

THIRD-PARTY LITIGATION FUNDING IN LUXEMBOURG

CURRENT PRACTICE AND FUTURE DEVELOPMENTS

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DE LUXEMBOURG



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CURRENT PRACTICE AND FUTURE DEVELOPMENTS

WELCOMING WORDS BY

William Simpson (*Conférence Saint-Yves*)

Géraldine Mersch (*Conférence du Jeune
Barreau de Luxembourg*)



LITIGATION FINANCE

- Or Third Party Litigation Funding
- 15 Novembre 2022

Fabio TREVISAN



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What is Third Party litigation funding?

Also called : Litigation finance, third party funding, third party litigation finance (“TPLF”).

= funding of a party’s legal costs in a dispute in exchange for a share of the profits (if any) of the litigation for the funder.

TPLF is extensively developed in Anglo-Saxon countries with a tradition of common law. On the contrary, its appearance in countries with a civil law tradition came later.

What about its origins ?





INTRODUCTION

History of Third Party Litigation Funding

Where does it come from ?

Origins of TPLF

Third party litigation finance finds its origin in Medieval England. In order to combat their political adversaries, nobles and royal officials associated their names to other party's claims, giving them more credibility. Lords maintained civil, and criminal claims for their political benefit. This practice was called **Maintenance**. Maintenance refers to an unconnected third-party assisting to maintain litigation, by providing, for example, financial assistance.

Champerty is maintenance, **in return** for a share of the profits generated by the lawsuit. In a Champerty contract, the funding party's aim is to obtain a share of the profits of the litigation's outcome, and is completely contingent upon the lawsuit's success. No win ..no share..

Origins

Because of the fear of Champerty and Maintenance corrupting justice, the practice was made **illegal** by the **Statute of Westminster in 1275** : *“None shall commit Champerty, to have part of the thing in question”*.

Purpose : prevent speculation in litigation

“Champerty is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression.” W. Blackstone (1723 –1780)

In common law UK and colonies, the lords had more chances to influence and corrupt singular judges, who set the unwritten laws, rather than parliament members outlining less malleable written laws in civil law countries.

Rationale of common law prohibition in medieval times

“Common law prohibition against champerty was originally based on a desire to prevent abuse of the court system by individuals wealthy enough to finance lawsuits, who would 'play 'the game of writs' to increase their power and harass their rivals through the medieval court system.”(Maslowski v. Prospect Funding Partners LLC, Minnesota Supreme Court , June 3, 2020)

The same court held that, *today*

“champertous contracts of this kind no longer contravene public policy as we understand it today.” Id. at *3.

Minnesota was the last US state to abolish the prohibition of champerty, while New York maintains some limitations

In modern times, with some initial resistance, things change..

Lord Denning in an early sixties case, made the argument that a TPLF could *“be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses”* (Re Trepcia Mines (No 2) [1963] Ch 199)

A rather quick evolution of society brought the legislator to intervene and in the United Kingdom, section 14 of the Criminal Law Act 1967 abolished criminal and tort liability for Maintenance and Champerty.

Later the England and Wales Court of Appeals decided in 2002 that alternative funding agreements were not against public policy, and it therefore was not a sufficient reason for striking down such agreements.

Exception : **Ireland**, where the Supreme Court of Ireland confirmed that third-party litigation funding by an entity with no independent interest in the underlying proceedings is **prohibited under Irish law- for how long ?**

TODAY

The present situation, In Luxembourg and beyond

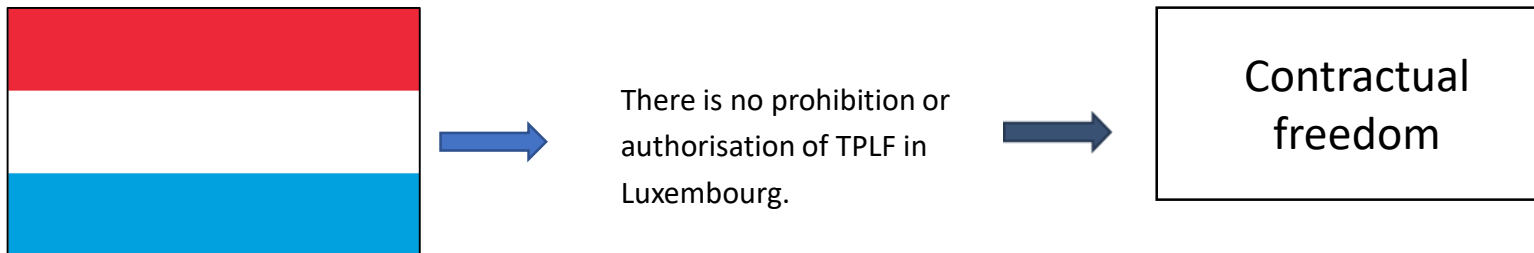


Civil Law countries : the Law / regulation

European Union: the European Commission did not take a position either for or against, as TPLF allows for a better access to justice but risks to encourage abusive appeals.

A study by the European Parliament was published in 2021 : **Responsible private funding of litigation - European added value assessment.** It found that “TPLF could offer **some benefits** if the associated risks are mitigated. In particular, it may represent **a tool to support private citizens and businesses in accessing justice** and constitute a mechanism for **transferring the risk of the uncertain outcome of the dispute to the litigation funder**. At the same time, it **may pose risks** and entail conflicts of interests. If not properly regulated, **it could lead** to excessive economic costs and to the multiplication of opportunity claims, problematic claims and so called 'frivolous claims'. It could also be used for the pursuit of strategic goals by competing businesses, and the cost and time wasted in frivolous litigation in some instances could also potentially directly affect aggregate productivity and competitiveness.”

At national level: there are no legislations → there is no prohibition against Third Party Funding.



The only existing *legal framework* mentioning TPLF in Luxembourg law : current bill on class actions

November 2020: European Union directive on the
authorisation of class action in the Member states



Luxembourg: creation of the bill 7650 concerning the
authorisation of class actions in consumer matters.

Objective: improve access to justice for consumers

How to finance class actions?

→ Financing from a private third party

**The bill refers to the supervision of class action
financing by a third party:**

- The funder is prohibited from influencing the client's decisions
- The court may request a financial overview if there are doubts about a conflict of interest



Litigation finance contract

A tri lateral *sui generis* contract

What does it regulate ?

The litigation funding agreement is a contract between an **investor who finances the litigation**, a **plaintiff who holds the claim**, and **the lawyer who will represent the claimant** that regulate the terms of their agreement. It includes *a minima* :

Description of the claim, and risk factors

a budget and its allocation amongst players (law firm, expert, arbitration costs...)

expected return on investment

how funds will be distributed among investors and claimant

resolution mechanism in case of a settlement offer : who decides ?

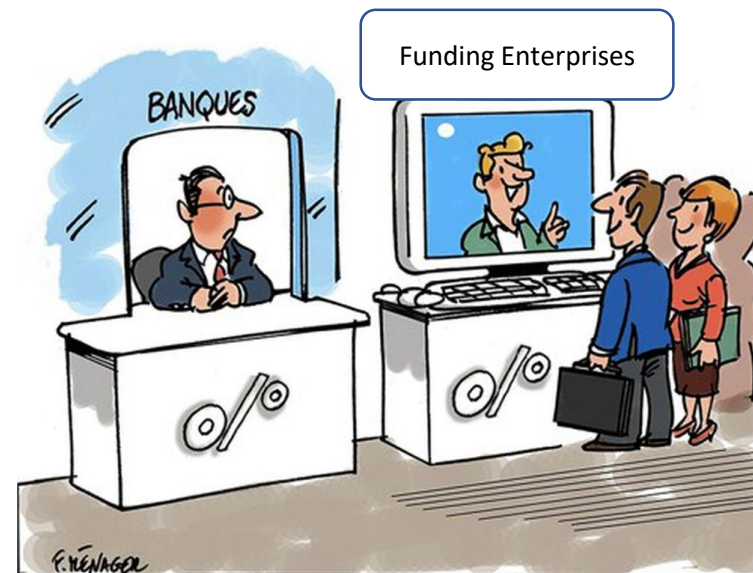
And naturally, no recourse in case of failure of the case in court/arbitration

Civil Law countries: challenges?

What are the potential **legal challenges** of TPLF development in civil law countries ?

Banking Monopoly ?

- Credit transaction and banking monopoly
- A credit transaction is defined as an advance of money by a creditor to a credited party, followed by the remuneration of this creditor and the return of the monetary advance.
- However, **Third Party Funding does not necessarily mean remuneration and restitution, as the risk is entirely borne by the funder ! It is more a partnership**



Civil Law countries: challenges?

Other potential legal challenges

**Quota Litis Pact
(QLP)**



Prohibited in France,
Luxembourg,..

Lawyer's fees are paid by the funder, and are not dependant on
the outcome of the case

**TPLF remains compatible with the QLP prohibition
as the pact only concerns lawyers and not funders.**

Civil Law countries: cultural issues at stake influencing its diffusion ?

What are the **cultural obstacles** of TPLF development in civil law countries?

- ❖ **A different law philosophy**

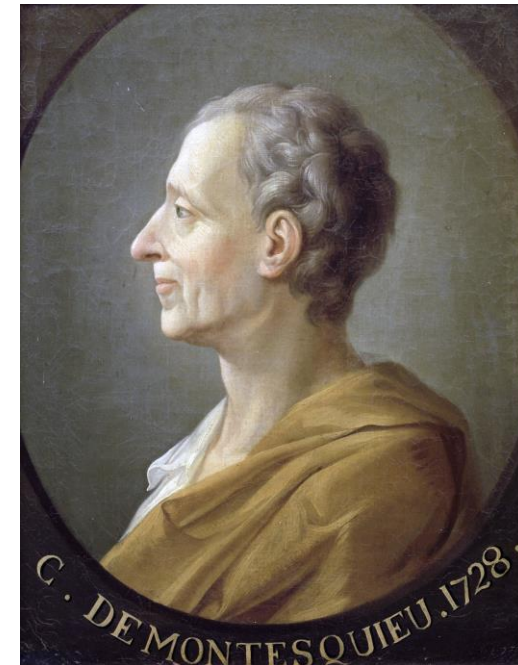
The law is used to give to each their own. There is no political or financial goal in the civil law traditional system.

- ❖ **The cost of legal procedures**

They are cheaper in civil countries, making the demand for funding less appealing

- ❖ **Class Actions**

They often lead to an increase in demand for TPLF,
Continental europe has less demand for TPLF because of the later arrival of Class Actions (Luxembourg still has to implement)



An exclusively Anglo saxon phenomenon ?

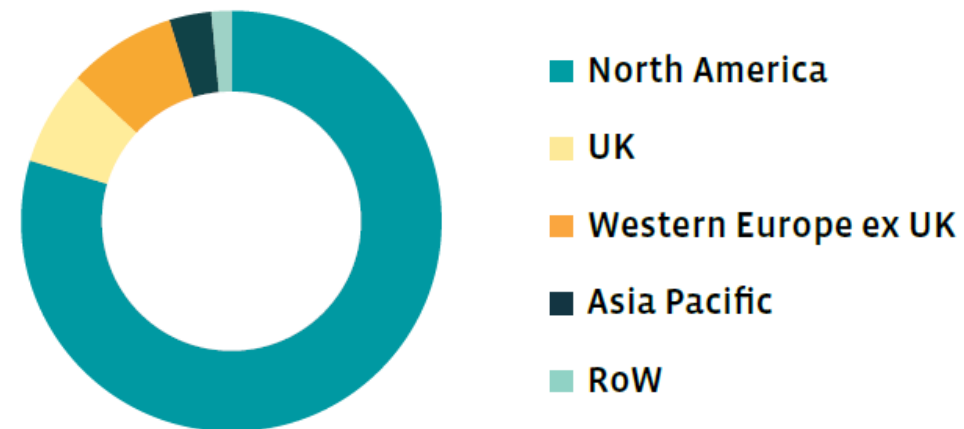
Not anymore !

While tracing its origins and development in the anglo-saxon countries, today, TPLF has largely found its place in the rest of the world, more particularly Europe.

Large collective actions first, then individual commercial claims started to be funded in the early 2000's, in Germany notably, after the dot come bubble burst...Later collective actions for consumers and anti trust actions for victims of illicit cartels. These areas are fast growing in Europe, where an estimate yearly deployment of financing amounts to USD 486m.

(source : Deminor)

Size of the global litigation funding market in USD (2020)



Challenges of TPLF and its development in Civil Law countries

The benefits and opportunities of TPLF

A better
access to
justice

The
funding
of class
actions

Enable
recovery by
bankruptcy
trustees

law firms can
create new
business
themselves

Responsible
funders could
act in ESG
cases ?

TPLF's benefits

A win – win ?

Benefits fro the claimants:

- ❖ Externalisation of the risk of lost litigation's costs
- ❖ Liquidity without having to wait for the litigation's payoff
- ❖ Shifting of the risks of litigation : If the litigation is lost, the plaintiff will not have to reimburse expenses

Benefits for TPF

- ❖ TPF will be reimbursed and make a profit if the case is won.
- ❖ share of the outcome is usually between 20%-40%

«Third Party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus third party funding promotes access to justice.»

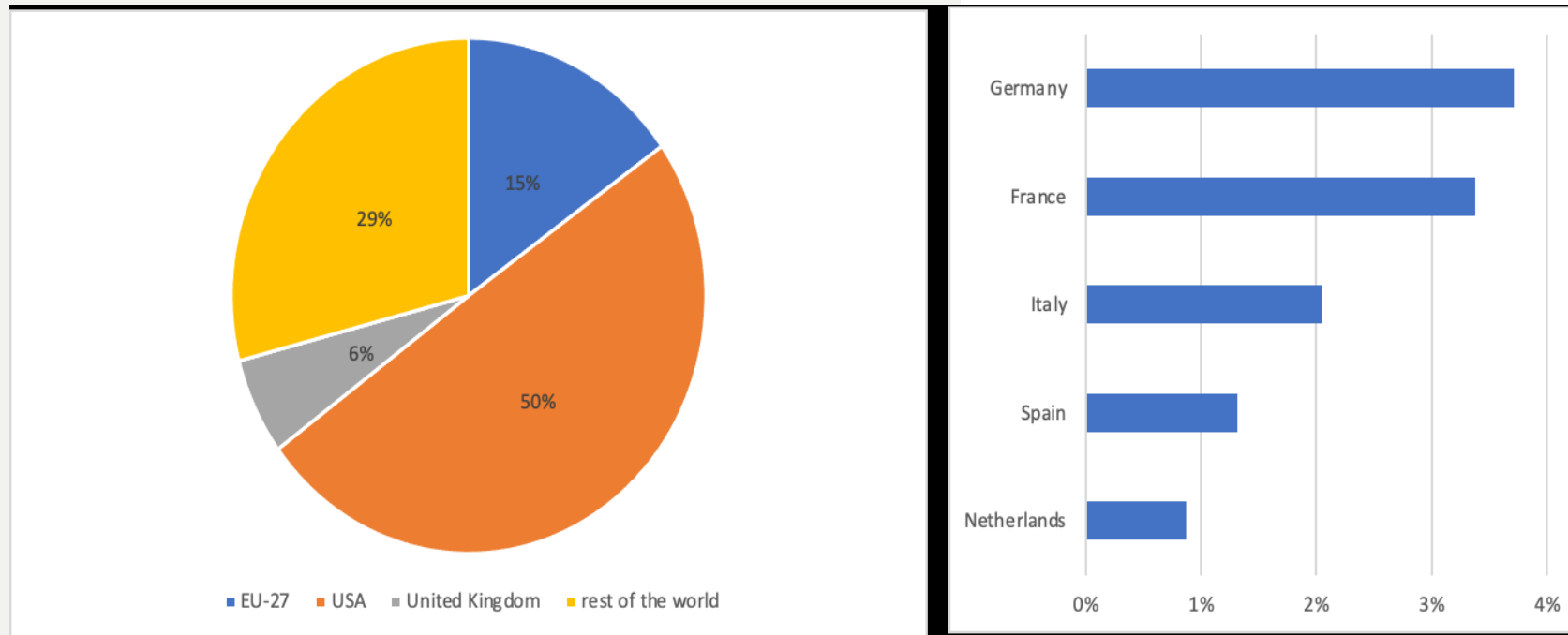
Lord Justice Jackson

The limitations and criticisms : justified ?

- ❖ Claim : Speculation on litigation = turning justice into financial markets and litigations into financial assets
- ❖ BUT speculation leads to the natural selection of litigations by third party funders, due to a purely financial aim
- ❖ Speculation leads to an increase in the number of litigations ?
- ❖ No evidence ..but 16 % of increase in litigations in Australia since the authorisation of TPLF
- ❖ is there a nexus ?
- ❖ Increase of the litigious nature of plaintiffs ? No evidence
- ➡ The relationship funder-lawyer → risk of conflict of interests ?
risk of the funder seeking to influence the client's choices against the client's interest, but can it happen ?



TPLF present European Market vs US Market – room for growth !



THANKS FOR YOUR ATTENTION

Fabio Trevisan

Partner, BSP

ftrevisan@bsp.lu



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