

Summary

Third-Party Litigation Funding in International Commercial Law

Drd. Marius Brănici

In the current social and political context, dominated by globalization and legislative harmonization, it is expected that institutions and legal instruments used extensively in other countries would already be present in Romania, in an adapted form. However, third-party litigation funding (TPF) remains, from the perspective of Romanian law, almost exclusively a concern for the litigant, without benefiting from a clear and coherent regulatory framework. Currently, only isolated mechanisms, such as exemption from stamp duties or assistance with court costs, provide financial support to those involved in lawsuits.

This situation contrasts sharply with international developments, where TPF is rapidly evolving, and it is recognized as a viable mechanism for facilitating access to justice. In certain jurisdictions, this funding model is already regulated and frequently used, while in others, the possibility of integrating it into the existing legislative framework is still being considered.

The purpose of this thesis is to characterize this mechanism and to analyze the ways in which it can be implemented in the Romanian legal system. The study aims to address both the conceptual and historical aspects of third-party litigation funding, as well as the distinction from other forms of funding used in international litigation. It highlights the legal principles that have influenced the emergence and development of TPF, as well as the reasons behind its expansion in various jurisdictions.

Special attention is given to the analysis of the litigation funding contract, including pre-contractual stages, its structure, and the applicable legal rules. It presents the types of lawsuits that most frequently attract the interest of funders and the issues that may arise, depending on the nature of the funded case. The funder's perspective is also analyzed, discussing how the disputed claims can be considered financial assets and included in investment portfolios.

Through this research, the goal is not only to understand the phenomenon at international level, but also to identify solutions for its integration into Romania law system, ensuring a balance between access to justice, the protection of the parties involved, and the transparency of the litigation funding mechanism.

Third-party litigation funding (TPF) is a relatively recent legal mechanism, in various stages of regulation and use globally. Although it is considered a useful tool for ensuring access to justice, TPF generates pending debates, both in favor and against it. Supporters emphasize its role in balancing the financial resources of the parties involved, facilitating legal representation, and promoting a competitive environment among lawyers. On the other hand, critics draw attention to the ethical and legal risks, such as the possibility of the abusive use of this mechanism to initiate speculative or intimidating lawsuits.

The thesis is structured in three parts, each analyzing essential aspects of TPF. The first part investigates the origin and evolution of the institution, existing international regulations, and the differences between various legal systems. The second part examines the funding contract, pre-contractual stages, and its applicability in different types of litigation, including international commercial and investment arbitration. The third part offers a perspective on TPF from the funders' point of view, analyzing the litigated claim as a financial asset, the business models of specialized companies, and their specific obligations.

The research methodology includes documentary analysis of legislation, case law, and legal doctrine, using comparative, logical, and historical methods to highlight the similarities and differences between various regulations. The paper contributes to the legal literature by presenting the integrated perspective on TPF, advocating for the need for clear regulation at the European and national levels. It also proposes legislative solutions for harmonizing the norms applicable to this mechanism, aiming to increase transparency and limit the ethical risks associated with it.

The evolution of TPF demonstrates that, from an initially skeptical mechanism, it has become a recognized tool for supporting the business environment and individuals without sufficient financial resources to pursue a lawsuit. The experience of other countries could serve as

a model for developing national legislation, and the adoption of a European directive on TPF could represent an important step in clarifying the use of this mechanism at the international level.

Third-party litigation funding (TPF) has evolved significantly, particularly in common law systems, where it was initially restricted by the doctrines of maintenance and champerty. However, it has been concluded that funders primarily pursue legitimate commercial interests, and the advantages offered by this mechanism have led to a greater openness to its use.

Thus, the regulation of TPF differs from one country to another: in some jurisdictions, such as Australia and the United Kingdom, its acceptance is broader, while in others, like Hong Kong and Singapore, it is mainly permitted in arbitration procedures. Recent regulations in Asia provide a clear model for addressing the challenges of TPF, establishing rules that ensure transparency, protect the parties involved, and prevent conflicts of interest.

Despite the existence of other financial support mechanisms for litigation (contingency fees, legal insurance, loan agreements), TPF remains an attractive tool due to its flexibility and accessibility. Moreover, these mechanisms can be used in combination, offering tailored solutions for litigants. In the context of rising arbitration costs, more and more claimants are turning to funders to cover expenses in exchange for a portion of the amounts awarded.

International case law, including cases like *S&T Oil* and *Arkin*, confirms the acceptance of TPF in arbitration, and the global trend indicates an increasingly frequent integration of this mechanism. Although there are concerns regarding ethical and deontological implications, existing rules regarding success fees and reasonable contracts can also be applied in the case of third-party funding.

For TPF to be implemented effectively and fairly, clear regulation is necessary to prevent abuses and ensure balance between the parties' interests. Lawyers must be mindful of potential ethical dilemmas and negotiate contracts that respect both their clients' interests and their professional obligations. At the same time, legislators and professional organizations should adapt regulations to respond to the challenges of the market.

The use of TPF is on the rise, and its regulation is becoming imperative to provide predictability and legal protection. A balanced approach, based on clear rules and adapted to current legal and economic realities, will contribute to strengthening this mechanism as a viable solution for access to justice.

In addition to the benefits it offers, third-party litigation funding (TPF) faces multiple criticisms, which is why it is necessary to identify solutions that mitigate the risks associated with this mechanism. A first step could be the creation of authorization and oversight systems for litigation funding companies, as proposed in the European Directive draft analyzed in the paper. This initiative would ensure compliance with legislation and establish minimum standards at the European level. Furthermore, judicial oversight of funding relationships would allow courts to prevent major imbalances that could affect both the funded party and the opposing party, thus protecting the rights of all parties involved. Another essential measure would be the protection of the litigant in relation to the funder. Proposed solutions include limiting the funder's profit to prevent situations where their gains are disproportionate to the benefits of the funded party. Additionally, contractual clauses that disturb the balance between the parties should be declared null and void.

Transparency is also a crucial aspect for the responsible use of TPF. Disclosing the identity of the funder and the existence of the funding should be mandatory to both the court and the opposing party. Furthermore, the court should have the ability to review the contract content to prevent conflicts of interest and contractual abuses. While this measure may affect the confidentiality of the contractual relationship, the overriding right of the opposing party to defense justifies such an obligation.

Finally, the funder's right to influence the course of the litigation should be limited so that decisions regarding the litigation strategy remain in the hands of the funded party. The funded party must have the freedom to choose, including opting for an amicable resolution through settlement, without being constrained by the funder's economic interests.

For TPF to become a viable and fair mechanism, clear regulation is essential to protect the interests of all parties involved. Creating a balanced legislative framework that ensures

transparency, contractual fairness, and adequate judicial control will contribute to the responsible development of third-party litigation funding.

Litigation funding (TPF) generates a constant concern for funders to ensure an adequate profit in the context of legislative changes and developments in judicial practice. In countries where this mechanism is used, TPF attracts the attention of not only legislators and courts but also other entities, such as the professional body of lawyers. The involvement of a funder adds complexity to litigation, influencing the evolution of legal processes and legal institutions.

Funders have developed innovative strategies to reduce the risks associated with TPF, such as conducting detailed case analyses before providing funding, which allows for the careful selection of cases based on objective predictions. Additionally, the approach of funding a portfolio of cases reduces the funder's risks and provides benefits for the client, such as lower compensation and the inclusion of cases that might not be eligible for individual funding.

After the funding agreement is concluded, the funder's concerns shift to increasing the chances of winning, managing their interests without affecting the client, collaborating with the client's lawyer, and managing potential effects of the funding's disclosure to the court and the opposing party. These strategies reflect the complexity and importance of adequate regulation of TPF considering the mechanism's evolution.

Regarding the disclosure of funding to the court and opposing parties, different solutions exist, depending on the practice of countries using TPF and the regulations proposed in the literature. It is crucial that disclosed information are strictly necessary for legal purposes, thus avoiding any unjustified advantage for the opposing party, who could access sensitive details of the relationship between the client and the funder (such as the funding budget). However, a mere disclosure of the funding's existence and the funder's details might be insufficient, as the court should have the right to exclude clauses in the funding contract that could harm the client or are deemed illegal.

Concerning the tripartite relationship between funder, client, and lawyer, the use of TPF influences not only the litigation procedure but also how lawyers apply professional norms, given their connection with the funder. We believe that professional conduct rules should be adapted to

allow lawyers to manage this relationship without the risk of disciplinary sanctions, to the benefit of the client.

A balance is needed between the lawyer's duties to the client and the obligations to inform the funder on the progress of the litigation, considering the economic interest of the funder. The lawyer's professional confidentiality should be nuanced so that they can communicate essential information to the funder without prejudicing the client. These communications should be official and documented, and the client must be informed and give their consent for such communication.

One of the ethical issues related to the use of TPF is the influence the funder may have on the litigation. If the funder could control how the litigation is conducted and resolved, a conflict of interest would arise between the client's and the funder's interests, which would violate the principle of the lawyer's independence. This would be particularly problematic in jurisdictions like Romania, where there is an emphasis on the autonomy of lawyers. Therefore, it is considered necessary to discourage the active involvement of the funder in litigation strategy to prevent conflicts of interest.

Regarding the payment of the opposing party's legal costs, there are dilemmas concerning the obligation of the court to impose this responsibility on the funder. Such an obligation would benefit both the funded party, which transfers the litigation risk to the funder, and the opposing party, which could collect from a solvent person. However, imposing this obligation on a non-party funder would contradict procedural principles, as the funder would not have the same guarantees as the directly involved parties. Therefore, this possibility should be expressly provided for by law, and the funder should be allowed to express this opinion before being required to pay.

In Romania, third-party litigation funding is not explicitly regulated, yet it is possible based on the principle of contractual freedom stated in the Civil Code, which allows for the conclusion of contracts not specifically regulated by law, following the general contract regime. In the absence of specific regulations, the rules of the most similar types of contracts is applicable.

A third-party litigation funding contract (TPF) is an aleatory contract because both parties are exposed to the risks of winning or losing. The funder advances the necessary resources for the process, but there is a possibility that they will not recover their costs and profit if the funded party

loses the case. On the other hand, the client must share the profit with the funder in case of success, which puts them in a more disadvantaged position compared to a situation without the involvement of a funder. However, in the case of a loss, the client benefits from the financial support of the funder for litigation expenses.

Regarding legal expenses, in the absence of specific regulations, the general principle in the Romanian law applies, which states that the losing party must bear the legal costs of the other party. Therefore, the financier should not be responsible for the legal costs of the opposing party, given that they are not a party to the litigation and legal liability is personal.

The financing contract is also one with successive performance, as the financier must support the client throughout the duration of the process, including in any appeals, if the parties agree to this. Additionally, it is a bilateral, consensual, *inter vivos*, and onerous contract.

Like any other legal act, the contract should meet the general conditions of validity. Regarding the capacity to contract, the general rules apply, but there may also be special restrictions, like those provided for the sale of litigation rights, according to the Civil Code. Therefore, imposing special prohibitions in this regard is reasonable. The consent of the parties within a litigation funding contract must be serious, freely presented, and expressed with full knowledge, according to Article 1204 of the Civil Code. Since this contract is aleatory, neither party could invoke lesion. However, there could be situations where the client's consent is vitiated by duress, for example, if the financier takes advantage of the client's state of necessity, thus affecting the free nature of the consent. Additionally, error and fraud could be invoked under the established legal conditions. The subject of the financing contract must be lawful and moral, and the financier's commercial interest must be clear, to avoid situations where the financing of litigation could be used for indirect and personal purposes.

Regarding the form of the contract, we agree with the doctrine suggesting that, in its precise regulation, the authentic form *ad validitatem* should be required. This would protect the client by providing complete information about the characteristics and risks associated with the legal operation, so that the consent is given with full knowledge, with the assistance of a notary.

Regarding the possibility of unilateral termination of the contract, this could be problematic from the client's perspective. Although the contract could be terminated under certain conditions (respecting the notice period), this could disadvantage the client, especially if they lack the financial resources to continue the process. It could also negatively affect the judicial proceedings, particularly if an unfavorable final decision would irreparably harm the client. A fairer solution would be to recognize the possibility of termination only when explicitly stipulated in the contract, rather than through the effect of the law, to protect the client's interests.

As for remedies for non-performance of the contract by the financier, Article 1516 of the Civil Code might theoretically be invoked, which regulates cases of non-performance of contractual obligations. However, in the case of a litigation funding contract, forced execution of the funding obligation are problematic. Considering the need for promptness in civil proceedings and the fact that the financier's failure to fulfill obligations would not alter the course of the procedure, the process could be delayed, and the client would be required to meet procedural obligations within the established deadlines, regardless of the financier's conduct.

The sale of litigation rights and the *quota litis* agreement, which are mechanisms similar to third-party litigation funding (TPF), have different regulations. In Romania, the *quota litis* agreement is prohibited by Law no. 51/1995, but this prohibition does not apply to TPF, as it concerns the legal profession, and the financier is not subject to the same regulations.

TPF is not expressly prohibited under Romanian legislation, and the development of this institution in our legal system would be possible. In this regard, the adoption of a European directive on "Responsible Litigation Funding" would represent an important step in regulating this practice, providing a clear framework and minimum standards at the EU level. The directive can regulate aspects such as the transparency of funding agreements, conflicts of interest, and the monitoring of financiers' activities. It is also proposed that financiers be required to ensure they have adequate financial resources and disclose the existence of a funding agreement to the courts and competent authorities.

Regarding the TPF mechanism, the thesis proves that this practice is in a phase of continuous development, and its regulations should ensure adequate protection for all parties

involved, both the financier and the funded party. In the future, EU regulations and potential improvements to the Romanian legal system should clarify the status and procedures related to this form of funding, maximizing its efficiency and transparency while protecting the interests of the parties involved.

The conclusion regarding third-party litigation funding (TPF) reflects the balanced assessment, acknowledging both its potential benefits and the risks and challenges associated with its implementation. TPF cannot be considered a universal solution for free access to justice, but neither a harmful practice. Instead, it is an instrument that, depending on its usage, can address specific financial needs of parties involved in litigation.

It is true that this mechanism operates within a complex procedural framework, and its regulation can generate effects on the justice process, such as the proper management of funding agreement terms, compliance with transparency, and the prevention of potential conflicts of interest. Furthermore, the complexity of the process and the risks to which the parties are exposed remain essential factors to consider, and the impact of TPF must be evaluated with caution.

However, TPF can play a significant role in facilitating access to justice, particularly when parties lack sufficient financial resources to support a lawsuit. Third-party financiers can provide innovative solutions that allow litigants to continue judicial or arbitration proceedings, given the impact of costs on access to fundamental rights.

In this context, TPF should be carefully regulated, respecting the fundamental principles and values of the legal system. Its proper use can contribute to ensuring fair justice, and financiers should adopt solutions that support, not violate, the rights and interests of the parties involved. In a balanced and well-regulated legal system, TPF becomes a valuable option for increasing accessibility and efficiency to the judicial process, without compromising its integrity or transparency.

In conclusion, as long as it is used responsibly and transparently, TPF can become an important tool for reducing financial barriers to justice, contributing to broader access to litigants' fundamental rights. However, it is essential that regulations ensure the balance between financial innovation and the protection of procedural rights.