where business deals are negotiated, courtrooms or board rooms employed to resolve international disputes[85]. However, the parties to an arbitration must carefully consider their funding arrangements including through due diligence and a review of applicable rules for their particular arbitration, given that this decision may not be dispositive as certain systems are in line with local laws while others better reflect best practices on the international level[86].

Third-party funding has taken root in international arbitration, but the legal territory is still emerging and sometimes thorny to tackle for practitioners that want a claimant's case fully funded before even embarking on proceedings. As arbitral institutions and regulators refine guidelines and standards in this field, parties should pay attention to transparency, conflicts of interests or compliance with procedural rules as key factors that will guarantee fairness and the legitimacy right for arbitrators proceeding relating third-party financing.

VIII. Analysis of the Complexities in the Legal Framework Surrounding Litigation Funding Post-Supreme Court Decision

The UK Supreme Court's judgment in the PACCAR case has significant ramifications for TPLF generally and, potentially therefore, also beyond the immediate Trucks collective action. The revelation by the Court that most litigation funding agreements are potentially unenforceable according to section 588AA (3) of the Courts and Legal Services Act 1990 has rocked industry practice[87]. In the past, funders have been confident that their arrangements where they recovered a share of any damages but kept out of proceedings so as not to inadvertently fall foul of being classified as Damages-Based Agreements (DBAs) and therefore unenforceable were not DBAs for all legal purposes. That assumption has now been proved wrong, and putting a slew of existing civil lawsuits in jeopardy[88].

85. Chan Eken, *Third-Party Funding: Threat or Facilitator of the System: An Ethical Dilemma*, in *Third-Party Funding in Investment Arbitration: A New Player in the System*, Springer International Publishing, 2024, 153-199.

86. Otabek Narziev, *Third-Party Funding in Global Arbitration: Balancing Access to Justice with Ethical Concerns*, in *Journal of Intellectual Property and Human Rights*, 3(8), 2024, 225-229.

87. David Capper, *Supreme Court holds that litigation funding agreement is a damages-based agreement. R (Paccar Inc) v Competition Appeal Tribunal [2023] UKSC 28*, in *Civil Justice Quarterly*, *43*(1), 2024, 16-27.

88. Xiyue Li, *Third-Party Funding in International Arbitration: An Analysis of Policy Challenges and Practical Considerations*, in *Beijing Law Review*, 15, 2024, 295.

The Litigation Bill 2024, which is still pending, adds to the uncertainty. This bill would provide a timely response to certain of the issues raised in PACCAR, although it also leaves some gaps. This uncertainty affects to the funder as well as to a claimant. Funders are now having to re-work their arrangements in order for them to comply with the new DBA regime, a task made all the more complex given that DBAs will be inappropriate within certain framework such as opt out collective proceedings before the Competition Appeal Tribunal (CAT)[89]. Accordingly, it is suggested that some claimants might abandon their claims as the risk/reward to them of pursuing litigation has changed considerably and defendants respond with substantial adverse costs claims plus applications for security for such same[90].

The impact of the PACCAR case is even more interesting when looked at from an international arbitration perspective. The complex regulatory framework governing funding arrangements in England and Wales does not clearly specify its application to arbitration. This lack of certainty could lead interpreters themselves, as well as funders and arbitration practitioners to take a more cautious approach going forward with interpreting support and in particular potentially restructuring their funding agreements so that further steps are taken procedurally rather than deciding issues at the pre-exam stage. Such a situation could inhibit the flow of capital into the UK legal market and decrease its status as a dispute resolution destination. Moreover, the uncertainty over whether DBA regulations cover international cases hinders cross-border litigation, by forcing funders and claimants to negotiate different regulatory landscapes.

The combined effect of the PACCAR decision and the deferred commencement of the Litigation Funding Agreements Bill is to highlight that there has never been a greater need for an overhaul in terms of litigation funding regulation. In the absence of strong legislative intervention, recourse to third party funding dwindles in the UK and its reputation as a hub for international legal services is tarnished[91].

The Supreme Court ruling on collective actions[92] has already had profound implications within the litigation funding domain and this development is set

89. Sebastian Peyer, *Time for Parliament to act? The PACCAR decision of the UK Supreme Court: R (on the application of PACCAR Inc and Others) (Appellants) v Competition Appeal Tribunal and Others (Respondents) [2023] UKSC 28*, in *Legal Studies*, 2023, 1-6.

90. Aparicio García J., *Legal Finance Analytics: a data-driven proposal of asset pricing litigation risk applied to international investment arbitration*, 2024.

91. David Capper, *Supreme Court holds that litigation funding agreement is a damages-based agreement. R (Paccar Inc) v Competition Appeal Tribunal [2023] UKSC 28*, in *Civil Justice Quarterly*, *43*(1), 2024, 16-27.

92. Royal Mail v DAF and BT v DAF [2023] CAT 6.

to be replicated in a wide array of claims not directly linked with an individual Trucks case[93]. That the implications of the issue in the appeal will be substantial and that most third party litigation funding agreements are likely to be caught out as unenforceable under s 588AA (3) CLSA 1990 by this judgment illustrates just how widespread an effect remedy may have[94]. A funder warned that hundreds of funded civil lawsuits in the English courts could be hit by the ruling, this is how serious it was viewed[95].

Both funders and clients in turn will be forced to revise their funding models. Historically, these agreements often involved the funder being paid a share of the proceeds but very rarely were an interest rate above zero payable. Although funders may now be willing to restructure their arrangements as multiples of the advances, there is no guarantee that such adjustments will help avoid classification under a DBA. The SCs verdict leaves the fate of these re-structured agreements as to whether they would be contractual DBAs, hanging almost in a limbo[96].

Funding groups have attempted to downplay the significance of this decision arguing that while it may be a disappointment, they believe will not alter the economic fundamentals behind legal finance or otherwise reduce their support for meritorious claims. Instead, the focus will turn to how to restructure legal finance agreements so that they are regulation-ready. Although the above still does not alleviate funder concerns that advances already made under now unenforceable agreements may be lost forever in terms of a return unless forced to disgorge on restitution, with at least some precedent lending support for funders generally obtaining repayment upfront anyway[97].

Until very recently, it was generally accepted in the litigation funding industry that one party risk-funded third-party arrangements where finances were raised by funders because of their passive role and remuneration came out from a

93. Ben Rigby, *Supreme Court Litigation Funding Judgment threatens viability of collective claims*, in *The Global Legal Post*, July 27, 2023. Available at: *www.globallegalpost.com/news/supreme-court-litigation-funding-judgment-threatens-viability-of-collective-claims-1990583922* (accessed: September 10, 2024).

94. Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*, in *The Cambridge Law Journal*, *83*(1), 2024, 99-131.

95. Hugh Sims *et al.*, *The Powers of Office-Holders*, in *Insolvency Practitioners*, Edward Elgar Publishing, 2024, 124-185.

96. Rupert Macey-Dare, *Litigation Funding Agreements (LFAs) for UK Opt-Out Competition Class Actions Post Sony- How Robust Are They?*, November 25, 2023. Available at Social Science Research Network: *ssrn.com/abstract=4644256 or dx.doi.org/10.2139/ssrn.4644256*.

97. Kieran Anderson, *Collective actions and litigation funding: Reasons for optimism in 2024*, Humphries Kerstetter, March 15, 2024. Available at: *www.humphrieskerstetter.com/article/collective-actions-and-litigation-funding-reasons-for-optimism-in-2024/* (accessed: September 10, 2024).

percentage share on recovered damages could not be considered as Damages Based Agreements[98]. Subsequently, an assumption was made that these agreements met the requirements of a standard contractual arrangement and therefore were not subject to additional regulatory conditions. Nevertheless, the Supreme Court holding has proved this premise wrong by finding that potentially many funding arrangements will come under a DBA format and therefore payment of state regulatory costs.

Further, restructuring to comply the DBA regulations may not solve all problems as issues remain and include opt-out collective proceedings in CAT which does not allow use of a DBA. In consequence, the restructured funding arrangements may not deliver a practical risk/reward balance and you could arrange to have front loaded Adverse cost cover in case claimants or funders decide instead of walking away from the claims. They could also apply for security for costs when arrangements cannot be modified[99].

The turmoil brought about by the Supreme Court ruling has been apparent, especially in circles where LFAs comparable to those targeted by the Court have long prevailed. The continual task ahead will be to find a way through the regulatory complexities of DBA, change funding models in order to remain compliant and work within the shadow it poses for claims already underway.

The uncertainty also arises in English-seated arbitrations, the application of which from the Supreme Court decision is imperative. Although the decision will not automatically apply to other claims, given the regulation of funding arrangements within England and Wales is complex these provisions are clearly more likely than ever now in practice funders and arbitration practitioners widely review their agreements with a view re-positioning themselves following this decision. The lacunae in judicial pronouncements with regard to the import of this decision, within the context of arbitration cases yet make legal ecosystem around litigation funding webbed and ever changing which calls for prudent thoughts along with necessary amendatory changes from all stakeholders.

a. Redefining Litigation Funding and Navigating Future Legal Complexities

The Supreme Court ruling in PACCAR has redefined litigation funding agreements (LFAs), categorising certain arrangements where the funder shares a percentage of recovered damages as damages-based agreements (DBAs). This

98. Ammar Tanhan, *Addressing the Costs Imbalance Resulting from Third-Party Funded Investment Claims*, in *Journal of International Arbitration*, 41(1), 2024.

99. Hugh Sims *et al.*, *The Powers of Office-Holders*, in *Insolvency Practitioners*, Edward Elgar Publishing, 2024, 124-185.

classification has had far reaching implications on the enforceability of LFAs, creating considerations and obstacles for large scale litigation funding moving forward[100].

As a key side-effect, numerous extant LFAs–especially in opt-out collective proceedings–are now likely to be unenforceable unless they satisfy the DBA regulations; an elaborate set of rules which continue to lampshade over and require reform. Outside of class-based actions, the answer seems to be a reform that would draw LFAs based on something different than joining funders' compensation with damage; it should establish their payments rather applying multiple etc[101]. This solution is obvious but by no means simple: because actually spelling out all of these in LFAs over time will both introduce delays and risks claims that the parties are reneging or disputing what they agreed[102].

The PACCAR ruling has the potential to generate further satellite litigation – particularly in commercial cases where LFAs were involved in security for costs applications. This decision will force parties to revisit existing agreements, and perhaps redesign certain agreements in the wake of this decision adding yet another layer of complexity to already ongoing as well future litigations[103]. The loose definition of *claims management services*, meanwhile, may have unintended consequences. On the other hand, After the Event insurers will be caught up by order particularly if damages recovered is used to calculate premiums which would in turn widen affected parties[104].

Going forwards, the Litigation Funding Agreements (Enforceability) Bill aims to reverse that position and confirm LFAs are not DBAs and therefore re-instil enforceability of same. If enacted, this Bill would clarify the confusion in and attend to stabilize the current litigation investment market due transient impact from PACCAR[105]. In sum, while PACCAR has created shockwaves in the world of litigation funding, the expected changes to be brought about by way of Litigation Funding Agreements (Enforceability) Bill introduce a clear

100. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

101. Julia H. McLaughlin, *Litigation funding: Charting a legal and ethical course*, in *Vermont Law Review*, 31, 2006, 615.

102. Adedotun Onibokun, Bankole Sodipo, *An evaluation of third-party funding in commercial arbitration*, in *Journal of Sustainable Development Law and Policy*, 15(1), 2024, 263-285.

103. John Walker, *Policy and Regulatory Issues in Litigation Funding Revisited*, in *Canadian Business Law and Journal*, 55, 2014, 85.

104. Emma Carr, Alexander Wrixon, Christopher Richards, *Supreme Court makes waves in litigation funding*, in *Gowling WLG*. Available at: *gowlingwlg.com/en/insights-resources/articles/2023/supreme-court-makes-waves-in-litigation-funding* (accessed: September 9, 2024).

105. MD Khairul Islam, *The impacts of third-party funding on cost decisions in investment arbitration*, in *Asia Pacific Law Review*, *32*(1), 2024, 259-278.

path forward from these uncertainties so as to protect long-term access for litigation funders. But in the meantime, funders, claimants and lawyers will have to negotiate a more complex regulatory environment as it unfolds.

IX. Conclusion

It is a critical time for litigation funding in the UK, and that it has its challenges as well as plentiful places ripe with opportunity. The future of this industry will be solidified by the interplay between judicial rulings, regulatory frameworks and the role that funders have established it. While stakeholders try to cross these convoluted waters, it is a constant reminder that there needs substantial and clean regulation on board which would not only protect the interests of all affected parties but also pivot readily towards ensuring more access to justice. The ongoing conversation about litigation finance will of course impact how legal finance evolves, which means that attention by scholars and lawmakers should be ongoing in order to ensure the system is serving its intended purpose as it must.

The advent of litigation funding in the UK has heralded a sea change for lawyers–impacting access to justice and commercial imperatives alike. In the past, because of judicial integrity fears doctrines such as maintenance and champerty kept third-party participation in legal cases at bay. But the judicial landscape has changed in recent years, most notably with Supreme Court rulings on collective actions which call into question existing mechanisms of enforceability for funding agreements and lead funders and clients to increasingly grapple with a fresh set of regulatory constraints through Damages-Based Agreements (DBAs). One thing the late Litigation Funding Agreements Bill does show is how important clear legislation will be on this topic to preserve one of Australia's main economic successes in third-party funding and having a workable landscape of access to justice.

There is increasing recognition of the importance to access in complex collective proceedings and that professional funders have a role to play. This emerging attentiveness on the part of judges to how third-party funding enables potentially having and winning cases that otherwise would have gone unfiled, as they are often precluded due to inability to pay the costs up front. But higher standards of scrutiny would require that a fine line be drawn to maintain both the integrity and productive investment in legal claims.

4. Examining the Regulatory Landscape of Litigation Funding in the United States

I. Introduction: Navigating the Complex Landscape of Litigation Funding in the United States

Litigation funding has become increasingly intertwined with the legal and economic environment in the United States, and now draws growing scrutiny itself[1]. The practice is often called third-party litigation financing; it is a matter of one who is not a party and usually has no intermediary role in any proceedings still stands behind legal fees demand on the part of an event. In this environment of mushrooming costs, the litigation finance industry has grown by leaps and bounds[2]. It provides consumers with the capacity to pursue claims for which they might not otherwise have had financial backing adequate. More generally, litigation funding is often hailed as a tool for broadening access to justice by allowing litigants who have meritorious claims go forward in certain cases even though they cannot afford the full financial risk themselves[3].

Yet American litigation finance is filled with complex legal and financial nuances. Litigation funds in other jurisdictions often focus more on one or the other, but in the US both aspects are usually needed[4]. Thus, the US practice of litigation funding has matured into a complex financial sector where lawsuits are

1. Christopher Hodges, Stefan Vogenauer, Magdalena Tulibacka, *The costs and funding of civil litigation*, in *The Costs and Funding of Civil Litigation*, 2010, 1-580.

2. Fiona McKenna *et al.*, *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, in *New York University Journal of Law & Business*, 12, 2015, 635.

3. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

4. Marco de Morpurgo, *A comparative legal and economic approach to third-party litigation funding*. in *Cardozo Journal of International and Comparative Law*, 19, 2011, 343.

no more than legal claims but are now investment opportunities. This duality is characteristic of how the industry has developed within this country.

The US regulatory framework around litigation funding is similarly complicated. It consists of a discontinuance of federal and state statutes that vary greatly depending on location. This chapter identifies and overcomes the critical legal, economic, and regulatory hurdles faced by the United States, which has seen significant growth in litigation funding over the past decade[5]. This framework offers potential lessons for other common law jurisdictions.

These are the sort of challenges that lie ahead for litigation funding in the USA: the larger issues of how it can be used without disadvantaging justice or fairness, and offering some case-studies that will provide models within US for other populations to look at. Particular emphasis is given to important case law and recent legislative changes which show how US litigation finance must navigate its own particular obstacles, particularly when it comes to issues surrounding disclosure, confidentiality, and investor protection. This chapter gives a historical overview of litigation funding's development in the US and compares it with other jurisdictions, illuminating the social and legal implications of that developing body.

II. A Nuanced Balance: Law and Economics in US Litigation Funding

The US approach to litigation funding is unique because it has learned how to marry conventional legal principles and economic realities. This is due to the less regulated and more tentative systems in these jurisdictions, compared to US where litigation funding has been forced onto a market footing in response to demand[6]. This becomes clear when litigation funding is viewed through a financial lens, for example in relation to interest rates and returns on investments and risk management. Litigation, of course, is a vehicle to resolve legal disputes, but over the years the US system has started to see litigation funding not only as a financial product where investment should be guided by calculating risk adjusted return and pricing for profit just like anyone else doing business in America[7]. Some might suggest that this results in an increasingly commercialised attitude to litigation

5. Jasminka Kalajdzic, Peter Cashman, Alana Longmoore, *Justice for profit: a comparative analysis of Australian, Canadian and US third-party litigation funding*, in *The American Journal of Comparative Law*, 61(1), 2013, 93-148.

6. Fiona McKenna *et al.*, *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, in *New York University Journal of Law & Business*, 12, 2015, 635.

7. Geoffrey J. Lysaught, D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the US Civil Justice System*, in *Journal of Law, Economics, and Policy*, 8, 2011, 645.

funding, with funding decisions more typically based on the prospects of success as well as quantum and legal costs before a funder is prepared to commit.

In the same vein, many also argue that the legalities around litigation funding still hold significant importance. The imposition of these investor-ownership mechanisms is falling to the courts and regulators, which are meant to ensure that outsourcing can be done without violating standards governing fairness of proceedings and the protection of vulnerable plaintiffs[8]. This was emphasized by the US District Court in In Charge Injection Technologies, Inc. vs. E.I. DuPont De Nemours & Co.[9], which suggested that third-party funders might be compelled to alert their role due to the risk of conflict of interest. This ruling is indicative of a trend to treat litigation funding as a form of capital like any other, one which should be subject to legal standards in order to keep the process from becoming tainted by money[10]. As an example, it highlights the need to balance funder's preferences against risks of actual or perceived conflicts of interest a highly material issue in cases where financial motivations stand to direct litigation strategy.

And the changing economic prospects of litigation financing are underscored by the emergence of industry titans including Burford Capital and Bentham IMF, who see litigation as an investment class much like private equity or venture capital[11]. The way they manage litigation portfolios is very similar to the way a hedge fund manages investments in general, with market dynamics operating more universally. But the issue of disclosure and privilege continues to make its way through the courts, as reflected in a case like *Palisades Collections LLC v. Shorts*[12] where a court ordered funding agreement disclosure but others where disclosure was seen as forcing the funder's hand indicating that disclosure requirements are turning somewhat toward US litigation funding transparency fashion model[13].

The US is in an evolutionary phase where the trend as to what should be considered confidential and what should be disclosed by litigation funders appears emergent, with individual states establishing divergent rules[14]. New York

8. Jason Lyon, *Revolution in progress: Third-party funding of American litigation*, in *UCLA Law Review*, 58, 2010, 571.

9. Charge Injection Technologies, Inc. v. E.I. DuPont de Nemours & Co., 89 A.3d 476 (Del. 2014).

10. Chen Wenjing, *An economic analysis of third-party litigation funding*, in *US-China Law Review*, 16, 2019, 34.

11. Stephanie Russell-Kraft, *Burford raises $250 M in 24 hours, litigation funding rolls on*, in *Bloomberg Law*, 2018. Available at: *news.bloomberglaw.com/business-and-practice/burford-raises-250-m-in-24-hours-litigation-funding-rolls-on* (accessed: September 20, 2024).

12. Palisades Collections LLC v. Shorts, 552 F.3d 327, 4th Cir. (2009).

13. Maya Steinitz, *Follow the money? A proposed approach for disclosure of litigation finance agreements*, in *UC Davis Law Review*, 53, 2019, 1073.

14. Julia H. McLaughlin, *Litigation funding: Charting a legal and ethical course*, in *Vermont Law Review*, 31, 2006, 615.

courts, for instance, have recently been moving towards an increased level of transparency with respect to the necessary disclosure regarding litigation funding arrangements, as illustrated by *in re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation*[15], where the Court ordered that its consideration may be required to evaluate the potential procedural effect of a litigation funding agreement[16]. In California, the absence of a state-wide requirement for mandatory disclosure thus becomes the point of conflict in litigation financing. This emerging way of litigating results from a mix both complex and controversial; it attempts to balance conflicting economical pragmatism and legal protection. It is neither too open nor too secretive, a middle ground being struck between putting things under dim lights and broadcasters to let everything be exposed. It is a result of the real world combined with American legal and ethical standards: litigation finance has become in The United States an industry that provides both a balanced approach by actively developing, confidentiality and disclosure standards which are great examples of this equilibrium at work. The legal profession can continue to expand the use of litigation funding, not as seen in past years where it grew tremendously but with integrity lineages that may make this system vulnerable or corrupt over future generations to come.

III. A Fragmented Regulatory Framework: Federal and State Jurisdictional Complexities

Within the US, litigation funding regulation involves a necessarily complex series of rules and statutes that touch on different aspects of the American legal system, one marked by jurisdictions that overlap but generally differ from federal to state, in addition to enforcing competing regulations[17]. The US, however, has a fractured legal system without a single unified national regulatory framework among a splintered patchwork of states with fragmented interpretations and implementations of the law on litigation funding[18]. Consequently, because legal

15. In Re: Valsartan N-Nitrosodimethylamine (Ndma) Contamination Products Liability Litigation Civil No. 19-2875 (RBK/JS).

16. Marla Decker, *A New York appellate court weighs in on Litigation Funding Disclosure: Relevance is Paramount*, in *Lake Whillans*, 2022. Available at: *lakewhillans.com/articles/a-new-york-appellate-court-weighs-in-on-litigation-funding-disclosure-relevance-is-paramount/* (accessed: September 20, 2024).

17. Victoria Sahani, *Harmonizing third-party litigation funding regulation*, in *Cardozo Law Review*, 36, 2014, 861.

18. Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, in *Law & Social Inquiry*, 37(3), 2012, 657-685.

reform has been left to individual state legislatures different courts have taken wildly differing positions on the enforceability of, and parameters around, litigation funding agreements[19].

In corporate disputes, for example, states such as Delaware have been more accepting of litigation funding due to the fact that it is a centre for corporate litigation[20]. Delaware courts, as shown previously and elsewhere in the first advisory, apply funding agreements when made sufficiently transparent so that they do not influence a case unfairly[21]. Other states, including Kentucky, have interpreted the coverage requirement more narrowly. For example, in *Boling v. Prospect Funding Holdings, LLC (2019),* the Sixth Circuit[22] held that a litigation funding agreement was null and void because it contravened Kentucky's champerty law, which prohibits third-party interference with lawsuits to make a profit[23].

Litigation funding at state level is regulated by an inconsistent patchwork of laws thus leading to some being deemed more favourable jurisdictions for litigation funding. For example, in Utah HB 312 (2020), entitled the Maintenance Funding Practice Act established to regulate litigation funding contained provisions requiring registration and some reporting of litigation funding[24]. The law increases transparency with funding contracts that establish terms and disclosures. Wisconsin has likewise enacted Act 235[25] to the publication of civil-litigation funding agreements in defence of transparency and the integrity of the judiciary[26].

California has taken an even more liberal view, permitting litigation finance

19. Jason Lyon, *Revolution in progress: Third-party funding of american litigation*, in *UCLA Law Review*, 58, 2010, 571.

20. Josh Landau, *Not just delaware: Litigation funding transparency progress across multiple states*, in *Patent Progress*, 2024. Available at: *www.patentprogress.org/2024/02/not-just-delaware-litigation-funding-transparency-progress-across-multiple-states/* (accessed: September 20, 2024).

21. Zacharias Shepard, *Disclosure of third-party litigation funding arrangements: An overview of recent decisions from top patent venues*, in *Baker Botts*, September 2023. Available at: *www.bakerbotts.com/thought-leadership/publications/2023/september/disclosure-of-third-party-litigation-funding-arrangements* (accessed: September 20, 2024).

22. Christopher Boling v. Prospect Funding Holdings, LLC, No. 18-5599 (6th Cir. 2019).

23. Susan L. Martin, *Financing Litigation On-Line Usury and Other Obstacles*, in *DePaul Business & Commercial Law Journal*, 1, 2002, 85.

24. Eric Schuller, *Is consumer legal funding a loan? why does it matter?*, in *ARC Legal Funding*, 2021. Available at: *arclegalfunding.org/is-consumer-legal-funding-a-loan-why-does-it-matter/* (accessed: September 20, 2024).

25. Ed Reilly, *Mandatory Disclosure of Litigation Funding Arrangements – Good, Bad or Indifferent?*, in *Themis Legal Capital*, 2018. Available at: *www.themislc.com/mandatory-disclosure-of-litigation-funding-arrangements-good-bad-or-indifferent/* (accessed: September 20, 2024).

26. Jamie Hwang, *Wisconsin law requires all litigation funding arrangements to be disclosed*, in *ABA Journal*, 2018. Available at: *www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrangements_to_be_disclosed#google_vignette* (accessed: September 20, 2024).

unencumbered by common law doctrines like champerty and maintenance[27]. Like, California courts upheld the state's disavowal of these doctrines on the grounds that they stifle litigation finance in case like *In re Cohen's Estate*[28] and *Abbot Ford, Inc. v. Superior Court*[29]. Enabling law practice to evolve within a more flexible legal framework, perhaps advancing the California State Bar's ongoing inquiry into non-lawyer ownership in law practices could represent another gold mine of funding sources and improved access to justice[30].

Conversely, some states maintain a more restrictive approach to litigation funding. Historically, Kentucky courts have found litigation funding agreements violate public policy in the now-well-known 1952 case *Charles v. Phillips*[31]. This perspective reflects a cautious stance towards third-party involvement in litigation[32]. Maryland restrictions are a bit more onerous as Maryland law treats these transactions as loans subject to its state licensing and usury laws, as outlined in Maryland Commercial Law sections 12-102 and 12-103[33]. In Maryland, a state investigation concluded that charging an effective interest rate higher than statutory maximums in a litigation funding agreement even made the arrangement usurious[34]. Although Minnesota recently abrogated its common law champerty doctrine in *Maslowski v. Prospect Funding Partners LLC*[35], to permit litigation funding, the state still suggests that it will carefully scrutinize a litigations funding document for signs of excessive control by these funders over the case process[36]. In other words, the case exemplifies the balance in modern access to justice between enabling funders and protecting substance of justice[37]. In summary, the regulatory environment for litigation funding in the US is one of various state statutes with

27. Justin Boes, *Lawyers, Funds, & Money: The Legality of Third-Party Litigation Funding in the United States*, in *Rutgers Law Record*, 49, 2021, 118.

28. In re Cohen's Estate, 152 P.2d 485 (Cal. Dist. Ct. A 1944).

29. Abbot Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 885 n.26 (Cal. 1987).

30. W. Bradley Wendel, *Paying the piper but not calling the tune: Litigation financing and professional independence*, in *Akron Law Review*, 52, 2018, 1.

31. Charles v. Phillips, 252 S.W.2d 920, 921 (Ky. 1952).

32. Sydney Auteri, *Litigation finance: An asset or a liability to the future of lawsuits?*, in *Northern Kentucky Law Review*, 2024. Available at: *northernkentuckylawreview.com/blog/litigation-finance-an-asset-or-a-liability-to-the-future-of-lawsuits* (accessed: September 20, 2024).

33. Sean Keller, Jonathan Stroud, *Litigation Funding Disclosure and Patent Litigation*, in *Federal Circuit Bar Journal*, 33, 2024, 77.

34. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

35. Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235 (Minn. 2020).

36. Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice*, in *Georgetown Journal of Legal Ethics*, 33, 2020, 687.

37. Erik Fuqua, *Two Roads Converged in a Legal Wood: The Intersection of Litigation Funding and the False Claims Act*, in *Indiana Health Law Review*, 19, 2022, 1.

some states more proactively developing a general structure to seek transparency and facilitate access, while other states are guided by stricter regulations designed to secure the administration of justice from any perceived litigation abuses.

The absence of clear federal guidance only serves to highlight just how convoluted the US regulatory framework really is. Litigation finance is a significant factor in numerous federal court cases, but there are no established rules of the road at the federal level[38]. The federal courts have thus far not adopted a uniform rule, and instead it has been handled on a case-by-case basis by the different courts; some federal courts apparently do require disclosure while others clearly do not[39]. This uncertainty is a problem for both funders and litigants, who face very different rules in litigation funding agreements depending on whether the dispute is heard in England or Singapore. For example, in Miller UK Ltd v Caterpillar Inc.[40] and Gbarabe v Chevron Corp[41], the courts demonstrated a growing division between jurisdictions that had seen proponents of litigation funding gain acceptance of its role within the civil justice system and those starting to require greater disclosure and adherence to ethical standards before executing funded proceedings.

After all, in *Miller UK Ltd. v. Caterpillar Inc.*[42] decided by the Northern District of Illinois, court blessed a litigation funding arrangement for use in commercial disputes, so long as such funding was disclosed to the court and opposing counsel[43]. This continued in the US with *Gbarabe v. Chevron Corp*. where, as part of a class action suit, for the first time, a court approved the disclosure of third-party funding to be used to support litigation costs[44]. These cases are illustrative of conflicting judicial mind sets primarily regarding the interests of funding parties vis-à-vis plaintiffs and defendants and have engendered a hodgepodge of regulatory situations around the country.

In addition to state regulations, the treatment of litigation funding in tax law has also garnered attention. Recently, in May 2020, the United States Tax Court treated the question of whether amounts paid for litigation funding where

38. Stephen B. Burbank, Sean Farhang, *A New (Republican) Litigation State?*, in *UC Irvine Law Review*, 11, 2020, 657.

39. Malcolm E. Wheeler, Theresa Wardon Benz, *Litigation Financing: Balancing Access with Fairness*, in *Journal of Tort Law*, 13(2), 2020, 281-301.

40. Miller UK Ltd. v. Caterpillar, Inc., Case No. 10 C 3770 (N.D. Ill. Feb. 11, 2015).

41. Gbarabe v. Chevron Corp., Case No. 14-cv-00173-SI (N.D. Cal. Aug. 5, 2016).

42. Miller UK Ltd. v. Caterpillar, Inc., Case No. 10 C 3770 (N.D. Ill. Feb. 11, 2015).

43. James Rowe, *Litigation Finance: Financial Engineering in the Courtroom*, 2020. Available at Social Science Research Network 3751369.

44. Robert Huffman, Robert Salcido, *Blowing the Whistle on Qui Tam Suits and Third-Party Litigation Funding: The Case for Disclosure to the Department of Justice*, in *Public Contract Law Journal*, 50, 2020, 343.

a third party assumes all or any part of the plaintiff's legal costs and attorney fees for a share of any recovery obtained, contingent or no contingent; *Novoselsky v. Commissioner of Internal Revenue*[45]. The court ruled that litigation funding payments structured as loans but including non-recourse contingent payments should be considered *income* rather than a *loan* for federal tax purposes. Applying a multi-factor test, the Tax Court characterized the upstream payment as one markedly without obligation of repayment if and unless litigation were successful – and hence more like advances for legal fees[46]. The ruling serves as a reminder that attorneys and their clients should be aware of the tax consequences of these types of litigation funding transactions based on how the agreements are documented to fit within federal tax law.

a. Ethical and Legal Considerations: Disclosure, Confidentiality, and Investor Protection

In the U.S, litigation funding raises a web of ethical and legal issues that regulators and lawmakers have only started to grapple with. The increasing push for transparency, confidentiality and investor rights imply a recognition that the unfettered use of litigation funding can interfere with the natural machinations of litigation[47]. Showing an increased push for transparency, courts are increasingly ordering disclosure of funding in cases like *Gbarabe v. Chevron Corp.*[48], especially with respect to class actions. But this comes with significant confidentiality questions, where funders might require case information that is protected by attorney-client privilege. The Wall Street Journal reports on the funding terms, noting that investors frequently charge upwards of 20% interest in these deals and that this is also a key investor-protection issue since some plaintiffs are so hard up they will do almost anything for high-interest funds[49]. While New York's proposed limits on interest rates and California's shield for human trafficking victims are among the few examples of regulatory efforts to stymie payday lending abuses, the law in the state's overall remains a patchwork that leaves many

45. Novoselsky v. Commissioner of Internal Revenue 119 TCM (CCH) 1474 (TC 2020).

46. Caitlin Hird and Keith Fogg, *Pro Se Precedent in the US Tax Court: A Case for Amicus Briefs*, in *Houston Business and Tax Law Journal*, 23, 2022, 1.

47. W. Bradley Wendel, Joshua P. Davis, *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, in *Hastings Law Journal*, 74, 2023, 1459. Available at: *repository.uclawsf.edu/hastings_law_journal/vol74/iss5/8*.

48. Gbarabe v. Chevron Corp., Case No. 14-cv-00173-SI (N.D. Cal. Aug. 5, 2016).

49. Robert Dillard, *Analysis: Expect to see targeted growth in litigation finance*, in *Bloomberg Law*, 2023. Available at: *news.bloomberglaw.com/bloomberg-law-analysis/analysis-expect-to-see-targeted-growth-in-litigation-finance* (accessed: September 20, 2024).

areas without overhead protection[50]. A piecemeal regulatory environment that attempts to reconcile the financial gains of litigation funding with the protection of plaintiffs remains an unstable one.

IV. Unpacking the Evolution and Challenges of Litigation Funding in the American Legal System

The business of litigation funding has evolved from a largely prohibited practice under strict champerty and maintenance laws to its present place in the legal landscape which is earmarked into an established multi-billion-dollar industry[51]. This veil began to change at the societal level both in terms of access to justice and our perception of this concept, before lawmakers codified it or courts interpreted where functional lines fall. However, over time as funding gets more common-place, it brings with it its own issues that in turn mean we need new kinds of regulations.

a. Champerty and Maintenance: From Prohibition to Acceptance

Across the landscape of American history, the rise and fall of the key doctrines, champerty and maintenance, underpins the prohibition against law suits funding holds in itself a past effort to curb unethical practice. The acceptance of this doctrine has become less and less acceptable over the recent years[52]. In 1997, Massachusetts became the first US state to eradicate champerty laws[53] and in 2009, New Jersey effectively eradicated champerty as a defence in recognition of the need for justice even where such justifiable cost would exclude a portion of society from legal aid[54]. Nonetheless, Arizona's lift of heavy champerty restrictions in 2008 created a significant ban as who litigation funders could invest more broadly into underfunded plaintiffs' claims within the realms of personal injury and commercial litigation[55]. More than a dozen states have since rolled back

50. Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice*, in *Georgetown Journal of Legal Ethics*, 33, 2020, 687.

51. US Chamber Institute for Legal Reform, *Selling More Lawsuits, Buying More Trouble*, 2020. Available at: *www.thefederation.org/docs/Resources/ReferencePapers/StillSellingLawsuits.pdf*.

52. Hilary Biehler, *Maintenance and champerty and access to justice – the saga continues*, in *Irish Jurist*, 59, 2018, 130-145.

53. Anusheh Khoshsima, *Malice Maintenance Is "Runnin' Wild": A Demand for Disclosure of Third-Party Litigation Funding*, in *Brooklyn Law Review*, 83(3), 2018, 5.

54. Justin Boes, *Lawyers, Funds, & Money: The Legality of Third-Party Litigation Funding in the United States*, in *Rutgers Law Record*, 49, 2021, 118.

55. Carol Langford, *Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients*, in USFL Review, 49, 2015, 237.

those archaic prohibitions, and the 2020 ruling of *Maslowski* in Minnesota looks like just another checkmark on the progression toward acceptance of litigation funding[56].

b. Federal Laws: Evolution of Litigation Funding Regulations

The legal landscape of litigation funding in the US is a complicated patchwork of statutes and common law principles, which have been influenced by market trends, technological advancements and shifting judicial interpretations. Although initially regarded sceptically, over time legislations have come around to permit litigation finance especially for large claims like securities fraud and consumer class actions. It is the consequence of those measures that legal frameworks in USA have undergone significant change to advance or regulate alternative financing sources.

i. Securities Litigation Uniform Standards Act (SLUSA) – 1998

SLUSA, passed in 1998, was enacted to limit the number of securities class action lawsuits brought against conflicting rulings or solely meant for forum shopping. Thus, by the enforcement of the act, it contributed to the regular application of results while making it a breeding ground for unmerited filings especially in securities fraud[57]. SLUSA eventually helped third-party litigation financiers service loans in a stable legal climate, by requiring them to be regulated at the federal level instead of patchwork regulations in state courts[58].

While SLUSA still remain in effect, the Supreme Court's holding in *Cyan, Inc. v. Beaver County Employees Retirement Fund (2018)*[59], has to some extent defined and cabined the statute. In this landmark decision, the court held that SLUSA does not entirely pre-empt state court jurisdiction over some securities class actions and that these cases could still be litigated in state courts[60]. This decision essentially established a bifurcated system where securities class actions could be pursued in state and federal courts, depending on the facts of each case.

56. Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235.

57. Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim*, in *Alabama Law Review*, 56, 2004, 325.

58. Ronald A. Stunda, *The Effects Of The Securities Litigation Uniform Standards Act (Slusa) On Earnings Forecasts*, in *International Journal of Business, Accounting & Finance*, 7(2), 2013.

59. Cyan, Inc. v. Beaver County Employees Retirement Fund, 583 US (2018).

60. Michael Klausner *et al.*, *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)*, in *Business Lawyer*, 75, 2019, 1769.

The Cyan decision was a pivotal moment in the evolution of SLUSA as it addressed concerns raised by plaintiffs who argued that they should still be able to bring certain securities class actions in state courts. The ruling recognized that while federal courts were better equipped to handle large-scale securities fraud cases, state courts should retain jurisdiction over smaller, localized class actions[61]. Though this reduced the scope of SLUSA, it upheld its most fundamental tenet, shield securities cases from abusive litigation. As a result, the decision brought an added layer of complication for litigation funders who must now navigate state and federal regulations in the realm of securities litigation.

Although the holding in Cyan struck a blow to SLUSA, it remains at the core of these securities class actions, especially cases involving federal jurisdiction[62]. For litigation funders, both challenges and opportunities are presented by SLUSA as its dual system effectively dictates that they must tailor their strategies based upon the jurisdiction in which the case is being brought, i.e. state or federal court. The act continues to be an important influence on third-party funders making decisions how and where they invest in securities fraud litigation.

ii. Federal Rules of Civil Procedure (FRCP) – Rule 26(b)(1) (1938)

Rule 26(b)(1) of the Federal Rules of Civil Procedure governs the scope of discovery in civil litigation, defining what information can be requested by the parties. While Rule 26 barely touches on litigation funding and the inclusion of such agreements in discovery has emerged as a hot topic. The 2015 amendment to Rule 26 that included proportionality was a major win in reigning in escalating legal expenses, but it left an open issue regarding the treatment of litigation funding agreements[63]. While the change sought to require these types of agreements to be produced only in response to discovery, if relevant and necessary to the prosecution or defence of a specific case by reducing litigation, neither element definitively settled whether such agreements must be disclosed or served courts around the nation with another riddle[64].

Though some judges have demanded that these agreements be disclosed up

61. B. John Torabi, *The Cyan Decision and its Impact on State-Level Securities Class Actions*, in *Fordham Journal of Corporate and Financial Law*, 26, 2021, 253.

62. Wendy Gerwick Couture, *Cyan, Reverse-Erie, and the PSLRA Discovery Stay in State Court*, in *Securities Regulation Law Journal*, 47, 2019, 21-22.

63. Christine L. Childers, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26 (b)(1)*, in *Valparaiso University Law Review*, 36, 2001, 677.

64. Jeffrey J. Grosholz, *In the Shadows: Third-Party Litigation Funding Agreements and the Effect Their Nondisclosure Has on Civil Trials*, in *Florida State University Law Review*, 47, 2019, 481.

front to assess conflicts or undue influence, others reject them out of hand as irrelevant. This leaves litigation funders dancing on the metaphorically head of a pin, trying to judge judicial scrutiny. The rule was originally meant to alleviate the burdens of discovery, but instead has led to uncertainty, due in no small part to its lack of specificity regarding third-party funding[65]. Courts are still mulling how readily to have the agreements turned over in discovery, leaving litigation funders and those they support at continued risk. Given the current trend toward increased transparency, the absence of a clear direction on funding agreements has been unfortunately exploited over time to make civil litigation even more complex.

iii. Dodd-Frank Wall Street Reform and Consumer Protection Act – 2010

The Dodd-Frank Act had a broader goal of reforming financial services following the 2008 crisis, including increasing transparency and accountability, which in turn would affect third-party litigation funding to some extent in areas like securities litigation and consumer class actions. However, in 2018, President Donald Trump signed the Economic Growth, Regulatory Relief, and Consumer Protection Act, which repealed or modified parts of Dodd-Frank and was primarily aimed at easing smaller financial institutions in order to save costs[66]. In practice, for litigation funders, this deregulation simply meant greater freedom in structuring agreements especially in securities and consumer cases. Critics, however, contend that it effectively eased one type of financial pressure by rolling back requirements and say too much relief went to larger houses meaning firms. Therefore, while the repeal of RFAs promises consumer protections will remain in place, others say change is needed to drive innovation that places access to justice at risk over the long term[67].

The rollback of certain Dodd-Frank provisions has created a more favourable environment for litigation funders, particularly in securities and consumer protection cases. The 2018 reforms have, by lightening the regulatory load, given

65. Suzanne H. Segal, *Proportionality and necessity under Federal Rule of Civil Procedure 26(b) Is your discovery worth it?*, in *Advocate Magazine*, 2017. Available at: *www.advocatemagazine.com/article/2017-july/proportionality-and-necessity-under-federal-rule-of-civil-procedure-26-b* (accessed: September 20, 2024).

66. J. Nicholas Ziegler, John T. Woolley, *After Dodd-Frank: Ideas and the post-enactment politics of financial reform in the United States*, in *Politics & Society*, 44(2), 2016, 249-280.

67. Kelly Pope and Chih-Chen Lee, *Could the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 be helpful in reforming corporate America? An investigation on financial bounties and whistle-blowing behaviours in the private sector*, in *Journal of business ethics*, 112, 2013, 597-607.

funders more leeway to embark on alternative funding streams. But we still need careful review to avoid these agreements taking advantage of plaintiffs that are susceptible or interfering with the legal process[68]. The current state of regulations is thus a fine line between encroaching too much onto market freedom while still preventing the near exploitation of consumers and litigants. As a result, federal laws that govern contracts for litigation funding have similarly evolved to strike a balance between the public policy considerations of access to justice and concerns regarding market exploitation.

c. The Evolution of State Laws Governing Litigation Funding in the US

The form of regulation varies by state, reflecting the diversity of legal traditions and priorities from jurisdiction to jurisdiction. At the time, champerty and maintenance laws aimed at outlawing third-party involvement in lawsuits were common throughout the country. These laws sought to prevent third party funders from getting a cut of lawsuits, out of worries that doing so would encourage shady practices and frivolous litigation. Except, as demonstrated above many states have already repealed or severely restricted such rules to reflect the evolving legal and economic realities of modern litigation[69].

Since then, a number of states have taken the lead in regulating litigation funding rather than outright banning it. So, In New York for instance the decision of Justinian Capital SPC v WestLB AG[70] did away with outdated doctrines that gave rise to large scale commercial litigation funding. Ohio, for example, only just changed its litigation financing laws in late 2018 to require more transparency and oversight not until recently did law firms need to guarantee that the plaintiffs signing longstanding funding agreements truly understood them[71]. Indiana has a Civil Proceeding Advance Payment Transaction rule on the books from 2016[72].

The Illinois Consumer Legal Funding Act and Nevada's Assembly Bill 477, for example, are both loaded with sweeping provisions like an interest rate cap and

68. Victoria Shannon, *Third-Party Litigation Funding and the Dodd-Frank Act*, in *Tennessee Journal of Business Law*, 16, 2014. Available at: *ir.law.utk.edu/transactions/vol16/iss1/2*.

69. Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, in *Fordham Journal of Corporate and Financial Law*, 10, 2004, 55.

70. Justinian Capital SPC v. Westlb AG, 37 Misc. 3d 518, 952 N.Y.S.2d 725, 2012 N.Y. Slip Op. 22227 (N.Y. Sup. Ct. 2012)

71. Jean Xiao, *Consumer litigation funding and medical malpractice litigation: examining the effect of Rancman v. Interim Settlement Funding Corporation*, in *Journal of Empirical Legal Studies*, 14(4), 2017, 886-915.

72. Mark Popolizio, *Indiana passes new TPLF law regulating commercial litigation financing*, in *Verisk*, March 20, 2024. Available at: *www.verisk.com/blog/indiana-passes-new-tplf-law-regulating-commercial-litigation-financing/* (accessed: September 20, 2024).

disclosure requirements that effectively single out transactions involving personal injury claims[73]. California, where recent multimillion-dollar human trafficking suits have put funders in the lion's den, has recently passed a law targeting what is known as control over legal strategy[74]. These regulatory reins balance on a line between protecting harmed plaintiffs from certain predatory behaviours and opening the door into much wider US courts for funding of plaintiff-side litigation by third-parties. Yet it also indicts the need for federal mandates to better harmonize that kind of patchwork.

V. The Rise and Regulation of Litigation Funding in the US: A Decade of Transformation

Central to the regulation of litigation funding are decisions of increasing legal scholarship that has shaped case law by defining the hallmarks of confidentiality and disclosure. For instance, in *Gbarabe v. Chevron Corp. (2016)*[75] out of the Northern District of California, the court required the plaintiff to disclose the existence of a litigation funding agreement, ruling that the defendant was entitled to know whether a third-party funder was controlling or influencing the litigation. Furthermore, in *Lambeth Magnetic Structures, LLC v. Seagate Technology (US) Holdings, Inc. (2018),* where a district court in Pennsylvania denied disclosure of litigation funding agreements[76] and noted that the same is privileged unless it serves as relevant to any issue presented in the litigation. The differing opinions of judges in these three cases reflect the continued debate around how transparent litigation funding should be and create further obstacles to developing a consistent regulatory regime[77].

In addition, California has taken the lead in regulation of litigation funding perhaps more than anything when it comes to its interest at the intersection between third party funding and certain social justice issues. In 2022, the California Senate Bill 1564 provided for a prohibition on human trafficking

73. Michael J. Howlett, *Consumer Litigation Financing in Illinois: Seeking Security and Legitimization Through Regulation, 26 Loy*, in *Consumer Law Review*, 140, 2013. Available at: *lawecommons.luc.edu/lclr/vol26/iss1/6*.

74. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

75. Gbarabe v. Chevron Corp., Case No. 14-cv-00173-SI (N.D. Cal. Aug. 5, 2016).

76. Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc., Civil Action No. 16-538 (W.D. Pa. Jun. 24, 2019).

77. Robert Huffman, Robert Salcido, *Blowing the Whistle on Qui Tam Suits and Third-Party Litigation Funding: The Case for Disclosure to the Department of Justice*, in *Public Contract Law Journal*, 50, 2020, 343.

of litigation support companies to know or disclose any other person involved in third-party litigation financing. The concern underpinning the law was that litigation funders with deep pockets who have derived great financial benefit from bringing human trafficking claims would take advantage of victims by exercising behind-the-scenes control over settlement or litigation decisions[78].

This approach, as already evidenced in context of state regulation of litigation funding in human trafficking cases in California, offers a potential model for other states to impose disclosure requirements that are nuanced toward particular types of freelance work, or industries where the type of high set up and lo visit expense loans described here may be problematic[79]. The bill scrutinizing intervention in this context is part of the wider effort to maintain transparency for US litigation funding, which has been a continuously soluble tension between being able to access justice through third-party funding, but also ensuring litigants are not subject to potential manipulation as well.

VI. The Evolution of Litigation Funding: A Comparative Analysis of Disclosure and Confidentiality in the US and the UK

The US post-litigation funding landscape has evolved along lines similar to the development of the practice in other common law jurisdictions, particularly in the UK. In the same way in which it took a while for the United States to permit litigation funding on public policy grounds notwithstanding Champerty and Maintenance which had outlawed third party involvement in litigation for profit, at first blush in the UK, there was fierce opposition when third parties were purporting to fund court cases. However, the UK loosened these restrictions bit by bit which led to the formal recognition of litigation funding in particular areas mainly collective redress and insolvency. The United States has undergone a similar transformation, from initial legal challenges to later adoption of permissive views toward litigation finance albeit with significant regional variances[80].

Yet despite a shared legal heritage between the US and UK jurisdictions, the two have developed different auspices when it comes to considerations of litigation

78. Suneal Bedi, William Marra, *Litigation Finance in the Market Square: A Non-Market Strategy Approach*, forthcoming in *Southern California Law Review*, September 09, 2024. Available at Social Science Research Network: *ssrn.com/abstract=)*.

79. W. Bradley Wendel, Joshua P. Davis, *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, in Hastings Law Journal, 74, 2023, 1459. Available at: *repository.uclawsf.edu/hastings_law_journal/vol74/iss5/8*.

80. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

funding. Meanwhile over in the States, courts have placed greater emphasis on confidentiality requirements and disclosure obligations as they grapple with ethical considerations about litigation finance[81]. While US courts and regulatory bodies have been persuaded on the basic principle that transparency matters as witnessed in Gbarabe case[82] where parties to funding agreements are typically required to disclose them a holding now being taken up by New York bills introduced this session[83].

By contrast, the UK regulatory regime has carried with it few demands for disclosure and confidentiality. Courts in the UK have tended to resist making orders compelling disclosure of funding agreements. Litigation funders have to abide by self-regulation through adherence to the Association of Litigation Funders' (ALF) Code of Conduct, which places an emphasis onto fairness but stops short on a lot of occasions on requiring that disclosure be made mandatory[84]. Confidentiality is a major issue in the UK because funding arrangements are usually treated as private contracts between the funder and the claimant, meaning there is rarely an obligation, unless it would be wrong to do so, to disclosures a clear conflict of interest. This creates a more streamlined litigation process compared to the US, where disclosure requirements can lead to additional litigation over the funding itself, complicating the legal proceedings[85].

The UK case *of PACCAR Inc. v. Road Haulage Association Ltd.*[86] is a recent decision which illustrates this development. A case in point was when the UK Supreme Court recently held that litigation funding agreements (LFAs) in collective redress actions are to be caught with the same type of regulatory control as DBAs. This decision has caused some concern regarding the extent to which certain funding agreements will be a realistic option in high value group actions where stricter compliance with DBA regulations and greater transparency may now be required following this judgment. This case marks an increased level of attention, but it is particular to the UK cases in the US have not encountered such

81. Michael Clements, *Third-party litigation financing: Market characteristics, data, and Trends*, in *US Government Accountability Office*, December 20, 2022. Available at: *www.gao.gov/products/gao-23-105210* (accessed: September 20, 2024).

82. Gbarabe v. Chevron Corp., Case No. 14-cv-00173-SI (N.D. Cal. Aug. 5, 2016).

83. New York City Bar Association, *NYC Bar's proposed Litigation Funding Reforms*, April 12, 2024. Available at: *www.nycbar.org/in-the-news/nyc-bars-proposed-litigation-funding-reforms-explained-law360-2/* (accessed: September 20, 2024).

84. Victoria Shannon Sahani, *Keep to the Code: A Global Code of Conduct for Third-Party Funders*, in *Boston University Law Review*, 102, 2022, 2331.

85. Rebecca Leinen, *Striking the right balance: disclosure of third-party funding*, in *Oxford University Commonwealth Law Journal*, 20(1), 2020, 115-138.

86. R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others, [2023] UKSC 28.

troubles yet. Although PACCAR could indicate a tightening of the regulatory reins around litigation funding in the UK, it still reflects a more permissive attitude overall compared to the complex and regionally diverse regulatory landscape in the U.S[87].

A similar situation can be seen in the US, because here, too, the fragmented system both at a federal and state level is creating an additional layer of complication. As California and New York consider full disclosure requirements, other states may not have as strict laws. This inconsistency leads to a lack of uniformity in how litigation funding is treated and thus can lead to inconsistent results depending on the jurisdiction[88]. The UK on the other hand is fortunate in having a single more cohesive regulatory regime controlled by ALF, meaning that there is some pretty significant consistency around litigation funding throughout the whole country[89].

A big contrast between UK and US legal regimes on litigation funding is that in the UK, there is a strong reliance on regulation to manage funder pricing and protect the interests of claimants, whereas in the US, market forces determine many aspects of how funders operate. As funders in the US behave like literal investors by managing risk and aggressively pricing to compete leading to things which can help compress costs. On the other hand, this leaves room for abuse if plaintiffs can be charged hidden fees or otherwise be subjected to unfair terms. While the stricter regulatory framework of the UK is less market-driven and undoubtedly reduces vexatious claims, it provides greater protections for claimants and ensures that justice is delivered, in particular to groups of claimants under collective redress. That tension highlights an inherent trade-off for every legal system between the need for wide and easy access to justice and the risk, on the other hand, that this very generosity of access will be abused.

a. Implications of the PACCAR Ruling for US Litigation Funding

This decision in PACCAR Inc. v Road Haulage Association Ltd is grounded within the legal framework of the United Kingdom, but has extensive and relevant implications for the global litigation funding market; most notably at least from a United States perspective. While the ruling primarily addresses the classification

87. Viren Mascarenhas, Hasan Tahsin Azizagaoglu, *Third-Party Funding: The implications for international disputes; and what the UK can learn from the PACCAR decision*, in *The Quarterly Magazine of The Chartered Institute of Arbitrators*, 2, 2024.

88. Suneal Bedi, William Marra, *Litigation Finance in the Market Square: A Non-Market Strategy Approach*, forthcoming in *Southern California Law Review*, September 09, 2024.

89. Wala Al-Daraji, *Third-party Funding Disclosure in England and Wales and in Australia*, in *Dispute Resolution Journal*, 75(3), 2021, 31-81.

of litigation funding agreements (LFAs) as damages-based agreements (DBAs) under UK laws, but its consequences could be global and heavily impact the burgeoning market for class action financing as well.

Namely, one factor that would be significantly affected should the judgement enter into force is global litigation funders who operate across a number of jurisdictions and in particular UK and US The UK is starting to closely look at LFAs and that may mean funders need to change their take. The PACCAR ruling may mean a number of these funders have to, especially in the UK where LFAs are likely be ruled under heavier regulatory scrutiny. The conservative shift will likely ripple through international funders' risk assessments and contractual arrangements, even in the US as litigation finance markets there have relatively few restrictions that have evolved over time. The advent of such large-scale collective actions in markets may cause funders to be more sceptical of their activities for fear of attracting unwanted attention or facing greater regulatory responsibilities[90].

A key but understated consequence of the PACCAR ruling is that it will establish a pattern for judicial review going forward. While the United States operates on a case-by-case basis and is not bound to adopt the same polices as the UK, it is possible that US courts and legislatures could find inspiration in these regulatory developments to question their own assumptions about litigation funding[91]. The PACCAR decision is an example of the ethical and regulatory risks posed by third-party involvement in litigation, and US agencies could follow the UK's lead in proposing policies to help detect and deter unfair or non-transparent changes to a litigation funder arrangement. These global developments may increase the visibility of proposals such as those in New York to require the disclosure of third-party funding, or better-defined rules on investment arbitration more broadly[92]. These provisions are in accord with an increasing emphasis on transparency, similar to the demands and practice in recent US cases like *Gbarabe v. Chevron Corp.*[93], which bars disclosure of funding agreements only under limited circumstances. Cases like this highlight a need for ethical standards in the litigation funding space, something that New York and other members of the US legal community are beginning to think about more often[94].

90. Viren Mascarenhas, Hasan Tahsin Azizagaoglu, *Third-Party Funding: The implications for international disputes; and what the UK can learn from the PACCAR decision*, in *The Quarterly Magazine of The Chartered Institute of Arbitrators*, 2, 2024.

91. Rachael Mulheron, *Third-party Funding, Class Actions, and the Question of Regulation: A Topical Analysis*, in *Mass Claims*, 5, 2022.

92. Sebastian Peyer, *Competition litigation funding*, in *Research Handbook on Private Enforcement of Competition Law in the EU*, Edward Elgar Publishing, 2023, 357-384.

93. Gbarabe v. Chevron Corp., Case No. 14-cv-00173-SI (N.D. Cal. Aug. 5, 2016).

94. Luke Streatfeild, Luke Grimes, Patrick Kenny, *Unpacking PACCAR: the fallout from the*

While the US system for class actions is more developed and litigation funding is widely accepted, any increase in regulatory scrutiny in other jurisdictions could influence US practices. US plaintiffs' attorneys and litigation funders may now face greater calls for transparency and fairness in funding agreements, particularly with respect to their influence on litigation strategy. However, the ruling is not an immediate legal equivalent in the US So far, these regulations have taken a piecemeal approach in the US, with individual states like New York and California passing their own laws around litigation funding outside of federal regulation. The US has not gone as far as the courts in Gbarabe for instance, which compelled limited disclosures when analyzing that specific type of ATS, but PACCAR shows that similar scrutiny is beginning to be applied on this side of the Atlantic. This UK decision to ban contingency fees may ironically end up benefitting the US as it will allow or continue the US to have more market-driven litigation funding industry[95].

While the PACCAR decision is limited to a different jurisdiction, its sweep ties it directly to broader questions about US litigation funding. The growing pressure and regulatory scrutiny in the UK may also raise similar conversations in type in America, and as concerns how these funding deals are made untenable. Aware of the shifting international landscape, funders in global litigation are likely to pressure the US to adapt its practices to maturing international standards even while the regulatory jungle remains fractured and more laissez-faire than in other parts of the world. The divergence between these two legal systems provides valuable insight into the evolving nature of litigation funding, and whether the US will continue to prioritize market forces over regulatory oversight remains an open question.

VII. Navigating the Complexities of Third-Party Litigation Financing: Disclosure, Compliance, and Impact

a. Evolving Legal Landscape of Disclosure Requirements for Third-Party Litigation Financing in US

With an increase in third-party litigation financing (TPF) over the last decade, comes a newfound emphasis on the transparency to financial agreements within

judgment, and the consequences for litigation funding in the UK, in *Competition Law International*, 20(1), 2024.

95. Susanne Augenhofer, Adriani Dori, *The proposed regulation of Third-party Litigation Funding-much ado about nothing?*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 20(5), 2023, 198-209.

the United States legal system. These days' judicial actions highlight the split on matters of TPF disclosure in our courts. In *Kaplan v. S.A.C. Capital Advisors*[96], Magistrate Judge Kevin N. Fox of the US District Court for the Southern District of New York denied plaintiffs motion to compel production of TPF Agreements. The defendants contended that the funding would adversely affect plaintiffs' counsel's ability to adequately represent them, and create conflicts of interest. However, Judge Fox found no proof of that fear because the existence of a TPF agreement is not in itself an adequate basis for challenging counsel's ability to prosecute the Action. The importance of having a concrete basis for disclosure was emphasized in the court opinion.

However, *Gbarabe v. Chevron Corp.*[97] reflects a much stricter position. Judge Susan Illston of the Northern District of California ordered an agreement for the plaintiff's third-party financing to be produced in connection with a class action suit arising from an oil rig explosion. This was the reason that the district court felt TPF agreement could have a bearing on whether adequate class representation was provided, a point which Chevron contested. In light of this opinion, the court ruled that Chevron needed to obtain a copy of the financing agreement so as to learn how these issues might have influenced whether representation was adequate or not. The case reflects a trend toward heightened transparency in class actions. The current year has seen political and legal debate both sides of the aisle concerning whether representation under Rule 23, Federal Rules of Civil Procedure should be being good enough.

Legislative efforts also reflect a trend towards enhanced disclosure. Ongoing is the conflict over third-party litigation funding (TPF) disclosure in the United States, a struggle that boils down to tension between transparency and efficiency of litigation process. In 2016 a proposal to require full disclosure of funders in by the Northern District of California was ultimately shelved because there was concern over increased litigation costs and potential abuse in discovery by parties to an action.

b. Local Rules and Standing Orders: The Need for Transparency and Compliance

In insurance litigation, an issue of expanding importance is whether to disclose financial interests: that includes where the local law on when a court should consider disqualification applies. The Delaware Supreme Court in *Shareholder Representative Services LLC v. Shire US Holdings, Inc.*[98], moved quickly to bring

96. Kaplan v. S.A.C. Capital Advisors, LP, 2015 WL 1223944 (S.D.N.Y. Mar. 18, 2015).

97. Gbarabe v. Chevron Corp., 2016 WL 4059693 (N.D. Cal. July 28, 2016).

98. Shareholder Representative Services LLC v. Shire US Holdings, Inc. *et al.*, C.A. No. 2017-0863-KSJM.

in front of all parties: Chief Judge Colm Connolly Closer Somebody who gets significant third-party funding Parties in front of Chief Judge Connolly's court must provide various details about third-party funders who hold an interest in any cases before the judge. One such requirement is when the judge in charge of a case must identify such a funder and disclose information about its interests. This requirement serves as a general principle for transparency, which will benefit the court. An undesignated funding source might potentially cause bias or other conflicts of interest in view of money gains unless funds are identified and their sources declared[99].

Importantly, a standing order by Judge Connolly for these disclosures was not reversed in In re: Nimitz Technologies LLC[100] and therefore continues to be legally requirement. The court identified four important concerns supporting such disclosures including, to ensure compliance with professional conduct rules and to confirm that the persons or entities actually involved are appropriately represented, and to guard against fraudulent conveyances. This ruling shows that the legal process is beginning to acknowledge how litigation funding can affect the integrity of our justice system. In *Backertop Licensing LLC v. Canary Connect Inc.*[101], when a plaintiff tried to voluntarily dismiss its case presumably to evade mandatory disclosure, the court charged the attorneys with contempt. This case serves as a powerful warning for litigants who may seek to circumvent these transparency obligations.

c. Damages and Valuation of Patents: Relevance of Litigation Funding

When deciding on awards, the valuation of patents can be crucial, especially in the area of patent litigation. The continued development of litigation finance has also made its mark on valuing patents. A kind of valuation is valuable in damages assessments or reasonable royalties. For instance, in *Electrolysis Prevention Solutions LLC v. Daimler Truck North America LLC*[102], the trial court permitted discovery of litigation financing terms and agreements stating that such discovery

99. Marla Decker, *Why a Delaware Supreme Court decision affirming shifting a contingency fee to the losing party could have applications to recovering the costs of litigation funding*, in *Lake Whillans*. Available at: *lakewhillans.com/articles/why-a-delaware-supreme-court-decision-affirming-shifting-a-contingency-fee-to-the-losing-party-could-have-applications-to-recovering-the-costs-of-litigation-funding/* (accessed: September 20, 2024).

100. In Re Nimitz Technologies LLC, No. 23-103 (Fed. Cir. 2022).

101. Backertop Licensing LLC v. Canary Connect, Inc., No. 2023-2367 (Fed. Cir. Jul. 16, 2024).

102. Electrolysis Prevention Sols. v. Daimler Trucks N. Am., 3:21-cv-00171-RJC-DCK (W.D.N.C. May. 4, 2022).

implicated potential relevance of possible damages values assigned to patents by backers. This is quite ironic. The funder was probably in the best position to evaluate its own interest. This calculation therefore would have an impact on a hypothetical reasonable royalty in the present instance; even though all parties are ready and willing to take much lower valuations.

Yet, consistent with this newfound acceptance of the practice by parties, courts are often still sceptical of allowing broad discovery into these types of financing agreements. In *Cirba Inc. v. VMWare Inc.*[103], what is even more telling of how infrequent litigation funding comes up when assessing damages is the fact that when Judge Leonard Stark sat as a special master, he underscored how there is no clear consensus amongst courts on whether or not litigation funding has any relevancy in calculating an award of damages for past economic harm. This decision, too, demonstrated a more calibrated approach to discovery limited without finally comprehensive; with an emphasis on specificity[104].

d. Witness Bias: Addressing Potential Conflicts in Testimonies

Another major worry is the litigation-funding-brought witness bias problem which has emerged in recent years. The result, says this experienced litigator, is that judges are examining closely whether the payment of witnesses or interested parties to a case will distort justice itself. Some courts have perhaps moved away from the principle of free throw when they start pointing to media reports as evidence; such evidence, however, is referred to in Parker, as outdated and unreliable secondary sources. In *V5 Technologies LLC v. Switch Ltd.*[105], for example, although non-frivolous allegations of bias were made that court conducted discovery whereas others didn't.

The court held that discovery into third-party non-party indemnification agreements is permissible in *In re: Complaint of Foss Maritime Co.*[106]. Where a third-party financer may directly benefit from the litigation outcome, the court held there was a reasonable apprehension of bias. This case provides a good example of judicial restraint in the area, where the mere existence of third-party financing does not justify discovery.

103. CiRBA Inc. v. VMware, Inc., C. A. 19-742-GBW (D. Del. Apr. 25, 2023).

104. Emily Pyclik, *An overview of how third-party litigation funders are being addressed by courts and policymakers*, in *Baker Botts*, June 3, 2024. Available at: *www.bakerbotts.com/thought-leadership/publications/2024/june/an-overview-of-how-third-party-litigation-funders-are-being-addressed-by-courts-and-policymakers* (accessed: October 2, 2024).

105. V5 Technologies v. Switch, Ltd., 332 F.R.D. 356, 104 Fed. R. Serv. 3d 842 (D. Nev. 2019).

106. Kentucky v. Altany (In re Complaint of Foss Mar. Co.), 29 F. Su 3d 955 (W.D. Ky. 2014).

VIII. Legal and Regulatory Framework of Litigation Financing Arrangements in the US

Litigation financing agreements, have emerged as a gateway in the US legal system for plaintiffs to file suits that may not be affordable otherwise. In those schemes, third-party funders are able to exploit injured plaintiffs by providing funding in exchange for a piece of the settlement or judgment[107]. While it can reduce the financial pressure involved in litigation, TPF presents a number of legal and regulatory concerns, including enforceability, discoverability, and ethical considerations[108].

Litigation financing arrangements are cantered on the underlying non-recourse principle, i.e., repayment is sought only from funds recovered in the action. This aspect led to extensive legal debate, with the central issue surrounding why these relationships should not be deemed loans governed by state usury laws[109]. In *Fast Trak Inv. Co., LLC v. Sax*[110], the court grappled with this question when it considered whether to classify litigation funding agreements as loans subject to usury regulation. While the court stopped short of making a formal decision on the interpretation, it criticised planning to treat TPF agreements in a similar way as loan arrangements contrary to its essence and also warned against making any distinction between loan agreements and TPF agreements especially given their very different structure.

The enforceability of litigation financing agreements is another unresolved legal question. Since some jurisdictions view these agreements as a violation of public policy such as champerty and maintenance, others have claimed they can be championed by independent third parties. Nonetheless, a number of states have relaxed or abolished these doctrines for the purposes of allowing TPF to exist as an acceptable form of credit. For instance, in *Charge Injection Techs., Inc. v. E.I. Dupont de Nemours & Co.*[111], the Delaware Superior Court upheld the validity of a third-party funding agreement, rejecting claims that it constituted illegal champerty.

The issue of discoverability is another rather important aspect when it comes to litigation financing arrangements. Courts are split on whether one must

107. Maya Steinitz, Abigail Field, *A Model Litigation Finance Contract*, in *Iowa Law Review* 99, 2014, 711. Available at Social Science Research Network: *ssrn.com/abstract=2320030*.

108. Malcolm E. Wheeler, Theresa Wardon Benz, *Litigation Financing: Balancing Access with Fairness*, in *Journal of Tort Law*, 13(2), 2020, 281-301.

109. Olivier Marquais, Alain Grec, *Do's and don'ts of regulating Third-Party litigation funding: Singapore vs. France*, in *Asian International Arbitration Journal*, 16(1) 2020.

110. Fast Trak Inv. Co., LLC v. Sax, 962 F.3d 455 (9th Cir. 2020).

111. Charge Injection Techs., Inc. v. E.I. Dupont de Nemours & Co., 2021 WL 2776954 (Del. Super. Ct. July 2, 2021).

disclose a funding agreement to an opposing party. Some courts have held that TPF agreements are not relevant to the underlying case and need not be disclosed; other courts, however, have required them to be disclosed where their existence could affect the fairness of the proceedings.

In the cases of *In re Valsartan case*[112], and *Miller UK Ltd. v. Caterpillar, Inc.*[113], it has been determined that litigation funding agreements are not discoverable because the information contained in those documents have no bearing on case merits or defences. Those decisions suggest military officials are leery of disclosing funding specifics in court cases. But no federal regulation means a piecemeal effort, and the Litigation Funding Transparency Act of 2021 even requires some form of disclosure in class actions and MDLs if passed but also raises considerable attorney-client privilege alarms.

Other than lawful and compliance matters, moral questions lie at the heart of funding arrangements. Cases with third-party funding raise potential conflicts of interest under the rules of professional conduct for involved attorneys. For example, Rule 1.8(e) of the New York Rules of Professional Conduct prohibits attorneys from engaging in conduct that infringes or might reasonably be seen by the public to infringe on an attorney's professional judgment and client loyalty due to financial assistance provided by the attorney. Similarly, Rule 1.7 requires attorneys to avoid conflicts that could limit their ability to represent a client free of potential interference by someone who has a financial interest in the outcome, particularly when a third-party funder has a financial stake in the outcome[114].

The popularity of litigation financing arrangements is still a relatively new facet of the US legal landscape and poses some novel, important ethical, regulatory, and other considerations as well. It seems likely that judges and legislators will be under increasing pressure to create more enforceable guidelines or frameworks in order to protect the integrity of the system while also allowing some TPF opportunities.

IX. The Concerns of Third-Party Funding in Commercial Arbitration in the USA

Commercial arbitration has a tremendous tradition of third party funding (TPF) and in the US, where litigation costs and particularly arbitration costs

112. In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation, 405 F. Su 3d 612 (D.N.J. 2019).

113. Miller UK Ltd. v. Caterpillar, Inc., 17 F. Su 3d 711 (N.D. Ill. 2014).

114. Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options for Plaintiffs*, in *Mississippi College Law Review*, 39, 2021, 102.

are high TPF has become more common than ever. Although TPF has many benefits, such as improving access to justice and allowing claims which would not be economically viable otherwise, a couple of key issues are raised by it around the integrity of arbitration that deserve further exploration[115].

Conflicts of interest are one of the main concerns with respect to TPF in commercial arbitration[116]. This compromises the consensual foundation of party autonomy due to interference by third parties such as funders who are also so-called instigates of arbitration proceedings has a potential impact on the way in which proceedings are conducted[117]. Especially if the funders are interested in the arbitration outcome[118].

In *ST Oil v. Romania*[119], something similar happened, where one arbitrator was allegedly connected to a third party funder. These relationships can create a perception that the arbitration process will be not be fair because of a lack of objectivity in the dispute resolution forum. The American Arbitration Association (AAA) has acknowledged these concerns and the AAA Guidelines suggest that arbitrators limit disclosures to the source of any funding of the parties or participants in a proceeding.

TPF is also burdened with another important issue regarding confidentiality. It represents a level of disclosure that, in many cases of funders funding their own clients as is typical, runs counter to the confidential nature of arbitration. The Interocean Oil Development Company[120] was a case that illustrated this concern, as the role of a funder had been used to create issues as to whether confidentiality of the arbitral process would be protected. Full disclosure between funders and funded parties as a matter of *contract uberrimae fidei*, is imperative to ensure that the arbitration system retains its credibility[121]. However, this requirement

115. Sahana Ramesh, *Third-party funding in international arbitration: Ownership of the claim, consequences for costs orders, and regulation*, in *Arbitration International*, 36(2), 2020, 275-295.

116. Kirstin Dodge *et al.*, *Third-Party Funding and Reform of the ICSID Arbitration Rules*, in *Romanian Arbitration Journal*, 2021, 15.

117. Josef Wolfgang Paulson, *Helpful Industry or Officious Intermeddles: Assessing US Champerty Law through the Lens of Third-Party Funding in International Dispute Resolution*, in *George Washington Law Review*, 92, 2024, 725.

118. Julien Laurent Chaisse, Chan Eken, *The Monetization of Investment Claims Promises and Pitfalls of Third-Party Funding in Investor-State Arbitration*, in *Delaware Journal of Corporate Law*, 44, 2020, 113.

119. ST Oil v. Romania (ICSID Case No ARB/07/13).

120. The Interocean Oil Development Company v. Federal Republic of Nigeria (ICSID Case No. ARB/13/20).

121. Adedotun Onibokun, Bankole Sodipo, *An evaluation of third-party funding in commercial arbitration*, in *Journal of Sustainable Development Law and Policy*, 15(1), 2024, 263-285.

can lead to complications, particularly if sensitive information is inadvertently disclosed to opposing parties.

The importance of transparency in TPF, especially concerning arbitration, is furthered underscored by case law. Like the necessity of disclosure in class action litigation was elaborated upon in the Supreme Court back in *Morrison v. National Australia Bank Ltd. (2008)*[122]. Moreover, *Baker Hughes v Hennigan (2018)*[123] demonstrates the importance of disclosure for unravelling potential interference with an ongoing arbitral process and underlying this idea is that transparency extinguishes conflicts of interest. These cases demonstrate that even if third-party funding may increase access to justice in commercial arbitration, it also involves substantial challenges concerning confidentiality and the protection of ethical standards[124]. This requires an integrative process in which arbitrators, legislators, and the arbitration bar collaborate to facilitate a permissible TPF scheme that strikes the right balance between TPF's well-known advantages and transparency in dispute resolution.

X. Future Considerations for Regulating Litigation Funding: Balancing Plaintiff Protection and Funder Incentives

The regulatory landscape of litigation funding remains highly complex, characterized by inconsistent state-level regulations and a lack of clear federal oversight. Recent developments underscore the necessity for a balanced approach that protects plaintiffs while providing incentives for funders. A key consideration is the protection of attorney-client communications in cases involving third-party funding. A ruling from a Delaware court that extends work product doctrine protections to funder communications emphasizes the importance of maintaining confidentiality in legal strategies. However, the absence of a uniform federal standard creates uncertainty across jurisdictions. Establishing a consistent framework to protect privileged communications would bring clarity and stability to litigation financing cases, ensuring that plaintiffs are not disadvantaged by revealing sensitive information to funders[125].

122. Morrison v. National Australia Bank Ltd., 561 US 247 (2010).

123. Baker Hughes Inc. v. United States, 313 F. Su 3d 804 (S.D. Tex. 2018).

124. Ina C. Popova, Katherine R. Seifert, *Gatekeeping, Lawmaking, and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration*, in *Private Actors in International Investment Law*, 2021, 133-155.

125. Chance King, *An examination of commercial litigation funding in the United States*, in *Business Law Digest*, 2023. Available at: *lawforbusiness.usc.edu/an-examination-of-commercial-litigation-funding-in-the-united-states/* (accessed: September 20, 2024).

Moreover, the issue of fair compensation for funders while safeguarding plaintiffs from exploitative practices is critical. Courts have begun to address concerns over unreasonably high returns on investment, emphasizing the need for statutory guidelines that cap returns while still allowing funders to earn fair compensation for their risks. Legislative efforts, such as California's Predatory Lawsuit Lending Prevention Act, demonstrate attempts to increase transparency but highlight the need for broader reforms that encompass commercial litigation funders. The proposed Litigation Funding Transparency Act of 2021 advocates for greater disclosure in civil cases, yet it also raises questions about potential infringements on attorney-client privilege. A regulatory framework should ensure that plaintiffs retain control over their cases and are not unduly influenced by funders. Furthermore, it is essential to establish minimum compensation percentages for plaintiffs in settlement distributions, thereby fostering equity in the litigation process. As the landscape of litigation funding evolves, particularly in commercial arbitration, comprehensive regulatory mechanisms are vital to promoting fairness and transparency while ensuring that legal counsel can act independently and maintain the integrity of trial proceedings.

XI. Conclusion

The growth of litigation funding has raised questions: about what the role should be TPLF in the United States, where access to justice requires external financial support only remodelled with some degree of oversight. TPLF has become a critical financial tool for plaintiffs to bring suit on what would otherwise be prohibitively expensive grounds, and hence diminishes the ability of individuals to seek recourse in court. The non-recourse characteristic of these arrangements means that plaintiffs can proceed with litigation without the risk of having to owe money in instances that they do not win their case, a feature that is particularly attractive in high-stakes cases.

The increased role of foreign currency in third-party litigation funding (TPLF) provides important questions about its effects on US legal procedures and national security. That danger not only calls into question the integrity of individual cases but has systemic implications for how courts can be used in fair and transparent ways. Legislative efforts, such as Montana's Senate Bill 269 and Indiana's House Bill 1160, seek to mitigate these risks by promoting transparency and accountability in financing litigation, ensuring all parties are aware of who is funding the litigation. Further, TPLF is evolving while the balance between access to justice and undue influence must be preserved. Public perception and the continued shift in regulation will indicate whether these legislative measures have been effective, or if they will be an adequate means for the US to preserve a prototypical and impartial legal system amid global financial turbulence.

 ISBN 9788835177470

5. The Rise of Third-Party Litigation Funding in the Asia-Pacific

I. The Evolution and Divergence of Third-Party Litigation Funding Across Asia

TPFL, is a relatively recent development in the legal landscapes of many Asian jurisdictions that offers potential plaintiffs access to litigation funds. This is a form of litigation finance, in which someone other than the litigant finances that individual or entity's litigation expenses in exchange for a portion the judgment or settlement[1]. But more importantly, the interpretation about its relativity for Asian markets is systematically wider in definition and natures of interventions[2]. Each Asian country is at a different period of growth and this article reveals the routes taken including arbitration to traditional litigation that each legal system is adopting while making way for TPLF.

The greater part of Asia is widely divided over this flexibility in adapting and incorporating TPLF into their legal systems. That is primarily because a number of Asian countries have attempted different strategies regarding TPLF, from maintaining an important equipoise to operate a fine line between opportunism and legal impossibility[3]. Hong Kong was the first jurisdiction to introduce a legislative framework enabling third-party funding in arbitration and Singapore similarly enacted legislation which took effect in early 2017 consistent with efforts by both jurisdictions to stay at the forefront as leading international

1. David S. Abrams, Daniel L. Chen, *A market for justice: a first empirical look at third-party litigation funding*, in *University of Pennsylvania Journal of Business Law*, 15, 2012, 1075.

2. Katie Chung, *Third-party funding in the Asia-Pacific*, in *Norton Rose Fulbright*, December 2021. Available at: *www.nortonrosefulbright.com/en/knowledge/publications/0ac96d60/third-party-funding-in-the-asia-pacific* (accessed: September 28, 2024).

3. Tran Hoang Tu Linh, Bui Trung Hieu, *Third-Party Funding in Commercial Arbitration in ASEAN: Dealing with Conflicts of Interest*, in *Contemporary Asia arbitration Journal*. 16, 2023, 97.

arbitration hubs[4]. The reform in each case was affected by legislation, in the form of the Arbitration Ordinance in Hong Kong and the Civil Law Act in Singapore, specifically enabling third-party funding of international arbitration for the first time and still leaving it prohibited in litigation due to common law doctrines like maintenance and champerty that both jurisdictions continue to honour[5]. These qualified doctrines that limit third party involvement in the funding of litigation remain on the books and so far have only been circumvented to a limited extent, such as for insolvency cases or where access to justice is a concern.

The variation in response pattern of different Asian countries to TPLF represents the nature of complexity imbibed in origin and evolution of third-party funding in legal disputes. While Hong Kong and Singapore have been pioneers with their TPLF armamentarium supporting international sale jurisdictions including China and India are on the brink where final push or hold may determine actualization of TPLF[6]. The future of third-party litigation funding in Asia is intriguing as the law is being allowed to grow simultaneously with economic growth and globalization Moreover, in a broader comparative perspective on TPLF in Asia, we see that some of the same key regional uses were accompanied by very different mixes of cautionary tales, innovation/discretion and increasing necessity[7]. The activity of arbitration was an arena for a team to use in order to try preparing an operation within certain legal bounds. By comparison, the growth of TPLF in litigation remains to be seen as countries grapple with the legal and ethical consequences of expanding third-party financing beyond less traditional areas of dispute resolution[8].

Third-party litigation funding has taken a firmer root in Asia among other developments in the region's legal landscape as around the world. The fact that Hong Kong and Singapore are among the most arbitration-friendly jurisdictions in the world makes them an integral part of the Asian Arbitration practice, and India with its relatively nascent but promising TPLF holds significant promise for the future of a region.

4. Tsai-Fang Chen, *Development in Responses of Arbitral Tribunals to Third-Party Funding in International Investment Arbitration*, in *Contemporary Asia Arbitration Journal*, 15, 2022, 1.

5. Can Eken, *A detailed comparison of third-party funding regulations in Hong Kong and Singapore*, in *Asia Pacific Law Review*, 29(1), 2021, 25-46.

6. Kaira Pinheiro, Dishay Chitalia, *Third-Party Funding in International Arbitration: Devising a Legal Framework for India*, in *National University of Juridical Sciences Law Review*, 14, 2021, 254.

7. Khong Cheng-Yee, *Monetizing Legal Assets: Social and Economic Benefits of Third-Party Dispute Finance in Asia*, in *Asian Journal of Law and Society*, 10(2), 2023, 204-218.

8. Nachiketa Mittal, *BRICS-Evolving Mechanism for Third-party Funded Arbitration. Arbit Praxi*, in *Asia Law House and Damodaram Sanjivayya National Law University*, 2018, 19-38.

II. Global Major Players in Litigation Funding in the Asia-Pacific Region

Litigation funding or legal finance is a growing and essential component of the dispute resolution system in the Asia-Pacific region and it would be a mistake to see this facet of litigation funding as secondary or superfluous in the Asia-Pacific region[9]. The marketplace changes year over year as more funders establish operational criteria and begin to expand their funding fields. Burford Capital, Omni Bridgeway or Harbour Litigation Funding are the most high-profile global litigation funders which have all been working hard to finance premium litigation and class actions within the Asian-Pacific legal space in particular arbitration[10].

a. Burford Capital: A Pioneering Global Presence

One of the biggest names in litigation funding, Burford Capital, has cemented its move into the Asia-Pacific region with several hires over the past year. In 2015 the firm opened its first Asia-Oceania office in Hong Kong, with subsequent launches in Singapore and Sydney[11]. By 2023, Burford had deployed $205 million investing in claims throughout Asia, Australia and the Middle East with an emphasis on complex commercial litigation and international arbitration[12]. They usually take on high value claims, and works towards the enforcement of arbitration awards and asset recovery. Burford's entry into these markets provides companies, law firms and investors with access to the capital necessary to finance legal claims on a non-recourse basis, without the financial exposure associated with long, uncertain lawsuits. This trend underscores Burford's crucial place in the changing global litigation finance market and our strategic activities within Asia-Pacific[13].

b. Omni Bridgeway: A Dominant Force in Australia and Beyond

It is one of the key global players in litigation funding with strong foothold across Asia including Australia, Singapore and Hong Kong. Mainstream strategist

9. Michael K. Velchik, Jeffrey Y. Zhang, *Islands of Litigation Finance*, in *Stanford Journal of Law, Business & Finance*, 24(1), 2019.

10. Patricia Schoeffmann, *Third-Party Funding and ISDS*, in *Austrian Yearbook on International Arbitration 2022*, MANZ'sche Verlags-und Universitätsbuchhandlung GmbH, 2022, 353-384.

11. Michael Redman, Jörn Eschment, Hannah Howlett, *Introduction to legal finance, in Burford Capital*. Available at: *www.burfordcapital.com/introduction-to-legal-finance/* (accessed: September 28, 2024).

12. *Litigation funding in the Middle East*, in *Burford Capital*. Available at: *www.burfordcapital.com/what-we-do/where-we-are/middle-east/* (accessed: September 28, 2024).

13. Victoria Sahani, *Reshaping third-party funding*, in *Tulane Law Review*, 91, 2016, 405.

claims netted were broadened to include class actions both before the firms founding and subsequently by it. We also fund portfolios of cases and corporate disputes, provide finance to law firms, manage legal exposures & make equity investments in corporates[14]. Omni Bridgeway funding is considered crucial to the eventual resolution of commercial disputes, particularly in regions such as Singapore and Hong Kong where Arbitration is preferred. This method not only brings the legal system closer to people but also facilitates resolving disputes quickly and cost effectively, which is ten times better than tying up for years in the court[15]. It is crucial for the functioning of arbitration friendly environments in Singapore and Hong Kong, where commercial disputes are resolved subtly and far too cheaply to be referred to the courts.

c. Harbour Litigation Funding: Pioneering Private Litigation Finance

With that $1 billion-plus figure, Harbour Litigation Funding is the biggest privately-owned funder anywhere in the world. Harbour is involved in a number of legal cases, including high profile class actions and international arbitrations, with offices in Hong Kong, Singapore and Australia. Through the provision of necessary capital, the company is able to empower businesses and individuals to assert their legal rights that they otherwise would not have been able[16]. This is especially true in the Asia-Pacific legal market where Harbour has been a star in some of the most essential jurisdictions to this part of the world such as Hong Kong and Singapore, which are two main arbitration existing hubs globally. Since its beginning, Harbour has established itself as the premier funder of litigation funding and a catalyst for the rapid expansion of arbitration in these geographic areas[17]. Harbour is well positioned as the global demand for arbitration funding grows and increasing importance of the role it plays in the Asia-Pacific legal ecosystem.

14. Adam Silverman, Camilla Godman, *The current approach to recovering third-party funding costs in arbitration*, in *Omni Bridgeway*, January 12, 2022. Available at: *omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2022/01/12/the-current-approach-to-recovering-third-party-funding-costs-in-arbitration* (accessed: September 28, 2024).

15. Camilla Godman, *How To Understand third-party funding*, in *The Quarterly Magazine of The Chartered Institute of Arbitrators*, 2, 2022.

16. *The largest privately-owned litigation funder*, in *Harbour Litigation Funding*, 2024. Available at: *www.harbourlitigationfunding.com/* (accessed: September 28, 2024).

17. Law Reform Commission, *Consultation Paper Third-Party Litigation Funding*, 2023. Available at: *www.lawreform.ie/_fileupload/consultation%20papers/lrc-cp-69-2023-third-party-funding-full-text.pdf* (accessed: September 28 2024).

d. Therium: Focused on Class Actions in Australia

Therium is a large litigation funder with significant interests in the Asia-Pacific Region, particularly Australia. Therium is a specialist provider of litigation finance funding for high-value commercial and class action cases, securing access to justice by sharing risk with claimants who cannot afford to pursue meritorious claims against well-resourced defendants[18]. Their extensive presence in large-scale class actions has transformed the litigation landscape of Australia, creating a more democratic channel for justice.

e. Alpha Group: Financial Solutions for Corporations

Founded in 2018 and less well-known globally than Burford or Omni Bridgeway, Alpha Group provides financial services, including litigation funding, to corporations and institutions throughout the Asia-Pacific region[19]. Alpha Group conserves this capital for growth of a company by using legal finance to cover the costs associated with commercial litigation or arbitration.

III. Emerging Trends and Challenges in Asia-Pacific's Litigation Funding Landscape

The Asia-Pacific region has a diverse landscape in terms of how litigation funding is employed currently. Some jurisdictions like Hong Kong and Singapore have allowed law firms to adopt third-party funding in international arbitration, while at the same time strictly prohibited TPLF in litigation connected with these jurisdictions. The advent of key international litigation financiers has been a gamechanger in these markets, positively shaping the legislative landscape, and bolstering the appeal of these venues as global arbitration centres[20].

However, many other countries in the region, remain at the nascent stages of

18. Neil Purslow, *Litigation funders unite to form global advocacy group*, in *Therium*, 2023. Available at: *www.therium.com/blog/news/litigation-funders-unite-to-form-global-advocacy-group/* (accessed: September 28, 2024).

19. Matt Webb, *Exposing foreign influence in third-party litigation funding, Exposing Foreign Influence in Third-party Litigation Funding*, US Chamber of Commerce, 2024. Available at: *www.uschamber.com/improving-government/pulling-the-curtain-back-on-foreign-influence-in-third-party-litigation-funding* (accessed: September 28, 2024).

20. Gitanjali Bajaj, Ernest Yang, Queenie Chan, *Third-party funding in the Asia-Pacific region*, in *Global Arbitration Review*, 2021. Available at: *globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/third-party-funding-in-the-asia-pacific-region/download* (accessed: September 28, 2024).

developing their litigation funding markets. For example, in China there is no formal ban on third-party funding, but the market remains undeveloped with only domestic players like Hold Capital (Hou Zhu) and DSLC (Ding Song), which operate cautiously and in a legal grey zone[21]. The presence of global funders is minimal with China's economy growing further and more intricate commercial disputes arising here in the future, a buoyant TPLF market may still be on the cards[22].

The litigation funding market is in its infancy on India, but the is growing steadily. The growth of TPLF in India is likely to be the speeding with the revolutionary reforms in legal system and the advent of new funders as the economy opens up as well as the increase in the number of cross-border commercial disputes, all collectively paving way for accelerated development of TPLF. However, hurdles related to judicial delays and restrictions on alternative fee arrangements (AFAs) continue to pose challenges for funders working in India[23].

Simultaneously, litigation funding is beginning to attract attention in emerging markets like South Korea and Japan, where TPLF remains relatively uncommon. With ongoing expansion of these economies into global trade and investment networks, the demand for new legal financing options is forecasted to grow[24]. These markets are now the target of investment and big global funders like Burford, Omni Bridgeway and Harbour unequivocally recognise that they have a genuine interest in facilitating claims out of foreign jurisdictions which would otherwise be too costly.

IV. The Role of Global Funders in Shaping the Future of TPLF in Asia-Pacific

Beyond merely funding, global litigation funders have involvement in Asia-Pacific The importance of these funders in shaping the regulatory and legal

21. Mariana Zhong, *Third-party funding blooms in Asia*, in *Law.asia*, 2024. Available at: *law.asia/third-party-funding-blooms/* (accessed: September 28, 2024).

22. Ernest Yang *et al.*, *Reshaping the landscape for third-party funding in China – new CIETAC arbitration rules on TPF came into effect*, in *DLA Piper*, January 1, 2024. Available at: *www.dlapiper.com/es-pr/insights/publications/2023/12/reshaping-the-landscape-for-third-party-funding-in-china-new-cietac-arbitration-rules-on-tpf#:~:text=In%20reviewing%20the%20challenge%20under,right%20to%20accept%20such%20funding* (accessed: September 28, 2024).

23. Prateek Dhir, Mohit Kandpal, *Third-party funding of Arbitrations in India – risks & liabilities*, in *Mondaq*, 2024. Available at: *www.mondaq.com/india/arbitration-dispute-resolution/1408892/third-party-funding-of-arbitrations-in-india-risks-liabilities#:~:text=Considering%20a%20lack%20of%20legislation,Financing%20agreements%20are%20not%20prohibited* (accessed: September 28, 2024).

24. *Inside arbitration: Beyond the hourly rate – what are the options?*, in *Herbert Smith Freehills*, 15 Mar 2023. Available at: *www.herbertsmithfreehills.com/insights/2023-03/inside-arbitration-beyond-the-hourly-rate-%E2%80%93-what-are-the-options* (accessed: 28 September 2024).

landscape of litigation finance is significant, especially for emerging or still developing TPLF jurisdictions. Given that global funders bring expertise, resources and leverage to bear in these regions, they have a key role to play in catalysing legislative reforms, setting industry standards and driving the implementation of new funding models which collectively can alter the legal landscape[25].

a. Advocating for Legislative Reforms

International funders may provide a crucial tuning key to real legislative change in countries where TPLF is still rare, nations such as Japan and South Korea, where the practice is considered unethical[26]. Both of these countries are very large contributors to world economy and have a lot of cross border commercial endeavours which probably involve more interwoven disputes. Without developed TPLF frameworks, businesses and individuals are forced to endure high financial burdens in order to bring legal claims[27]. Global funders like Burford Capital and Omni Bridgeway are uniquely qualified to service local franchises, if they work with public entities and local legal structures to introduce appropriate TPLF legislation. In addition, the entrance of funders into more mature jurisdictions such as Australia has also shown what might be possible for other countries in the region in time[28].

A preview of such reforms can be seen in the evidence of Hong Kong and Singapore. In each case, the jurisdictions responded by enacting specific legislation to expressly authorize third-party funding in international arbitration, reflecting an awareness that such forms of finance were indispensable for preserving their status as worldwide leaders in the field[29]. Hong Kong passed the Arbitration and Mediation Legislation (Third Party Funding) Ordinance in 2017, subsequently issuing a Code of Practice for third-party funders in 2018[30]. The appearance of the

25. Cheng-Yee Khong, Mohamed Abdel Wahab, *Third-Party Funding in the MENA Region*, in *Dispute Resolution International*, 15, 2021, 175.

26. Julien Laurent Chaisse, Can Eken, *The Monetization of Investment Claims Promises and Pitfalls of Third-Party Funding in Investor-State Arbitration*, in *Delaware Journal of Corporate Law*, 44, 2020, 113.

27. Cento Veljanovski, *Third-party Litigation Funding in Europe*, in *Journal of Law, Economics and Policy*, 8, 2011, 405.

28. David S. Abrams, Daniel L. Chen, *A market for justice: a first empirical look at third-party litigation funding*, in *University of Pennsylvania Journal of Business Law*, 15, 2012, 1075.

29. Caroline Kenny, *A Comparison of Singapore and Hong Kong's Third-Party Funding Regimes to England and Australia*, in *The International Journal of Arbitration, Mediation and Dispute Management*, 87(2), 2021.

30. Chiann Bao, *Third-party Funding in Singapore and Hong Kong: The Next Chapter*, in *Journal of International Arbitration*, 34(3), 2017, 387-400.

regulatory framework legitimized third-party funding in arbitration and established specific provisions on capital adequacy, conflicts of interest, disclosure and control over proceedings. The 2017 changes to the Civil Law Act in Singapore permitted third-party funding for international arbitration, and with that, a new era of legal financing was ushered in[31]. The ripple effect of these legislative changes has enhanced both regions' attractiveness to foreign businesses seeking dispute resolution services.

b. Promoting Best Practices and Governance

Global litigation funders working together in the Asia-Pacific are doing more than just pushing best practices and governance standards on the TPLF industry through legislative advocacy. For funders in those jurisdictions who have not yet matured their litigation funding markets, that presents each funder with a chance to help form the industry as they see it from inception[32]. This would include the enforcement of transparency, ethical behavior and measures to prevent conflict of interest[33].

Funders such Harbour Litigation Funding and Therium have implemented robust internal policies to prevent their participation in litigation and arbitration cases from compromising the independence of legal processes, for instance[34]. Those policies generally have provisions that appropriately limit the ability of the funder to control legal strategies, so as to preserve the fundamental decision-making power in clients and their lawyers[35]. By exporting these governance standards to Asia-Pacific emerging markets, international funders are contributing to a growing ecosystem of transparent and equitable litigation funding that enables local businesses to work more closely with the rest of their community.

c. Transformative Economic Impact

The implications of the introduction and growth of litigation funding are far reaching for the broader economic and legal landscape in Asia-Pacific. The potential to widen access to justice and remove at least some of the financial

31. Jung Won Jun, *Third-Party Funding of Arbitration: Focusing on Recent Legislations in Hong Kong and Singapore*, in *Journal of Arbitration Studies*, 30, 2020, 137.

32. Victoria Sahani, *Reshaping third-party funding*, in *Tulane Law Review*, 91, 2016, 405.

33. Victoria Sahani, *Harmonizing third-party litigation funding regulation*, in *Cardozo Law Review*, 36, 2014, 861.

34. Francesca Locatelli, *Challenges and comparative perspectives on third-party litigation funding – judicium*, in *Rivista Judicium*, 2024. Available at: *www.judicium.it/challenges-and-comparative-perspectives-on-third-party-litigation-funding/* (accessed: September 28, 2024).

35. Samuel Antill, Steven R. Grenadier, *Financing the litigation arms race*, in *Journal of Financial Economics*, 149(2), 2023, 218-234.

barriers that frequently stop smaller enterprises or individuals from asserting legal claims that they may have otherwise won is one of the biggest benefits of TPLF. This is even more relevant in the context of developing countries or jurisdictions with intricate judicial systems such as India where litigation takes forever.

As we consider the growing Indian economy, we also recognize that it is an economy which has become hardly predictable in terms of commercial disputes. The country's legal system, however, has long been criticized for its endemic delays, which can extend the time it takes to resolve cases to several years[36]. Though litigation funding is still burgeoning in India, if tried global players such as Omni Bridgeway and Hold Capital establish themselves within the community; corporations can now find a means to attempt lengthy contested conflicts without needing to gamble their capital. While it may have been interpreted as settlement of difficult disputes to occur sooner or later by the legal fraternity, the mobilisation is expected to give a shot in the arm to quicker justice delivery in one of Asia's largest court systems by fostering efficient mechanisms and enhancing legibility in India's judicial system[37].

Moreover, the entry of litigation funders into emerging markets could also stimulate economic growth by fostering a more predictable legal environment. For instance, South Korea and Japan, though traditionally conservative in terms of legal finance, could see significant economic benefits from adopting TPLF, especially as they continue to integrate into global trade networks[38]. The adoption of litigation funding in these countries might lead to other businesses and investors from foreign jurisdictions being less likely to participate into the jurisdiction because they would know that legal finance is available for claims in their commercial disputes.

Furthermore, the presence of litigation funders in developed markets could inspire economic development through facilitating a reliable legal system. That kind of legal finance has faced historic conservatism in countries such as South Korea and Japan, but TPLF could yield huge economic benefits for both while more deeply linking them to global trade networks[39]. While we can more easily

36. Cahaya Azwari, Febriansyah, Sri Delasmi Jayanti, *Impact of Third-Party Funds and Capital Adequacy Ratio on Profit Sharing Financing*, in *International Business and Accounting Research Journal*, 6(1), 2022, 63-70.

37. Florence Dafe, Zoe Williams, *Banking on courts: financialization and the rise of third-party funding in investment arbitration*, in *Review of international political economy*, 28(5), 2021, 1362-1384.

38. Natalie Yap, *Third-party funding in Japan: Opportunity for a clear policy*, in *Kluwer Arbitration Blog*, 2021. Available at: *arbitrationblog.kluwerarbitration.com/2021/04/30/third-party-funding-in-japan-opportunity-for-a-clear-policy/* (accessed: September 28, 2024).

39. *Litigation 2024 South Korea*, in *Chambers and Partners*, 2024. Available at: *practiceguides.chambers.com/practice-guides/litigation-2024/south-korea* (accessed: September 28, 2024).

imagine businesses and investors from other countries feeling freer to act in these countries if they employed litigation funding, the same is difficult to say about the foreign side of business since clearly this would potentially be decidedly less attractive were these jurisdictions finally start to rely on legal finance for out of court or arbitral resolution of commercial disputes.

d. Growing Influence of Global Litigation Funders in Shaping Future Implications for Asia-Pacific

Going forward, this will likely speed up the emergence of TPLF in jurisdictions such as Australia where a culture supporting and having some experience with litigation funding already exists in countries across the Asia-Pacific region. As Japan, South Korea, and others consider the potential benefits of TPLF in emerging mandates, international funders will undoubtedly continue to play an important role in moulding their legal landscapes[40]. While TPLF has proved its viability in even the most mature of markets, such as Australia, and is starting to prove itself in legal landscapes less entrenched with it, like Hong Kong and Singapore; this will ultimately serve as a template for how litigation funding may continue to spread from one jurisdiction to the other[41].

In addition, the ongoing expansion of TPLF into the Asia-Pacific is anticipated to offer wider flow-on economic benefits through enabling international commerce to resolve disputes in these regions. Over time, these legal reforms will deliver greater access to funding for both local and foreign entities in cross-border trade and investment, secure in the knowledge that they can rely on third-party funders to help prosecute their claims if disputes eventuate[42].

Consequently, the presence of global litigation funders in Asia-Pacific is changing not only how legal disputes are financed but also more profoundly driving reforms and developments to support a different order of legal and economic structures across the region[43]. As these entities become further entrenched and push for legalistic change, their power will play a key role in determining where

40. Alix Partners, *The future of third-party litigation funding*, June 2021. Available at: *www.alixpartners.com/media/17916/litigation-funding-survey-2021-tl.pdf* (accessed: September 28, 2024).

41. Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice*, in *Georgetown Journal of Legal Ethics*, 33, 2020, 687.

42. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

43. US Chamber of Commerce Institute for Legal Reform, *A new Threat: The national security risk of third-party litigation funding*, November 2022. Available at: *instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf* (accessed: 28 September 2024).

TPLF goes from here, imparting both tangible pay-offs like access to justice as well as intangible but equally notable results such as access to justice and long-term gains in legal certainty and economic development[44].

V. The Rise and Regulation of Third-Party Funding: Trends and Transformations in Key Markets Across the Asia-Pacific Region

a. The Landscape of Third-Party Litigation Funding in Australia

Over the recent years Australia has arguably emerged as a global frontrunner in third-party litigation funding, which has, to a significance extent, informed our civil litigation space; especially in the bigger class actions. The analysis below examines where the law of TPLF now sits in Australia, considers some of the operational and conceptual challenges that have accompanied its evolution, and explores how the current state-of-play may be indicative of what we can expect to follow any Paccar-like decision by the UK Supreme Court within our own jurisdiction.

i. State of TPLF in Australia in the last decade

TPLF has been an essential part of the Australian legal market for more than 20 years stretching back to high-profile securities litigation as well as more recent class actions in general[45]. Almost 50% of federal class actions in Australia over the last six years have been backed by one or more third-party funders according to research. This trend highlights the growing use of TPLF as a tool for obtaining justice, particularly among claimants who cannot afford to litigate at length[46].

Australia is a fee-shifting country, where the loser in court normally pays the winner's legal fees a major spur to TPLF. Since the reality is that the cost of litigation is high, many plaintiffs would make sure they get funded to hedge against losing all their money with no prospects for recovery[47]. Furthermore,

44. Ronen Avraham, Abraham Wickelgren, *Third-Party Litigation Funding – A Signaling Model*, *DePaul Law Review*, 63, 2014, 233. Available at: *via.library.depaul.edu/law-review/vol63/iss2/4*.

45. Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, in *Minnesota Law Review*, 95(4), 2011.

46. UNSW CLMR, *The regulation of Third-party Litigation Funding in Australia*. Available at: *clmr.unsw.edu.au/article/market-conduct-regulation/capital-markets/the-regulation-of-third-party-litigation-funding-in-australia* (accessed: September 28, 2024).

47. Michael Legg *et al.*, *The rise and regulation of litigation funding in Australia*, in *Northern Kentucky Law Review*, 38, 2011, 625.

Australia's ban on contingency fee American participants makes a difficult environment for plaintiffs' attorneys who cannot build up substantial funds over many years to filter into major lawsuits as the US firm has done. In their place, come the litigation funders who front legal fees in exchange for a share of the settlement typically 25% to 40%.

Australian court has granted funders significant power to effectively manage class actions in recent years. Without, however, limiting the beneficiaries to such a great extent as to not offer anyone quality *opt-in* classes wherein class members must individually agree to the funding arrangements, thereby restricting the pool of beneficiaries[48]. However, the landmark case of Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd has opened the floodgates for *common fund approach*[49]. This ruling has the practical effect of enabling class actions to continue, with the liability for the funder's commission being divided between all persons who received money by way of distribution from it, whether they were a party to the funding agreement or not, meaning more ready access to justice is available[50].

Although TPLF is playing a bigger role, they are driving freely on unregulated roads in Australia. While regulators like the Australian Securities and Investments Commission (ASIC) are keeping a close eye on funders to ensure that they appropriately manage conflict of interest considerations, there are no obligatory licensing requirements around litigation funding at present. A key decision by the Full Federal Court ruled that funded class actions were a kind of managed investment scheme under the Corporations Act 2001 and so should be required to register as such and comply with certain regulatory standards[51]. However, this determination was later reversed by the Australian Federal Government, which exempted funding arrangements from such regulatory oversight.

ii. Evolution of Litigation Funding in Australia

Over the last twenty years, litigation funding in Australia has undergone a significant evolution to become an integral component of access to justice

48. Jasminka Kalajdzic, Peter Cashman, Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and US Third-party Litigation Funding*, *The American Journal of Comparative Law*, 61, 2013, 93.

49. Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd [2016] FCAFC 148.

50. Julie-Anne Tarr, AJ George, *Third-party litigation funding in Australia*. Available at: *eprints.qut.edu.au/120988/22/120988.pdf* (accessed: September 28, 2024).

51. Australian Government, The Office of Impact Analysis, *Regulation impact statement – regulating litigation funders under the Corporations Act*, 2020. Available at: *oia.pmc.gov.au/sites/default/files/posts/2020/06/regulation_impact_statement_-_regulating_litigation_funders.pdf* (accessed: September 28, 2024).

generally and more particularly for large scale civil litigation and class actions. One of the largest drivers in TPLF gaining power throughout the country is its unlocking fee-shifting system. In Australia, it is usual that the loser in litigation has to pay for the legal costs of the winner. In overall, this system imposes a huge financial burden on plaintiffs, especially in complicated and high-value cases. Litigation funders offer to relieve this pressure by paying the plaintiff's legal costs and, sometimes, future adverse costs reimbursements, in order for individuals and smaller entities to bring claims that would otherwise be cost prohibitive[52].

Australia has also contributed to the rise of TPLF due its prohibition on the payment of contingency fees. In contrast to the US, Australian laws have historically prevented lawyers from receiving a percentage of damages awarded. This has prevented plaintiffs' attorneys from building the financial resources often necessary to fund substantial litigation, thereby creating a gap filled by third-party funders. This is related to another function of TPLF: it acts as an important provider of capital to claimants, providing the financial resources needed to push back against big business and protect your rights without such resources, many wronged individuals would never have a chance at a hearing[53].

Although litigation funding has its advantages, there are a few notable challenges for those in Australia who want to avail themselves of this relatively new opportunity. One of the biggest problems are the rise of so-called opt-in classes in funded class actions. Because Australia does not have a class certification process that would bind all class members to the funding agreement, funders often require potential beneficiaries to sign an agreement entitling the funder to a share of any recovery. It means that only those who sign up to the arrangement benefit from any successful litigation but it has also led to what they call opt-in classes[54].

In addition to this, the Australian laws surrounding litigation funding have changed. Even though litigation funders are not yet subject to mandatory licensing or supervision, case law has taken a different turn. One high-profile decision declared funded class actions to be managed investment schemes and functionally applied the stricter regulatory burdens mandated by the Corporations Act 2001 on funders[55]. But the following year, the Australian government exempted funding

52. Rachael Mulheron, *Third-party Funding, Class Actions, and the Question of Regulation: A Topical Analysis*, in *Mass Claims*, 2022, 5.

53. Florence Dafe, Zoe Williams, *Banking on courts: financialization and the rise of third-party funding in investment arbitration*, in *Review of international political economy*, 28(5), 2021, 1362-1384.

54. Can Eken, *Third-Party Funding: Threat or Facilitator of the System: An Ethical Dilemma*, in *Third-Party Funding in Investment Arbitration: A New Player in the System*, Springer International Publishing, 2024, 153-199.

55. Fahad Bin Siddique, *Champerty vs. Third-Party Funding in Arbitration: A Censorious Debate*, in *SCLS Law Review*, 3(3) 2020.

agreements from these rules. Neither has stifled Australia's market for litigation funding, but both provide that litigation funders remain subject to the regulatory supervision of the Australian Securities and Investments Commission (ASIC) and ensure they maintain adequate processes for handling conflicts of interest. However, the lack of a workable regulatory framework has seen questions raised about how third-party litigation funding in Australia should be regulated going forward[56].

Although TPLF has certainly transformed the legal landscape in Australia and made it easier for people to gain access to justice, there are still ongoing issues such as regulatory uncertainties and class action architecture[57]. The way the litigation funding industry continues to develop, together with any evolution of our judicial and regulatory system will be formative in relation to what future civil litigation looks like in the UK.

iii. Recent Legal Developments in Litigation Funding in Australia: Case Laws and Regulatory Changes

The practice of third-party litigation funding has emerged from a range of important judicial decisions and the transformation in legislation landscape together with case law is one of the most critical determinants which shapes its existing laws in Australia. Although the concept was conceived as early as the 1990s through financial support by insolvency liquidators, litigation funding in Australia suffered from maintenance and champerty common law doctrines unique to each Australian State that prohibited third parties who had no direct interest in a lawsuit from reaping any share of profit[58]. It has now been abolished in all other states and territories except Queensland, as well as the Northern Territory where third-party litigation funding is now increasingly being used across a range of claims from class actions to insolvency and commercial litigation.

One of the most important events which have contributed to the shaping of litigation funding in Australia was a 2006 High Court decision in Campbells Cash and Carry Pty Ltd case[59]. The court ruled in effect that litigation funding is offensive to the process of the court, and contrary to public policy, thereby

56. Wala Al-Daraji, *Third-party Funding Disclosure in England and Wales and in Australia*, in *Dispute Resolution Journal*, 75(3), 2021, 31-81.

57. Patricia Schoeffmann, *Third-Party Funding and ISDS*, in *Austrian Yearbook on International Arbitration 2022*, MANZ'sche Verlags-und Universitätsbuchhandlung GmbH, 2022, 353-384.

58. Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-party Litigation Funding*, in *Cardozo Journal of International and Comparative Law*, 19, 2011.

59. Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386.

affirming its use as a means for widening access to justice. This ruling marked the birth of litigation funding as a not just an insolvency litigation funding solution, but a solution suitable to fund almost all types of civil litigation[60].

Recent decisions have further shaped the litigation funding horizon. Maintenance or champerty: The Queensland Supreme Court in Murphy Operator & Ors case held that the common law tort of maintenance or champerty continued to apply in Queensland but that litigation funding agreements including for class actions were not contrary to public policy and could be enforced[61]. It looks at the class actions and determines in any particular instance that they were not contrary to policy save some specific abuse of process. This was subsequently confirmed in Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Ors where the Queenslands Court of Appeal determined the law had not changed thereby re-affirming the status of litigation funding arrangements in the state[62].

This has been a key watershed moment, and followed the High Court decision in Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd which determined that litigation funding schemes constituted managed investment scheme (MIS) under the Corporations Act 2001[63]. As a question of consequence of this conclusion, litigation funders came beneath the very onerous licensing regime defined in MIS under the Act. But the federal Labor government granted an exemption for litigation funding schemes from those requirements in 2012, to give as many people access to justice as possible[64].

This landscape was changed even more in 2020 when the Liberal Government introduced new requirements that litigation funders must hold an Australian Financial Services Licence (AFSL) and be regulated under MIS regime of the Corporations Act. This sparked a heated discussion about whether or not the financial services that could be significantly regulated and enforced, apply to litigation finance[65]. In a watershed 2022 decision, the Full Court of the Federal Court has unanimously ruled in LCM Funding Pty Ltd v Stanwell Corporation

60. Suneal Bedi, William C. Marra, *The Shadows of Litigation Finance*, in *Vanderbilt Law Review*, 74, 2021, 563.

61. Queensland Supreme Court in Murphy Operator & Ors v Gladstone Ports Corporation and Anor (No.4) [2019] QSC 228.

62. Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Ors [2020] QCA 250.

63. Multiplex Limited v International Litigation Funding Partners Pte Ltd (2009) 260 ALR 643.

64. Julie-Anne Tarr, AJ George, *Third-party litigation funding in Australia*. Available at: *eprints.qut.edu.au/120988/22/120988.pdf* (accessed: September 28, 2024).

65. Maya Steinitz, *Third-party Funding of Investment Arbitration*, *University Iowa Legal Studies*, Research Paper No. 2021-42, June 24, 2021. Available at Social Science Research Network: *ssrn.com/abstract=3873523*.

Limited[66] that litigation funding schemes are not MIS and therefore have never been subject to expectation of generating financial returns from proceeds of legal proceedings thus casting into doubt previous aggregated accounting-based Justice Besanko's analysis in Brookfield. The decision was a welcome relief to litigation funders[67].

Shortly after, the federal government, under the Labor party, introduced the Corporations Amendment (Litigation Funding) Regulations (2022 Regulations), which explicitly exempted litigation funding schemes from the MIS, AFSL, product disclosure, and anti-hawking provisions of the Corporations Act[68]. This exemption marks a significant development in the regulation of litigation funding in Australia, providing funders with more flexibility while maintaining certain protections such as the law regarding unconscionable conduct, misleading and deceptive conduct, and unfair contract terms. Moreover, the Australian Securities and Investments Commission (ASIC) extended relief to litigation funders, ensuring that these schemes do not offend the National Credit Code, and some proof of debt arrangements are exempt from regulatory scrutiny[69].

While the 2022 Regulations exempt litigation funders from regulation, class actions are still subject to the supervision of the court. For example, class action litigation funding agreements must be disclosed to the court under the Federal Court of Australia's court practice notes and only settlements in such actions are required to be approved by the court. The courts also can order costs against non-parties, including litigation funders, where it is shown that an order for costs against a party to the proceedings would not be enforceable[70].

Concurrent to these changes in regulation, best practice guidelines for litigation funding are also published by Association of Litigation Funders of Australia (ALFA), but are not mandatory. The ALFA's best practice guidelines for promote transparency, improving conflict management and higher professional standards within the industry though not all litigation funders operating in Australia are signatories to the guidelines[71].

66. LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103.

67. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

68. Amelia Atkinson *et al.*, *At a glance: Regulation of litigation funding in Australia*, in *Lexology*, 2023. Available at: *www.lexology.com/library/detail.aspx?g=68509e95-5e28-42bb-9c2f-11aed7fcec36* (accessed: September 28, 2024).

69. Patricia Schoeffmann, *Third-Party Funding and ISDS. In Austrian Yearbook on International Arbitration 2022*, MANZ'sche Verlags-und Universitätsbuchhandlung GmbH, 2022, 353-384.

70. Wala Al-Daraji, *Third-party Funding Disclosure in England and Wales and in Australia*, in *Dispute Resolution Journal*, 75(3), 2021, 31-81.

71. Sean Keller, Jonathan Stroud, *Litigation Funding Disclosure and Patent Litigation*, in *Federal Circuit Bar Journal*, 33, 2024, 77.

Also, some provisions require by way of consumer protection and disclosure, the legal framework which governs litigation funding. In Australia, parties to arbitration pursuant to the Australian Centre for International Commercial Arbitration (ACICA) rules are required to disclose third-party funding and the identity of the funder, although the specific terms of the agreement remain confidential. Disclosure is similarly required in liquidations, class actions, and certain corporate proceedings[72].

iv. Impact of the Paccar Decision on Australia's Future TPLF Landscape

The recent UK Supreme Court decision in Paccar *et al.* v Competition Appeal Tribunal *et al.* (2023)[73] has sent shockwaves throughout the global TPLF community by characterizing TPLF agreements as *claims management services*. Troublingly, the application of this wording would render such agreements unenforceable against UK legislation and there is potential for a similar legal interpretation in jurisdictions like Australia[74].

While Australia's business environment is currently less rule-bound than that for TPLF, the Paccar decision may signal a broader turning point in Australian legal culture. It could well enough sustain the chorus for legislative change across Australia in particular. The suggestion can surely not have been lost on any of the lawyers and others defending litigation funding as a legitimate way for plaintiffs to fund an action in Australian and international courts that if this year's Paccar decision does anything at all to harm the essential partnership between lawyer and funder it will likely push other doors too, bringing more binding definitions of just where and how the cash flows trailing from clients are being sheltered by our laws. This is liable to improve the performance standards of TPLF transparency and accountability[75].

Second, the process by which the Paccar ruling was constructed may cause some funders to think twice about investing in the Australian TPLF space. But if domestic class actions offered similar uncertainties, funders may re-evaluate their

72. John Emmerig, Michael Legg, *Disclosure of funding agreements in class actions*, in *Jones Day*, April 26, 2016. Available at: *www.jonesday.com/en/insights/2016/04/disclosure-of-litigation-funding-agreements-in-australian-class-actions* (accessed: September 28, 2024).

73. R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal *et al.* [2023] UKSC 28.

74. Daniel Williams, *Class action funding paccar and now thorium*, in *DWF*, October 25, 2023. Available at: *dwfgroup.com/en/news-and-insights/insights/2023/10/class-action-funding-paccar-and-now-therium* (accessed: September 28, 2024).

75. Susanne Augenhofer, Adriani Dori, *The proposed regulation of Third-party Litigation Funding-much ado about nothing?*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 20(5), 2023, 198-209.

strategy towards funding this kind of complex litigation and their business will be less money in the pipeline. This could of course have a chilling effect on access to justice for many claimants, especially those without the deep pockets it typically takes to pursue court proceedings over an extended period.

Furthermore, the judgement could also cause Australian regulators to tighten up their existing TPLF practising guidelines so as not to face a similar situation like that being faced in the UK. Australian courts, for example, would potentially amplify Paccar and find that TPLF funding agreements are unenforceable exposing funders to the very risks implicitly hedged by a robust TPLF market.

In this way, the Australian TPLF landscape is marked by its crucial role in ensuring access to justice through class actions on the one hand and regulatory ambiguities on the other. With the legal landscape still developing in Australia, the potential repercussions of the UK Paccar ruling could offer some serious challenges for law makers as this burgeoning area consolidates[76]. But stakeholders need to stay mindful so that TPLF remains as a way of increasing legal access and equity, rather than being bogged down by any accessibility-killing legal ambiguities[77]. The interaction of global trends with local fencing laws will be critical to the future trajectory of TPLF in Australia, ensuring ongoing regulatory monitoring and adjustment within a flexible legal framework.

b. The Evolution and Challenges of Third-Party Funding in China

The transformation in the landscape of TPF within China and indeed more broadly across Asia is stark when contrasted with TPF developments in jurisdictions like Singapore. TPF is gaining a foothold there, as well but with some unique obstacles and even a few opportunities that one would be hard pressed to think up in the West. In this analysis, we explore the present TPF landscape in China compared with Singapore, an established regulatory hub and analyse its recent outcomes on the back of UK developments namely the Paccar decision.

i. China's Growing TPF Framework

Recent developments involving TPF in China are worth noting, specifically as a number of Chinese arbitration institutions, including the likes of the China International Economic and Trade Arbitration Commission (CIETAC) and the

76. Mustafaen Kamal, *Hope for the litigation funding industry*?, in *Global Arbitration News*, 2024. Available at: *www.globalarbitrationnews.com/2024/02/13/hope-for-the-litigation-funding-industry/* (accessed: September 28, 2024).

77. Therium Litigation Funding A IC v Bugsby Property LLC [2023] EWHC 2627 (Comm).

Beijing International Arbitration Centre (BIAC), have begun to adopt specific rules addressing TPF. The reform of the regulatory system can be interpreted as a leap towards recognition and regulation of TPF in the country[78].

Yet, the launch of TPF in China remains at a nascent stage compared to Singapore, is still at an embryonic stage when compared to Singapore where legislation governing litigation funding has and arguably had nurtured for over 10 years. Although Chinese institutions are starting to incorporate TPF clauses into their rules, they do so in practice against a legal black hole where the agreements of the funders operate. This uncertainty causes legal recourse to be filled with strings attached and funding agreements deserving little or no respect for being enforceable[79].

The significant case where the Chinese court enforced a TPF agreement in arbitration was a landmark case illustrating this developing legal framework in China, *Case No. (2022) Jing 04 Min Te No. 368*[80]. This was a positive indication that the judiciary is prepared to welcome TPF, but only within the constraints of the legal rights of the parties. However, decisions like C*ase No. (2021) Hu 02 Min Zhong No. 10224*[81] demonstrate inconsistencies in the Chinese legal system and reflect that there is still a long way for China to go to ensure TPF contracts are enforceable within the jurisdiction[82].

In comparison, Singapore's TPF framework is characterized by clear, well-defined rules and an established regulatory environment. The Singapore International Arbitration Centre (SIAC) has set a precedent with its robust TPF provisions, which include specific disclosure requirements that ensure transparency in funding arrangements. This clarity fosters investor confidence and attracts international funders seeking to engage in arbitration within a stable legal environment.

78. Zhang Shouzhi, Huang Tao, Xiong Yan, *Third-party funding and other key takeaways for arbitration in China*, in *Global Arbitration Review*. Available at: *globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2024/article/third-party-funding-and-other-key-takeaways-arbitration-in-china#footnote-001-backlink* (accessed: September 28, 2024).

79. Wang Heng, *Developments in third-party funding in Mainland China*, in *Global Arbitration Review*, May 26, 2023. Available at: *globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2024/article/developments-in-third-party-funding-in-mainland-china* (accessed: September 28, 2024).

80. Sunan Ruili Airlines Limited *et al.* v Silver Aircraft Leasing (Tianjin) Co, Ltd (2022) Jing 04 Min Te No. 368 and No. 369.

81. Company A v Company B (2021) Hu 02 Min Zhong No. 10,224.

82. Charles Zhao, *The landscape of third-party funding in Mainland China*, in *Lexology*, 2023. Available at: *www.lexology.com/library/detail.aspx?g=fde52e05-391e-4e77-8c42-4a3a7ce52de1* (accessed: September 28, 2024).

ii. Comparative Analysis: China vs. Singapore

The differences in TPF regulation are stark when compared with Singapore. In developing TPF in harmony with the Bankruptcy Act and Singapore International Arbitration Centre parameters, Singapore has positioned itself as a global leader in ensuring that funding will be both predictable and reliable for those who would consider availing themselves of it[83]. The new changes in the SIAC rules will make these even easier to implement and adopt, including guidelines on how TPF can operate and the disclosure obligations of parties to this process[84].

In comparison, the Chinese mechanisms are scattered as TPF concepts are not implemented uniformly. Although the adoption of TPF rules in institutions like CIETAC is a positive development, the ultimate success of these rules relies to a large extent on broader judicial endorsement and certainty surrounding the legality of TPF agreements[85].

The discrepancies over disclosure standards set by CIETAC and SIAC point to continued regulatory competition between the two jurisdictions[86]. The CIETAC regulations are relatively restrictive and force parties to disclose much more detail on TPF arrangements, which could in turn lead to concern by parties that third party funders would know too much about their confidential position and gain a strategic advantage[87]. In contrast the narrower disclosure obligations of the SIAC manage to balance transparency with protection of parties' interests and hence TPF is able to operate as a real option in commercial disputes.

iii. Implications of the Paccar Decision in the UK

The recent UK Supreme Court ruling in Paccar *et al.* v Competition Appeal Tribunal *et al.* (2023) is a matter of particular concern to the TPF community, as it classified TPF agreements as *claims management services*, which has obvious implications on their enforceability under current UK law. This decision may

83. Beibei Zhang, *TPF in China. Third-party Funding for Dispute Resolution: A Comparative Study of England, Hong Kong, Singapore, the Netherlands, and Mainland China*, Springer, 2021, 159-206.

84. Matthew S. Erie, *Chinese law and development*, in *Harvard International Law Journal*, 62, 2021, 51.

85. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

86. Nataša Hadžimanović, *Third-Party Funding in Arbitration: A Case for Mandatory Disclosure?*, in *Balkan Yearbook of European and International Law 2019*, 2020, 41-52.

87. Ammar Tanhan, *Addressing the Costs Imbalance Resulting from Third-Party Funded Investment Claims*, in *Journal of International Arbitration*, 41(1), 2024.

impact not only UK based companies and litigants but also cast a shadow over the future of TPF, making it more difficult for funders to navigate through regulatory approvals in some other jurisdictions too especially those that belong to the Asia-Pacific region[88].

This decision presents both challenges and opportunities for China. This could serve to further drive a culture of caution for Chinese funders and indicate the UK as symptomatic of higher risks in the abasement of third-party financing. Alternatively, this may lead to Chinese regulators and arbitration institutions introducing better terms and protections for foreign funders[89]. While demand for a transparent and conducive regulatory environment may not immediately be imperative, it could grow in urgency as international funders consider entering or growing their presence in China's TPF market.

In addition, UK regulatory setbacks and the examples of best practice in jurisdictions like Singapore could offer a degree of impetus to Chinese regulators involved in further refining TPF frameworks. By learning from Singapore's experience and the challenges illustrated by the Paccar case, China has the opportunity to carve a niche that balances the interests of funders, legal practitioners, and disputing parties.

Therefore, it has become increasingly clear that TPF in China today is rapidly changing due to the new regulatory trends and the consulting guidelines developed by the judicial system. Despite the fact that it still lags behind Singapore in regulatory certainty and acceptance, a greater awareness of the part TPF can play in making arbitration easier is clearly taking place[90]. The potential implications of the UK's Paccar decision underscore this key point, while also illustrating why China should establish its TPF framework in a way that reflects global best practices and takes into account the specificities of its own legal system. As TPF matures, how China deals with these challenges will be highly consequential for its prospects to become a significant global player in litigation funding.

88. Gareth Thomas, Rachael Shek, Jojo Fan, *Litigation and Arbitration Funding in Hong Kong: Will the UK Supreme Court decision in PACCAR Affect Hong Kong Litigation Funding?*, in *Hebert Smith Freehills*, September 18, 2023. Available at: *www.herbertsmithfreehills.com/notes/asiadisputes/2023-09/litigation-funding-in-hong-kong-will-the-uk-supreme-court-decision-in-paccar-affect-hong-kong-litigation-funding* (accessed: September 28 2024).

89. Eleanore Di Claudio, David Bridge, Verity Jackson-Grant, *Supreme Court Ruling on PACCAR Deals a Blow to Litigation Funding*, in *Simmons & Simmons*, July 26, 2023. Available at: *www.simmons-simmons.com/en/publications/clkjuwvwa00buth1s7g02mp4v/paccar-supreme-court-throws-litigation-funders-under-a-truck* (accessed: 28 September 2024).

90. Caroline Kenny, *A Comparison of Singapore and Hong Kong's Third-Party Funding Regimes to England and Australia*, in *The International Journal of Arbitration, Mediation and Dispute Management*, 87(2), 2021.

c. The Evolution of Third-Party Litigation Funding in India

With the rapidly growing economy and continued sophistication of legal disputes now common in India, this jurisdiction is emerging as a potential TPF hub. Its rapidly growing infrastructure, ambitious economic targets and increasing commercial disputes that are attracting the interest of global litigation funders. The developments of the legal landscape in India have manifested an upward trajectory indicating more jurisdictions recognizing TPF as a crucial mechanism to make this possible, for access to justice in commercial, arbitration disputes.

i. The Development of the Legal Framework for TPF in India

Unlike in jurisdictions where the common law doctrines of maintenance and champerty limit third-party funding, those principles have no place in India. This position was solidified by the Privy Council in Ram Coomar Coondoo v Chunder Canto Mookerjee (1876) which held that a reasonable agreement to finance litigation in return for some part of the recovered property would not be against public policy[91]. This ruling set the stage for TPF in India by rejecting the maintenance and champerty doctrines[92].

This judgment shows that the courts in India have consistently been lenient towards TPF, specifically in commercial disputes. Lastly, the position of law in India has been crystallized after the decision in *Bar Council of India v. A.K. Balaji (2018)* by the Indian Supreme Court[93] clarified that while lawyers are prohibited from funding litigation but receiving repayment after outcome is not a restriction under law to third party funders such as non-lawyer. This decision has strengthened the legal standing of TPF in India.

The Delhi High Court further highlighted the real embodiment of access to justice in the case of *Tomorrow Sales Agency Pvt Ltd v. SBS Holdings, Inc. & Others (2023)* proscribing interference with TPFs[94]. The Indian approach of TPF endorsements also get reflected in a ruling against making third-party funder responsible for adverse arbitration outcomes unless they were directly involved in the arbitration process, demonstrating India's pro-TPF approach.

91. Ram Coomar Coondoo and others v. Chunder Canto Mookerjee (Fort William (Bengal)) Privy Council Nov 25, 1876.

92. Cyril Amarchand Mangaldas, *Third-party funding in India*, 2019. Available at: *www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf* (accessed: September 28, 2024).

93. Bar Council of India v. A.K. Balaji (2018) 5 SCC 379.

94. Tomorrow Sales Agency Private Limited v. SBS Holding Inc. 2023 SCC Online Del 3191.

ii. Key Challenges in the Indian TPF Landscape

However, while the jurisprudence is rapidly growing on a positive note in India, the road ahead for the Indian TPF market continues to struggle and there are several hindrances that need to be removed. This includes a huge judicial backlog, with over 44.58 million cases pending in courts of India, delaying recovery for long and scaring away prospective investors. Although the creation of commercial courts and e-filing are critically important reforms in reducing delays, movement here can be glacial[95]. One obstacle is that the Bar Council of India prohibits lawyers from working on a conditional fee basis or funding litigation, which leaves funders without a full ability to partner with legal practitioners in such deals. Further, while TPF considered to be lawful not having a distinct legal framework significant uncertainty regarding disclosure requirements, funder liabilities, and ethical standards, thereby negatively impacting India's attractiveness as an investment destination for foreign funders[96].

iii. Future Prospects for TPF in India

The Indian TPF market is forecasted to expand noticeably in the near future because of various essential drivers. Emerging jurisprudence, particularly the 2024 decision by the Indian Supreme Court in Tomorrow Sales Agency Pvt Ltd v SBS Holdings, Inc. is expected to significantly clarify the notion of funders' liabilities and their involvement in arbitration thus potentially providing a legal foundation underpinning TPF. This regulatory change is expected to bring a much-needed change institutional arbitration and give formal recognition and regulation to TPF in cases of arbitration, thus rising investor confidence and promoting growth[97].

Additionally, the recent entry of global players in litigation funding such as Omni Bridgeway and Phoenix Advisors; as well Indian entities LegalPay and FightRight is broadening the TPF market in India, making it more competitive

95. Cyril Shroff & Amita Gupta Katragadda, *Third-party funding of litigation in India: An asset class in waiting*, in *NDTV Profit*, 2019. Available at: *www.ndtvprofit.com/opinion/third-party-funding-of-litigation-in-india-an-asset-class-in-waiting* (accessed: September 28, 2024).

96. Desai, *et al.*, *Dispute resolution in India*, April 2020. Available at: *www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Dispute_Resolution_in_India.pdf* (accessed: September 28, 2024).

97. Muskan Arora *et al.*, *At a glance: Regulation of Litigation Funding in India*, in *Lexology*, 2023. Available at: *www.lexology.com/library/detail.aspx?g=cfefc261-5536-4bdc-af86-9bf0c7ed4f1a* (accessed: September 28, 2024).

and accessible to companies and individuals[98]. The *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd (2016)* UK judgment which permitted the recovery of third-party funding costs is also under litigation before the Bombay High Court[99]. If such a judgment were upheld, it would be one of the first in India to set such precedent, bringing Indian jurisprudence in line with global TPF trends and further encouraging funders to fund in the Indian market[100].

India is at a critical juncture in the lifecycle of its third-party funding market. The country has a healthy economy and advanced legal system, leading to an uptick of TPF cases. This could be further accelerated with international funders getting involved and a number of upcoming Supreme Court judgements, positioning India as an important jurisdiction in the global landscape for litigation funding.

d. Third-Party Funding of Arbitration in Singapore and Hong Kong

Singapore and Hong Kong have emerged as two of the pre-eminent arbitration hubs in the world today, and both have taken important steps in recent years to encourage third-party funding (TPF), in order to improve their attractiveness. The analysis centres on legal frameworks and the most important judicial decisions that have formed TPF in both jurisdictions, with a special focus on this dissimilarity among litigation funding and arbitration funding, particularly their treatment of arbitration funding in contrast to litigation funding.

i. Legislative Framework for Third-Party Funding

Hong Kong: The Arbitration and Mediation Legislation (Third-Party Funding) Ordinance (2017)

Hong Kong's move towards third-party funding, underpinned by the Arbitration and Mediation Legislation (Third-Party Funding) Ordinance 2017 which allows for the funding of arbitration and mediation. The bill is a part of Hong Kong's wider initiative to maintain its competitiveness in the international

98. Ashish Rukhaiyar, *Global Litigation Finance major Omni Bridgeway Eyes India entry*, in *Business Today*, September 26, 2022. Available at: *www.businesstoday.in/latest/corporate/story/global-litigation-finance-major-omni-bridgeway-eyes-india-entry-348155-2022-09-26* (accessed: September 28, 2024).

99. Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm).

100. Murali Jagannathan, U. Quapp, Venkata Santosh Kumar Delhi, *Litigation risk transfer mechanisms in construction dispute resolution process: Cross-case analysis*, in *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 13(3), 2021.

arbitration arena[101]. At common law, maintenance and champerty have always made third party funding of litigation highly controversial in the base case. However, Hong Kong recognized the necessity of reform in light of its global standing as an arbitration hub[102].

The Ordinance allows TPF in arbitration and mediation proceedings but because the common law prohibitions on maintenance and champerty continue to apply, not in litigation[103]. Perhaps most significantly, however, the courts have recognized limited exceptions to the general rule that TPF is allowed in litigation, such as in cases where there is a legitimate common interest or access-to-justice issue. These exceptions are limited, reinforcing Hong Kong's stance that while litigation funding remains restricted, arbitration funding is pivotal for the jurisdiction's growth[104].

The Code of Practice for Third-Party Funding of Arbitration (December 2018) sets out the principal duties on funders including maintenance of sufficient capital, implementation of adequate measures to navigate conflicts issues mandatory disclosure and restricting funder control over the proceedings[105]. The Code also limits funders' rights to terminate funding agreements, making funded arbitrations fair. A transparent and account control framework is required in order not to make the funders' inappropriate influence over arbitration process, thereby safeguarding due process.

Singapore: The Civil Law (Third-Party Funding) Regulations (2017)

Likewise, in Singapore, the passing of the Civil Law (Third Party Funding) Regulations 2017 introduced reforms which included abolishing civil liability for maintenance and champerty in arbitration proceedings to allow third party funding to be used generally for international arbitration[106]. The 2017 Civil Law Act provided the conditions for enforcing agreements on third-party funding. Unlike Hong Kong, Singapore has taken a more focused approach by limiting TPF to international arbitration and related proceedings such as mediation and

101. Jung Won Jun, *Third-Party Funding of Arbitration: Focusing on Recent Legislations in Hong Kong and Singapore*, in *Journal of Arbitration Studies*, 30, 2020, 137.

102. Ammar Tanhan, *Addressing the Costs Imbalance Resulting from Third-Party Funded Investment Claims*, in *Journal of International Arbitration*, 41(1), 2024.

103. Du Junpeng, *Comparative Analysis of Third-Party Funding of Arbitration in Singapore and Hong Kong*, in *Ученый XXI века*, 4 (85), 2022, 27-34.

104. Olivier Marquais, Alain Grec, *Do's and dont's of regulating Third-Party litigation funding: Singapore vs. France*, in *Asian International Arbitration Journal*, 16(1) 2020.

105. Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.

106. Masood Ahmed, Xandra Kramer, *Global Developments and Challenges in Costs and Funding of Civil Justice*, in *Erasmus Law Review*, 14, 2021, 181.

ancillary court proceedings. This was seen as a strategic move to cement its status as one of the world's leading arbitration jurisdictions, particularly for cross-border commercial disputes[107].

The Singapore International Arbitration Centre (SIAC) is leading the charge in terms of TPF regulation, having published its Practice Note on Arbitrations Funded by Third Parties to provide guidance on a range of procedural issues regarding arbitrations funded by third-parties. The new guidelines focus on capital adequacy, funder disclosures and conflict-of-interest procedures, similar to what Hong Kong has done[108]. SIAC also permits an arbitral tribunal to take into account in its allocation of costs the existence of a third-party funding arrangement[109]. This demonstrates an acknowledgment that funding can put the financial scales at an imbalance between parties, specifically if one party is funded and the other party is not.

ii. Future of Third-Party Funding in Litigation: Expanding Horizons in Singapore and Hong Kong

Despite the harmonized goal of TPF structure in arbitration, each proposed law contains a singular regulation-friendly framework. This is unlike in Singapore, where the Civil Law (Third Party Funding) Regulations 2017 have been passed but which specify minimum threshold requirements that funders must comply with such as financial and ethical criteria, ensuring fairness and transparency in funded arbitration proceedings[110]. Both the United Kingdom and Hong Kong operate in accordance with similar legislative frameworks that both highlight disclosures by funders and ethical behaviour, albeit there are some procedural differences between the pair[111].

The introduction of TPF legislation in Singapore and Hong Kong is, therefore, clearly a significant part of each jurisdiction's wider plans to establish themselves as pre-eminent global centres for arbitration[112]. The case for permitting TPF

107. Siyuan Jin and Wei Shen, *Third-party Funding for Dispute Resolution*, *China and WTO Review*, 9(1), 2023.

108. Beibei Zhang, *Third-party Funding for Dispute Resolution*, Springer Singapore, 2021.

109. Sam Roberton, *The Regulation of Third-Party Litigation Funders in New Zealand: A Proposed Solution*, in *Public Interest Law Journal of New Zealand*, 10, 2023, 177.

110. Rebecca Leinen, *Striking the right balance: disclosure of third-party funding*, in *Oxford University Commonwealth Law Journal*, 20(1), 2020, 115-138.

111. Siyuan Jin, Wei Shen, *Third-party Funding for Dispute Resolution*, in *China and WTO Review*, 9(1), 2023.

112. Elena Sitkareva, Yulia A Artemyeva, Svetlana Mendosa-Molina, *Third-party Funding: Practical, Ethical and Procedural Issues*, in *Proceedings of Intcess 2019 – 6th International Conference On Education And Social Sciences*, 2019.

in arbitration reflects a common-sense reaction to the commercial context of international dispute resolution. As the international arbitration landscape becomes more competitive, both Singapore and Hong Kong are likely to continue innovating their legal frameworks to attract high-profile, high-value arbitration cases.

One important question for the future will be if both territories extend their TPF regimes to cover litigation funding in order to create a more attractive landscape for third party funders. This combination of ongoing public consultations in Singapore and growing discussions in Hong Kong puts these two jurisdictions at the vanguard to influence the direction TPF develops throughout Asia and possibly beyond. The swiftness with which these changes have taken place in both Singapore and Hong Kong is another illustration of the parallel paths that their rules reforms are taking, as they compete to be the most attractive venues for investor-state arbitration globally by truly enabling TPF to support complex high-value investor-state disputes[113].

While Singapore and Hong Kong have both made considerable strides in permitting TPF for arbitration, neither has taken this forward to litigation funding except in limited circumstances[114]. Globally, however, due to the application of champerty and maintenance doctrines outside of arbitration and because Hong Kong has only recognized limited exceptions and Singapore does not yet have a ruling on whether funders meet the *genuine commercial interest test* in common law actions; litigation funding deals continue to be constrained[115].

Nonetheless, both jurisdictions have indicated that they are open to extending TPF beyond arbitration[116]. Discussion around expansion of TPF in other areas of litigation is currently under public consultation in Singapore, and demonstrates an increasing appreciation for the potential value litigation funding may have to increase access to justice for complex commercial disputes. Similarly, in Hong Kong, while TPF in litigation remains largely prohibited, ongoing discussions suggest that the legal community may soon consider broader reforms to align litigation funding with arbitration practices[117].

The Singaporean government has confirmed these views in public statements,

113. Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, in *Theoretical Inquiries in Law*, 19(1), 2018, 109-123.

114. David Capper, *Three aspects of litigation funding*, in *Northern Ireland Legal Quarterly*, 70, 2019, 357.

115. Rebecca Leinen, *Striking the right balance: disclosure of third-party funding*, in *Oxford University Commonwealth Law Journal*, 20(1), 2020, 115-138.

116. Adrian Cordina, *Is It All That Fishy? A Critical Review of the Concerns Surrounding Third-party Litigation Funding in Europe*, in *Erasmus Law Review*, 14, 2021, 270.

117. Pryderi Diebschlag, *The landscape of Litigation Funding in Hong Kong*, in *Clyde & Co*, November 30, 2023. Available at: *www.clydeco.com/en/insights/2023/11/the-landscape-of-litigation-funding-in-hong-kong* (accessed: September 28, 2024).

only reaffirming the nation equality willing to update their legal and the legal-theory-framework-systems in order to make them more enticing and accommodating for international businesses. As noted by Indranee Rajah S.C., Senior Minister of State of Law, Singapore aspires to remain among the world's top arbitration destinations by continuing to evolve its laws to meet the demands of the global business community[118].

iii. Comparative Analysis of TPF in Arbitration and Litigation

Limited Scope for Litigation Funding

Although Hong Kong and Singapore have retained the common law prohibitions on maintenance and champerty in place, both have also taken a highly restrictive approach to third-party litigation funding. Equity principles inherited from English common law prevent the practice of others litigating to make money for third-parties. Although litigation funding remains for the most part prohibited, there are circumscribed carve outs in both jurisdictions where TPF is permitted, such as insolvency proceedings and cases where the third party has a genuine commercial interest or when access to justice would be otherwise be denied.

For example, TPF in litigation is reserved for insolvency proceedings in Hong Kong. This may be the case where a company goes into liquidation and liquidators need to pursue claims on behalf of creditors against third parties. Singapore courts too will enforce a TPF agreement in exceptional circumstances when litigants are truly priced out of justice. The trouble is, the exceptions barely scratch the surface of commercial litigation generally because funding simply costs too much money while being risky for commercial disputes.

Growing Role of Arbitration Funding

In recent years, both Hong Kong and Singapore have taken positive steps to encourage the external financing of arbitration claims, identifying it as a key factor in making their jurisdictions more competitive as venues for international dispute resolution[119]. This trend is consistent with a growing acceptance of arbitration funding around the world; as an essential means of granting access to justice, particularly in the context of expensive international disputes. In doing

118. Ministry of Law of Singapore, *Keynote address by MS Indranee Rajah, senior minister of State, Ministry of Law and Ministry of Finance, at the UK singapore law students society (UKSLSS)*, August 5, 2017. Available at: *www.mlaw.gov.sg/news/speeches/keynote-address-by-senior-minister-of-state-indranee-rajah-for-l/* (accessed: September 28, 2024).

119. Ridhima Sharma, *Third-party Funding in International Commercial Arbitration*, in *NUALS Law Journal*, 12, 2018, 61.

so, it levels the playing field by making sure claimants who lack financial resources can have access to claims against well-funded opponents, and enabling a fairer environment for dispute resolution[120].

Hong Kong and Singapore have respectively passed legislative reforms allowing third-party funding of arbitration, strengthening their status as the two leading seats in the Asia-Pacific region for international arbitration[121]. In balancing the need for regulatory control against the benefits of using third party funding to increase the justifiability of disputes in international arbitration, both jurisdictions are making some allowances and reaping some rewards. Arbitration funding has complied directly as a reaction to the abuses of international dispute resolution and it has flourished while litigation funding has been choked by common law doctrines of maintenance and champerty[122].

Furthermore, Singapore has turned into one of the leading names to promote arbitration funding as a key feature in its legal services. The country has acutely placed itself as an arbitration friendly jurisdiction and shown progressive steps to suit the most popular globally appreciated funders[123]. The participation of third-party funders in arbitration seems, therefore, promising for claimants who obtain financial support while maintaining control over the case outcome. That stands in contrast to the litigation model, where funders are often viewed with suspicion due to the potential for conflicts of interest. Singapore, signifying a resolve to improve access to justice and further cement its status as the preferred seat of international arbitration[124].

Legislative reforms that have now been followed by legislation in both jurisdictions and clarify their positions as leading centres for international arbitration of the Asia-Pacific. The recent Hong Kong Arbitration and Mediation Legislation (Third-Party Funding) Ordinance 2017 as well as the Singapore Act 2017 have provided a legislative framework for ensuring transparency, impartiality, and accountability in funded arbitrations. By being complementary

120. Sarah E. Moseley, *Disclosing third-party funding in international investment arbitration*, in *Texas Law Review*, 97, 2018, 1181.

121. Dominik Horodyski, Maria Kierska, *Third-party funding in international arbitration: legal problems and global trends with a focus on disclosure requirement*, Towarzystwo Doktorantów UJ, 2017.

122. Caroline Dos Santos, *Third-party funding in international commercial arbitration: a wolf in sheep's clothing*, in *ASA Bulletin*, 35, 2017, 918.

123. Florence Dafe, Zoe Williams, *Banking on courts: financialization and the rise of third-party funding in investment arbitration*, in *Review of international political economy*, 28(5), 2021, 1362-1384.

124. Varun Mansinghka, *Third-party funding in international commercial arbitration and its impact on independence of arbitrators: an Indian perspective*, in *Asian International Arbitration Journal*, 13(1), 2017.

to these legal structures and guided more specifically by institutional rules such as Singapore International Arbitration Centre (SIAC) practice notes or the Code of Practice which is applied in Hong Kong, funders have been able to work within this framework effectively whilst also respecting the arbitration process itself[125]. As these jurisdictions further mature, and continue to show dedication to promoting third-party funding, it is anticipated that they will become more appealing seats for the resolution of international disputes thereby diversifying the arbitration market in the region.

VI. Looking Ahead: Future Prospects and Conclusions on Third-Party Funding Across Asia-Pacific Markets

TPLF has a potentially bright future in the Asia-Pacific region as legal frameworks continue to develop and clients seek ways to provide effective cost-sharing solutions. TPLF is a more successful model of accessing justice, especially in relation to striking commercial disputes, for members of public were deployed e.g. Australia, Hong Kong and Singapore. They are important examples of how TPLF can be used to democratize access to legal resources, improving judicial outcomes. They therefore present a good example for other countries in the region to follow along with. By borrowing these or similar TPLF models, countries could help establish vibrant markets while also helping to create a fairer legal landscape for all stakeholders.

On the other hand, emerging markets such as South Korea and Japan are beginning to recognize the potential of TPLF, though at a slower and more measured pace. Furthermore, the presence of such renowned global funders in these jurisdictions is expected to spur legislative reforms which will ensure a better hospitable atmosphere for enhance third party funding in legal disputes. They offer not only capital, but hard-earned expertise, to help implement a regulatory framework that will facilitate the growth of litigation financing. TPLF appears to be destined to become a fixture of the legal systems in South Korea and Japan because their integration into global trade networks is predicted only to grow.

However, TPLF faces a more challenging environment in China and India. On the other hand, India appears to present an enormous TPLF opportunity underpinned by a growing economy and more favourable operating environment from recent legislative reforms, however the opportunities are vast but hurdles including severe judicial backlog and certain restrictive fee structures remain

125. Stavros Brekoulakis, Catherine Rogers, *Third-party financing in ISDS: a framework for understanding practice and policy*, in *Academic Forum on ISDS Concept Paper*, 22, 2019.

significant. The diverse directions these states take serve as a reminder that TPLF must be adapted to the legal and economic approach in which it is going to be enforced. The interaction of legal reforms, economic transformation and global funders in the Asia-Pacific will dictate whether TPLF becomes more or less embedded in the future with implications for dispute resolution and justice use across multiple legal systems.

 ISBN 9788835177470

6. Litigation Funding in a Global Context: Financial Risks, Technological Disruptions, and Social Impacts

I. Introduction

While this might seem a socialistic perspective, it is third party litigation funding (TPLF), one of the newest kids on the block but undoubtedly one of the biggest enablers impacting various economic aspects of the case. The TPLF improves individual access to the heating system and has added new dimensions to various market affairs. This multi-level analysis of the economic impact of third-party financing can denote differences in systemic justice costs, behaviour thereof, and a host of other complex issues depending on the justice system involved[1].

But litigation is expensive, with attorney fees and court costs, in most jurisdictions. In the US, a simple civil matter can run the legal bill up to just over a $100k[2]. By putting up those costs, TPLF enables plaintiffs to seek redress without fear of bankruptcy. This is because, despite our claims of impartiality, in our current civil justice system access to be heard remains a function not of truth and injury but rather wealth and standing[3]. The TPLF operates as a significant source of finance for investment arbitration, in which disputes often involve millions of dollars[4]. TPLF has funded 69% of claimants in investment disputes, said a study by the International Institute for Conflict Prevention & Resolution[5].

1. Marco de Morpurgo, *A comparative legal and economic approach to third-party litigation funding*, in *Cardozo Journal of International and Comparative Law*, 19, 2011, 343.

2. Joshua G. Richey, *Tilted scales of justice-The consequences of third-party financing of American litigation*, in *Emory Law Journal*, 63, 2013, 489.

3. Victoria Shannon Sahani, *Judging third-party funding*, in *UCLA Law Review*, 63, 2016, 388.

4. Jason Lyon, *Revolution in progress: Third-party funding of american litigation*, in *UCLA Law Review*, 58, 2010, 571.

5. Paulina Jedrzejowski, *Paying for conflict and resolution: Europe seeks further third-party funding regulation*, in *International Institute for Conflict Prevention & Resolution*, April 28,

It will enable legal rights to be satisfactorily protected through such a cost-effective, expeditious, efficient and justifiable procedure which promotes greater disincentive for potential wrongdoers to conduct any illegal acts and as a result is conducive to the growth of the market.

The emergence of other forms of international arbitration disputes reflects the recent changes in the business operations around the globe and how TPLF has been employed therein; this supports our claim about this issue's global economic consequences[6]. Cases such as those with ICSID and even more so the recent cases, underscore the critical role TPLF serves in enabling claims against states which tend historically to carry much leverage over foreign investors[7]. Indeed, there are economic consequences that are the dynamics on the TPLF market itself. This increased competition has seemed reduced costs of access to funding with a range of new funders entering the space[8]. However, this might be different after 2023 as the landscape continued to undergo changes with new funders entering the marketplace and untested technologies being used that may have impacted the price of funding and what it cost a claimant by way of profits[9].

Hence, the complexity of third-party litigation funding is multifaceted and has important consequences for economic, technology, social and ethical matters[10]. TPLF shifts contours of law by helping alleviate the cost of litigation, promoting litigation funding competition, and enabling access to legal remedy in investment arbitration. But, as the market continues to evolve we need to be wary of some potential ethicalities and longer-term sustainability of funding practices.

II. The Economics of Litigation Funding in USA at Present and in the Future

The ambiguity in the economic environment for litigation funding occurs when there is no strict legislative infrastructure or framework that results in

2023. Available at: *www.cpradr.org/news/paying-for-conflict-and-resolution-europe-seeks-further-third-party-funding-regulation* (accessed: October 2, 2024).

6. Bernardo M. Cremades, *Third-party funding in international arbitration*, in *Transnational Dispute Management*, 7, 2013, 1.

7. Khushboo Hashu Shahdadpuri, *Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory*, in *Asian International Arbitration Journal*, 12, 2016, 77.

8. Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, in *DePaul Law Review*, 63, 2013, 527.

9. Valentina Frignati, *Ethical implications of third-party funding in international arbitration*, in *Arbitration International*, 32(3), 2016, 505-522.

10. Caroline Dos Santos, *Third-party funding in international commercial arbitration: a wolf in sheep's clothing*, in *ASA Bulletin*, 35, 2017, 918.

financial consequences, both positive and negative. Similarly, without robust regulations in most US states, plaintiffs can be stuck with arrangements that are potentially exploitative such as provided in the case of *Horn v. AT&T*, where funders took more than their fair share of awards, leaving less for the injured party. This legal uncertainty also dissuades potential funders from whole-heartedly supporting risky cases, as results may be uncertain and reputational risk remains high[11]. Another example of this regulatory arbitrage has just been highlighted by a Delaware court ruling that protected exchanges between attorneys and funders from attorney-client privilege, despite being protected work-product. Without clear standards to apply, sophisticated funders will profit significantly at the expense of plaintiffs as litigation funding becomes a more critical and permanent fixture in civil cases generally[12]. To tackle the issue, measures like Senator Anna Caballero's Predatory Lawsuit Lending Prevention Act are working their way through California's law-making process to ensure that funders and lenders come out into the open, money-makers do not take more than they should in returns, and most importantly; plaintiffs are able to push for settlements or reject them[13]. By adding these safeguards, you will reduce economic risk and create a fair playing field in the litigation process as well as provide some level of predictability for both the plaintiff and funders of when to know when to pay up for legal fees which inherently creates a stable environment that benefits all parties involved.

a. The Economic Dynamics of Third-Party Litigation Funding in Patent Disputes

With that said, the most important economic reason to have TPLF is access to justice. TPLF lets plaintiffs bring lawsuits without any obligation to pay unless they win their case, which means that small companies and lone inventors can effectively assert their rights against powerful defendants[14]. TPLF provides a crucial mechanism for those with meritorious claims but limited capital,

11. Valerie Sanders, *Probate Court's prior exclusive jurisdiction Dooms Federal-court injunction*, in *Eleventh Circuit Business Blog*, 2023. Available at: *www.11thcircuitbusinessblog.com/2023/11/probate-courts-prior-exclusive-jurisdiction-dooms-federal-court-injunction/* (accessed: October 2, 2024).

12. Chance King, *An examination of commercial litigation funding in the United States*, in *Business Law Digest*, 2023. Available at: *lawforbusiness.usc.edu/an-examination-of-commercial-litigation-funding-in-the-united-states/* (accessed: September 29, 2024).

13. Anna M. Caballero, *Senator Anna M. Caballero Proposes stronger consumer protections against predatory lawsuit lending (no date) California Government*, March 1, 2023. Available at: *sd14.senate.ca.gov/index.php/news/press-release/senator-anna-m-caballero-proposes-stronger-consumer-protections-against* (accessed: October 2, 2024).

14. Ava J. Borrasso, *Third-Party Funding: Relationships, Relevance, and Recent US Court Analysis*, in *Dispute Resolution Magazine*, 26, 2020, 26.

in a litigation cost environment that can quickly soar out of reach. A perfect application of this funding model is patent disputes that's because the obtuse nature of intellectual property law dissuades potential plaintiffs from litigating legitimate claims[15].

This, however, is more than a simple problem of access to justice. Critics have long claimed that TPLF drives up litigation even bringing baseless lawsuits designed to extort settlements merely for financial gain rather than justice. This is especially clear in the context of patent assertion entities (PAEs), more casually known as patent trolls[16]. Operational companies end up paying settlements that may not be the best reflection of the merits, facilitated by TPLF users bringing three-parties into litigation. We underscored this importance in the context of *Taction Tech., Inc. v. Apple Inc.*[17]. which also makes it a worthwhile case to follow, because this recognition needs materialized when the court found that of litigation-funding-related documents relevant for purposes of evaluating the asserted patents valuation[18].

TPLF has taken hold and courts from coast to coast are faced with the question in various cases. In *Taction Tech., Inc. v. Apple Inc.,* for instance, the court ordered identification of litigation funders given that transparency in funding arrangements remains a live concern with both courts and scholars today[19]. The court wanted to ensure transparency in the litigation process and avoid potential conflicts of interest by knowing who was backing plaintiffs in their lawsuits. The ruling is part of a larger trend, that litigation finance can become a game changer in case strategies, settlement decisions and the entire environment of litigating[20].

Conversely, the District of Delaware on the other hand, under the guidance of Chief Judge Colm F. Connolly has sought transparency with respect to TPLF. Namara said the order was standing and required entities to disclose all people and businesses with direct or indirect stakes in a party, another sign of intensified

15. Sean Keller and Jonathan Stroud, *Litigation Funding Disclosure and Patent Litigation*, in *Federal Circuit Bar Journal*, 33, 2024, 77.

16. Fiona Scott Morton, Carl Shapiro, *Patent assertions: are we any closer to aligning reward to contribution?*, in *Innovation Policy and the Economy*, 16(1), 2016, 89-133.

17. Taction Tech., Inc. v. Apple Inc., No. 21-CV-00812-TWR-JLB, 2022 WL 18781396.

18. Jerry Theodorou, *Time to shine light on dark third-party litigation funding*, in *R Street Institute*, March 19, 2024. Available at: *www.rstreet.org/commentary/time-to-shine-light-on-dark-third-party-litigation-funding/* (accessed: October 2, 2024).

19. Robert E. Colletti, *Disclosure of third-party funding documents in patent litigation: A shift towards greater transparency in patent ownership and litigation financing*, in *Haug Partners*. Available at: *haugpartners.com/article/disclosure-of-third-party-funding-documents-in-patent-litigation-a-shift-towards-greater-transparency-in-patent-ownership-and-litigation-financing/* (accessed: October 2, 2024).

20. Mullen Indus. LLC v. Apple Inc., No. 6:22-cv-00145.

scrutiny of TPLF practices[21]. This pro-active initiative targets to find the intricate connections of patents litigation, especially by non-practicing entities (NPEs). The case against VLSI Technology also shows what can happen when disclosures come up short, as the court in that company ordered a stay of proceedings until VLSI complied with the disclosure order. This reflects a larger trend of telling the more parties that they have to be accountable to TPLF, and, by extension, following some in the economic community who believe transparency could lead toward a less restrictive litigation playing field[22].

By way of comparison, courts in Texas have allowed TPLF disclosure with a more relaxed attitude. In *Mullen Indus v. Apple Inc.,* the Court in the Western District of Texas granted Apple its requested relief that would have enjoined Mullen from responding to discovery concerning her funders, adding another brick to the wall. Plus, significantly penetrating armour for litigants trying to protect their funding sources[23]. Their dispute exposes a division among judges over what to do about TPLF, with some courts willing to let plaintiffs hide the identity and financial details of the backers who are bankrolling their cases. Decisions like this one open the door to NPEs continue to gather BRI-style patents with TPLF funding that has less scrutiny than continental jurisdictions[24].

These legal outcomes have profound implications for the economics of patent litigation. With a more critical review of TPLF, perhaps less frivolous litigation or largely no meritorious lawsuits would be filed and fewer appeals might be taken on the number of damages awarded or even the validity of particular patents[25]. There is no doubt that such regulations are necessary to set the bar at a reasonable level to prevent groundless, nuisance lawsuits driven solely by the chance for a monetary settlement and avoiding the age-old question of how can viably patent suits be able to survive in such context with due respect toward credibility of our legal system[26].

Nonetheless, the inconsistent jurisdictional approaches result in an unfair competition among litigants. This will make it less attractive to opportunistic

21. District of Delaware, *Standing Order Re: Third-party Litigation Funding Arrangements*, April 18, 2022. Available at: *www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Disclosure%20Statements.pdf.*

22. VLSI Tech. LLC v. Intel Corp., C.A. No. 18-966-CFC-CJB, 2022 WL 3134427.

23. Mullen Indus. LLC v. Apple Inc., No. 6:22-cv-00145, Dkt. 64 (W.D. Tex. Oct. 19, 2022).

24. Korok Ray, *Third-Party Funding of Patent Litigation: Problems and Solutions*, 2022. Available at Social Science Research Network 4125510.

25. Alec J. Manfre, *The Debate Over Disclosure in Third-Party Litigation Finance: Balancing the Need for Transparency with Efficiency*, Brooklyn Law Review, 86, 2021, 561. Available at: *brooklynworks.brooklaw.edu/blr/vol86/iss2/9*.

26. Khushboo Hashu Shahdadpuri, *Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory*, in *Asian International Arbitration Journal*, 12, 2016, 77.

litigants, potentially discouraging some TPLF activity. At the same time jurisdictions that practice a loose standard would face an increase in patent litigation with more suit filed upon financially motivated claims exhausting the legitimate business capabilities[27].

With the law in this area continuing to evolve, so too are the economics around TPLF likely to change. Judges will still be left to weigh the balance of transparency with maintaining privilege, so that courts will continue to grapple with the complexities of TPLF. In the end, the fate of TPLF will depend on whether or not policymakers can find ways to offer increased access to justice prerogatives without breaking the whole system down thus increasing the importance of continuing dialogue and regulatory change scales for an evolving market.

b. The Economic Implications of Transparency in Litigation Funding Arrangements

While litigation funding serves as a crucial economic support tool for plaintiffs, the opacity it conveys is disadvantageous and consequently requires some regulation. One of the major concerns is the absence of transparency of litigation funding agreements that may lead to potential impacts by third-parties' funders on the strategy and settlement choice without disclosure. The lack of such clarity can pervert economic motive alignment as the funders may gravitate towards their financial self-interest, as opposed to what is best for plaintiffs[28]. In addition, stealth third-party funders may then cause confidential communications to be disclosed which could compromise attorney-client privilege and further broaden legal exposure. Even where there is a public record of lawsuit financing agreements, the opacity of these contracts has allowed some funders to include even more punitive terms with interest rates exceeding 100% that can significantly diminish financial recovery for plaintiffs. Courts and regulators can minimize these economic distortions by increasing transparency in litigation funding arrangements, which allows plaintiffs to continue to operate with equitable access to forced legal action without the detrimental financial terms[29].

27. Emily Pyclik, *An overview of how third-party litigation funders are being addressed by courts and policymakers*, in *Baker Botts*, June 3, 2024. Available at: *www.bakerbotts.com/thought-leadership/publications/2024/june/an-overview-of-how-third-party-litigation-funders-are-being-addressed-by-courts-and-policymakers* (accessed: October 2, 2024).

28. Ronen Avraham, Abraham Wickelgren, *Third party litigation funding. A signaling model*, in *DePaul Law Review*, 63, 2013, 233.

29. Julie-Anne Tarr, *Insurance and third-party litigation funding in Australia: The desirability or otherwise of a common regulatory framework?*, in *Australian Business Law Review*, 45(5), 2017, 419-427.

Transparency on litigation funding agreements is another controversy. In fact, courts specifically those in the US District Court for the District of Nevada as represented by *V5 Technologies LLC v. Switch Ltd.*[30], have rejected defence counsel attempts to discover litigation funding information saying essentially that absent a showing of cause to believe that some potential bias likely exists, such discovery is impermissible. Likewise, in Cirba Inc. v VMWare Inc., (2021)[31] the District of Delaware would not order discovery of money deals, finding irrelevance to damages. But Chief Judge Colm Connolly in the same court has ordered the disclosure of litigation funding agreement conditions, a decision he maintained was proper in a recent mandamus review by the US Court of Appeals for the Federal Circuit[32].

To address these issues, states like Indiana and West Virginia have passed legislation to govern litigation funding. The Indiana law prohibits foreign entities from funding lawsuits, restricts which types of cases funders can be involved in, and requires disclosure over the plea deal. Under West Virginia's statute, subverting unethical business practices such as referral commissions and misleading advertising is forbidden in addition to prohibiting funders from waiving settlements[33]. It is against these backdrops and the different judicial responses that legislative intervention must be tools up. States should adopt changes that provide diversity, transparency, control and ethical behavior for investors to ensure fairness in the judicial process all the while protecting all parties[34].

III. Economic Impacts of PACCAR Inc Decision on UK Litigation Funding: DBAs, Collective Actions, and Opt-Out Claims

The litigation funding industry in UK is still reeling after the decision of the UK Supreme Court in PACCAR case[35] which has significant ramifications for how to treat litigation funding agreements (LFAs) within the context of

30. V5 Technologies v. Switch Ltd. *et al.*, No. 2:2017cv02349.

31. CiRBA Inc. v. VMware, Inc., C. A. 19-742-GBW.

32. Jerry Theodorou, *Time to shine light on dark third-party litigation funding*, in *R Street Institute*, 2024. Available at: *www.rstreet.org/commentary/time-to-shine-light-on-dark-third-party-litigation-funding/* (accessed: October 2, 2024).

33. Ronen Avraham, Abraham Wickelgren, *Third party litigation funding. A signalling model*, in *DePaul Law Review*, 63, 2013, 233.

34. Michael Silvestri, *More States Pushing Back on Third-Party Litigation Funding*, in *CLM Magazine*, April 23, 2024. Available at: *www.theclm.org/Magazine/articles/more-states-moving-to-regulate-third-party-litigation-funding-of-plaintiffs-lawsuits/2923* (accessed: October 2, 2024).

35. R (on the application of PACCAR Inc and others) v. Competition Appeal Tribunal and others [2023] UKSC 28.

damages-based agreements (DBAs). This decision has considerable repercussions with economic consequences, particularly for group actions, in changing the way litigation funding can be structured[36]. The ruling, which not only spells a challenging new regulatory landscape but also financial risk for businesses that turn to third-party litigation funders, with Centrica already fighting the increased bill. With the exception of competition law and collective actions, most of these challenges arise from the overlap between DBAs with opt-out claims[37].

a. Impact on Collective Proceedings and the Use of DBAs

The economic impact is most keenly felt in relation to 'opt-out' collective proceedings for breaches of competition law, funding of which has been predicated on the availability adverse costs insurance. This is where funders play a vital role in financing complex and resource-intensive litigation. Prior to PACCAR, LFAs offered a means to secure funding on a contingent basis without being so rigidly formal or constraining as DBAs[38]. Yet, by declaring that LFAs should be regarded as damages-based agreements (DBAs), for the purposes of which funders' rewards are a *percentage sum payable*, the Supreme Court has therefore subjected these agreements to much more stringent statutory conditions set out in Section 58AA of the Courts and Legal Services Act 1990[39].

They must comply with strict regulatory requirements with respect to user structure, content, and legal validity. Section 47C (8) of the Competition Act 1998 specifically bans DBAs in opt out collective proceedings. For such claims, this creates a critical economic bottleneck as claimants must now either disappoint DBA regulations with respect to funding agreements or depart from the percentage-based recovery model completely[40]. As a result, the funding market has been thrown into disarray as those existing LFAs pegged to uncertain damages are now unenforceable and claimants are frantically trying to put new funding arrangements in place.

36. Luke Streatfeild, Luke Grimes, Patrick Kenny, *Unpacking PACCAR: the fallout from the judgment, and the consequences for litigation funding in the UK*, in *Competition Law International*, 20(1), 2024.

37. Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*, in *The Cambridge Law Journal*, 83(1), 2024, 99-131.

38. Viren Mascarenhas, Hasan Tahsin Azizagaoglu, *Third-Party Funding: The implications for international disputes; and what the UK can learn from the PACCAR decision*, in The Quarterly Magazine of The Chartered Institute of Arbitrators, 2, 2024.

39. Anna Dannreuther, Gareth Shires, *R (on the Application of PACCAR Inc) v Competition Appeal Tribunal: Case Note [2023] UKSC 28*, in *Mass Claims*, 117, 2023.

40. Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*, in *The Cambridge Law Journal*, 83(1), 2024, 99-131.

b. Increased Costs for Businesses and Funders

For both funders and claimants, the necessity of converting LFAs to satisfy DBA requirements or transitioning to other forms of payment is a significant economic event. For those funding this work, the reclassification will have stark implications regulators will need to revisit many of their agreements, and perhaps sponsors will rely less on contingent and more on fixed fees[41]. That may, in turn, increase the cost of funding litigation in general more expensive to fund cases means that funders will need bigger returns just to protect their profit margins within the new regulatory framework. As funders bear more and more upfront financial risk, they will need conservatively priced pricing models to compensate for that risk which will in turn likely result in higher prices for claimants[42].

The higher cost of obtaining litigation funding could also make it uneconomical for companies that participate in collective claims. This may mean that claimants, particularly for opt-out claims where collective damages are pursued on behalf of large groups, find it harder to secure a funder willing to carry the significant upfront costs in order to forego any percentage-based recovery[43]. In practice this would dissuade businesses from grouping together for claims, leading to access to justice in circumstances where individuals or smaller companies would not be able to meet that cost alone being minimized. Especially in competition law, consumer protection and ESG (environmental, social and governance) related litigation this has a chilling effect on the number of collective actions being brought in the UK collectively.

41. Francisco Marcos, *The Uneven and Unsure Playing Field for Competition Damages Claims in the EU: Shortcomings and Failures of Directive 2014/104/EU and Its Implementation*, in *IIC-International Review of Intellectual Property and Competition Law*, 52(4), 2021, 468-476.

42. Stephen Wisking *et al.*, *Revised litigation funding agreement approved for opt-out competition claim: Fee based on multiple of funding was not a DBA*, in *Herbert Smith Freehills*, November 23, 2023. Available at: *www.herbertsmithfreehills.com/insights/2023-11/revised-litigation-funding-agreement-approved-for-opt-out-competition-claim-fee* (accessed: October 2, 2024).

43. Max Hotham, *The truck stops here? In PACCAR Inc and others v Competition Appeal Tribunal and others Supreme Court finds certain litigation funding agreements to be damages-based agreements and unenforceable*, in *Enyo Law*, July 31, 2023. Available at: *enyolaw.com/news/the-truck-stops-here-in-paccar-inc-and-others-v-competition-appeal-tribunal-and-others-supreme-court-finds-certain-litigation-funding-agreements-to-be-damages-based-agreements-and-unenforceable/* (accessed: October 2, 2024).

c. Market Dynamics and Competition Among Funders

The PACCAR decision has market implications for litigation funding in the UK, too. With the reclassification of LFAs as DBAs, competition between litigation funders to devise compliant alternative ATP models is set to grow. However, this might lead to a near-term market shakeout in which some modest or less versatile funders find it difficult to adjust and comply with the new regulatory regime. The financial pressure is likely to be more on larger, long-standing funders who are able to absorb legal and administrative costs although those could potentially rise as smaller players are priced out of the game[44].

In addition, the ruling may open the door to more development in structuring litigation funding agreements. Funders could experiment with variations on this model that strike an appropriate balance without running afoul of DBA restrictions, such as hybrid agreements that combine fixed fees with success fee arrangements that are not tied to damages. It will be some time before these models are developed in new ways but in the meantime we face a period of uncertainty with potentially less funders willing to enter into high risk, high-cost class actions[45].

Additionally, this shift mirrors the growing regulatory analogue in the EU, and especially within the AI Act. The regulation of AI on the one hand calls for transparency, accountability, ethical considerations and so structured compliance to a significant extent[46]. As well as providing a helping hand for the protection of applicants, the new regulations indicate a growing need across differing regulatory domains for better legal definitions to govern risk and enter into chance minimization, fair treatment and leading open subjects in sensible relations. Similarly to the DBAs, in litigation, stricter rules are being put to save claimants and stop any potential abuses as the EU AI Act are standing on toe, regulating AI systems to help mitigate risks of bias, all safety among others[47]. In both cases, businesses and funders must invest heavily to comply with the regulations, raising

44. Felicity Ewing *et al.*, *Supreme Court forces industry-wide change to litigation funding model*, in *Dentons*, July 27, 2023. Available at: *www.dentons.com/en/insights/articles/2023/july/27/supreme-court-forces-industry-wide-change-to-litigation-funding-model* (accessed: October 2, 2024).

45. Viren Mascarenhas, Hasan Tahsin Azizagaoglu, *Third-Party Funding: The implications for international disputes; and what the UK can learn from the PACCAR decision*, *The Quarterly Magazine of The Chartered Institute of Arbitrators*, 2, 2024.

46. Rupert Macey-Dare, *Preserving 3rd Party Funding in UK Competition Law Opt-Out Class Proceedings-Imminent Legislative Response to Detonate the PACCAR Torpedo*, 2023. Available at Social Science Research Network 4634289.

47. Patrick Rode, *AI in litigation funding in the context of the EU AI act*, in *Deminor Litigation Funding*, August 27, 2024. Available at: *www.deminor.com/en/news-insights/ai-in-litigation-funding-in-the-context-of-the-eu-ai-act/* (accessed: October 2, 2024).

costs but also spurring innovation and leading to new compliance cleaning models. This convergence of these frameworks is emblematic of a wider global regulatory development and climate demanding better monitoring, transparency and structured economic relationships across the board[48].

IV. The Increasing Relevance of TPLF in Arbitration: Key Aspects and Legal Developments

The most obvious such thing in investment arbitration surely is the TPLF, an institute long known to arbitration and mediation but suddenly so vague case its relation with the 2020s. This is so that, with the prices of investment disputes increasing arsenal against a nation or capital enterprise gushes out, parts demand – typically from small investors and/or developing nations for TPLF[49]. The TPLF arrangement may also offer a crucial financial lifeblood for those with claims in investment arbitration, as the sums at stake in such proceedings can be rising, and often there is a number of years between referral to trial because they require lengthy investigations and consideration[50]. This is particularly so in investor-state disputes, he adds, which are frequently arbitrated under agreements like ICSID and often involve an enormous amount of money with the claimant pitted against the resources of entire states. TPLF is also involved in mediation and funding by more than a 'few' funders savouring the prospect of potentially greater returns from settlements. By advancing these proceedings, TPLF not only opens the doors to justice, but also allows plaintiffs to take part in sophisticated international disputes and enhances a better functioning arbitration world[51].

These are illustrated in three broad respects: TPLF as an investment arbitration tool, TPLF assisting claimants to bring cases forward for hearing by facilitating settlements or through commercial arbitration[52]. This is of particular importance

48. Adrian Cordina, *Is It All That Fishy? A Critical Review of the Concerns Surrounding Third-party Litigation Funding in Europe*, in *Erasmus Law Review*, 14(4), 2021. Available at Social Science Research Network: *ssrn.com/abstract=4163066*.

49. Brooke S. Güven, *Regulating Third-Party Funding in Investor-State Arbitration Through Reform of ICSID and UNCITRAL Arbitration Rules: Holding Global Institutions to Their Development Mandates*, in *Boston College Law School Legal Studies Research Paper*, 2020, 627.

50. Kirstin Dodge *et al.*, *Third-Party Funding and Reform of the ICSID Arbitration Rules*, in *Romanian Arbitration Journal*, 15, 2021, 15.

51. Jonathan Barnett, Lucas Macedo, Jacob Henze, *Third-party funding finds its place in the new ICC rules*, in *Kluwer Arbitration Blog*, 2021. Available at: *arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/* (accessed: October 2, 2024).

52. Didem Kayali, *Third-Party Funding in Investment Arbitration: How to Define and Disclose It*, in *ICSID Review-Foreign Investment Law Journal*, 38(1), 2023, 113-139.

in an investor-state dispute settlement, where a claimant with few bones to financial support often finds itself up against powerful states or multinational cooperation the case that finished TPLF. TPLF, for instance, backed the claimant in Teinver v Argentina[53] with respect to conducted litigation between a sovereign state and thereby highlighted the importance of an access to justice based on means. The TPLF has been widely accepted on many jurisdictions which includes Singapore and Hong Kong, the Civil Law (Amendment) Act 2017 and The Hong Kong Arbitration Ordinance. Requiring the disclosure of funding arrangements to help notify investors on how funds are funded and thus keep everything clear[54].

TPLF is also coming up as a device in mediation, that seek to give litigants the round money required to pay court awards[55]. That said, while also not as common compared to arbitration, we expect the quicker return on their investment is known by funders in TPLF mediations most recently illustrated by cases such as Eco Oro Minerals Corp vs. Colombia[56], where third-party funding was being used to also finance this party's involvement during mediation.

TPLF is concentrating in the area of commercial disputes and is increasingly employing its resources to fund larger commercial arbitrations. The *V5 Technologies LLC v. Switch Ltd. (2019)* decision also demonstrates how challenging it will continue to be for courts to strike a balance between the values of transparency and the confidential nature of commercial arbitration, particularly in view of what details about their TPLF arrangements litigants will have to furnish to obtain relief from costs sanctions[57]. The implications for third-party funding in arbitration, based on what we have observed of Hong Kong and Singapore are that while it safeguards the interests of claimants as needed, it also eliminates any adverse distribution or unfair practice overall.

a. The Economic Impact of Mandatory Disclosure in Third-Party Funding for Arbitration

Mandatory disclosure of third-party funding in arbitration raises significant economic implications, particularly in cases where a funder's involvement influences

53. Teinver v Argentina, ICSID Case No. ARB/15/32.

54. Young Hye Chun, *Security for Costs under the ICSID Regime: Does It Prevent Arbitral Hit-and-Runs or Does It Unduly Stifle Third-Party Funded Investors' Due Process Rights?*, in *Pepperdine Dispute Resolution Law Journal*, 21, 2021, 477.

55. Matias Tamlander, *Proposed Regulation of Third-Party Funding in Investor-State Dispute Settlement*, in *Helsinki Law Review*, 14(1), 2020, 74-87.

56. Eco Oro Minerals Corp vs. Colombia (ICSID Case No. ARB/16/41).

57. V5 Technologies v. Switch Ltd. *et al.*, No. 2:2017cv02349.

cost management, liability, and fairness in the proceedings[58]. The third-party funder, unlike the real party in arbitration, is of course not subject to adverse costs orders: this is one of the basic economic risks. Where the other side is impecunious and has hidden behind third-party funding, it can create a financial outlay for the successful party who then cannot recover costs[59]. The potential injustice of this position means that others insist on disclosure being compelled at an appropriate juncture e.g. subject to security for costs. Recent legislation in jurisdictions such as Singapore and Hong Kong appear to follow this approach, the new laws in both countries require disclosure in advance regarding assessment third-party funding contracts to ensure transparency regulations so as not to cause financial risk[60].

In contrast, others argue that the very economic incentives of third-party funders provide the market with inherent protection against foul play or excessive delay in arbitration. Given that funders are winners only if their party wins, they have an economic interest to see the process through in as efficient a manner as possible. Nonetheless, there is a fear that non-disclosure could result in arbitrators having conflicts of interest with their funders or mislead tribunals about the financial health of any funded party[61]. Requiring disclosure equips arbitrators to hold fair proceedings and establish when security for costs is due, giving each party balanced economic risks. As these Singapore and Hong Kong developments develop, they serve as a useful laboratory for assessing whether required disclosure of third-party funding can strike a better balance between fairness and economic accountability without unduly interfering with efficiency[62].

V. Ethics and Moral Aspects of Litigation Funding: Navigating Risks, Incentives, and Transparency

TPLF has received praise for facilitating lawsuits which would not exist due to underfunding, but can lead to questions about moral hazard and ethical

58. Didem Kayali, *Third-Party Funding in Investment Arbitration: How to Define and Disclose It*, in *ICSID Review-Foreign Investment Law Journal*, 38(1), 2023, 113-139.

59. Can Eken, *A detailed comparison of third-party funding regulations in Hong Kong and Singapore*, in *Asia Pacific Law Review*, 29(1), 2021, 25-46.

60. Nataša Hadžimanović, *Third-Party Funding in Arbitration: A Case for Mandatory Disclosure?*, in Zlatan Meškić, Ivana Kunda, Dušan V. Popović, Enis Omerović (eds.), *Balkan Yearbook of European and International Law 2019. Balkan Yearbook of European and International Law*, Springer, 2019.

61. Matias Tamlander, *Proposed Regulation of Third-Party Funding in Investor-State Dispute Settlement*, in *Helsinki Law Review*, 14(1), 2020, 74-87.

62. Milan Lazić, Milica Savić, *Third-party funding and access to justice*, in *Revija Kopaoničke škole prirodnog prava*, 3(2), 2021, 135-148.

dilemmas as well as fairness. Third-party funders, with an eye towards making a profit, can have such a substantial impact on litigation dynamics that they may functionally wield more influence than the parties most directly tied to achieving justice-oriented outcomes. A central problem with several ethical implications, this issue is that parties who are protected against the financial risks of being sued have less incentive to bring a case to close quickly[63]. For example, funding agreements are typically structured so that funders receive a percentage of the ultimate settlement amount thus causing plaintiffs and law firms to turn down reasonable offers in the hopes of securing higher-value settlements to cover not only legal expenses but also the funder's cut. This can in turn protract litigation unnecessarily and undermine efficiency, fairness in the administration of justice[64].

The *Excalibur Ventures LLC v. Texas Keystone Inc. & Ors case*[65] illustrates the ethical issues that can arise around litigation funding. This time it was high-stakes dodgy or speculative oil and gas litigation that was mostly funded by third-party funders, with the court ordering the funders to pay indemnity costs due to the lack of merit in its multiple piece proceedings. This case is a showcase of the type of moral hazard presented by third-party funding where funders can back without merit claims for potentially large rewards leading to an abuse on judicial resources[66]. First, what began as a potentially well-intentioned idea to help plaintiffs in need of capital has evolved into a massive industry making billions and billions but not necessarily oriented toward justice. To the extent that there is a market, today's TPLF market is led mostly by private investors and hedge funds, often funding corporate litigation and large class actions rather than simply helping indigent consumers. Such a move begs important ethical questions about the nature of profit-seeking funders to legal disputes which should be just and fair, thus undermining the original purpose of TPLF for widening access to those in need of legal representation[67].

The most serious ethical issue raised by litigation funding in general and TPLF in particular is the fact that many jurisdictions do not require disclosure of the terms under which parties receive TPLF. Where money issues are rarely

63. Sairam Bhat, Vikas Gahlot, *Third-party Funding: A Conceptual and Comparative Legal Perspective*, in *CMR University Journal for Contemporary Legal Affairs*, 5, 2023, 34.

64. Peny Cahaya Azwari, Febriansyah, Sri Delasmi Jayanti, *Impact of Third-Party Funds and Capital Adequacy Ratio on Profit Sharing Financing*, in *International Business and Accounting Research Journal*, 6(1), 2022, 63-70.

65. Excalibur Ventures LLC v. Texas Keystone Inc. & Ors [2016] EWCA Civ 1144.

66. Ann M. Lipton, *Not everything is about investors: the case for mandatory stakeholder disclosure*, in *Yale Journal on Regulation*, 37, 2020, 499.

67. Insurance Information Institute, *What is third-party litigation funding and how does it affect insurance pricing and affordability?*, 2022. Available at: *www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf* (accessed: October 2, 2024).

an unknown in traditional litigation, the financial relationships underpinning a TPLF agreement often remain hidden from public view and thus raise uncertainty about possible conflicts of interest and make it tough to know why the plaintiffs' San Francisco lawyers brought their suit[68]. A funder could, for example, have an identity or financial interest in the arbitrator and as a result biases his decision. As a result, jurisdictions like Hong Kong and Singapore have introduced rules to regulate this industry by requiring the disclosure of third-party funders in arbitration cases to address these concerns but that is far from being on everyone's agenda[69]. Champerty is an example of the type of arrangement that has historically been prohibited because it may compromise the integrity of legal system: under champerty, a third party finances a plaintiff's lawsuit and takes a share in return on whatever money or other benefit comes from the case[70]. Champerty prohibitions have since relaxed in most jurisdictions, but the ethical questions remain for today's TPLF market[71]. When third-party funders have profit-driven interests, it can compromise their fairness and bias particularly when they wield enough control over litigation strategies to raise serious ethical questions about the legitimacy of legal processes.

The advent of third-party litigation funding has upended the traditional legal landscape, providing capital where none before was available and enabling litigants who otherwise might not be able to afford to bring their claims. However, this transformation has its own fair share of ethical & moral challenges[72]. The effects of moral hazard, conflict and lack of transparency are the worst possible corrupting forces on the principles liberties based legal system. While this latter set of risks has been countered through imposing disclosure obligations and regulatory safe guards in some jurisdictions, the ethical risks of TPLF are insurmountable[73]. The

68. Dalal Alhouti, *Disclosing third-party funding in international arbitration: Where are we now?*, in *Charles Russell*, November 29, 2022. Available at: *www.charlesrussellspeechlys.com/en/insights/expert-insights/litigation--dispute-resolution/2022/disclosure-obligations-and-third-party-funding/* (accessed: October 2, 2024).

69. Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice*, in *Georgetown Journal of Legal Ethics*, 33, 2020, 687.

70. Fahad Bin Siddique, *Champerty vs. Third-Party Funding in Arbitration: A Censorious Debate*, in *SCLS Law Review*, 3(3), 2020.

71. Josef Wolfgang Paulson, *Helpful Industry or Officious Intermeddles: Assessing US Champerty Law through the Lens of Third-Party Funding in International Dispute Resolution*, in *George Washington Law Review*, 92, 2024, 725.

72. John Pierce and David Burnett, *The emerging market for litigation funding*, in *The Hedge Fund Journal*, June 2013. Available at: *thehedgefundjournal.com/the-emerging-market-for-litigation-funding/* (accessed: October 2, 2024).

73. Robert E. Colletti, *Disclosure of third-party funding documents in patent litigation: A shift towards greater transparency in patent ownership and litigation financing*, in *Haug Partners*. Available at: *haugpartners.com/article/disclosure-of-third-party-funding-documents-in-patent-litigation-a-shift-*

litigation funding industry continues apace, leaving eager courts and regulators to attempt the difficult juggle of navigating the need for access to justice on one end while ensuring that integrity of the judicial system does not turn into an object up for sale with dollar signs colliding mid-air.

VI. Advocate General Szpunar's Opinion in ASG 2 (C-253/23): Economic Implications and Third-Party Funding Dynamics

The Advocate General's (AG) Opinion in the case ASG 2 (C-253/23) demonstrates how certain ancillary litigation funding arrangements can raise important matters of principle of economic interest, particularly where claims arise in respect of breaches of Article 101 TFEU. This opinion is of great importance to the legal profession, but also to the civil economic form of justice.

The case C-253/23 concerns the *assignment model* in Germany, with which claims can be assigned to benefit from collective private enforcement of competition law. In this case, 32 sawmills have assigned their claims to ASG 2, which is a legal service provider according to the German *Rechtsdienstleistungsgesetz* (RDG) and is entitled to pursue these claims in court. The state of North Rhine-Westphalia took legal action against the measure, arguing that it contravened the RDG's limitations on who can provide certain forms of legal service. The RDG specifies which claims may be transferred to substitute providers, and the government had argued that competition law claims did not fall within these categories. Thus, the outcome of this dispute is important not only because it affects a food delivery service for a major platform company (*Lieferando*), but also to define what private enforcement and alternative legal service provision could look like in Germany[74].

TPLF permits claimants to litigate risk-free, with third-party funders paying the litigation costs in return for a share of any settlement. The assignment model increases demand for TPLF by allowing claimants to package their claims and spreading risk amongst prospective funders. By utilising a collective action approach, we are able to make a stronger, more coherent case that is likely to lead to better outcomes and is altogether a much more attractive investment for funders[75]. Additionally, alternative legal service providers benefit from regulatory

towards-greater-transparency-in-patent-ownership-and-litigation-financing/ (accessed: October 2, 2024).

74. ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v Land Nordrhein-Westfalen Case C-253/23.

75. Ronen Avraham, Abraham Wickelgren, *Third-Party Litigation Funding – A Signaling Model*, in *DePaul Law Review*, 63, 2014, 233. Available at: *via.library.depaul.edu/law-review/vol63/iss2/4*.

flexibility under the RDG, allowing them to adopt innovative fee structures, such as contingency fees. Indeed, since the judgment raises fundamental questions about the relationship between national laws and EU principles, it should be of great importance to determine the future viability of TPLF as well as to access justice in European competition law.

a. The Economic Landscape of Litigation and Claim Assignment

Over recent years the landscape of litigation has changed somewhat dramatically, with third-party funding at the forefront of these changes. As financial issues prevent some claimants from taking their claims to court, third-party funding can provide the resources they need to obtain legal assistance in pursuing a claim. This is particularly so in relation to cartel damages, where the costs of going into litigation can be a major obstacle to bringing claims by individuals.

AG Szpunar's Opinion dissects the economic logic behind the prohibition on assignment of claims in cartel harm cases. He insists that these prohibitions put hurdles in the path of injured parties, making it virtually impossible or much too complicated to claim compensation for losses experienced a result. The Opinion notes, however, the inherent difficulty for claimants to consolidate their claims where they are precluded from assigning them to licensed legal service providers. This process slows the legal system as a whole and ultimately discourages wider competition within the law market[76].

The no assignability of claims, however, also perturbs the economic balance to be struck in the market for litigation funding. Such laws limit mechanisms for claimants to access financial support and therefore provide less incentive for third-party funders to invest in potential claims. The risk is resulting from removing the capacity of funders to assign claims would make the funding model far less attractive and could dry up some of the finance that has become available so claimants can access justice. As such, it could prevent investment in claims which have a sound legal basis from being brought, defeating the ends of justice[77].

76. *Ag Szpunar delivers opinion regarding prohibition on assignment on fiduciary basis claims for compensation resulting from competition law infringements*, in *EU Law Live*, 2024. Available at*: eulawlive.com/ag-szpunar-delivers-opinion-regarding-prohibition-on-assigning-on-fiduciary-basis-claims-for-compensation-resulting-from-competition-law-infringements/* (accessed: October 2, 2024).

77. Nils Imgarten *et al.*, *Collective private enforcement clashes with German laws on the regulation of legal services: AG Szpunar's opinion in C-253/23 – ASG 2*, in *Kluwer Competition Law Blog*, 2024. Available at: *competitionlawblog.kluwercompetitionlaw.com/2024/09/25/collective-private-enforcement-clashes-with-german-laws-on-the-regulation-of-legal-services-ag-szpunars-opinion-in-c-253-23-asg-2/#:~:text=In%20his%20Opinion%2C%20AG%20Szpunar,effectiveness%20in%20conjunction%20with%20Art* (accessed: October 2, 2024).

The AG stressed that it must be evaluated if national laws are in harmony with EU directives and principles. This problem can be enlarged to broader economic issues concerning access to justice as national restrictions are fundamentally incompatible with EU law. If ordinary citizens and sole proprietors cannot go to court because they cannot afford it, something is fundamentally wrong with the system. Additionally, it may create a two-tiered system in which only the affluent are able to address their grievances, leading to economic disparities.

b. The Role of Third-Party Funding in Enhancing Access to Justice

Opinion of AG Szpunar thus has significant consequences for the legal framework and the commercial opportunities relating to third party funding, not in the least as concerns access to justice. In pointing out that prevention of assignment claims cannot be justified to the purposes 'a fair trial', the AG stresses that all parties should have equal access to justice, regardless of their financial position. Third-party funding is an essential tool for achieving a level playing field, giving claimants the ability to challenge deep-pocketed opponents who would otherwise financially cripple them through attrition[78]. The AG's opinion also calls for less rigid legal frameworks which respect the economic needs of claimants. By allowing claim assignment and enabling the kind of third-party funding that arose alongside class-action lawsuits, the system can help level the field for individuals seeking redress for wrongs done to them[79]. This change improves not only justice but may improve competition among funders, with better terms for claimants and making sure that equal access to justice remains true.

c. Social, Ethical, and Moral Impacts on Third-Party Funding

The conclusion drawn in AG Szpunar's Opinion on third-party funding has major social, ethical and moral repercussions for the sector Therefore, a bar on claim assignment can result in huge disparities in access to justice; limiting the ability of only those with extremely deep pockets, able to bring claims at all. This represents a significant moral question on the integrity of our legal system and success to get remedy against losses originating from cartel-based behaviour[80].

78. V. Sahani, *Rethinking the impact of third-party funding on access to civil justice*, in *DePaul Law Review*, 69(2), 2020, 611-632.

79. Mohamed Sweify, *Third-party funding: A new perspective of access to justice*, in *American Bar Association Dispute Resolution Section*, July 2020. Available at: *www.americanbar.org/content/dam/aba/publications/just-resolutions/february-2021/sweify-tpf-access-to-justice.pdf* (accessed: October 2, 2024).

80. Peny Cahaya Azwari, Febriansyah, Sri Delasmi Jayanti, *Impact of Third-Party Funds and*

This does not only make it less likely that they will access the legal system in order to achieve justice, but also betrays the fundamental tenet of any legal system to ensure all citizens are able to vindicate their rights irrespective of their resources. Therefore, Szpunar's Opinion is not only a legal interpretation but also an invitation to create conditions where economic obstacles do not prevent the pursuit of justice and in this way, support fair functioning society.

Advocate General Szpunar's Opinion is useful for this: it shows us the economic consequences of claim assignment prohibitions in the perspective of EU law. Highlighting the necessity for legal frameworks that enable access to justice through third-party funding where absolutely essential to making sure all have an equal opportunity to assert legitimate claims regardless of financial means[81]. In so doing, the legal system can live up to its promise of fairness and justice for all.

VII. AI and Litigation Funding: A Transformative Interaction

The use of AI in litigation funding marks a radical reformation to the evaluation, funding, and management of legal cases. Historically, litigation funders used to take the view that to some degree they had a portfolio of legal and financial expertise on which to predicate case investment decisions. Yet AI has added another layer to this phenomenon[82]. So, by the use of bait and predictive analysis machine learning AI is capable to sort out vast pools of extra-legal data i.e. for past judgments, case applications, and case histories to more certainly anticipate what are the odds a law suit would be winnable that any human reviewer simply could on his own. This enables funders to make smarter decisions identifying trends that may not be immediately apparent, and consequently enabling better risk assessment and resource allocation[83].

The operational benefits litigation funders enjoy with the technology is because of automation of AI decision-making. For example, AI systems can

Capital Adequacy Ratio on Profit Sharing Financing, in *International Business and Accounting Research Journal*, 6(1), 2022, 63-70.

81. Simon Kleinert, Christine Volkmann, Marc Grünhagen, *Third-party signals in equity crowdfunding: the role of prior financing*, in *Small Business Economics*, 54(1), 2020, 341-365.

82. David Perla, *The current state of AI in Legal Finance*, in *Burford Capital*, February 22, 2024. Available at: *www.burfordcapital.com/insights-news-events/insights-research/nylj-current-state-of-ai/* (accessed: October 2, 2024).

83. Terry Dee, Michael Hill, *Deep Learning Meets Deep Pockets: Artificial Intelligence's Impact on Litigation Financing*, in *Winston & Strawn*, August 7, 2024. Available at: *www.winston.com/en/blogs-and-podcasts/product-liability-and-mass-torts-digest/deep-learning-meets-deep-pockets-artificial-intelligences-impact-on-litigation-financing* (accessed: October 2, 2024).

help hasten the due diligence process by reviewing extensive legal documents using natural language processing (NLP) tools to extract important contractual terms and risks. This not only minimises human error, but speeds up decision-making too meaning funders can process a higher volume of cases more efficiently. AI essentially gives litigation funders a competitive advantage that enables them to grow their practice, optimize profits, and better deploy funds[84]. The increasingly ubiquitous use of AI nonetheless brings problems with it, especially when it comes to transparency and fairness that we need to be careful how to navigate.

However, today AI is changing the way litigation finance works, making it easier for both cases and analysis to be assessed. The AI tool Legalist Inc. builds is the truffle sniffer, which finds high likely matches of cases by things like court, judge, and case type making $901M in AUM as their portfolio expanded with precision[85]. Another funder, *Qanlex* uses Case Miner to identify, screen and automatically connect with clients in Latin America and Europe who are potential breach of contract cases[86]. AI provides assistance to corporations such as Apex Litigation Finance in negatively evaluating cases by forecasting potential losses; however, it still needs a human input towards the final investment decisions because of the data limitations that exist at present. AI will contribute to improved predictive analytics and greater efficiencies in managing cases for the benefit of litigation funding, among other things, in the future[87]. More data will improve AI when it comes to predicting case outcomes, timelines and settlements which is where players like Apex Litigation Finance expect the technology to mature. Legalist predicts AI will improve case sourcing even more to turn the entire litigation process on its head.

84. Michael Duffy, *Two's company, three's a crowd?: Regulating third-party litigation funding, claimant protection in the tripartite contract, and the lens of theory*, in *University Of New South Wales Law Journal*, 39(1), 2016 165–205. Available at: *search.informit.org/doi/10.3316/informit.024631232228937*.

85. Emily R. Siegel, *AI helps litigation funders mine court dockets for Legal Gold*, in *Bloomberg Law*, 2024. Available at: *news.bloomberglaw.com/business-and-practice/lawsuit-investors-use-ai-to-mine-cases-for-promising-returns* (accessed: September 29, 2024).

86. Carolina Gonzalez, *Qanlex, a litigation financing startup, receives $3M investment*, in *LatamList*, 2022. Available at: *latamlist.com/qanlex-a-litigation-financing-startup-receives-3m-investment/* (accessed: September 29, 2024).

87. Moran, *Apex Litigation Finance brings artificial intelligence development in-house to drive funding activity and further promote access to justice*, in *Legal Funding Journal*, 2020. Available at: *legalfundingjournal.com/apex-litigation-finance-brings-artificial-intelligence-development-in-house-to-drive-funding-activity-and-further-promote-access-to-justice/* (accessed: September 29, 2024).

a. Technological, Economic, and Legal Risks in AI-Driven Litigation Funding

AI is significantly impacting the litigation funding landscape by enabling firms to identify and evaluate potential claims with unprecedented accuracy. For example, firms can now use AI algorithms to sift through vast amounts of data from court records and legal precedents to determine which cases are more likely to yield favourable outcomes. This technological advancement is revolutionizing how litigation finance firms assess risks and opportunities, allowing them to make informed decisions quickly.

Moreover, the term *Holy Grail* in the context of litigation finance refers to the quest for a perfect system that can reliably predict the outcomes of cases and the associated risks. Capital, a prominent litigation finance firm, emphasizes the potential of AI to transform the underwriting process by enhancing efficiency and accuracy. The integration of machine learning in assessing the strength of claims allows funders to make data-driven decisions, reducing the uncertainty historically associated with funding litigation[88].

This shift toward AI-driven litigation funding has serious implications for companies frequently targeted by lawsuits. As funders become more adept at identifying potentially lucrative claims, businesses may face an increase in litigation volume, particularly in areas such as class actions and mass torts. Companies must prepare for this evolving landscape by understanding the criteria funders use and employing proactive legal strategies to manage the growing risks associated with litigation funding[89].

b. The Future of Litigation Finance and Legal and Regulatory Challenges of AI in Litigation Finance

Litigation finance can change significantly in the future and one of the great influencers will be Artificial Intelligence (AI). The predictive analysis enabled by AI can help funders assess huge sets of data spanning from court records and legal briefs to judicial rulings, making it capable of accurately predicting case

88. Christopher J. Valente, *et al.*, *Recent trends in Generative Artificial Intelligence Litigation in the United States*, in *K&L Gates*, September 5, 2023. Available at: *www.klgates.com/Recent-Trends-in-Generative-Artificial-Intelligence-Litigation-in-the-United-States-9-5-2023* (accessed: October 2, 2024).

89. Terrence J. Dee, Kyllan Gilmore, Michael Hill, *Deep Learning Meets Deep Pockets: Artificial Intelligence's Impact on Litigation Financing*, in *Winston & Strawn*, August 7, 2024. Available at: *www.winston.com/en/blogs-and-podcasts/product-liability-and-mass-torts-digest/deep-learning-meets-deep-pockets-artificial-intelligences-impact-on-litigation-financing* (accessed: October 2, 2024).

outcomes. Natural language processing (NLP) can assist this functionality by pulling out the key arguments and evidence from legal documents, and using these to provide a faster risk assessment[90]. In addition, AI can perform in-depth settlement analysis so funders can identify which cases harbour the greatest possibility of significant returns and thereby make informed decisions based on their investment parameters in a more data-driven approach to litigation funding.

But increased use of AI also brings substantial legal and regulatory issues. The biggest worry about AI-fuelled decision-making is the risk of bias, which might in turn have a pernicious effect on the justice system by perpetuating discrimination[91]. This is further complicated by the opacity of AI algorithms that makes it difficult for stakeholders to comprehend how decisions are being made. To address these issues, legislators are expected to implement laws that enforce transparency in AI systems and provide a continuous audit trail to detect and eliminate any biases which will undoubtedly maintain fairness but would be an ideal smart integration of AI into the litigation finance industry as well.

i. The EU AI Act and Its Impact on Litigation Funding

In addition, in terms of particular legislative endeavours an evolutionary legislation took place the EU AI Act, passed in 2024 became the first detailed means to regulate AI systems across a spectrum of risk levels. Though not a high-risk category as described in the EEA proposal, litigation funding places near to law so AI systems in this context are likely subject to tight regulation[92]. The provision of act states that for any AI system used in by financial institution for duties such as due diligence, case evaluation or predictive analytics should provide requisite transparency and accountability. This includes Impact assessments, Data privacy protections and Mitigating risks of bias & discrimination in AI driven decisions[93].

The two sides of the coin are that the compliance demands of the EU AI Act

90. Michael Paczolt, *The role of NLP and AI in third-party litigation funding: How insurers can leverage data analytics to level the playing field*, in *Milliman*, April 10, 2023. Available at: *nodal.milliman.com/en/insight/role-of-nlp-and-ai-in-third-party-litigation-funding* (accessed: October 2, 2024).

91. Matthew Blundell, *What are the Chances?: The Predictive Analytics behind Third-Party Litigation Funding in Investment Arbitration*, Uppsala Universitet, 2022.

92. Charlotte Siegmann, Markus Anderljung, *The Brussels effect and artificial intelligence: How EU regulation will impact the global AI market*, in *Arxiv Cornell University*, 2022.

93. Patrick Rode, *AI in litigation funding in the context of the EU AI act*, in *Deminor*, August 27, 2024. Available at: *www.deminor.com/en/news-insights/ai-in-litigation-funding-in-the-context-of-the-eu-ai-act/* (accessed: September 29, 2024).

could have a very marked effect on how litigation funders adopt AI. In particular, smaller firms might find it difficult to afford the compliance burden, such as regular audits and impact assessments, which could in turn stifle innovation and restrict competition. Further, given the importance to transparency in the Act, it could require funders to rebuild their legacy AI tools so decisions can be explained all of the way through[94]. The regulatory framework is also focused on eliminating bias to respect the universal values of fairness as well as ethical concerns derived from using AI in wider social context, how this can impact access to justice. Consequently, litigation funds will have to adjust to this slowly emerging legal ecosystem and keep in mind the EU regulatory framework when they invest in improvements of mechanisms and further standardization of the AI processes behind it.

VIII. Conclusion

Globally, the advent of TPLF has transformed the way justice is accessed and how law operates in practice. In this regard, TPLF has the potential of serving as an important new mechanism to facilitate lawsuits by meritorious claimants' individuals or corporations who would otherwise find prohibitive the costs of bringing a lawsuit. This form of funding is of particular importance in complex areas such as patent litigation and group action, where the complexity of legal systems regularly deters potential claimants litigating.

The chapter highlights the significant economic stakes in TPLF given recent legal developments, most notably the PACCAR decision of the UK Supreme Court. The ruling is therefore a new regulatory hurdle to LFAs, which leaves funders and claimants with even more law steps to navigate through. The trend towards LFAs as damages-based agreements (DBAs) has led to a funding bottleneck, which in turn has led to concerns about the future sustainability of TPLF in these areas.

Additionally, this chapter scrutinizes ethical implications related to TPLF and discusses whether such for-profit incentives run the risk of disputing legal processes. But, as litigation strategies are increasingly influenced by third-party funders, some are bound to ask whether access to justice is being facilitated or over-harvested and if the legal system itself could not be losing legitimacy in the process.

94. Michael Veale, Frederik Zuiderveen Borgesius, *Demystifying the Draft EU Artificial Intelligence Act – Analysing the good, the bad, and the unclear elements of the proposed approach*, in *Computer Law Review International*, 22(4), 2021, 97-112.

Finally, the chapter argues for a legal regime favouring TPLF but recognizing the economic and ethical difficulties associated with it. By promoting an environment that fosters responsible funding and allows the legal system to invest in greater access to justice, and commit more forcibly to fairness and justice of all individuals on reasonable bases. TPLF's evolution is a game changer which could reset how justice is conceived and realized around the world.

7. Conclusion and Recommendations for Policymakers

I. Future Prospects and Challenges for Policymaker

Litigation funding, notably third-party litigation funding (TPLF), has developed into an effective device in improving access to justice, permitting claimants to initiate legal actions even without the financial costs. It creates a lot of opportunities and challenges in the industry as it grows bigger day by day, especially when mentioned within the context of for instance regions in Asia Pacific. If TPLF is to develop well, symmetrically and good policies will have to consider everything from missing regulations up to ethical considerations. These recommendations form a blueprint for policymakers, serving as guidelines on how to build an open, regulated, and equitable market for litigation funding.

a. Challenges for Policymakers in the Litigation Funding Ecosystem

The ongoing situation in TPLF is characterized by a mix of challenges and opportunities that need careful strategic decision and interventions. Although regulation and specific industry-standard governance ensure an ethically sound, self-sustainable, and transparent litigation funding ecosystem, countries today cannot afford inefficient or unfair judicial systems whilst also safeguarding the best interests or rights of litigants, claimants as well as other interested parties and the funders. The litigation funding industry faces a number of problems that need to be resolved by policymakers in order to create a system which is fair and transparent.

One of the main things is that there is no uniform system in many jurisdictions, providing guidance with disclosure obligations and funder liability, as well as funding contracts being informal unregulated transactions. These broad regulations often lead to ambiguity and allow for possible exploitation,

especially in less regulated jurisdictions[1]. For example, India's ban on CFAs is one of the several factors that prevents TPLF from actually working in an efficient manner as combined with judicial delays. In the US, for example, there is uneven application of state-specific regulations and class action litigation funding is still a rarity even tried[2].

Finally, there is the ethical issue of conflicts of interest arising from situations when lawyers have interests in the funding agreements they arrange on behalf of clients. In the area of transparency, litigation funding also lags behind; claimants are simply not discussed about the terms of those agreements and how their involvement financially from the funders. Without a decision tree, plaintiffs can be unfairly left out of the distribution or not be properly informed about the risks and rewards[3].

Policymakers also need to consider how litigation funding affects the broader society, as the current framework does not account for those claimants in under-represented groups who are, specifically because of their financial circumstances, excluded from financing options. With such broad issues raised, the recommendations below are focused on solutions to encourage a more transparent, fair and efficient litigation funding market.

b. Recommendations for Policymakers: Ensuring a Balanced and Ethical Litigation Funding Framework

i. Establish a Comprehensive Regulatory Framework

Policymakers are urged to develop transparent and harmonising regulatory environments that provide legal certainty regarding the status of TPLF. Given present limited regulation of TPLF in many jurisdictions, funders and claimants often find themselves uncertain as to their obligations and rights. One good example is the Association of Litigation Funders in the UK, which can be cited as a dedicated regulatory body to ensure ethical standards among funders[4]. If these

1. Rupert Macey-Dare, *Litigation Funding Agreements (LFAs) for UK Opt-Out Competition Class Actions Post Sony- How Robust Are They?*, November 25, 2023. Available at Social Science Research Network: *ssrn.com/abstract=4644256 or dx.doi.org/10.2139/ssrn.4644256.*

2. Anthony J. Sebok, *Third-Party Litigation Finance: Law, Policy, and Practice*, First Edition, Aspen Publishing, 2024, Cardozo Legal Studies Research Paper No. 2024-16. Available at Social Science Research Network: *ssrn.com/abstract=4748699*.

3. Ronen Avraham, Abraham Wickelgren, *Third-Party Litigation Funding – A Signaling Model*, in *DePaul Law Review*, 63, 2014, 233. Available at: *via.library.depaul.edu/law-review/vol63/iss2/4*.

4. Elayne E. Greenberg, *Please Ask, Please Tell: Disclosing Third-Party Funding in Mediation*, in *St. John's Legal Studies Research Paper*, 21-0015, 2021.

guidelines were in place, they would clarify the role of funders and the limits on the kinds of funding arrangements that are permissible as well as provide a basis for holding funders more accountable[5]. Not only that, certain stipulations ought to be included in order to protect claimants from funders who might end up taking a large percentage of any recovery. By establishing statutory caps on funder returns, it is possible to balance the need to make funders whole for the risk of funding litigation and from preventing plaintiffs from suffering too great a financial loss.

ii. Enhance Transparency and Disclosure Requirements

Institutional safeguards should also be established to claw back gains from litigation funders who have engaged in even the slightest chicanery so as to, over time, rebuild trust of the TPLF system. Alma then should create requirements for funders to disclose information about their funding arrangements generally but especially whether they are paying by the hour, how much of a recovery they will take and any financial interests or conflicts of interest that might impact the litigation[6]. Claimants are advised about financial relationships between the funders and their solicitors so that they have an informed choice to take independent legal advice before entering into any agreements. This will not only give greater transparency to claimants in the decisions they make but also protect the vulnerable from funders who might seek to profit off them. In addition, setting a floor percentage of compensation due to plaintiffs in settlement distributions can also help to guarantee claimants obtain at least some of the recovery[7].

iii. Address Conflicts of Interest and Lawyer Funder Relationships

Few conflicts are as prevalent or as potentially unethical in litigation funding as the conflict of interest, between funders and lawyers. Because it is possible for litigation funders to have financial connections to the law firms representing

5. Tom Baker, *What Litigation Funders Can Learn About Settlement Rights From the Law of Liability Insurance*, in *Theoretical Inquiries of Law*, forthcoming, University of Pennsylvania, Institute for Law & Economics Research Paper No. 23-41, November 15, 2023. Available at Social Science Research Network: *ssrn.com/abstract=4638617*.

6. Keith Sharfman, *The Economic Case Against Forced Disclosure of Third-party Litigation Funding*, in New York State Bar Journal, 94, 2022, 36. Available at Social Science Research Network: *ssrn.com/abstract=4051939 or dx.doi.org/10.2139/ssrn.4051939*.

7. Adrian Cordina, Eva Storskrubb, *The Future Regulation of Third-Party Funding in Europe*, in *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement Aflevering*, 26(2), 2022. Available at Social Science Research Network: *ssrn.com/abstract=4415772 or dx.doi.org/10.2139/ssrn.4415772*.

claimants, there may also be decisions that benefit litigations funds instead of plaintiffs[8]. To address this risk, policymakers should require lawyers to disclose any financial arrangements they have with funders. Claimants should also be afforded the right to independent legal advice before signing funding agreements. To prevent this from recurring, policy makers should consider mandating firewalls that place funders financial interests and the litigation strategy of their case at arm's length to guarantee the integrity of chaos's best interests.

iv. Facilitate Access to Funding for Underrepresented Groups

While serving the end of justice is a primary goal of litigation funding, many current frameworks simply do not work for larger swathes of underprivileged populations. Policymakers need to design one-off special programmes to make sure TPLF is readily available to all claimants, no matter how well heeled. Given the circumstances, one way to address this problem is for governments to partner with non-profit organizations and legal aid societies so that all individuals in need have access to funding, even if he or she may not meet the financial requirements of traditional litigation funders[9]. This could supplement and broaden the access for disenfranchise communities and create more equity in the constitution process. Thus, governments might implement such policies as offering tax breaks to those who fund cases that impact social justice or the public interest.

Create a Monitoring and Reporting Mechanism

On accountability in the TPLF market, one of the key pieces of advice is to establish strong monitoring and reporting machinery. These might involve receiving regular returns on what is happening in the litigation funding market so that the authorities can see trends developing and target problematic areas. Policymakers might create a procedure of auditing or reviewing the activities of funders on an annual basis, with an eye to ensuring both that they follow ethical standards and remain in compliance with their legal obligations[10]. It will also detect and correct any bias or conflict of interest in the account, unfair

8. W. Bradley Wendel, Josh Paul Davis, *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, in *Hastings Law Journal*, 74(5), 2023, 1459-1482. Available at Social Science Research Network: *ssrn.com/abstract=4408887 or dx.doi.org/10.2139/ssrn.4408887*.

9. Sasha Nichols, *Access to cash, access to court: Unlocking the courtroom doors with third-party litigation finance*, in *UC Irvine Law Review*, 5, 2015, 197.

10. Adrian Cordina, Eva Storskrubb, *The Future Regulation of Third-Party Funding in Europe*, in *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement Aflevering*, 26(2), 2022. Available at Social Science Research Network: *ssrn.com/abstract=4415772 or dx.doi.org/10.2139/ssrn.4415772*.

distributions on settlement approval or excessive fees[11]. This tribunal would be regulated by a specialised regulatory body which would monitor the procedure and ensure compliance, as well as receiving complaints from claimants of other stakeholders to the litigation.

Leverage Technology to Improve Efficiency and Accessibility

Technology has only recently started to be adopted in the TPLF sector, and offers an opportunity for efficiencies around litigation funding out of all proportion to the incremental savings it provides in other verticals. What was missing in the market were efficient digital platforms that make it easier for claimants to get funded or otherwise supported by funders. Data analytics and artificial intelligence (AI) can also help funders to analyse risks and potential returns on cases, allowing them to be more selective[12]. To make the TPLF market more technology-friendly policymakers could consider introducing regulations that promote the use of digital platform and AI to allocate fund. The adoption of technology can make the TPLF market accessible, efficient and transparent which can create value for all the stakeholders.

In addition, the litigation funding space can be improved upon by legislators addressing areas of fairness, transparency, and access. A significant portion of this step is the implementation of minimum compensation percentages for claimants, so that a fair percentage of any settlement will go to claimants and not just to funders[13]. Furthermore, it is recommended that a separate regulatory institution be established to streamline proper supervision and compliance with ethical practices, keep an eye on the agreements and redressal of complaints thereby protecting the sanctity of legal system[14]. Likewise, regulators should reassess and amend state-by-state prohibitions on litigation funding, as in Maryland and Kentucky to standardize guidelines and create favorable rules that will facilitate greater access to justice. Lastly, creating programs which catered to under-represented groups served by such as partnerships with non-profits and legal aid organizations would be beneficial in order to create more opportunities for

11. Michael James Boland, *Multi-Party Litigation and Third-Party Funding of Litigation as a Response to Globalisation*, Galway Law Review, 2022, 159-182. Available at Social Science Research Network*: ssrn.com/abstract=4316382*.

12. John Sorabji, *Legal Expenses Insurance and the Future of Effective Litigation Funding*, in *Erasmus Law Review*, 14(4), 2021. Available at Social Science Research Network: *ssrn.com/abstract=4163046*.

13. Suneal Bedi, William C. Marra, *The Shadows of Litigation Finance*, in *Vanderbilt Law Review*, 74, 2021, 563. Available at: *scholarship.law.vanderbilt.edu/vlr/vol74/iss3/6*.

14. Erik Fuqua, *Two Roads Converged In A Legal Wood: The Intersection of Litigation Funding and the False Claims Act*, in *Indiana Health Law Review*, 19(1), 2022. Available at Social Science Research Network: *ssrn.com/abstract=3896591*.

those who are intentionally locked out of traditional funding sources would bring about greater access in the justice system. In order to do this, policymakers should focus on these areas[15].

This is clear evidence that litigation funding provides great potential to improve access to justice, yet at the same time it presents some challenges for regulatory oversight. By focusing on these challenges with specific recommendations, policymakers can craft a more equitable and humane architecture for TPLF. Appropriate regulation will deliver transparency, prevent conflicts of interest, open up the industry to consumers from all demographics and enable cross border collaboration without reducing or compromising fair regulation in funding of litigation.

II. Insights from the Proposed Regulation of Third-Party Litigation Funding in the EU

By implementing the model proposed in the regulation of TPLF, the members of European Parliament offer useful guidance for legislators looking to improve both access and transparency over litigation funding in their own countries[16]. On 13 September 2022, the European Parliament released an informational report advocating for a much stronger EU-wide approach to TPLF which gave a clear idea how good legislation can work in practice for minimising perceived risks of party funding. These observations beg for scrutiny as well as active review of their own oversight mechanisms, including the creation of an independent oversight body to oversee funders[17]. Such an initiative could then become a template for jurisdictions worldwide, and well beyond the immediate incentive as it would play facilitate across the world subsequent to their example so that legal systems are make fairer and better serve a greater portion of claimants especially those from disadvantaged backgrounds[18].

Meanwhile, the proposal also presents important guideposts for fostering integrity in the litigation funding market by speaking to robust ethical norms

15. Elayne E. Greenberg, Please Ask, *Please Tell: Disclosing Third-Party Funding in Mediation*, 2021. Available at Social Science Research Network: *ssrn.com/abstract=3864248*.

16. EU – Parliament Responsible private funding of litigation P9 TA (2022) 0308.

17. International Institute for Sustainable Development, *EU Parliament proposes directive to regulate third-party funding*, in Investment Treaty News, July 1, 2023. Available at: *www.iisd.org/itn/en/2023/07/01/parlamento-de-la-ue-propone-directiva-para-regular-la-financiacion-por-terceros/* (accessed: October 3, 2024).

18. Rita Portenti, *Three's a Crowd: The EU Should Safeguard Against Third-Party Funding*, in *Arbitration Law Review* 15, 2024, 104.

like fiduciary obligations and conflict-of-interest disclosures. This meant that any funding a party was receiving should be disclosed fully and clearly to claimants and that an appropriate share of any awards should be passed on to the funder effectively establishing best practice[19]. The recommendations from Mr. Keeler provide models for other jurisdictions that are considering TPLF; they suggest how to structure the arrangement so as to benefit all parties without causing delays for justice in prefacing It will establish a legal environment in which litigation funding is as accepted as case law creating the conditions for expansion of access to justice and bringing an eventual new age of remedies at law[20].

III. Concluding Remarks

Over the last decade, the litigation funding industry has exploded from a niche idea into a major force that is re-shaping legal practices around the globe. TPLF has notably democratised access to justice making the judicial process more available for claimants unable to pay legal costs up front and who have legitimate legal claims to litigate. This change is particularly noticeable in regions such as the UK, USA and Asia Pacific where litigation funding has made strong progress and well-defined regulatory environments have already been established or are maturing. The availability of litigation funding is increasing, leading to happy opportunities and sad challenges within from a regulatory and an ethical perspective.

In different jurisdictions, the maturity of TPLF illustrates the ability of this financial mechanism to support in law proceedings those people who otherwise would be completely denied access to justice. Hong Kong and Singapore have been at the forefront of providing third party funding, by laying down clear regulations which can be taken as a benchmark word class practice. On the flip side, countries like India where plenty of potential for litigation funding lies vacant are still at crossroads. The rampant judicial backlog in the country and a ban on alternative fee arrangements are only impeding further growth of TPLF as an investment mechanism. But recent developments, such as expected decisions

19. Daniela Amarante, Diana Nunes, *News on third-party funding in the EU: The Parliament's recent proposal for a regulation*, in *International Arbitration Outlook Uría Menéndez*, 11, 2023. Available at: *www.uria.com/en/publicaciones/8498-news-on-thirdparty-funding-in-the-eu-the-parliaments-recent-proposal-for-a-re* (accessed: October 3, 2024).

20. Alberto Favro, *European Parliament resolution on third-party funding: A step too far?*, in *Kluwer Arbitration Blog*, 2023. Available at: *arbitrationblog.kluwerarbitration.com/2023/02/16/european-parliament-resolution-on-third-party-funding-a-step-too-far/* (accessed: October 3, 2024).

from the Supreme Court of India could change this and offer a more hospitable environment for litigation finance.

At the higher stakes, litigation funding has shaped nearly two archetypes of about the legal system. But on the other hand, it is an essential legal tool, which is required to enable claimants who could not fund traditional litigation access to justice. On the other hand, equally it raises considerable ethical and practical issues. A big part of that concern is simply making sure potential conflicts of interest are included for example, when a lawyer introduces clients to their own investment in the funder. That the effect of this may paradoxically be to quash the interests of the claimants in preference to funders and a guild of lawyers, thereby undermining access to justice. With legal claims being turned into a commodity, legitimate concerns are raised about other financial influences that could otherwise lead regulators to jump the shark.

Regulatory landscapes for litigation funding vary widely between jurisdictions. The UK has been a frontrunner in this field, with clear and tough regulation that focuses on transparency, accountability, and ethical behaviour amongst funders. Game-changing judicial rulings in the UK have influenced its legal landscape heavily, having paved the way for TPLF to come about but, crucially also ensuring that claimants' rights are still preserved. In contrast, the more fractured regulatory system in the United States means that herbalism is regulated on a state-specific basis. While a few other states have fully accepted litigation funding as another means to provide access to justice, with the negative consequences resulting from restrictions (e.g. Maryland and Kentucky), may make such widespread implementation elsewhere unlikely for some time. A balancing act faces the policymakers in these states however, of an access to justice with proscription against harm from potential exploitation.

The UK's claims litigation funding framework is widely regarded as the most sophisticated and well-regulated globally and as such, leads others to aspire towards it. The UK courts have clarified, through important judicial decisions such as *Excalibur Ventures LLC v. Texas Keystone Inc.*[21] and *Davey v. Money*[22], that TPLF has clear benefits and certain limitations. These decisions have crystallized a desire for openness, responsibility, and justice in how these funding arrangements are structured to ensure protection of claimants' rights whilst enabling funders to operate unfettered. Meanwhile, regulation in the UK which is led via the Association of Litigation Funders (ALF), exists to maintain ethical funding by obligating funders to comply with stringent codes of practice which take into account capital adequacy and conflict-of-interest respectively.

21. Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm).
22. Davey v Money [2019] EWHC 997 (Ch).

The resistance-versus-support nature of that distinction has manifested itself all over the world, in few places more strikingly than in the US with their stateside variance and India where it is early days for litigation funding as we know it coming from a jurisdiction like the UK. Instead, like Hong Kong and Singapore, these share a UK-style system of ensuring access to justice as well as fairness and catering to the protection of claimants. These developing regulatory environments in Asia Pacific could offer a best practice blueprint for others contemplating third-party funding. They have been strict in their consultation reviews and oversight of the industry which are pushing litigation funding in the realm of evolution to a more transparent, accountable, and ethical as well as developments both open whilst people can still retain access into legal financing but without a loss on their rights.

Ultimately, the progress of litigation funding will be determined by various legislators working together: legal practitioners who seek to advance client interests and a greater access to justice; funders looking for profitable investments safely provided under regulator-approved arrangements; and regulators that need the right balance between accessibility of justice and maintaining the integrity of the judicial system. While the democratizing power of TPLF is profound, it needs to be matched with strong regulation in order to curb abuses and protect against unethical practices. As the market for litigation funding continues to develop, it is imperative that jurisdictions compromise between allowing the natural progress and improvement of new business models and ensuring that principles of law followed throughout time are not violated. From the outset, if handled correctly with the right policies in place, litigation funding can continue to grow into a highly effective instrument that advances access to justice and is fully compliant with bedrock legal principles of fair play and justice.

 ISBN 9788835177470

Bibliography

Websites

Adam Silverman, Camilla Godman, *The current approach to recovering third-party funding costs in arbitration*, in *Omni Bridgeway*, January 12, 2022. Available at: *omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2022/01/12/the-current-approach-to-recovering-third-party-funding-costs-in-arbitration* (accessed: September 28, 2024).

Ag Szpunar delivers opinion regarding prohibition on assignment on fiduciary basis claims for compensation resulting from competition law infringements, in *EU Law Live*, 2024. Available at: *eulawlive.com/ag-szpunar-delivers-opinion-regarding-prohibition-on-assigning-on-fiduciary-basis-claims-for-compensation-resulting-from-competition-law-infringements/* (accessed: October 2, 2024).

Alberto Favro, *European Parliament resolution on third-party funding: A step too far?*, in *Kluwer Arbitration Blog*, 2023. Available at: *arbitrationblog.kluwerarbitration.com/2023/02/16/european-parliament-resolution-on-third-party-funding-a-step-too-far/* (accessed: October 3, 2024).

Alex Petrasincu, Manuel Knebelsberger, *Recent arbitration developments in Europe*, in *Hausfeld*, August 31, 2021. Available at: *www.hausfeld.com/en-us/what-we-think/competition-bulletin/the-i-airdeal-i-ruling-german-federal-court-of-justice-strengthens-collective-redress-in-germany/* (accessed: September 8, 2024).

Alexandre Biard, *Collective Redress in the EU: A Rainbow Behind the Clouds?*, in *ERA Forum*, 19, 2018, 189.

Alix Partners, *The future of third-party litigation funding*, June 2021. Available at: *www.alixpartners.com/media/17916/litigation-funding-survey-2021-tl.pdf* (accessed: September 28, 2024).

AmCham EU, *Our position regulating third-party litigation funding*. Available at: *www.amchameu.eu/system/files/position_papers/tplf_final.pdf* (accessed: September 7, 2024).

Amelia Atkinson *et al.*, *At a glance: Regulation of litigation funding in Australia*, in *Lexology*, 2023. Available at: *www.lexology.com/library/detail.aspx?g=68509e95-5e28-42bb-9c2f-11aed7fcec36* (accessed: September 28, 2024).

Anna M. Caballero, *Senator Anna M. Caballero Proposes stronger consumer protections*

against predatory lawsuit lending (no date) California Government, March 1, 2023. Available at: *sd14.senate.ca.gov/index.php/news/press-release/senator-anna-m-caballero-proposes-stronger-consumer-protections-against* (accessed: October 2, 2024).

Ashish Rukhaiyar, *Global Litigation Finance major Omni Bridgeway Eyes India entry*, in *Business Today*, September 26, 2022. Available at: *www.businesstoday.in/latest/corporate/story/global-litigation-finance-major-omni-bridgeway-eyes-india-entry-348155-2022-09-26* (accessed: September 28, 2024).

ASL Law Firm, *Third-party funding (TPF): A new trend in international commercial disputes in Vietnam*. Available at: *aslgate.com/third-party-funding-tpf-a-new-trend-in-international-commercial-disputes-in-vietnam/* (accessed: September 8, 2024).

Australian Government, The Office of Impact Analysis, *Regulation impact statement – regulating litigation funders under the Corporations Act*, 2020. Available at: *oia.pmc.gov.au/sites/default/files/posts/2020/06/regulation_impact_statement_-_regulating_litigation_funders.pdf* (accessed: September 28, 2024).

Ben Rigby, *Supreme Court Litigation Funding Judgment threatens viability of collective claims*, in *The Global Legal Post*, July 27, 2023. Available at: *www.globallegalpost.com/news/supreme-court-litigation-funding-judgment-threatens-viability-of-collective-claims-1990583922* (accessed: September 10, 2024).

British Institute of International and Comparative Law, *Collective redress Germany*. Available at: *www.collectiveredress.org/documents/14_germany_report.pdf* (accessed: September 8, 2024).

Bryan Cave Leighton Paisner, *After Paccar: A new approach to funding collective proceedings in the cat*. Available at*: www.bclplaw.com/en-US/events-insights-news/after-paccar-a-new-approach-to-funding-collective-proceedings-in-the-cat.html* (accessed: September 10, 2024).

Business & Human Rights Resource Centre, *Nigeria: Shell settles lawsuit in the Netherlands for €15 million over oil spillages in Niger Delta*, January 3, 2023. Available at: *www.business-humanrights.org/en/latest-news/nigeria-shell-settles-lawsuit-in-the-netherlands-for-15-million-over-oil-spillages-in-niger-delta/* (accessed: September 8, 2024).

Carolina Gonzalez, *Qanlex, a litigation financing startup, receives $3M investment*, in *LatamList*, 2022. Available at: *latamlist.com/qanlex-a-litigation-financing-startup-receives-3m-investment/* (accessed: September 29, 2024).

Chance King, *An examination of commercial litigation funding in the United States*, in *Business Law Digest*, 2023. Available at: *lawforbusiness.usc.edu/an-examination-of-commercial-litigation-funding-in-the-united-states/* (accessed: September 29, 2024).

Charles Zhao, *The landscape of third-party funding in Mainland China*, in *Lexology*, 2023. Available at*: www.lexology.com/library/detail.aspx?g=fde52e05-391e-4e77-8c42-4a3a7ce52de1* (accessed: September 28, 2024).

Chiara Capalti, Giorgia Bizzarri *et al.*, *The revised IBA Guidelines on conflicts of interest: A call to action for parties and counsel?*, Kluwer Arbitration Blog, 2024. Available at: *arbitrationblog.kluwerarbitration.com/2024/05/07/the-revised-iba-guidelines-on-conflicts-of-interest-a-call-to-action-for-parties-and-counsel/* (accessed: September 10, 2024).

Christopher Bogart, *Third-Party Financing of International Arbitration*, in *The*

Arbitration Review of the Americas 2017, in *Global Arbitration Review*. Available at: *globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2017/article/third-party-financing-of-international-arbitration* (accessed: March 19, 2023).

Christopher Hodges, John Peysner, Angus Nurse, *Litigation funding: Status and issues – faculty of law*. Available at: *www.law.ox.ac.uk/sites/default/files/migrated/litigation_funding_here_1_0.pdf* (accessed: September 10, 2024).

Christopher J. Valente *et al.*, *Recent trends in Generative Artificial Intelligence Litigation in the United States*, in *K&L Gates*, September 5, 2023. Available at: *www.klgates.com/Recent-Trends-in-Generative-Artificial-Intelligence-Litigation-in-the-United-States-9-5-2023* (accessed: October 2, 2024).

Christopher Unseld, Anne Van Den Bergh, *The EU representative actions directive in Germany and the Netherlands: One small step or one giant leap for access to Justice?*, in *Hausfeld*, February 27, 2024. Available at: *www.hausfeld.com/en-us/what-we-think/competition-bulletin/the-eu-representative-actions-directive-in-germany-and-the-netherlands-one-small-step-or-one-giant-leap-for-access-to-justice/* (accessed: September 8, 2024).

Cyril Amarchand Mangaldas, *Third-party funding in India*, 2019. Available at: *www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf* (accessed: September 28, 2024).

Cyril Shroff, Amita Gupta Katragadda, *Third-party funding of litigation in India: An asset class in waiting*, in *NDTV Profit*, 2019. Available at: *www.ndtvprofit.com/opinion/third-party-funding-of-litigation-in-india-an-asset-class-in-waiting* (accessed: September 28, 2024).

Dalal Alhouti, *Disclosing third-party funding in international arbitration: Where are we now?*, in *Charles Russell*, November 29, 2022. Available at: *www.charlesrussellspeechlys.com/en/insights/expert-insights/litigation--dispute-resolution/2022/disclosure-obligations-and-third-party-funding/* (accessed: October 2, 2024).

Daniel Williams, *Class action funding paccar and now thorium*, in *DWF*, October 25, 2023. Available at: *dwfgroup.com/en/news-and-insights/insights/2023/10/class-action-funding-paccar-and-now-therium* (accessed: September 28, 2024).

Daniela Amarante, Diana Nunes, *News on third-party funding in the EU: The Parliament's recent proposal for a regulation*, in *International Arbitration Outlook Uría Menéndez*, November 2023. Available at: *www.uria.com/en/publicaciones/8498-news-on-thirdparty-funding-in-the-eu-the-parliaments-recent-proposal-for-a-re* (accessed: October 3, 2024).

David Capper, *Third-party litigation funding in family law cases: Akhmedova v Akhmedov*, Queen's University Belfast, 2021. Available at: *pure.qub.ac.uk/en/publications/third-party-litigation-funding-in-family-law-cases-akhmedova-v-ak* (accessed: September 10, 2024).

David Perla, *The current state of AI in Legal Finance*, in *Burford Capital*, February 22, 2024. Available at: *www.burfordcapital.com/insights-news-events/insights-research/nylj-current-state-of-ai/* (accessed: October 2, 2024).

Department of Enterprise, Trade and Employment, *Public Consultation on the Transposition of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25*

November 2020 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, March 2021. Available *at: enterprise.gov.ie/en/consultations/consultations-files/public-consultation-on-the-transposition-of-directive-eu-2020-1828.pdf* (accessed: September 8, 2024).

Desai, *et al.*, *Dispute resolution in India*, April 2020. Available at: *www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Dispute_Resolution_in_India.pdf* (accessed: September 28, 2024).

Di Francesca Locatelli, *Challenges and comparative perspectives on third-party litigation funding – judicium*, in *Rivista Judicium*, 2024. Available *at: www.judicium.it/challenges-and-comparative-perspectives-on-third-party-litigation-funding/* (accessed: September 8, 2024).

Diego Agulló, *Directive 2020/1828: A new era for "European class actions"?*, in UNIO EU Law Journal The Official Blog, 2021. Available at: *officialblogofunio.com/2021/11/22/directive-2020-1828-a-new-era-for-european-class-actions/* (accessed: September 8, 2024).

Dina Komor, *At a glance: Regulation of litigation funding in Germany*, in *Lexology*, 2023. Available at: *www.lexology.com/library/detail.aspx?g=b4ce6f44-0875-4125-99a5-c1dbf661353e* (accessed: October 21, 2024).

Ed Reilly, *Mandatory Disclosure of Litigation Funding Arrangements – Good, Bad or Indifferent?*, in *Themis Legal Capital*, 2018. Available at: *www.themislc.com/mandatory-disclosure-of-litigation-funding-arrangements-good-bad-or-indifferent/* (accessed: September 20, 2024).

Eleanore Di Claudio, David Bridge, Verity Jackson-Grant, *Supreme Court Ruling on PACCAR Deals a Blow to Litigation Funding*, in *Simmons & Simmons*, July 26, 2023. Available at: *www.simmons-simmons.com/en/publications/clkjuwvwa00buth1s7g02mp4v/paccar-supreme-court-throws-litigation-funders-under-a-truck* (accessed: September 28, 2024).

Elena Sitkareva, Yulia A Artemyeva, Svetlana Mendosa-Molina, *Third-party Funding: Practical, Ethical and Procedural Issues*, in *Proceedings of Intcess 2019 – 6th International Conference On Education And Social Sciences*, 2019.

Emilie Jones, *UK litigation funding bill delayed until summer 2025 at the earliest*, Pinsent Masons, 2024. Available at: *www.pinsentmasons.com/out-law/news/litigation-funding-bill-delayed-summer-2025* (accessed: September 9, 2024).

Emily Pyclik, *An overview of how third-party litigation funders are being addressed by courts and policymakers*, in *Baker Botts*, June 3, 2024. Available at: *www.bakerbotts.com/thought-leadership/publications/2024/june/an-overview-of-how-third-party-litigation-funders-are-being-addressed-by-courts-and-policymakers* (accessed: October 2, 2024).

Emily R. Siegel, *AI helps litigation funders mine court dockets for Legal Gold*, in *Bloomberg Law*, 2024. Available at: *news.bloomberglaw.com/business-and-practice/lawsuit-investors-use-ai-to-mine-cases-for-promising-returns* (accessed: September 29, 2024).

Emma Carr, Alexander Wrixon, Christopher Richards, *Supreme Court makes waves in litigation funding*, in *Gowling WLG*. Available at: *gowlingwlg.com/en/insights-resources/articles/2023/supreme-court-makes-waves-in-litigation-funding* (accessed: September 9, 2024).

Eric Schuller, *Is consumer legal funding a loan? why does it matter?*, in *ARC Legal Funding*, 2021. Available at: *arclegalfunding.org/is-consumer-legal-funding-a-loan-why-does-it-matter/* (accessed: September 20, 2024).

Ernest Yang *et al.*, *Reshaping the landscape for third-party funding in China – new CIETAC arbitration rules on TPF came into effect*, in *DLA Piper*, January 1, 2024. Available at: *www.dlapiper.com/es-pr/insights/publications/2023/12/reshaping-the-landscape-for-third-party-funding-in-china-new-cietac-arbitration-rules-on-tpf#:~:text=In%20reviewing%20the%20challenge%20under,right%20to%20accept%20such%20funding* (accessed: September 28, 2024).

European Law Institute, *Third-party Funding of Litigation*, Project Period, (July 2022 – September 2024). Available at: *www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/third-party-funding-of-litigation/* (accessed: March 19, 2023).

Felicity Ewing *et al.*, *Supreme Court forces industry-wide change to litigation funding model*, in *Dentons*, July 27, 2023. Available at: *www.dentons.com/en/insights/articles/2023/july/27/supreme-court-forces-industry-wide-change-to-litigation-funding-model* (accessed: October 2, 2024).

Francesca Locatelli, *Challenges and comparative perspectives on third-party litigation funding – judicium*, in *Rivista Judicium*, 2024. Available at: *www.judicium.it/challenges-and-comparative-perspectives-on-third-party-litigation-funding/* (accessed: September 28, 2024).

Gareth Thomas, Rachael Shek, Jojo Fan, *Litigation and Arbitration Funding in Hong Kong: Will the UK Supreme Court decision in PACCAR Affect Hong Kong Litigation Funding?*, in *Hebert Smith Freehills*, September 18, 2023. Available at: *www.herbertsmithfreehills.com/notes/asiadisputes/2023-09/litigation-funding-in-hong-kong-will-the-uk-supreme-court-decision-in-paccar-affect-hong-kong-litigation-funding* (accessed: September 28, 2024).

Gitanjali Bajaj, Ernest Yang, Queenie Chan, *Third-party funding in the Asia-Pacific region*, in *Global Arbitration Review*, 2021. Available at: *globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/third-party-funding-in-the-asia-pacific-region/download* (accessed: September 28, 2024).

Helen Fairhead, Emma Foord, *Litigation funding agreements (enforceability) Bill clears another hurdle*, Norton Rose Fulbright. Available at: *www.nortonrosefulbright.com/en/inside-disputes/blog/202404-litigation-funding-agreements-enforceability-bill-clears-another-hurdle* (accessed: September 9, 2024).

Herbert Smith Freehills – Global Law Firm, *Government announces planned legislation to bolster litigation funding by reversing effect of Paccar*. Available at: *www.herbertsmithfreehills.com/notes/litigation/2024-03/government-announces-planned-legislation-to-bolster-litigation-funding-by-reversing-effect-of-paccar* (accessed: September 10, 2024).

House of Lords, *Litigation funding agreements (enforceability) Bill [HL]*. Available at: *lordslibrary.parliament.uk/research-briefings/lln-2024-0017/* (accessed: September 10, 2024).

Inside arbitration: Beyond the hourly rate – what are the options?, in *Herbert Smith Freehills*, Mar 15, 2023. Available at: *www.herbertsmithfreehills.com/insights/2023-03/inside-*

arbitration-beyond-the-hourly-rate-%E2%80%93-what-are-the-options (accessed: 28 September 2024).

Institute for Legal Reform, *A New Threat: The National Security Risk of Third Party Litigation Funding*, November 2022. Available at: *instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf* (accessed: September 10, 2024).

Insurance Information Institute, *What is third-party litigation funding and how does it affect insurance pricing and affordability?*, 2022. Available at: *www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf* (accessed: October 2, 2024).

International Council For Commercial Arbitration, *Report Of The ICCA-Queen Mary Task Force On Third-Party Funding In International Arbitration*, 2018. Available at: *cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf* (accessed: September 10, 2024).

International Institute for Sustainable Development, *EU Parliament proposes directive to regulate third-party funding*, in Investment Treaty News, July 1, 2023. Available at: *www.iisd.org/itn/en/2023/07/01/parlamento-de-la-ue-propone-directiva-para-regular-la-financiacion-por-terceros/* (accessed: October 3, 2024).

Jérôme Saulnier, Klause Müllerwith, Ivona Koronthalyova, *Responsible private funding of litigation – european parliament*, European Parliamentary Research Service. Available at: *www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf* (accessed: September 8, 2024).

Jamie Hwang, *Wisconsin law requires all litigation funding arrangements to be disclosed*, in *ABA Journal*, 2018. Available at: *www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrangements_to_be_disclosed#google_vignette* (accessed: September 20, 2024).

Jamie Maples, Craig Watson, Charlotte de Vitry, *Third-party litigation funding – back on track or forging a new path?*, in *European Disputes Blog*, 2024. Available at: *europeandisputes-blog.weil.com/england-uk/third-party-litigation-funding-back-on-track-or-forging-a-new-path/* (accessed: September 9, 2024).

Jérôme Saulnier, Ivona Koronthalyova, Klaus Müller, *Responsible private funding of litigation – european parliament*, European Parliamentary Research Service. Available at: *www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf* (accessed: September 8, 2024).

Jerry Theodorou, *Time to shine light on dark third-party litigation funding*, in *R Street Institute*, March 19, 2024. Available at: *www.rstreet.org/commentary/time-to-shine-light-on-dark-third-party-litigation-funding/* (accessed: October 2, 2024).

John Emmerig, Michael Legg, *Disclosure of funding agreements in class actions*, in *Jones Day*, April 26, 2016. Available at: *www.jonesday.com/en/insights/2016/04/disclosure-of-litigation-funding-agreements-in-australian-class-actions* (accessed: September 28, 2024).

John Pierce, David Burnett, *The emerging market for litigation funding*, in *The Hedge Fund Journal*, June 2013. Available at: *thehedgefundjournal.com/the-emerging-market-for-litigation-funding/* (accessed: October 2, 2024).

Jonathan Barnett, Lucas Macedo, Jacob Henze, *Third-party funding finds its place in the new ICC rules*, in *Kluwer Arbitration Blog*. Available at: *arbitrationblog.*

kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/ (accessed: October 2, 2024).

Josh Landau, *Not just delaware: Litigation funding transparency progress across multiple states*, in *Patent Progress*, 2024. Available at: *www.patentprogress.org/2024/02/not-just-delaware-litigation-funding-transparency-progress-across-multiple-states/* (accessed: September 20, 2024).

Julie-Anne Tarr, AJ George, *Third-party litigation funding in Australia*. Available at: *eprints.qut.edu.au/120988/22/120988.pdf* (accessed: September 28, 2024).

Justus Herrlinger, Marcus P. Lerch, *Bundled debt collection for cartel damages: With the Round Timber Cartel "Out of the Woods"?*, in *DLA Piper*, 2024. Available at: *www.dlapiper.com/en-cl/insights/publications/2024/09/bundled-debt-collection-sammelklage-inkasso-for-cartel-damages* (accessed: October 21, 2024).

Katie Chung, *Third-party funding in the Asia-Pacific*, in *Norton Rose Fulbright*, December 2021. Available at: *www.nortonrosefulbright.com/en/knowledge/publications/0ac96d60/third-party-funding-in-the-asia-pacific* (accessed: September 28, 2024).

Kieran Anderson, *Collective actions and litigation funding: Reasons for optimism in 2024*, Humphries Kerstetter, March 15, 2024. Available at: *www.humphrieskerstetter.com/article/collective-actions-and-litigation-funding-reasons-for-optimism-in-2024/* (accessed: September 10, 2024).

Law Reform Commission, *Consultation Paper Third-Party Litigation Funding*, 2023. Available at: *www.lawreform.ie/_fileupload/consultation%20papers/lrc-cp-69-2023-third-party-funding-full-text.pdf* (accessed: September 28 2024).

Litigation 2024 South Korea, in *Chambers and Partners*, 2024. Available at: *practiceguides.chambers.com/practice-guides/litigation-2024/south-korea* (accessed: September 28, 2024).

Litigation funding in the Middle East, in *Burford Capital*. Available at: *www.burfordcapital.com/what-we-do/where-we-are/middle-east/* (accessed: September 28, 2024).

Mariana Zhong, *Third-party funding blooms in Asia*, in *Law.asia*, 2024. Available at: *law.asia/third-party-funding-blooms/* (accessed: September 28, 2024).

Mark Popolizio, *Indiana passes new TPLF law regulating commercial litigation financing*, in *Verisk*, March 20, 2024. Available at: *www.verisk.com/blog/indiana-passes-new-tplf-law-regulating-commercial-litigation-financing/* (accessed: September 20, 2024).

Marla Decker, *A New York appellate court weighs in on Litigation Funding Disclosure: Relevance is Paramount*, in *Lake Whillans*, 2022. Available at: *lakewhillans.com/articles/a-new-york-appellate-court-weighs-in-on-litigation-funding-disclosure-relevance-is-paramount/* (accessed: September 20, 2024).

Marla Decker, *Why a Delaware Supreme Court decision affirming shifting a contingency fee to the losing party could have applications to recovering the costs of litigation funding*, in *Lake Whillans*. Available at: *lakewhillans.com/articles/why-a-delaware-supreme-court-decision-affirming-shifting-a-contingency-fee-to-the-losing-party-could-have-applications-to-recovering-the-costs-of-litigation-funding/* (accessed: September 20, 2024).

Matt Webb, *Exposing foreign influence in third-party litigation funding, Exposing Foreign Influence in Third-party Litigation Funding*, US Chamber of Commerce,

2024. Available at: *www.uschamber.com/improving-government/pulling-the-curtain-back-on-foreign-influence-in-third-party-litigation-funding* (accessed: September 28, 2024).

Max Hotham, *The truck stops here? In PACCAR Inc and others v Competition Appeal Tribunal and others Supreme Court finds certain litigation funding agreements to be damages-based agreements and unenforceable*, in *Enyo Law*, July 31, 2023. Available at: *enyolaw.com/news/the-truck-stops-here-in-paccar-inc-and-others-v-competition-appeal-tribunal-and-others-supreme-court-finds-certain-litigation-funding-agreements-to-be-damages-based-agreements-and-unenforceable/* (accessed: October 2, 2024).

Michael Clements, *Third-party litigation financing: Market characteristics, data, and Trends*, in *US Government Accountability Office*, December 20, 2022. Available at: *www.gao.gov/products/gao-23-105210* (accessed: September 20, 2024).

Michael Paczolt, *The role of NLP and AI in third-party litigation funding: How insurers can leverage data analytics to level the playing field*, in *Milliman*, April 10, 2023. Available at: *nodal.milliman.com/en/insight/role-of-nlp-and-ai-in-third-party-litigation-funding* (accessed: October 2, 2024).

Michael Redman, Jörn Eschment, Hannah Howlett, *Introduction to legal finance*, in *Burford Capital*. Available at: *www.burfordcapital.com/introduction-to-legal-finance/* (accessed: September 28, 2024).

Michael Silvestri, *More States Pushing Back on Third-Party Litigation Funding*, in *CLM Magazine*, April 23, 2024. Available at: *www.theclm.org/Magazine/articles/more-states-moving-to-regulate-third-party-litigation-funding-of-plaintiffs-lawsuits/2923* (accessed: October 2, 2024).

Mike Scarcella, *Apple sued with Visa, MasterCard in card-fee antitrust case*, *Reuters*. Available at: *www.reuters.com/legal/transactional/apple-sued-with-visa-mastercard-card-fee-antitrust-case-2023-12-15/* (accessed: September 10, 2024).

Ministry of Law of Singapore, *Keynote address by MS Indranee Rajah, senior minister of State, Ministry of Law and Ministry of Finance, at the UK singapore law students society (UKSLSS)*, August 5, 2017. Available at: *www.mlaw.gov.sg/news/speeches/keynote-address-by-senior-minister-of-state-indranee-rajah-for-l/* (accessed: September 28, 2024).

Mohamed Sweify, *Third-party funding: A new perspective of access to justice*, in *American Bar Association Dispute Resolution Section*, July 2020. Available at: *www.americanbar.org/content/dam/aba/publications/just-resolutions/february-2021/sweify-tpf-access-to-justice.pdf* (accessed: October 2, 2024).

Moran, *Apex Litigation Finance brings artificial intelligence development in-house to drive funding activity and further promote access to justice*, in *Legal Funding Journal*, 2020. Available at: *legalfundingjournal.com/apex-litigation-finance-brings-artificial-intelligence-development-in-house-to-drive-funding-activity-and-further-promote-access-to-justice/* (accessed: September 29, 2024).

Muskan Arora *et al.*, *At a glance: Regulation of Litigation Funding in India*, in *Lexology*, 2023. Available at: *www.lexology.com/library/detail.aspx?g=cfefc261-5536-4bdc-af86-9bf0c7ed4f1a* (accessed: September 28, 2024).

Mustafaen Kamal, *Hope for the litigation funding industry*?, in *Global Arbitration News*, 2024. Available at: *www.globalarbitrationnews.com/2024/02/13/hope-for-the-litigation-funding-industry/* (accessed: September 28, 2024).

Natalie Yap, *Third-party funding in Japan: Opportunity for a clear policy*, in *Kluwer Arbitration Blog*, 2021. Available at: *arbitrationblog.kluwerarbitration.com/2021/04/30/third-party-funding-in-japan-opportunity-for-a-clear-policy/* (accessed: September 28, 2024).

Neil Purslow, *Litigation funders unite to form global advocacy group*, in *Therium*, 2023. Available at: *www.therium.com/blog/news/litigation-funders-unite-to-form-global-advocacy-group/* (accessed: September 28, 2024).

New York City Bar Association, *NYC Bar's proposed Litigation Funding Reforms*, April 12, 2024. Available at: *www.nycbar.org/in-the-news/nyc-bars-proposed-litigation-funding-reforms-explained-law360-2/* (accessed: September 20, 2024).

Nils Imgarten *et al.*, *Collective private enforcement clashes with German laws on the regulation of legal services: AG Szpunar's opinion in C-253/23 – ASG 2*, in *Kluwer Competition Law Blog*, 2024. Available at: *competitionlawblog.kluwercompetitionlaw.com/2024/09/25/collective-private-enforcement-clashes-with-german-laws-on-the-regulation-of-legal-services-ag-szpunars-opinion-in-c-253-23-asg-2/#:~:text=In%20his%20Opinion%2C%20AG%20Szpunar,effectiveness%20in%20conjunction%20with%20Art* (accessed: October 2, 2024).

Oliver Blundell, *Stamping out Paccar: Mr Bates, the Post Office, and funded arbitration*, *Farrer & Co: Independent Lawyers in London*, *UK*, 2024. Available at: *www.farrer.co.uk/news-and-insights/stamping-out-paccar-mr-bates-the-post-office-and-funded-arbitration/* (accessed: 10 September 2024).

Patrick Rode, *AI in litigation funding in the context of the EU AI act*, in *Deminor Litigation Funding*, August 27, 2024. Available at: *www.deminor.com/en/news-insights/ai-in-litigation-funding-in-the-context-of-the-eu-ai-act/* (accessed: October 2, 2024).

Paulina Jedrzejowski, *Paying for conflict and resolution: Europe seeks further third-party funding regulation*, in *International Institute for Conflict Prevention & Resolution*, April 28, 2023. Available at: *www.cpradr.org/news/paying-for-conflict-and-resolution-europe-seeks-further-third-party-funding-regulation* (accessed: September 8, 2024).

Prateek Dhir, Mohit Kandpal, *Third-party funding of Arbitrations in India – risks & liabilities*, in *Mondaq*, 2024. Available at: *www.mondaq.com/india/arbitration-dispute-resolution/1408892/third-party-funding-of-arbitrations-in-india-risks-liabilities#:~:text=Considering%20a%20lack%20of%20legislation,Financing%20agreements%20are%20not%20prohibited* (accessed: September 28, 2024).

Pryderi Diebschlag, *The landscape of Litigation Funding in Hong Kong*, in *Clyde & Co*, November 30, 2023. Available at: *www.clydeco.com/en/insights/2023/11/the-landscape-of-litigation-funding-in-hong-kong* (accessed: September 28, 2024).

Reynolds Porter Chamberlain LLP, *Litigation funders backing class action lawsuits as they put £2.2bn "war chests" to work*, June 20, 2022. Available at: *www.rpc.co.uk/press-and-media/litigation-funders-backing-class-action-lawsuits-as-they-put-22bn-war-chests-to-work/* (accessed: September 10, 2024).

Robert Dillard, *Analysis: Expect to see targeted growth in litigation finance*, in *Bloomberg Law*,

2023. Available at: *news.bloomberglaw.com/bloomberg-law-analysis/analysis-expect-to-see-targeted-growth-in-litigation-finance* (accessed: September 20, 2024).
Robert E. Colletti, *Disclosure of third-party funding documents in patent litigation: A shift towards greater transparency in patent ownership and litigation financing*, in *Haug Partners*. Available at: *haugpartners.com/article/disclosure-of-third-party-funding-documents-in-patent-litigation-a-shift-towards-greater-transparency-in-patent-ownership-and-litigation-financing/* (accessed: October 2, 2024).
Robert Wheal, Oliver Dean, *The end of the regulatory vacuum in Europe and a new era for international arbitration in Ireland? Developments in third-party funding regulation*, in *White & Case LLP*, 2022. Available at: *www.whitecase.com/insight-alert/end-regulatory-vacuum-europe-and-new-era-international-arbitration-ireland* (accessed: September 10, 2024).
Signature Litigation, *Lucy Keane discusses the CJC's review of Litigation Funding in Litigation Finance Insider*, 2024. Available at: *www.signaturelitigation.com/winners-and-losers-in-the-uk-governments-review-of-litigation-funding-lucy-keane-discusses-the-civil-justice-councils-review-of-litigation-funding-in-litigation-finance-insider/* (accessed: September 10, 2024).
Stephanie Russell-Kraft, *Burford raises $250 M in 24 hours, litigation funding rolls on*, in *Bloomberg Law*, 2018. Available at: *news.bloomberglaw.com/business-and-practice/burford-raises-250-m-in-24-hours-litigation-funding-rolls-on* (accessed: September 20, 2024).
Stephen Wisking *et al.*, *Revised litigation funding agreement approved for opt-out competition claim: Fee based on multiple of funding was not a DBA*, in *Herbert Smith Freehills*, November 23, 2023. Available at: *www.herbertsmithfreehills.com/insights/2023-11/revised-litigation-funding-agreement-approved-for-opt-out-competition-claim-fee* (accessed: October 2, 2024).
Steven Friel, Jonathan Barnes, *Litigation funding – Germany*, in *Lexology*, 2022. Available at: *woodsford.com/wp-content/uploads/2023/02/2023-Litigation-Funding-Germany.pdf* (accessed: October 21, 2024).
Stewarts, *Uncertainty around litigation funding must not be swept under the rug*, 2024. Available at: *www.stewartslaw.com/news/uncertainty-around-litigation-funding-must-not-be-swept-under-the-rug/* (accessed: September 10, 2024).
Suzanne H. Segal, *Proportionality and necessity under Federal Rule of Civil Procedure 26(b) Is your discovery worth it?*, in *Advocate Magazine*, 2017. Available at: *www.advocatemagazine.com/article/2017-july/proportionality-and-necessity-under-federal-rule-of-civil-procedure-26-b* (accessed: September 20, 2024).
Sydney Auteri, *Litigation finance: An asset or a liability to the future of lawsuits?*, in *Northern Kentucky Law Review*, 2024. Available at: *northernkentuckylawreview.com/blog/litigation-finance-an-asset-or-a-liability-to-the-future-of-lawsuits* (accessed: September 20, 2024).
Terrence J. Dee, Kyllan Gilmore, Michael Hill, *Deep Learning Meets Deep Pockets: Artificial Intelligence's Impact on Litigation Financing*, in *Winston & Strawn*, August 7, 2024. Available at: *www.winston.com/en/blogs-and-podcasts/product-liability-and-mass-torts-digest/deep-learning-meets-deep-pockets-artificial-intelligences-impact-on-litigation-financing* (accessed: October 2, 2024).

Terry Dee, Michael Hill, *Deep Learning Meets Deep Pockets: Artificial Intelligence's Impact on Litigation Financing*, in *Winston & Strawn*, August 7, 2024. Available at: *www.winston.com/en/blogs-and-podcasts/product-liability-and-mass-torts-digest/deep-learning-meets-deep-pockets-artificial-intelligences-impact-on-litigation-financing* (accessed: October 2, 2024).

The ICCA Reports No. 4: ICCA-Queen Mary Task Force Report on Third-Party Funding (*ICCA*). Available at: *arbitration-icca.org/icca-reports-no-4-icca-queen-mary-task-force-report-third-party-funding* (accessed: August 11, 2024).

The largest privately-owned litigation funder, in *Harbour Litigation Funding*, 2024. Available at: *www.harbourlitigationfunding.com/* (accessed: September 28, 2024).

UNSW CLMR, *The regulation of Third-party Litigation Funding in Australia*. Available at: *clmr.unsw.edu.au/article/market-conduct-regulation/capital-markets/the-regulation-of-third-party-litigation-funding-in-australia* (accessed: September 28, 2024).

US Chamber Institute for Legal Reform, *Third-party financing*. Available at: *instituteforlegalreform.com/wp-content/uploads/2020/10/Third_Party_Financing.pdf* (accessed: September 8, 2024).

US Chamber of Commerce Institute for Legal Reform, *A new Threat: The national security risk of third-party litigation funding*, November 2022. Available at: *instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf* (accessed: September 28, 2024).

Valerie Sanders, *Probate Court's prior exclusive jurisdiction Dooms Federal-court injunction*, in *Eleventh Circuit Business Blog*, 2023. Available at: *www.11thcircuitbusinessblog.com/2023/11/probate-courts-prior-exclusive-jurisdiction-dooms-federal-court-injunction/* (accessed: October 2, 2024).

Wang Heng, *Developments in third-party funding in Mainland China*, in *Global Arbitration Review*, May 26, 2023. Available at: *globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2024/article/developments-in-third-party-funding-in-mainland-china* (accessed: September 28, 2024).

Xandra Kramer *et al.*, *The application of Brussels I (Recast) in the legal practice of EU Member States*, in *Asser Institute*. Available at: *www.asser.nl/media/5018/m-5797-ec-justice-the-application-of-brussels-1-09-outputs-synthesis-report.pdf* (accessed: September 8, 2024).

Yating Lin, *et al. Third-party funding in litigation and arbitration: A dichotomy in China's practice*, in *Kluwer Arbitration Blog*, Available at: *arbitrationblog.kluwerarbitration.com/2023/04/24/third-party-funding-in-litigation-and-arbitration-a-dichotomy-in-chinas-practice/* (accessed: September 8, 2024).

Zacharias Shepard, *Disclosure of third-party litigation funding arrangements: An overview of recent decisions from top patent venues*, in *Baker Botts*, September 2023. Available at: *www.bakerbotts.com/thought-leadership/publications/2023/september/disclosure-of-third-party-litigation-funding-arrangements* (accessed: September 20, 2024).

Zhang Shouzhi, Huang Tao, Xiong Yan, *Third-party funding and other key takeaways for arbitration in China*, in *Global Arbitration Review*. Available at: *globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2024/article/third-party-funding-and-other-key-takeaways-arbitration-in-china#footnote-001-backlink* (accessed: September 28, 2024).

Cases

Abbot Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 885 n.26 (Cal. 1987).

Akhmedova v Akhmedov [2020] EWHC 1526 (Fam).

Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd [2023] CAT 73.

Arkin v Borchard Lines Ltd [2005] EWCA Civ 655.

Arkin v Borchard Lines Ltd & Ors | [2005] 2 Lloyd's Rep 187.

ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v Land Nordrhein-Westfalen Case C-253/23.

Backertop Licensing LLC v. Canary Connect, Inc., No. 2023-2367 (Fed. Cir. Jul. 16, 2024).

Baker Hughes Inc. v. United States, 313 F. Su 3d 804 (S.D. Tex. 2018).

Bar Council of India v. A.K. Balaji (2018) 5 SCC 379.

Bradshaw v McMullan, (1920) 2 I.R 412.

C-623/17: Privacy International v Secretary of State for Foreign and Commonwealth Affairs.

Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386.

Charge Injection Technologies, Inc. v. E.I. DuPont de Nemours & Co., 89 A.3d 476 (Del. 2014).

Charge Injection Techs., Inc. v. E.I. Dupont de Nemours & Co., 2021 WL 2776954 (Del. Super. Ct. July 2, 2021).

Charles v. Phillips, 252 S.W.2d 920, 921 (Ky. 1952).

Christopher Boling v. Prospect Funding Holdings, LLC, No. 18-5599 (6th Cir. 2019).

CiRBA Inc. v. VMware, Inc., C. A. 19-742-GBW (D. Del. Apr. 25, 2023).

Commercial and Interregional Card Claims I Limited v Mastercard Incorporated & Others, 1441/7/7/22.

Company A v Company B (2021) Hu 02 Min Zhong No. 10,224.

Converium Case, Gerechtshof Amsterdam 12 November 2010 (Converium *et al.*); Gerechtshof Amsterdam January 17, 2012 (Converium *et al.*).

Cyan, Inc. v. Beaver County Employees Retirement Fund, 583 US ___ (2018).

Davey v Money [2019] EWHC 997 (Ch), April 17 2019.

Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd [2024] CAT 5.

Eco Oro Minerals Corp vs. Colombia (ICSID Case No. ARB/16/41).

Electrolysis Prevention Sols. v. Daimler Trucks N. Am., 3:2[1]-cv-00171-RJC-DCK (W.D.N.C. May. 4, 2022).

Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm).

Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm).

Factortame (No.8) [2002] EWCA Civ 932.

Fast Trak Inv. Co., LLC v. Sax, 962 F.3d 455 (9th Cir. 2020).

Gbarabe v. Chevron Corp., 2016 WL 4059693 (N.D. Cal. July 28, 2016).

Gbarabe v. Chevron Corp., Case No. 14-cv-00173-SI (N.D. Cal. Aug. 5, 2016).

Giles v. Thompson [1994] 1 AC 142 (HL).
Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Ors [2020] QCA 250.
In re Cohen's Estate, 152 P.2d 485 (Cal. Dist. Ct. A 1944).
In Re Nimitz Technologies LLC, No. 23-103 (Fed. Cir. 2022).
In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation, 405 F. Su 3d 612 (D.N.J. 2019).
In Re: Valsartan N-Nitrosodimethylamine (Ndma) Contamination Products Liability Litigation Civil No. 19-2875 (RBK/JS).
Justinian Capital SPC v. Westlb AG, 37 Misc. 3d 518, 952 N.Y.S.2d 725, 2012 N.Y. Slip Op. 22227 (N.Y. Sup. Ct. 2012)
Kaplan v. S.A.C. Capital Advisors, LP, 2015 WL 1223944 (S.D.N.Y. Mar. 18, 2015).
Kentucky v. Altany (In re Complaint of Foss Mar. Co.), 29 F. Su 3d 955 (W.D. Ky. 2014).
Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc., Civil Action No. 16-538 (W.D. Pa. Jun. 24, 2019).
LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103.
Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235 (Minn. 2020).
Miller U.K. Ltd. v. Caterpillar, Inc., Case No. 10 C 3770 (N.D. Ill. Feb. 11, 2015).
Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd [2016] FCAFC 148.
Morrison v. National Australia Bank Ltd., 561 US 247 (2010).
Mullen Indus. LLC v. Apple Inc., No. 6:22-cv-00145, Dkt. 64 (W.D. Tex. Oct. 19, 2022).
Multiplex Limited v International Litigation Funding Partners Pte Ltd (2009) 260 ALR 643.
Novoselsky v. Commissioner of Internal Revenue 119 TCM (CCH) 1474 (TC 2020).
Palisades Collections LLC v. Shorts, 552 F.3d 327, 4th Cir. (2009).
Queensland Supreme Court in Murphy Operator & Ors v Gladstone Ports Corporation and Anor (No.4) [2019] QSC 228.
R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others, [2023] UKSC 28.
Ram Coomar Coondoo and others v. Chunder Canto Mookerjee (Fort William (Bengal)) Privy Council Nov 25, 1876.
Royal Mail v DAF and BT v DAF [2023] CAT 6
Shareholder Representative Services LLC v. Shire US Holdings, Inc. *et al.*, C.A. No. 2017-0863-KSJM.
ST Oil v. Romania (ICSID Case No ARB/07/13).
Stone and Rolls Ltd (in liq) v Moore Stephens (a firm) [2007] EWHC 1826 (Comm).
Sunan Ruili Airlines Limited *et al.* v Silver Aircraft Leasing (Tianjin) Co, Ltd (2022) Jing 04 Min Te No. 368 and No. 369.
Taction Tech., Inc. v. Apple Inc., No. 21-CV-00812-TWR-JLB, 2022 WL 18781396.
Teinver v Argentina, ICSID Case No. ARB/15/32.
The Interocean Oil Development Company v. Federal Republic of Nigeria (ICSID Case No. ARB/13/20).
Therium Litigation Funding A IC v Bugsby Property LLC [2023] EWHC 2627 (Comm).
Tomorrow Sales Agency Private Limited v. SBS Holding Inc. 2023 SCC Online Del 3191.

V5 Technologies v. Switch, Ltd., 332 F.R.D. 356, 104 Fed. R. Serv. 3d 842 (D. Nev. 2019).
VLSI Tech. LLC v. Intel Corp., C.A. No. 18-966-CFC-CJB, 2022 WL 3134427.
Wallersteiner v Moir (No 2) [1975] QB 373.

Journals

Adedotun Onibokun, Bankole Sodipo, *An evaluation of third-party funding in commercial arbitration*, in *Journal of Sustainable Development Law and Policy*, 15(1), 2024, 263-285.

Adrian Cordina, Eva Storskrubb, *The Future Regulation of Third-Party Funding in Europe*, in *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement Aflevering*, 26(2), 2022. Available at Social Science Research Network: *ssrn.com/abstract=4415772 or dx.doi.org/10.2139/ssrn.4415772*.

Adrian Cordina, *Is It All That Fishy? A Critical Review of the Concerns Surrounding Third-party Litigation Funding in Europe*, in *Erasmus Law Review*, 14(4), 2021. Available at Social Science Research Network: *ssrn.com/abstract=4163066*.

Adrian Dori, Vincent Richard, *Litigation Costs and Procedural Cultures – New Avenues for Research in Procedural Law*, in X. E. Kramer, B. Hess (eds.), *From Common Rules to Best Practices in European Civil Procedure*, Nomos/Ashgate. Available at: Social Science Research Network: *ssrn.com/abstract=2915067*.

Alec J. Manfre, *The Debate Over Disclosure in Third-Party Litigation Finance: Balancing the Need for Transparency with Efficiency*, in *Brooklyn Law Review*, 86, 2021, 561. Available at: *brooklynworks.brooklaw.edu/blr/vol86/iss2/9*.

Ammar Tanhan, *Addressing the Costs Imbalance Resulting from Third-Party Funded Investment Claims*, in *Journal of International Arbitration*, 41(1), 2024.

Andrew F. Daughety, Jennifer F. Reinganum, *The Effect of Third-Party Funding of Plaintiffs on Settlement*, in *The American Economic Review*, 104(8), 2014, 2553-2554.

Ann M. Lipton, *Not everything is about investors: the case for mandatory stakeholder disclosure*, in *Yale Journal on Regulation*, 37, 2020, 499.

Anna Dannreuther, Gareth Shires, *R (on the Application of PACCAR Inc) v Competition Appeal Tribunal: Case Note [2023] UKSC 28*, in *Mass Claims*, 117, 2023.

Anne M. Rodgers, Peter Scott, Arnaud Sanz, *Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know*, in *The Antitrust Source*, 2016, 1-16.

Anthony J. Sebok, *Third-Party Litigation Finance: Law, Policy, and Practice*, First Edition, Aspen Publishing, 2024, Cardozo Legal Studies Research Paper No. 2024-16. Available at Social Science Research Network: *ssrn.com/abstract=4748699*.

Anusheh Khoshsima, *Malice Maintenance Is "Runnin' Wild": A Demand for Disclosure of Third-Party Litigation Funding*, in *Brooklyn Law Review*, 83(3), 2018, 5.

Aparicio García J., *Legal Finance Analytics: a data-driven proposal of asset pricing litigation risk applied to international investment arbitration*, 2024.

Astrid Stadler, *German collective actions-is litigation funding in a dead end?*, in *Frontiers in Civil Justice*, Edward Elgar Publishing, 2022, 259-275.

Ava J. Borrasso, *Third-Party Funding: Relationships, Relevance, and Recent US Court Analysis*, in *Dispute Resolution Magazine*, 26, 2020, 26.
B. John Torabi, *The Cyan Decision and its Impact on State-Level Securities Class Actions*, in *Fordham Journal of Corporate and Financial Law*, 26, 2021, 253.
Barry J. Rodger, *Germany and the Netherlands*, in *Research Handbook on Private Enforcement of Competition Law in the EU*, Edward Elgar Publishing, 2023, 458-503.
Beibei Zhang, *TPF in China. Third-party Funding for Dispute Resolution: A Comparative Study of England, Hong Kong, Singapore, the Netherlands, and Mainland China*, Springer, 2021, 159-206.
Beibei Zhang, *Third-party Funding for Dispute Resolution*, Springer Singapore, 2021.
Bernardo M. Cremades, *Third-party funding in international arbitration*, in *Transnational Dispute Management*, 7, 2013, 1.
Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, in *Theoretical Inquiries in Law*, 19(1), 2018, 109-123.
Brooke S. Güven, *Regulating Third-Party Funding in Investor-State Arbitration Through Reform of ICSID and UNCITRAL Arbitration Rules: Holding Global Institutions to Their Development Mandates*, in *Boston College Law School Legal Studies Research Paper*, 2020, 627.
C. Hodges, *Collective Redress: The Need for New Technologies*, in *Journal of Consumer Policy*, 42, 2019, 59.
Cahaya Azwari, Febriansyah, Sri Delasmi Jayanti, *Impact of Third-Party Funds and Capital Adequacy Ratio on Profit Sharing Financing*, in *International Business and Accounting Research Journal*, 6(1), 2022, 63-70.
Caitlin Hird, Keith Fogg, *Pro Se Precedent in the US Tax Court: A Case for Amicus Briefs*, in *Houston Business and Tax Law Journal*, 23, 2022, 1.
Camilla Godman, *How To Understand third-party funding*, in *The Quarterly Magazine of The Chartered Institute of Arbitrators*, 2, 2022.
Can Eken, *A detailed comparison of third-party funding regulations in Hong Kong and Singapore*, in *Asia Pacific Law Review*, 29(1), 2021, 25-46.
Can Eken, *Third-Party Funding: Threat or Facilitator of the System: An Ethical Dilemma*, in *Third-Party Funding in Investment Arbitration: A New Player in the System*, Springer International Publishing, 2024, 153-199.
Carol Langford, *Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients*, in *USFL Review*, 49, 2015, 237.
Caroline Dos Santos, *Third-party funding in international commercial arbitration: a wolf in sheep's clothing*, in *ASA Bulletin*, 35, 2017, 918.
Caroline Kenny, *A Comparison of Singapore and Hong Kong's Third-Party Funding Regimes to England and Australia*, in *The International Journal of Arbitration, Mediation and Dispute Management*, 87(2), 2021.
Cento Veljanovski, *Third-party Litigation Funding in Europe*, in *Journal of Law, Economics and Policy*, 8, 2011, 405.
Chan Eken, *Third-Party Funding: Threat or Facilitator of the System: An Ethical Dilemma*, in *Third-Party Funding in Investment Arbitration: A New Player in the System*, Springer International Publishing, 2024, 153-199.

Charles Silver and David A. Hyman, *Third-party Litigation Funding: Panacea or More Problems?*, in *University of Texas Law*, Legal Studies Research Paper, 2023.
Charlotte Siegmann, Markus Anderljung, *The Brussels effect and artificial intelligence: How EU regulation will impact the global AI market*, in *Arxiv Cornell University*, 2022.
Chen Wenjing, *An economic analysis of third-party litigation funding*, in *US-China Law Review*, 16, 2019, 34.
Cheng-Yee Khong, Mohamed Abdel Wahab, *Third-Party Funding in the MENA Region*, in *Dispute Resolution International*, 15, 2021, 175.
Chiann Bao, *Third-party Funding in Singapore and Hong Kong: The Next Chapter*, in *Journal of International Arbitration*, 34(3), 2017, 387-400.
Christine L. Childers, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26 (b)(1)*, in *Valparaiso University Law Review*, 36, 2001, 677.
Christopher Hodges, Stefan Vogenauer, Magdalena Tulibacka, *The costs and funding of civil litigation*, in *The Costs and Funding of Civil Litigation*, 2010, 1-580.
Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options for Plaintiffs*, in *Mississippi College Law Review*, 39, 2021, 102.
Civil Justice Council, *A Self-Regulatory Code for Third-party Funding*, July 2010. Devised by working group consisting of Harbour Litigation Funding, Calunius Capital, Allianz, IMF Australia and Commercial Litigation Funding.
Collin Flake, *Third-party funding in domestic arbitration: champerty or social utility?*, in *Dispute Resolution Journal*, 2015.
D.A. Agulló, *Directive 2020/1828 on representative actions for the protection of the collective interests of consumers: an overview*, in *UNIO-EU Law Journal*, 8(1), 2022, 127-142.
David Capper, *Supreme Court holds that litigation funding agreement is a damages-based agreement. R (Paccar Inc) v Competition Appeal Tribunal [2023] UKSC 28*, in *Civil Justice Quarterly*, 43(1), 2024, 16-27.
David Capper, *Third-party funders' rights in financial provision proceedings*, in *Law Quarterly Review*, 140(2), 2024, 187-191.
David Capper, *Three aspects of litigation funding*, in *Northern Ireland Legal Quarterly*, 70, 2019, 357.
David Markworth, *Debt collection services in Germany: A sector in turmoil*, in *Regulation of Debt Collection in Europe*, Routledge, 2022, 66-82.
David Muradyan, *The efficiency of the European Union's Anti-money laundering legislation: An analysis of the legal basis and the harmonisation of the EU Anti-money laundering legal framework*, 2022.
David S. Abrams, Daniel L. Chen, *A market for justice: a first empirical look at third-party litigation funding*, in *University of Pennsylvania Journal of Business Law*, 15, 2012, 1075.
Debashree Chakraborty, *Empirical (non-Doctrinal) Research Method and Its role in Legal Research*, in *Advances in Social Science, Education and Humanities Research*, 3, 2015, 25.
Deborah R. Hensler, *The future of mass litigation: Global class actions and third-party litigation funding*, in *George Washington Law Review*, 79, 2010, 306.

Didem Kayali, *Third-Party Funding in Investment Arbitration: How to Define and Disclose It*, in *ICSID Review-Foreign Investment Law Journal*, 38(1), 2023, 113-139.
Dieter Martiny, *The Recognition and Enforcement of Court Decisions Between the EU and Third States*, in *EU Civil Procedure Law and Third Countries*, Nomos Verlagsgesellschaft mbH & Co. KG, 2021, 127-146.
District of Delaware, *Standing Order Re: Third-party Litigation Funding Arrangements*, April 18, 2022. Available at: *www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Disclosure%20Statements.pdf*.
Dominik Horodyski, Maria Kierska, *Third-party funding in international arbitration: legal problems and global trends with a focus on disclosure requirement*, Towarzystwo Doktorantów UJ, 2017.
Du Junpeng, *Comparative Analysis of Third-Party Funding of Arbitration in Singapore and Hong Kong*, in *Ученый XXI века*, 4 (85), 2022, 27-34.
Ea Valvi, *The role of legal professionals in the European and international legal and regulatory framework against money laundering*, in *Journal of Money Laundering Control*, 26(7), 2023, 28-52.
Elayne E. Greenberg, *Please Ask, Please Tell: Disclosing Third-Party Funding in Mediation*, in *St. John's Legal Studies Research Paper*, 21-0015, 2021.
Erik Fuqua, *Two Roads Converged In A Legal Wood: The Intersection of Litigation Funding and the False Claims Act*, in *Indiana Health Law Review*, 19(1), 2022. Available at Social Science Research Network: *ssrn.com/abstract=3896591*.
EU – Parliament Responsible private funding of litigation P9 TA (2022) 0308.
European Commission, Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.
Fahad Bin Siddique, *Champerty vs. Third-Party Funding in Arbitration: A Censorious Debate*, in *SCLS Law Review*, 3(3), 2020.
Fernando Aguilar de Carvalho *et al.*, *Portugal. The Third-party Litigation Funding Law Review*, in *The Third-party Litigation Funding Law Review, Law Business Research*, 2020, 134-141.
Fiona McKenna *et al.*, *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, in *New York University Journal of Law & Business*, 12, 2015, 635.
Fiona Scott Morton, Carl Shapiro, *Patent assertions: are we any closer to aligning reward to contribution?*, in *Innovation Policy and the Economy*, 16(1), 2016, 89-133.
Florence Dafe, Zoe Williams, *Banking on courts: financialization and the rise of third-party funding in investment arbitration*, in *Review of international political economy*, 28(5), 2021, 1362-1384.
Francisco Marcos, *The Uneven and Unsure Playing Field for Competition Damages Claims in the EU: Shortcomings and Failures of Directive 2014/104/EU and Its Implementation*, in *IIC-International Review of Intellectual Property and Competition Law*, 52(4), 2021, 468-476.
G.S. Swann, *Economics and the litigation funding industry: How much justice can you afford*, in *New England Law Review*, 35, 2000, 805.

General Thurbert, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, in *Widener Law Journal*, 23, 2013, 229.
Geoffrey J. Lysaught, D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the US Civil Justice System*, in *Journal of Law, Economics, and Policy*, 8, 2011, 645.
George Robert Barker, *Third-party litigation funding in Australia and Europe*, in *Journal of Law, Economics and Policy*, 8, 2011, 451.
Georgios Pavlidis, *Financial information in the context of anti-money laundering: Broadening the access of law enforcement and facilitating information exchanges*, in *Journal of Money Laundering Control*, 23(2), 2020, 369-378.
Gian Marco Solas, *Alternative Litigation Funding and the Italian Perspective*, in *European Review of Private Law*, 24(2), 2016.
Hilary Biehler, *Maintenance and champerty and access to justice – the saga continues*, in *Irish Jurist*, 59, 2018, 130-145.
Hugh Sims *et al.*, *The Powers of Office-Holders*, in *Insolvency Practitioners*, Edward Elgar Publishing, 2024, 124-185.
I. Ganguli *et al.*, *The Third AML-Directive: Europe's Response to the Threat of Money Laundering and Terrorist Financing: Part I*, in *Banking Law Journal*, 126, 2009, 579.
Ina C. Popova, Katherine R. Seifert, *Gatekeeping, Lawmaking, and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration*, in *Private Actors in International Investment Law*, 2021, 133-155.
International Council For Commercial Arbitration, Queen Mary University of London, *Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration*, 2018, 14-16. Available at: *cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf*.
J. Nicholas Ziegler, John T. Woolley, *After Dodd-Frank: Ideas and the post-enactment politics of financial reform in the United States*, in *Politics & Society*, 44(2), 2016, 249-280.
Jack Ballantyne, *EU parliament calls for regulation of third-party funding*, in *Global Arbitration Review*, 2022. Available at: *globalarbitrationreview.com/article/eu-parliament-calls-regulation-of-third-party-funding*.
Jack Fox-Williams, *Doctrinal Legal Research: What Does It Entail and Is It Still Relevant to Law?*, Rochester, 2016, 52.
Jacqueline Gray, *Party Autonomy Under the New Brussels IIa (Recast) Regulation: Stalemates and Innovation*, in *Utrecht Law Review*, 18(1), 2022, 45-56.
Jaime Aparicio García, *Legal Finance Analytics: a data-driven proposal of asset pricing litigation risk applied to international investment arbitration*, in *Thesis DBA in Management and Technology*, 2024.
James Rowe, *Litigation Finance: Financial Engineering in the Courtroom*, 2020. Available at Social Science Research Network 3751369.
Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice*, in *Georgetown Journal of Legal Ethics*, 33, 2020, 687.
Jasminka Kalajdzic, Peter Cashman, Alana Longmoore, *Justice for profit: a comparative analysis of Australian, Canadian and US third-party litigation funding*, in *The American Journal of Comparative Law*, 61(1), 2013, 93-148.

Jason Geisker, Jenny Tallis, *Litigation funding in Australia: A year of review and change?*, in *Law Society of NSW Journal*, 46, 2018, 81-83.
Jason Lyon, *Revolution in progress: Third-party funding of American litigation*, in *UCLA Law Review*, 58, 2010, 571.
Jean Xiao, *Consumer litigation funding and medical malpractice litigation: examining the effect of Rancman v. Interim Settlement Funding Corporation*, in *Journal of Empirical Legal Studies*, 14(4), 2017, 886-915.
Jeffrey J. Grosholz, *In the Shadows: Third-Party Litigation Funding Agreements and the Effect Their Nondisclosure Has on Civil Trials*, in *Florida State University Law Review*, 47, 2019, 481.
Jennifer A. Trusz, *Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, in *Georgetown Law Journal*, 101, 2012, 1649.
Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim*, in *Alabama Law Review*, 56, 2004, 325.
Jeremy Smith, *Age of Third-Party Funding: Time for States to Permit and Regulate Third-Party Funding in Arbitration*, 2024. Available at: *scholarship.shu.edu/cgi/viewcontent.cgi?article=2410&context=student_scholarship*.
Joanna Shepherd Bailey *et al.*, *Third-Party Litigation Financing*, in *Journal Of Law, Economics & Policy*, 8, 2011, 257.
Johan Skog, *Illusory Truths and Frivolous Claims: Critical Reflections on a Report on Litigation Funding by the European Parliamentary Research Service*, in *YSEC Yearbook of Socio-Economic Constitutions 2022: Funding of Justice*, Springer Nature Switzerland, 2023, 87-117.
John Sorabji, *Legal Expenses Insurance and the Future of Effective Litigation Funding*, in *Erasmus Law Review*, 14(4), 2021. Available at Social Science Research Network: *ssrn.com/abstract=4163046*.
John Walker, *Policy and Regulatory Issues in Litigation Funding Revisited*, in *Canadian Business Law and Journal*, 55, 2014, 85.
Josef Wolfgang Paulson, *Helpful Industry or Officious Intermeddles: Assessing US Champerty Law through the Lens of Third-Party Funding in International Dispute Resolution*, in *George Washington Law Review*, 92, 2024, 725.
Joseph J. Stroble, Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, in *Defence Counsel Journal*, 87, 2020, 1.
Joshua G. Richey, *Tilted scales of justice-The consequences of third-party financing of American litigation*, in *Emory Law Journal*, 63, 2013, 489.
Julia H. McLaughlin, *Litigation funding: Charting a legal and ethical course*, in Vermont Law Review, 31, 2006, 615.
Julie-Anne Tarr, *Insurance and third-party litigation funding in Australia: The desirability or otherwise of a common regulatory framework?*, in *Australian Business Law Review*, 45(5), 2017, 419-427.
Julien Laurent Chaisse, Chan Eken, *The Monetization of Investment Claims Promises and Pitfalls of Third-Party Funding in Investor-State Arbitration*, in *Delaware Journal of Corporate Law*, 44, 2020, 113.

Jung Won Jun, *Third-Party Funding of Arbitration: Focusing on Recent Legislations in Hong Kong and Singapore*, in *Journal of Arbitration Studies*, 30, 2020, 137.
Justin Boes, *Lawyers, Funds, & Money: The Legality of Third-Party Litigation Funding in the United States*, in *Rutgers Law Record*, 49, 2021, 118.
Kaira Pinheiro, Dishay Chitalia, *Third-Party Funding in International Arbitration: Devising a Legal Framework for India*, in *National University of Juridical Sciences Law Review*, 14, 2021, 254.
Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, in *DePaul Law Review*, 63, 2013, 527.
Keith Sharfman, *The Economic Case Against Forced Disclosure of Third-party Litigation Funding*, in *New York State Bar Journal*, 94, 2022, 36. Available at Social Science Research Network: *ssrn.com/abstract=4051939 or dx.doi.org/10.2139/ssrn.4051939*.
Kelly Pope and Chih-Chen Lee, *Could the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 be helpful in reforming corporate America? An investigation on financial bounties and whistle-blowing behaviours in the private sector*, in *Journal of business ethics*, 112, 2013, 597-607.
Khong Cheng-Yee, *Monetizing Legal Assets: Social and Economic Benefits of Third-Party Dispute Finance in Asia*, in *Asian Journal of Law and Society*, 10(2), 2023, 204-218.
Khushboo Hashu Shahdadpuri, *Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory*, in *Asian International Arbitration Journal*, 12, 2016, 77.
Kirstin Dodge *et al.*, *Third-Party Funding and Reform of the ICSID Arbitration Rules*, in *Romanian Arbitration Journal*, 15, 2021, 15.
Korok Ray, *Third-Party Funding of Patent Litigation: Problems and Solutions*, 2022. Available at Social Science Research Network 4125510.
Lena Hornkohl, *Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive (Germany)*, in *Journal of European Competition Law & Practice*, 2024.
Louis Visscher, Faure Michael, *A Law and Economics Perspective on the EU Directive on Representative Actions*, in *Journal of Consumer Policy*, 44, 2021, 455-482.
Luke Streatfeild, Luke Grimes, Patrick Kenny, *Unpacking PACCAR: the fallout from the judgment, and the consequences for litigation funding in the UK*, in *Competition Law International*, 20(1), 2024.
M. Velicogna, *Cross-border dispute resolution in Europe: Looking for a new normal*, in *Oñati Socio-Legal Series*, 12(3), 2022, 556-581.
Malcolm E. Wheeler, Theresa Wardon Benz, *Litigation Financing: Balancing Access with Fairness*, in *Journal of Tort Law*, 13(2), 2020, 281-301.
Manfredi Marciante, *Funding of Claims in Investor-State Dispute Settlements: Could Third-Party Funding Enhance Access to Justice?*, in *YSEC Yearbook of Socio-Economic Constitutions 2022: Funding of Justice*, Springer Nature Switzerland, 2023, 291-320.
Marco de Morpurgo, *A comparative legal and economic approach to third-party litigation funding*, in *Cardozo Journal of International and Comparative Law*, 19, 2011, 343.
María Carlota Ucín, *How Can Business Best Approach Human Rights in Third-Party*

Litigation Funding? Guidelines for Future Regulations, in *Erasmus Law Review*, 16, 2023, 102.
Maria Dumitru-Nica, *Third-party Litigation Funding-between Business Opportunity and Facilitating Access to Justice*, in *European Journal of Law and Public Administration*, 9(1), 2022, 104-111.
Maria João Mimoso, Joana Lourenço Pinto, *The Third-Party Funding in Arbitration: A Challenge in Times of Crisis*, in *European Journal of Marketing and Economics*, 4(2), 2021, 1-12.
Marko Djinovic, *Procedural Costs and Third-Party Litigation Funding of Collective Redress under the Slovenian Collective Actions Set*, in *Pravni Letopis*, 2022, 117.
Masood Ahmed, Xandra Kramer, *Global Developments and Challenges in Costs and Funding of Civil Justice*, in *Erasmus Law Review*, 14, 2021, 181.
Massaro Piletta, *The new directive on an EU-wide representative action and third-party litigation funding: An opportunity for European consumers?*, in *Revija Kopaoničke škole prirodnog prava*, 3(1), 2021, 95-117.
Matias Tamlander, *Proposed Regulation of Third-Party Funding in Investor-State Dispute Settlement*, in *Helsinki Law Review*, 14(1), 2020, 74-87.
Matthew Blundell, *What are the Chances?: The Predictive Analytics behind Third-Party Litigation Funding in Investment Arbitration*, Uppsala Universitet, 2022.
Matthew S. Erie, *Chinese law and development*, in *Harvard International Law Journal*, 62, 2021, 51.
Maya Steinitz, Abigail Field, *A Model Litigation Finance Contract*, in *Iowa Law Review* 99, 2014, 711. Available at Social Science Research Network: *ssrn.com/abstract=2320030*.
Maya Steinitz, *Follow the money? A proposed approach for disclosure of litigation finance agreements*, in *UC Davis Law Review*, 53, 2019, 1073.
Maya Steinitz, *The litigation finance contract*, in *William & Mary Law Review*, 54, 2012, 455.
Maya Steinitz, *Third-party Funding of Investment Arbitration*, *University Iowa Legal Studies*, Research Paper No. 2021-42, June 24, 2021. Available at Social Science Research Network: *ssrn.com/abstract=3873523*.
Maya Steinitz, *Whose claim is this anyway-Third-party litigation funding*, in *Minnesota Law Review*, 95(4), 2011, 1268.
MD Khairul Islam, *The impacts of third-party funding on cost decisions in investment arbitration*, in *Asia Pacific Law Review*, *32*(1), 2024, 259-278.
Michael Duffy, *Two's company, three's a crowd?: Regulating third-party litigation funding, claimant protection in the tripartite contract, and the lens of theory*, in *University Of New South Wales Law Journal*, 39(1), 2016 165–205. Available at: *search.informit.org/doi/10.3316/informit.024631232228937*.
Michael J. Howlett, *Consumer Litigation Financing in Illinois: Seeking Security and Legitimization Through Regulation, 26 Loy*, in *Consumer Law Review*, 140, 2013. Available at: *lawecommons.luc.edu/lclr/vol26/iss1/6*.
Michael James Boland, *Multi-Party Litigation and Third-Party Funding of Litigation as a Response to Globalisation*, Galway Law Review, 2022, 159-182. Available at Social Science Research Network: *ssrn.com/abstract=4316382*.

Michael K. Velchik, Jeffrey Y. Zhang, *Islands of Litigation Finance*, in *Stanford Journal of Law, Business & Finance*, 24(1), 2019.
Michael Klausner *et al.*, *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)*, in *Business Lawyer*, 75, 2019, 1769.
Michael Krestin *et al.*, *Third-Party Funding in International Arbitration: To Regulate Or Not To Regulate?*, in *Kluwer Arbitration Blog*, 2017. Available at: *arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/*.
Michael Legg *et al.*, *The rise and regulation of litigation funding in Australia*, in *Northern Kentucky Law Review*, 38, 2011, 625.
Michael Veale, Frederik Zuiderveen Borgesius, *Demystifying the Draft EU Artificial Intelligence Act – Analysing the good, the bad, and the unclear elements of the proposed approach*, in *Computer Law Review International*, 22(4), 2021, 97-112.
Michiel Poesen, *Civil Litigation Against Third-Country Defendants in the EU: Effective Access to Justice as a Rationale for European Harmonization of the Law of International Jurisdiction*, in *Common Market Law Review*, 59(6), 2022.
Milan Lazić, Milica Savić, *Third-party funding and access to justice*, in *Revija Kopaoničke škole prirodnog prava*, 3(2), 2021, 135-148.
Murali Jagannathan, U. Quapp, Venkata Santosh Kumar Delhi, *Litigation risk transfer mechanisms in construction dispute resolution process: Cross-case analysis*, in *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 13(3), 2021.
Nachiketa Mittal, *BRICS-Evolving Mechanism for Third-party Funded Arbitration. Arbit Praxi*, in *Asia Law House and Damodaram Sanjivayya National Law University*, 2018, 19-38.
Nataša Hadžimanović, *Third-Party Funding in Arbitration: A Case for Mandatory Disclosure?*, in Zlatan Meškić, Ivana Kunda, Dušan V. Popović, Enis Omerović (eds.), *Balkan Yearbook of European and International Law 2019. Balkan Yearbook of European and International Law*, Springer, 2019.
Nicholas Dietsch, *Litigation Financing in the US, the UK, and Australia: How the Industry Has Evolved in Three Countries*, in *Northern Kentucky Law Review*, 38, 2011, 687.
Office of Fair Trading, *Private Actions in Competition Law: Effective Redress for Consumers and Business*, Discussion paper, 2007, 27-28.
Olivier Marquais, Alain Grec, *Do's and don'ts of regulating Third-Party litigation funding: Singapore vs. France*, in *Asian International Arbitration Journal*, 16(1) 2020.
Otabek Narziev, *Third-Party Funding in Global Arbitration: Balancing Access to Justice with Ethical Concerns*, in *Journal of Intellectual Property and Human Rights*, 3(8), 2024, 225-229.
Patrícia Godinho Silva, *Recent developments in EU legislation on anti-money laundering and terrorist financing*, in *New Journal of European Criminal Law*, 10(1), 2019, 57-67.
Patricia Schoeffmann, *Third-Party Funding and ISDS. In Austrian Yearbook on International Arbitration 2022*, MANZ'sche Verlags-und Universitätsbuchhandlung GmbH, 2022, 353-384.
Paul H. Rubin, *Third-party financing of litigation*, in *Northern Kentucky Law Review*, 38, 2011, 673.

Peiyao Su, *Disclosure Dilemmas and the Way Forward in Third-party Funding of International Investment Arbitration-From the Perspective of Building a Localized Disclosure System*, in *Advances in Economic Development and Management Research*, 1(3), 2024, 188-196.
Peny Cahaya Azwari, Febriansyah, Sri Delasmi Jayanti, *Impact of Third-Party Funds and Capital Adequacy Ratio on Profit Sharing Financing*, in *International Business and Accounting Research Journal*, 6(1), 2022, 63-70.
Peter Melamed, *An Alternative to the Contingent Fee-An Assessment of the Incentive Effects of the English Conditional Fee Arrangement*, in *Cardozo Law Review*, 27, 2005, 2433.
Poonam Puri, *Financing of litigation by third-party investors: A share of justice*, in *Osgoode Hall Law Journal*, 36, 1998, 515.
R. Avraham, A. Wickelgren, *Third-party litigation funding-A signaling model*, in *DePaul Law Review*, 63, 2013, 233.
Rachael Mulheron, *England's Unique Approach to the Self-Regulation of Third-party Funding: A Critical Analysis of Recent Developments*, in *The Cambridge Law Journal*, 73(3), 2014, 570-597.
Rachael Mulheron, *The Funding of the United Kingdom's Class Action at a Cross-Roads*, in *King's Law Journal*, 2023, 1-27.
Rachael Mulheron, *Third-party Funding of Litigation: A Changing Landscape*, in *Civil Justice Quarterly*, 27, 2008, 314-16.
Rachael Mulheron, *Third-party Funding, Class Actions, and the Question of Regulation: A Topical Analysis*, in *Mass Claims*, 5, 2022.
Rachael Mulheron, *Unpacking Paccar: Statutory Interpretation and Litigation Funding*, in *The Cambridge Law Journal*, 83(1), 2024, 99-131.
Rachel Mulheron, *England's Unique Approach to the Self-Regulation of Third-party Funding: A Critical Analysis of Recent Developments*, in *The Cambridge Law Journal*, 73(3), 2014, 570-597.
Rebecca Leinen, *Striking the right balance: disclosure of third-party funding*, in *Oxford University Commonwealth Law Journal*, 20(1), 2020, 115-138.
Ridhima Sharma, *Third-party Funding in International Commercial Arbitration*, in *NUALS Law Journal*, 12, 2018, 61.
Rita Portenti, *Three's a Crowd: The EU Should Safeguard Against Third-Party Funding*, in *Arbitration Law Review*, 15, 2024, 104.
Robert B. Fuqua, *How Litigation Funders Have Improved the Quality of Settlements in America*, in *Harvard Negotiation Law Review Online*, 2020.
Robert Huffman, Robert Salcido, *Blowing the Whistle on Qui Tam Suits and Third-Party Litigation Funding: The Case for Disclosure to the Department of Justice*, in *Public Contract Law Journal*, 50, 2020, 343.
Ronald A. Stunda, *The Effects Of The Securities Litigation Uniform Standards Act (Slusa) On Earnings Forecasts*, in *International Journal of Business, Accounting & Finance*, 7(2), 2013.
Ronen Avraham, Abraham Wickelgren, *Third-Party Litigation Funding – A Signaling Model*, in *DePaul Law Review*, 63, 2014, 233. Available at: *via.library.depaul.edu/law-review/vol63/iss2/4*.

Rule 9.01(4) of the Solicitors' Code of Conduct 2007, *Referrals of business*.
Rupert Macey-Dare, *Litigation Funding Agreements (LFAs) for UK Opt-Out Competition Class Actions Post Sony- How Robust Are They?*, November 25, 2023. Available at Social Science Research Network: *ssrn.com/abstract=4644256 or dx.doi.org/10.2139/ssrn.4644256*.
Rupert Macey-Dare, *Preserving 3rd Party Funding in UK Competition Law Opt-Out Class Proceedings-Imminent Legislative Response to Detonate the "PACCAR Torpedo"*, 2023. Available at Social Science Research Network 4634289.
Sahana Ramesh, *Third-party funding in international arbitration: Ownership of the claim, consequences for costs orders, and regulation*, in *Arbitration International*, 36(2), 2020, 275-295.
Sairam Bhat, Vikas Gahlot, *Third-party Funding: A Conceptual and Comparative Legal Perspective*, in *CMR University Journal for Contemporary Legal Affairs*, 5, 2023, 34.
Sam Korte, Jonathan Stroud, *Insuring Judgments And The Disclosure Gap*, in *American University Law Review*, 73, 2024, 1057.
Sam Roberton, *The Regulation of Third-Party Litigation Funders in New Zealand: A Proposed Solution*, in *Public Interest Law Journal of New Zealand*, 10, 2023, 177.
Samuel Antill, Steven R. Grenadier, *Financing the litigation arms race*, in *Journal of Financial Economics*, 149(2), 2023, 218-234.
Sarah E. Moseley, *Disclosing third-party funding in international investment arbitration*, in *Texas Law Review*, 97, 2018, 1181.
Sasha Nichols, *Access to cash, access to court: Unlocking the courtroom doors with third-party litigation finance*, in *UC Irvine Law Review*, 5, 2015, 197.
Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, in *Law & Social Inquiry*, 37(3), 2012, 657-685.
Sean Keller, Jonathan Stroud, *Litigation Funding Disclosure and Patent Litigation*, in *Federal Circuit Bar Journal*, 33, 2024, 77.
Sebastian Peyer, *Competition litigation funding*, in *Research Handbook on Private Enforcement of Competition Law in the EU*, Edward Elgar Publishing, 2023, 357-384.
Sebastian Peyer, *Time for Parliament to act? The PACCAR decision of the UK Supreme Court: R (on the application of PACCAR Inc and Others) (Appellants) v Competition Appeal Tribunal and Others (Respondents) [2023] UKSC 28*, in *Legal Studies*, 2023, 1-6.
Simon Kleinert, Christine Volkmann, Marc Grünhagen, *Third-party signals in equity crowdfunding: the role of prior financing*, in *Small Business Economics*, 54(1), 2020, 341-365.
Sir Anthony Clarke MR, quoted in *Drive for transparency on third-party funding*, in *The Law Society Gazette*, February 14, 2008.
Siyuan Jin and Wei Shen, *Third-party Funding for Dispute Resolution*, *China and WTO Review*, 9(1), 2023.
Stavros Brekoulakis, Catherine Rogers, *Third-party financing in ISDS: a framework for understanding practice and policy*, in *Academic Forum on ISDS Concept Paper*, 22, 2019.
Stefan Kirchner, *Legal Ethics in Germany*, in *Indonesian Journal of International & Comparative Law*, 2, 2015, 98.

Stephen B. Burbank, Sean Farhang, *A New (Republican) Litigation State?*, in *UC Irvine Law Review*, 11, 2020, 657.
Suneal Bedi, William C. Marra, *The Shadows of Litigation Finance*, in *Vanderbilt Law Review*, 74, 2021, 563. Available at: *scholarship.law.vanderbilt.edu/vlr/vol74/iss3/6*.
Suneal Bedi, William Marra, *Litigation Finance in the Market Square: A Non-Market Strategy Approach*, forthcoming in *Southern California Law Review*, September 09, 2024. Available at Social Science Research Network: *ssrn.com/abstract=)*.
Susan L. Martin, *Financing Litigation On-Line Usury and Other Obstacles*, in *DePaul Business & Commercial Law Journal*, 1, 2002, 85.
Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, in *Fordham Journal of Corporate and Financial Law*, 10, 2004, 55.
Susanne Augenhofer, Adriani Dori, *The proposed regulation of Third-party Litigation Funding-much ado about nothing?*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 20(5), 2023, 198-209.
T.M.C. Arons, *Cross-border dimension of collective proceedings in the Brussels Ibis regime: jurisdiction, lis pendens and related actions*, in *Research Handbook on the Brussels Ibis Regulation*, Edward Elgar Publishing, 2020, 1-39.
Tessa Trapp *et al.*, *Third-Party Legal Standing under European Union Law: A Comparative Review of Selected EU Law and National Implications*, in *Amsterdam Law School Research Paper*, 1, 2024.
The Funding of Litigation: Alternative Funding Structures: A Series of Recommendations to the Lord Chancellor, June 2007, 53, and recommendation 3.
Tom Baker, *What Litigation Funders Can Learn About Settlement Rights From the Law of Liability Insurance*, in *Theoretical Inquiries of Law*, forthcoming, University of Pennsylvania, Institute for Law & Economics Research Paper No. 23-41, November 15, 2023. Available at Social Science Research Network: *ssrn.com/abstract=4638617*.
Tran Hoang Tu Linh, Bui Trung Hieu, *Third-Party Funding in Commercial Arbitration in ASEAN: Dealing with Conflicts of Interest*, in *Contemporary Asia arbitration Journal*. 16, 2023, 97.
Tsai-Fang Chen, *Development in Responses of Arbitral Tribunals to Third-Party Funding in International Investment Arbitration*, in *Contemporary Asia Arbitration Journal*, 15, 2022, 1.
UK Criminal Law Act 1967, Chapter 58, Section 14.
US Chamber Institute for Legal Reform, *Selling More Lawsuits, Buying More Trouble*, 2020. Available at: *www.thefederation.org/docs/Resources/ReferencePapers/StillSellingLawsuits.pdf*.
V. Sahani, *Rethinking the impact of third-party funding on access to civil justice*, in *DePaul Law Review*, 69(2), 2020, 611-632.
Valentina Frignati, *Ethical implications of third-party funding in international arbitration*, in *Arbitration International*, 32(3), 2016, 505-522.
Valsamis Mitsilegas, Niovi Vavoula, *The evolving EU anti-money laundering regime: challenges for fundamental rights and the rule of law*, in *Maastricht journal of European and comparative law*, 23(2), 2016, 261-293.
Varun Mansinghka, *Third-party funding in international commercial arbitration and its*

impact on independence of arbitrators: an Indian perspective, in *Asian International Arbitration Journal*, 13(1), 2017.
Victoria Sahani, *Harmonizing third-party litigation funding regulation*, in *Cardozo Law Review*, 36, 2014, 861.
Victoria Sahani, *Reshaping third-party funding*, in *Tulane Law Review*, 91, 2016, 405.
Victoria Shannon Sahani, *Judging third-party funding*, in *UCLA Law Review*, 63, 2016, 388.
Victoria Shannon Sahani, *Keep to the Code: A Global Code of Conduct for Third-Party Funders*, in *Boston University Law Review*, 102, 2022, 2331.
Victoria Shannon, *Third-Party Litigation Funding and the Dodd-Frank Act*, in *Tennessee Journal of Business Law*, 16, 2014. Available at: *ir.law.utk.edu/transactions/vol16/iss1/2*.
Viren Mascarenhas, Hasan Tahsin Azizagaoglu, *Third-Party Funding: The implications for international disputes; and what the UK can learn from the PACCAR decision*, in *The Quarterly Magazine of The Chartered Institute of Arbitrators*, 2, 2024.
W. Bradley Wendel, Joshua P. Davis, *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, in *Hastings Law Journal*, 74, 2023, 1459. Available at: *repository.uclawsf.edu/hastings_law_journal/vol74/iss5/8*.
W. Bradley Wendel, *Paying the piper but not calling the tune: Litigation financing and professional independence*, in *Akron Law Review*, 52, 2018, 1.
Wala Al-Daraji, *Third-party Funding Disclosure in England and Wales and in Australia*, in *Dispute Resolution Journal*, 75(3), 2021, 31-81.
Wendy Gerwick Couture, *Cyan, Reverse-Erie, and the PSLRA Discovery Stay in State Court*, in *Securities Regulation Law Journal*, 47, 2019, 21-22.
Xandra E. Kramer, *The ELI-Unidroit Model European Rules of Civil Procedure: Key Features and Prospects of Costs and Funding of Collective Redress*, in *Mélanges en l'honneur du Professeur Loïc Cadiet*, LexisNexis, 2023, 823-835.
Xandra Kramer, I.N. Tzankova, Jos Hoevenaars, CJM Van Doorn, *Financing Collective Actions in the Netherlands*, Eleven International Publishing, 2024.
Xandra Kramer, *The Quest for Funding Under the Dutch WAMCA: Third-party Funding and the Viability of a Procedural Fund*, in *Emory International Law Review*, 38, 2024, 767.
Xiyue Li, *Third-Party Funding in International Arbitration: An Analysis of Policy Challenges and Practical Considerations*, in *Beijing Law Review*, 15, 2024, 295.
Young Hye Chun, *Security for Costs under the ICSID Regime: Does It Prevent Arbitral Hit-and-Runs or Does It Unduly Stifle Third-Party Funded Investors' Due Process Rights?*, in *Pepperdine Dispute Resolution Law Journal*, 21, 2021, 477.
Zeqing Zheng, *The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation*, in *Georgetown Journal of Legal Ethics*, 34, 2021, 1383.
Zia Akhtar, *Conditional fees and the contingency fees distinction: a comparative study of the UK and US risk assessment for insurers in litigation*, in *European Insurance Law Review*, 2021, 54.

Collana del Dipartimento di Sociologia e Diritto dell'Economia Università di Bologna

Open Access

Federica Bertocchi, La violenza contro le donne. La rivoluzione culturale.

Marco Tieghi, Carlotta del Sordo, Il bilancio di esercizio degli ETS non commerciali. Aspetti economico-aziendali, normativa di riferimento e strumenti di analisi.

Claudia Golino, Alessandro Martelli (a cura di), Un modello sociale europeo?. Itinerari dei diritti di welfare tra dimensione europea e nazionale.

Alessandro Pomelli, Inside Debt Financing. Theory, Practice, and Regulatory Approaches.

Open Access Green

Mario Bertolissi, Marco Lamandini, Roberto Nania (a cura di), La tutela giurisdizionale effettiva dei diritti. Sfide e prospettive in materia economico-finanziaria nell'ordinamento italiano.

 ISBN 9788835177470

Vi aspettiamo su:

www.francoangeli.it

per scaricare (gratuitamente) i cataloghi delle nostre pubblicazioni

DIVISI PER ARGOMENTI E CENTINAIA DI VOCI: PER FACILITARE
LE VOSTRE RICERCHE.

Management, finanza, marketing, operations, HR
Psicologia e psicoterapia: teorie e tecniche
Didattica, scienze della formazione
Economia, economia aziendale
Sociologia
Antropologia
Comunicazione e media
Medicina, sanità

Architettura, design, territorio
Informatica, ingegneria
Scienze
Filosofia, letteratura, linguistica, storia
Politica, diritto
Psicologia, benessere, autoaiuto
Efficacia personale
Politiche e servizi sociali

FrancoAngeli

La passione per le conoscenze

 ISBN 9788835177470

 ISBN 9788835177470

Understanding Litigation Funding

Litigation funding, or third-party financing of legal disputes, has emerged as a transformative mechanism within modern legal systems, presenting both opportunities and challenges. This study provides a detailed exploration of litigation funding across key jurisdictions, including the European Union, United Kingdom, United States, and Asia-Pacific, with an emphasis on regulatory frameworks, market behaviours, and economic implications.

The volume traces the historical foundations of litigation funding, from doctrines such as champerty and maintenance, to its current role as a tool for enhancing access to justice. At the same time, it examines the ethical, procedural, and economic dilemmas posed by the involvement of third-party financiers in legal proceedings. Special attention is given to regulatory responses, varying approaches to transparency, and the interplay between private investment and public legal norms.

By integrating legal analysis with comparative perspectives, this work offers valuable insights for scholars, practitioners, and policymakers seeking to understand the complexities of litigation funding and its broader implications for the legal order.

Francesca Pellegrini is a legal scholar specialised in financial markets law, fintech regulation, and corporate governance. Her research focuses on the intersection of financial innovation and regulation, including litigation funding, crypto-asset frameworks, and alternative dispute resolution mechanisms in cross-border contexts. She has contributed extensively to comparative legal analysis through publications on banking union reforms, effective judicial protection, and the digitalization of financial services. She is Adjunct professor of Financial Markets Law and Research Fellow in Commercial Law at University of Bologna and collaborates on international research projects addressing regulatory challenges in evolving financial ecosystems.

FrancoAngeli
La passione per le conoscenze