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Challenges and Comparative Perspectives on Third-Party Litigation Funding

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I. TPLF: AN OVERVIEW

1. *A Premise and The Concept and Mechanism of TPLF*

The Italian legal system generally exhibits a negative stance towards third-party litigation funding, with relevant sources being sparse. Cases that receive such funding are exceedingly rare and often surrounded by numerous doubts and uncertainties. This skepticism likely stems from concerns over the potential influence of third-party funders on litigation strategies and outcomes, which could undermine the integrity of the judicial process. Consequently, the approach adopted to study this issue has been largely comparative.

Given the scarcity of existing literature on the topic within Italy, examining practices in other jurisdictions where third-party litigation funding is more prevalent and better documented provides valuable insights. This comparative method enables a more comprehensive analysis, highlighting different regulatory frameworks, practical implications, and potential benefits and drawbacks, thereby offering a broader understanding of how third-party litigation funding might be effectively integrated or regulated within the Italian context.

With this in mind, we can now outline the fundamental aspects of third-party litigation funding and reflect on the reasons why the Italian legal system remains critical of this practice.

In *Common Law* tradition, *third party litigation funding*, better known by the acronym "TPLF", represents an alternative solution to cover the costs of a dispute, whether judicial or extrajudicial, making use of the intervention of a third party, without having to bear the costs.

More precisely, in the TPLF [1] there is an agreement between a third-party investor who financially supports a dispute and the involved party. In this arrangement, the investor assumes responsibility by funding a dispute in which

[1] While there isn't a precise definition for this concept, we can get an idea from Article 8.1 of the 2017 Global Economic and Trade Agreement. It defines Third-Party Litigation Funding (TPLF) as financing provided by individuals or entities, whether natural or legal, who are not part of the dispute but enter into an agreement with one of the parties to fund the proceedings' costs. They do so in exchange for compensation contingent upon the dispute's outcome. To better understand this concept, let's delve into it reading DE PAMPHILIS, *"Litigation Funding": I modelli di finanziamento del contenzioso tra luci e ombre,* in *Nuova giur. civil comm*., 2023, 2, pp. 451 ff.; DE NOVA, *Il finanziamento della lite: il "litigation funding agreement"*, in *Riv. trim. dir. and proc. civil* , 2022, pp. 267 ff.; SPIER , PRESCOTT, *Contracting on litigation*, in *The RAND Journal of Economics*, 2019, Vol. 50, No. 2, pp. 391-417; CASTELLI-MONTI, *Third party litigation funding*, in *Contratti*, 2019, pp. 580 ff.; BERNARDINI, *Third*

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they have no vested interest. They cover all or part of the associated costs and share all or part of the risks, including legal fees in case of loss.

TPLF addresses the financial needs of parties seeking support for their legitimate claims. Compensation percentages hinge on claim merits and represent the funding agency's potential return on investment. Third-party funders solely invest in legal proceedings, anticipating favourable financial outcomes while remaining detached from the dispute's underlying merits. If the dispute is successful, the funder is entitled to compensation calculated as a percentage of the amount obtained. In the event of a loss, the financier, who has assumed the risk of the dispute's failure, is not required to be repaid.

Typically, a common contractual framework includes due diligence before the contract is signed[2]. This assesses the dispute's financeability[3], imposes disclosure obligations on the funded party, and mandates confidentiality maintenance by the financing entity, including any subsidiary or associated entities.

TPLF's origin lies in the predicament of individuals or groups entitled to damages but lacking the means to cover legal expenses.

The high cost of accessing justice explains why TPLF primarily emerges in common law systems. In contrast, civil law jurisdictions, with some exceptions like France[4] and Germany, often encounter legal and regulatory constraints. These limits stem from rigid interpretations of legal concepts not primarily concerned with TPLF matters, but still involved.[5]

Commercial third-party funding, as we recognize it today, traces its roots back to Australia, where it initially gained prominence before spreading to the United States and the United Kingdom[6]. In these matured markets, litigation and arbitration funding have flourished, evolving into a multibillion-dollar industry. Notably, third-party funding is permissible in most major arbitration hubs worldwide, including New York, London, and Paris and others across the world.

However, third-party litigation funding (TPLF) raises several questions and issues, which become even more complex in the context of arbitration. The purpose of this brief study, intended for an international audience (and so not necessarily focused only on the Italian legal system), is to converge on these subjects, particularly within the framework of arbitration, to examine the main problems and experiences associated with TPLF, exploring how these aspects are currently regulated and how they might evolve in the context of arbitration.

2. Leading Jurisdictions for TPLF

2.1. Australia

Party Funding , in *Riv. arb.*, 2017, pp. 1 ff.; BOGART, *The Case for Litigation Financing*, in *Litigation,* 2016, Vol. 42, No. 3, New Frontiers, pp. 46-49 ; D'ALESSANDRO, *"Contratto di finanziamento della lite"*, in *Int'l Lis*, 2016, pp. 142 ff.; SAMRA, *The Business of Defense: Defense-Side Litigation Financing*, in *The University of Chicago Law*, 2016, Vol. 83, No. 4, pp. 2299-2341; *SOLAS*, *Finanziamento del contenzioso: esperienze a confronto,* in *Contratto e impresa /Europa,* 2016, I, pp. 184 ff.; FAVA, *L'impossibilità delle class actions*, in *Contr. and imprint.*, 2004, pp. 66 ff.

[2] DE NOVA, *The impact of a litigation funding agreement*, cit., 818; ID., *Il finanziamento della lite: il "litigation funding agreement"*, quot., 269; D'ALESSANDRO, *Prospettive del* third party funding *nel processo civile italiano: il progetto* fundIT *e le iniziative del Parlamento europeo*, cit., 277.

[3]Generally, the *funder* agrees to finance the litigation when it involves disputes of significant economic value, accompanied by certain probabilities of success of the dispute, without prejudice to the solvency of the counterparty. Last but not least, the possibility of predicting the terms of conclusion of the dispute.

[4]V. RODAK, *It's about Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, in *University of Pennsylvania Law Review*, 2006, Vol. 155, No. 2, pp. 503-535.

[5]See *below*, § II.

[6] D'ALESSANDRO, *"Contratto di finanziamento della lite",* in *Int'l Lis*, 2016, 143; SOLAS, *Finanziare il contenzioso*, in *Contr. e impr. Eur.*, 2016, 192.

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The Australian legal system stands out as the most developed and established environment for TPLF, since TPLF made its first appearance since the Nineties; over there, third-party funders play a significant role and are among the primary sources of funding for legal cases.[7]

As of December 10, 2022, the regulation of this matter is governed by the Corporations Amendment (Litigation Funding) Act[8]. This legislation replaced the previous 2020 regime, which required operators of litigation financing schemes with specific characteristics to hold an Australian financial services license.

Under the 2020 regime, such schemes were generally subject to the investment schemes framework outlined in the Corporations Act 2001. The recent changes have instead introduced relief measures to provide clarity to litigation funders, lawyers, and members of litigation funding agreements and evidence of debt funding agreements[9].

These changes, while clarifying certain aspects, do not alter the obligation of funders to adopt appropriate practices for managing conflicts of interest. They stem from a High Court decision[10] that previously determined that the financing arrangements for disputes fell under the Managed Investment Scheme (MIS) regime.

In fact, the interest in the litigation funding sector in Australia has always been especially developed at the jurisprudential level, even before legislative changes. This discussion arose because historically the aim of preventing abuse of trials led Australian jurisdictions to view the encouragement and financing of litigation for profit, traditionally referred to as "champerty," as illicit or even criminal. The concern was that the judicial system should not be a platform for speculative commercial endeavours.

A notable case is Gladstone Ports Corporation Limited v. Murphy Operator Pty Ltd & Ors [2020] QCA 250, where the High Court of Australia confirmed previous decisions in 2019[11] and 2006[12], stating that litigation funding agreements are not contrary to public policy. The court emphasized that the funder's position is not substantially different from that of an insurer defending a claim and paved the way for the diffusion of TPLF.

2.2. UK

Other common law jurisdictions in which the use of the TPLF is most fuelled are UK and the United States [13].

From the TPLF's perspective, the British legal system is considered the most advanced in terms of regulations. This has also enabled the UK, and more specifically England, to take the lead in the world when it comes to litigation funding.

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[7] On the use of the TPLF in sector of the *class action* in Australia see GEISKER, TALLIS, *Australia*, in *The Third Party Litigation Funding Review* 11, 11 (Leslie Perrin ed., 2d ed., Law Business Research, 2017; BAKER , *Third-Party Litigation Funding in Australia and Europe*, in *8(3) Journal of Law, Economics and Policy*, 2012, pp. 451, 452; LEGG, *The Rise and Regulation of Litigation Funding in Australian Class Actions*, in 38 *Northern Kentucky Law Review*, 2011, pp. 626 ff.; LEGG, TRAVERS, '*Necessity is the Mother of Invention: The Adoption of Third Party Litigation Funding and the Closed Class in Australian Class Actions*' , in 38 *Common Law World Review* 252-253, 2009, p. 245.

[8] Available at https://www.legislation.gov.au/Details/F2022L01614.

[9] However, the government is still evaluating its stance on these types of agreements.

[10] See Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (2009) 180 FCR 11.

[11] See *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No. 4)* [2019] QSC 228, in which, in the context of a collective action financed by third parties, despite the failure to abolish *maintenance* and *champerty* torts, the court held that the provisions of *Civil Proceedings Act 2011*, which regulate the class action procedure, would allow third-party funding of commercial disputes.

[12] The reference is to chance *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) CLR 386 (*Fostif*), cit., considered the key decision legitimizing the financing of disputes in Australia. The Court had in fact stated that the fact that the financier can exercise control over the proceedings and acquire the rights in a dispute would not make such agreements contrary to public order.

[13] See. KHALDOUN S. QTIASHAT, ALI K. QTAISHAT, *Third Party Funding in Arbitration: Questions and Justifications*, at https://doi.org/10.1007/s11196-019-09635-2; CUNNINGHAM, *Public interest litigation in Indian Supreme Court: a study in the light of American Experience*, in *Journal of the Indian Law Institute*, 1987, Vol. 29, pp. 494 ff.

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The matter is currently regulated by the Code of Conduct for Litigation Funders (ALF Code and subsequent amendments), in effect since November 23, 2011.

It was adopted, and its compliance is overseen, by ALF, the *Association of Litigation Funders,* which is the independent body appointed by the Ministry of Justice for the self-regulation of litigation funding in England and Wales.

This Code sets out the standards of practice and behaviour required of ALF members who fund litigation in England and Wales [14], providing standards and practices to be adhered to by funders and rules on capital adequacy of the funders; it regulates the circumstances in which a third-party funder may withdraw from financing and prevents the financier from taking control over litigation or settlement decisions.

It's important to stress the accent on the circumstance that, although membership of the ALF is voluntary, however, most of the professional and long-standing third-party funders in the London market have signed up to it.

The purpose of this regulation is to promote best practices and ethical conduct among third-party litigation funders. It focuses on fostering responsible use and application of litigation funding as a component of prudent financial risk management in dispute resolution. Additionally, it plays a role in actively influencing the development of laws and regulations related to third-party funding (TPF)[15].

This practice follows the old common law tradition. In TPLF, an investor commits to covering the claimant's legal costs in exchange for a share of the winnings if the case is successful. The specific terms are outlined in an agreement, which often includes a provision requiring the funded party to obtain "after the event" insurance. This insurance ensures coverage for costs in case of a loss, thereby limiting the investor's liability concerning the dispute.

The developments highlighted by the PACCAR case (2023) further reinforce the UK's commitment to maintaining high standards in TPLF.[16]

The PACCAR case represents a pivotal moment in the jurisprudence surrounding third-party litigation funding (TPLF) in the United Kingdom. In this landmark case, PACCAR Inc., a leading truck manufacturer, was accused of engaging in anti-competitive practices. The claimants, consisting of multiple truck buyers, were backed by a third-party litigation funder. This setup brought to light several crucial issues regarding the nature and regulation of TPLF, sparking a significant legal discourse.

One of the primary concerns addressed in the PACCAR case was the necessity for transparency in TPLF agreements. The court emphasized that all parties involved must be fully aware of the funding arrangements. This ruling underscore the importance of fairness in the litigation process and seeks to eliminate any hidden influences that could potentially affect the outcome of a case. Transparency ensures that the judicial process remains unbiased and that all stakeholders have a clear understanding of the financial dynamics at play, which is essential for maintaining the integrity of the legal proceedings.

Another critical aspect scrutinized by the court was the extent of control that funders could exert over the litigation. The court ruled that funders should not have undue influence over strategic decisions, as this could

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[14]The ALF Code needs to be read jointly to the articles and regulations of the ALF procedure of complaint. See <associationoflitigationfunders.com/ documents />.

[15]See the *Akhmedova case*, in which jurisprudence's support for the practice of litigation financing was expressed. See also *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and others and Road Haulage Association Limited v Man SE and others*.

[16] In a landmark decision for future group actions, the Supreme Court issued its ruling in the PACCAR Truck appeal on July 26, 2023. The court determined that Litigation Funding Agreements (LFAs), which allow funders to receive a percentage of any awarded damages, qualify as damages-based agreements (DBAs) under section 58AA of the Courts and Legal Services Act 1990 (CLSA). Consequently, for these LFAs to be enforceable, they must now comply with section 58AA of the CLSA and the Damages-Based Agreements Regulations 2013 (DBA Regulations). See. R (on the application of PACCAR Inc) v The Competition Appeal Tribunal, in https://www.supremecourt.uk/cases/uksc-2021-0078.html.

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compromise the integrity of the legal process. This decision is crucial for maintaining the independence of legal counsel and ensuring that the primary objective of litigation remains the pursuit of justice, rather than the financial interests of the funders. The ethical considerations raised in the PACCAR case, particularly regarding potential conflicts of interest and the financial motivations of funders, are instrumental in shaping the regulatory landscape for TPLF. The court's decision highlighted the need for stringent checks to prevent funders from overstepping their roles and interfering with legal strategies and decisions.

The PACCAR ruling has profound implications for the practice of TPLF in the UK. It reinforces the necessity for clear regulations and guidelines to ensure that third-party funders do not undermine the fairness and transparency of the legal process. The ruling calls for a balanced approach that facilitates access to justice through funding while protecting the integrity of the judicial system. It highlights the need for a regulatory framework that can effectively manage the complexities introduced by TPLF.[17]

In response to the PACCAR case, the UK has seen increased legislative scrutiny of TPLF. A significant development in this regard is the introduction of legislation in the House of Lords proposing that litigation funding agreements be classified as Damages Based Agreements (DBAs). This proposed legislation seeks to redefine litigation funding agreements within the scope of DBAs, aligning funders' remuneration directly with the damages recovered. This alignment of interests aims to ensure that the objectives of the funders and the claimants are more closely matched, fostering a more equitable legal process.

By categorizing TPLF agreements as DBAs, the proposed legislation intends to bring these agreements under stricter regulatory oversight. This includes stringent requirements for transparency, disclosure, and limitations on the percentage of damages that funders can claim. The legislation also emphasizes the protection of consumers and claimants, ensuring that they are not exploited by funders seeking excessive returns on their investments. The introduction of such regulations is aimed at maintaining a balance between enabling access to justice and safeguarding the interests of claimants.

If enacted, this legislation would significantly transform the landscape of TPLF in the UK. It would impose stricter regulations on funders, ensuring greater transparency and fairness in their agreements with claimants. The proposed changes aim to protect the integrity of the legal process while still leveraging the benefits of TPLF in facilitating access to justice. The legislation reflects a shift towards a more regulated and transparent framework for TPLF, which is essential for maintaining public confidence in the legal system.

The PACCAR case thus stands as a cornerstone in the ongoing evolution of TPLF regulation in the UK, demonstrating the judiciary's commitment to ensuring that the practice serves its intended purpose without compromising the fairness and integrity of the legal process.

2.3. US

In the United States, the situation is somewhat different. While TPLF over there has been in use since the late 1990s, there isn't a specific legislative regulation governing it. However, there have been calls to allow courts, particularly during the discovery phase, to assess potential conflicts of interest arising from third-party funders' involvement.

[17] CROSS*, Legislation to be unveiled to reverse Supreme Court's ruling in PACCAR,* in *The Law Society Gazette*, https://www.lawgazette.co.uk/law/legislation-unveiled-to-reverse-paccar-funding-ruling/5118943.article; see also *Third-Party Funding in England & Wales: PACCAR to be reversed but in an uncertain direction,* in https://www.lalive.law/third-party-funding-in-england-wales-paccar-to-be-reversed-but-in-an-uncertain-direction/

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Currently, regulations related to third-party financing vary by state, and attempts to establish uniform federal regulations have not been successful thus far. It's worth noting that historically, the doctrines of "maintenance" and "champerty"[18] which were prohibited as far back as the 13th century, haven't received full approval either in the US.[19].

For instance, the U.S. Chamber of Commerce has emerged as the primary adversary of Third-Party Litigation Funding (TPLF). Through research reports, blog posts, news articles, and press releases, the Chamber's Institute for Legal Reform (ILR) has raised alarms about significant risks and potential misuse of TPLF. They have also expressed disapproval of initiatives that would expand the collaboration between funders and lawyers. Additionally, they have advocated for the implementation of regulations and increased transparency within the TPLF industry.[20]

In short, TPLF operates in a diverse and fragmented regulatory environment across the United States. Unlike the United Kingdom, which has a centralized regulatory framework for TPLF, the US relies on a combination of state laws, federal guidelines, and court rulings to govern the practice. This has led to a patchwork of regulations, with some states being more receptive to TPLF than others.

At the federal level, TPLF has been a topic of increasing interest and debate. Both the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) have investigated TPLF practices, primarily to assess their impact on consumer protection and financial markets. There have been calls for more transparency and regulation to ensure that TPLF does not adversely affect the legal process or the interests of plaintiffs.

A significant recent development is the introduction of the Litigation Funding Transparency Act (LFTA) of 2021. This proposed legislation seeks to increase transparency in TPLF by requiring disclosure of funding agreements in federal class action lawsuits and multidistrict litigation (MDL). The LFTA aims to prevent potential conflicts of interest and ensure that all parties, including the courts, are aware of the financial interests involved in a case.

State legislatures and courts have also played an active role in shaping the landscape of TPLF. States like New York and California have embraced TPLF, recognizing its potential to provide access to justice. In these states, TPLF agreements are generally upheld as long as they are transparent and do not violate usury laws. On the other hand, states such as Nevada and Tennessee have passed legislation that imposes strict regulations on TPLF, including caps on the interest rates that funders can charge and mandatory disclosures to the courts and opposing parties.

A notable case influencing state-level TPLF regulation is Boling v. Prospect Funding Holdings, where the Kentucky Supreme Court ruled that TPLF agreements are subject to state usury laws, limiting the amount of interest

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[18] In Singapore the TPF was legalized following the decriminalization of the conduct of *maintenance* and *champerty* (cf. ZHUANG, *The subsumation of maintenance and champerty under thirs party orders*, in *Singapore Journal of Legal Studies*, 2014, pp. 377-396); in Hong Kong, the TPF has been admitted to international arbitration since 2019, but its application in court is prohibited. On the subject, see CASTELLI-MONTI, op. cit., 581 s.; D'ALESSANDRO, *"Contratto di finanziamento della lite"*, cit., pp. 147 ff.

[19] *Maintenance* involves a third party providing financial support to a litigant, while *champerty* is an agreement between a party and an unrelated third-party to support the party's case in exchange for a share of the dispute's outcome See. WINFIELD, *The History of Maintenance and Champerty*, in 35 *Law Quarterly Review*, 50, p. 59 (1919); KALAJDZIC, CASHMAN, LONGMORE*, Justice for Profit: A Comparative Analysis of Australian, Canadian and US Third Party Litigation Funding* , in *The American Journal of Comparative Law* , 2013, Vol. 61, No. 1, pp. 93-148. . GIUGGIOLI, *"Litigation funding": l'esperienza anglo-americana ed i risvolti municipali*, in *Riv. trim. dir. e proc. civ.*, 2022, 321 ss.

[15] *In re Primus*, 436 US 412, 425 (1978).

[20] U.*S. CHAMBER OF COM. INST. FOR LEGAL REFORM, 101 Ways To Improve State Legal Systems (*7th Ed., 2022), https://Instituteforlegalreform.Com/Wp-Content/Uploads/2022/10/101-Ways-2022-Rgb-Wp-Final.Pdf; U.S.; CHAMBER OF COM. INST. FOR LEGAL REFORM*, A New Threat: The National Security Risk Of Third Party Litigation Funding* (2022), https://Instituteforlegalreform.Com/Research/Ilr-Briefly-A-New-Threat-The-Nationalsecurity-Risk-Of-Third-Party-Litigation-Funding/ (Hereinafter, A New Threat); U.S.CHAMBER OF COM.INST. OF LEGAL REFORM, Selling More Lawsuits, Buying More Trouble 20 (2020), https://Instituteforlegalreform.Com/Research/Selling-*More-Lawsuits-Buying-More-Trouble-Third-Party-Litigationfunding-A-Decade-Later/ (Hereinafter, Selling More). 8 How Courtrooms Are Turned Into Casinos* With Page Faulk And John Beisner, U.S. CHAMBER OF COM. INST. OF LEGAL REFORM (Sept. 10. 2019).

that can be charged. This ruling has significant implications for the enforceability of TPLF agreements in states with stringent usury laws.

The ethical and legal considerations surrounding TPLF are central to the ongoing debate about its regulation. Critics argue that TPLF can lead to frivolous lawsuits, as funders may be motivated by the potential for high returns rather than the merits of the case. They also express concerns about the influence of funders on litigation strategy and the potential for conflicts of interest. To address these concerns, several professional and legal organizations, including the American Bar Association (ABA), have issued guidelines and best practices for TPLF. The ABA's 2020 Best Practices for Third-Party Litigation Funding emphasize the importance of transparency, informed consent from clients, and the independence of legal counsel.

Recent legislative trends indicate a move towards greater regulation and transparency in TPLF in the US. The Litigation Funding Transparency Act (LFTA) of 2021 exemplifies federal efforts to regulate TPLF. If enacted, the LFTA would mark a significant step towards standardized disclosure requirements, helping to mitigate some of the ethical and legal concerns associated with TPLF. At the state level, there is a growing trend towards enacting laws that regulate the terms and conditions of TPLF agreements. States like New York and California continue to refine their regulations to balance the benefits of TPLF with the need to protect plaintiffs from potentially exploitative practices. For instance, New York's Consumer Litigation Funding Act requires funders to register with the state and adhere to specific consumer protection standards.

The future of TPLF in the United States will likely be shaped by ongoing legislative efforts, court rulings, and the evolving perspectives of stakeholders in the legal community. As more states consider the benefits and drawbacks of TPLF, there will likely be continued efforts to develop a coherent regulatory framework that promotes transparency, fairness, and access to justice. The role of technology and data analytics in TPLF is also expected to grow. Advanced data analytics can help funders assess the merits of cases more accurately, potentially leading to more informed funding decisions and reducing the risk of frivolous lawsuits. However, this also raises new ethical considerations about data privacy and the use of predictive analytics in legal contexts.

3. Emerging European regulation

3.1 *Proposed European Directive and Resolutions on TPLF*

A completely different approach has been adopted at the European level until recently. The only significant directive in this context was the European Commission Recommendation 2013/396/EU issued on June 11, 2013. This recommendation focused on establishing common principles for collective redress in cases of damage caused by violations of European Union regulations.

Recently, on 13 September 2022 to be precise [21], the European Parliament has also passed a resolution with recommendations to the Commission regarding responsible private financing of litigation.[22] The goal is for the Commission to adopt a directive that Member States should follow. This initiative has been prompted by the "rapid expansion across the Union" of litigation funding and its increasing role in some Member States' judicial systems,

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[21] Published in the Official Journal of the European Union n. 66/2023.

[22] This perspective is also notably reflected at the European Union (EU) level through the EU Representative Actions Directive for consumers (RAD). Within this directive, Third-Party Litigation Funding (TPLF) is permitted, but subject to stringent conditions, especially in collective redress actions. The implicit message is clear: while TPLF is acknowledged, it is tightly regulated and closely monitored to safeguard the integrity of legal proceedings. See Directive 2020/1828/EU of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1; BIARD, KRAMER, *The EU Directive on Representative Actions for Consumers: A Milestone or Another Missed Opportunity?* in 27 *Zeitschrift Für Europäisches Privatrecht Zeup* 249, at 251-2 (2019).

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particularly in cross-border cases[23]. The practice of TPLF has been in fact largely unregulated at the European Union level. Consequently, the proposed Directive, in line with Parliament's recommendations, includes several key provisions:

1. The establishment of an independent public supervisory authority responsible for authorizing third-party funders and monitoring their activities.
2. Granting Member State courts the authority to hold third-party funders jointly and severally liable with claimants for the payment of any adverse costs in unsuccessful funded proceedings if the claimant lacks sufficient resources.
3. Requiring third-party funders to demonstrate annually that they possess adequate financial resources for their activities.
4. Imposing a fiduciary duty of care on third-party lenders towards the funded party.
5. Mandating precise information and transparency obligations regarding financing agreements with third parties to the competent judicial or administrative body. This includes the obligation, upon request, to provide a complete copy of the agreement during the initial stages of proceedings [24].

The European Parliament's proposal, instead, aims to enhance the existing rules concerning the ability of private investors to generate profits through third-party litigation financing.

The European Parliament in fact acknowledged that TPLF can facilitate collective actions, but it raised concerns about the possibility of litigation funders primarily pursuing their own economic interests and potentially exerting undue influence over the organizations involved in the proceedings.

To address these concerns and protect claimants, the Parliament recommended that the Commission establish a licensing system for litigation funders, similar to the one in place in Australia. This system would set minimum criteria for granting TPLF licenses.

Among the suggested criteria, litigation funders would need to establish internal governance processes that align with proposed transparency requirements and fulfil their fiduciary duties toward aggrieved parties to prevent conflicts of interest.

Furthermore, the European Parliament believes that agreements between funders and claimants should generally follow the principle that at least 60% of the gross settlement or damages should be allocated to claimants. Deviations from this rule should be exceptional. Lastly, the Parliament suggests that funding agreements should be made public by compensation bodies, promoting transparency in the process.

These recommendations obviously aim to strike a balance between facilitating access to justice through collective actions and safeguarding the interests of claimants and the integrity of the legal process.

3.2. Directive 2020/1828/EU

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[23] D'ALESSANDRO, *Prospettive del* third party funding *nel processo civile italiano: il progetto* fundIT *e le iniziative del Parlamento europeo*, in *Riv. trim. dir. e proc. civ.*, 2022, 276.

[24] Moreover, financing agreements can include a clause stating that any premiums, from which the funders' commissions are deducted, must first be paid in full to the applicants. After that, the agreed sums can be transferred to the financier. These agreements also outline specific situations in which the financier can terminate the contract, with a notable exception being the unilateral termination by third-party funders without the informed consent of the applicant. Additionally, the agreements must include a declaration confirming that the financier has no conflicts of interest. It's important to note that financing agreements are considered invalid if they grant the financier explicit authority to influence decisions or take control of proceedings, including settlement and expense management. Furthermore, agreements that entitle the financier to more than 40% of the total premium, unless exceptional circumstances exist, are also deemed null and void.

Within Directive 2020/1828/EU, third-party litigation funding (TPLF) is permitted but subject to stringent conditions, particularly in the context of collective redress actions. This directive, which aims to enhance the enforcement of consumer rights across the European Union, acknowledges the role of TPLF but insists on strict regulatory oversight to safeguard the integrity of legal proceedings.[25]

The directive's approach to TPLF reflects a broader European strategy to balance the benefits of litigation funding with the need for transparency and fairness in legal processes. Under the directive, qualified entities such as consumer organizations can bring representative actions on behalf of consumers affected by violations of EU law. This mechanism is designed to address situations of mass harm where individual claims might be impractical, providing a more efficient means of redress.

The directive mandates full disclosure of the funding arrangements to the court and all parties involved. This requirement ensures that the role and interests of third-party funders are transparent, preventing any hidden influences that could affect the litigation's outcome. By insisting on such transparency, the directive helps maintain the fairness and integrity of the judicial process, ensuring that all stakeholders are aware of the financial dynamics at play.

Furthermore, the directive imposes strict conditions on the level of control that funders can exert over the litigation. Funders are prohibited from unduly influencing decisions regarding the conduct of the litigation, including settlement decisions. This provision is crucial to ensure that the primary objective of the legal action remains the pursuit of justice for the affected consumers, rather than the financial interests of the funders. To prevent conflicts of interest, the directive requires that any potential conflict between the interests of the funder and those of the consumers be clearly disclosed and managed. This measure is intended to protect consumers from any actions by funders that could undermine their legal claims or result in unfair settlements.

The directive also emphasizes the need for funders to have sufficient financial resources to meet their obligations. This requirement ensures that funders can adequately support the legal action throughout its duration without compromising the financial stability of the litigation process.

The implicit message of the directive is clear: while TPLF is recognized as a valuable tool for facilitating access to justice, it must be tightly regulated and closely monitored to ensure that it does not compromise the integrity of legal proceedings. This balanced approach aims to harness the benefits of TPLF—such as increased access to justice and the ability to pool resources for complex litigation—while addressing the potential risks associated with third-party funding.

In their analysis, Biard and Kramer[26] describe the directive as both a milestone and a potential missed opportunity. On one hand, it represents significant progress in formalizing the role of TPLF in collective redress actions and setting high standards for its regulation. On the other hand, they argue that the directive could have gone further in providing more detailed and prescriptive regulations to address the nuances of TPLF in various legal contexts.

Overall, Directive 2020/1828/EU sets a precedent for the responsible use of TPLF in collective actions, highlighting the need for transparency, independence, and adequate financial resources. As member states transpose

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[25] SCARCHILLO, *Class action. Dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive*, 2ª ed., Torino, 2022, 159 ss.; GSELL, *The new European directive on representative actions for the protection of the collective interests of consumers – a huge, but blurry, step forward*, in *Comm. Mar. Law Rev*., 2021, 1365 ss.; BONA, *Profili della tutela individuale dei consumatori e della riforma di quella collettiva – La Direttiva UE 1828/2020 sulla tutela rappresentativa dei consumatori*, in *Giur. it.,* 2021, 226 ss.; LHORNKOHL*, Up and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers – Comments on Key Aspects*, in *EuCML,* 2021, 189 ss.; PAILLI, *Unione europea e azione di classe: la grande assente*, in *Azione di classe: la riforma italiana e le prospettive europee*, V. Barsotti, F. De Dominicis, G. Pailli e V. Varano (a cura di), Torino, 2020, 246 ss.; CAPONI, *Ultime dall'Europa sull'azione di classe (con sguardo finale sugli Stati Uniti e il Dieselgate),* in *Il Foro It.*, 2019, cc. 332 ss.; BIARD, *Collective redress in the EU: a rainbow behind the clouds?*, in *ERA forum*, 2018, in part. 196 ss

[26] BIARD, KRAMER, *The EU Directive on Representative Actions for Consumers: A Milestone or Another Missed Opportunity?* loc. ult. cit

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this directive into their national laws, it will be crucial to monitor its implementation to ensure that these principles are effectively upheld, thereby fostering a legal environment that supports both access to justice and the integrity of the judicial process.

3.3. *EU Members States where TPLF is permitted*

Among the Member States where TPLF is permitted in the absence of specific regulation, France and Germany stand out. While they share some principles with the Italian legal tradition, such as the prohibition of *quota lite* agreements (a.k.a. contingency fees), they have seen the practice of litigation funding become established over time.

In Germany, although third-party funding has been in use since 1999, it remains unregulated, lacking a set of rules or a competent oversight body.

Despite the explicit denial of its classification as an insurance or banking product, common solutions have emerged in contractual practice. This includes the enclosure of an "Abtretung" clause for disputed claims, a clause that involves the financed party transferring the disputed right to the financier, keeping the transaction confidential. The financier then authorizes the financed party to take legal action in their name and for the company's benefit. If necessary, the financier can notify the transfer and agrees to return the right without additional costs once they've verified the fulfilment of all contractual obligations.

In the French legal system, while TPLF is practiced to some extent[27], it also lacks specific regulation; consequently, TPLF is considered feasible according to the general civil law principles that are usually applied in the realm of commercial contracts: this approach aligns with the principle of contractual freedom, even though it's worth to note that the French system doesn't strictly bind courts to the parties' intended agreement classification. Therefore, while respecting the parties' intentions, the court has the discretion to reclassify the agreement as a standard contract (e.g., insurance or corporate) when necessary.

Professional ethics rules and specific legislation, particularly the 1971 Law regulating the legal profession in France, are relevant to lawyers who offer guidance and assistance to clients concerning third-party litigation funding, stating that lawyers should receive instructions directly from the client, not from third-party funders. This principle was reaffirmed in a resolution passed by the French National Bar Council in November 2015.

TPLF is pacifically admitted also in arbitration in France, as the Paris Bar Council has explicitly acknowledged. And this doesn't come as a surprise, given that international arbitration has been a well-established market for third-party funding[28] and that Paris serves as a significant international arbitration centre, with many law firms based in the city actively engaged in this field.

II. THE THIRD-PARTY LITIGATION FUNDING CONTRACT: MAIN ISSUES ARISING

1. The Challenge of Disclosure in TPLF Contracts

The disorder that characterizes the matter in the states belonging to the European Union, among which a particular mention goes to Italy, where nothing is foreseen and where the recourse to the TPLF seems to want to be hindered, has definitely drawn the attention of the European Union also on another level, that is the attempt to address the main issues arising from TPLF at least through soft law measures[29].

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[27] SOLAS, op. cit., 186

[28] See below § III.

[29] As per the recommendation, Member States should require parties to declare the source of their action's financing to the judge. The judge should have the authority to halt proceedings if there is a conflict of interest between the financier and the party or class, or if there is confirmed inadequacy of financial resources, including the ability to cover litigation costs in case of an unfavourable outcome.

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On this matter, we already mentioned the recommendation no. 396/2013 EU which, despite having a soft law profile, shows a mature awareness of the impact of Litigation Funding in giving substance to collective claims, although it also appears to be aware of the risks of abuse or conflict of interest.

In this regard, one of the significant challenges revolves around the lack of requirements for the funded party to inform the court and the opposing party about the presence and source of the funding, which might be crucial to ensure that the judge and the defendant are informed about any potential conflicts of interest[30].

Even the *ELI-Unidroit Model European Rules of Civil Procedure* advocate for a unified community-level effort to establish the requirement for the funded party to declare the presence of financing in court[31].

We also addressed the Directive 2020/1828, which establishes a general framework, to be implemented within the Member States; but this is a directive that addresses a specific sector, that of class actions, where there appear to be derogations to protect the consumer as the weaker party. It remains to be seen if this will be enough to state that the EU legislation gave a complete green light to the TPLF.

But, aside from this attempt to raise awareness on the issue, it must be said that the road to a complete development of the idea of the necessary disclosure of TPFL to avoid any chances of conflict of interests is very far from being achieved and it looks like the experiences of different jurisdictions on the matter is still very mixed and heterogeneous.

In the civil law jurisdictions where the use of TPLF is permitted, there currently aren't any legal obligations for the financed party to disclose the existence of the financing arrangement. Even though the proposed draft EU directive includes such obligations, countries like France and Germany, which allow TPLF, currently do not have formal legal requirements for the financed party to disclose their litigation funding agreement. There is also no general concept of discovery or disclosure that parties can rely on to obtain information from one another in these jurisdictions.

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[30]This matter was previously addressed in the EU Parliament Resolution mentioned earlier. Regarding litigation financing, it was established that the plaintiff should declare the source of funds used to support the legal action to the judge from the outset of the proceedings. The judge should have the authority to suspend proceedings under certain conditions, such as when there is a conflict of interest between the third party providing financial resources and the plaintiff or its members, or if the third party lacks sufficient resources to fulfil its financial commitments to the plaintiff initiating the collective redress procedure, or if the plaintiff lacks sufficient resources to cover any potential costs if the collective redress procedure is unsuccessful. Member States should ensure that when a private third-party funds a collective redress action, the third party is prohibited from: (a) trying to influence the procedural decisions of the plaintiff, including settlements; (b) funding a class action against a defendant who is a competitor of the funder or on whom the funder depends; (c) imposing excessive interest on the provided funds (see resolution of January 12, 2012, - 2011/2089(THE)).

[31]Such disclosure may bring potential conflicts of interest to the attention of the court, which may decide to act according to applicable procedural rules, while at the same time allowing the defendant to better understand the plaintiff's means. On the topic Yes Report MOSS, *Litigation discovery cannot be optimal, but could be better: the economics of improving discovery timing in a digital age*, in *Duke Law Journal*, 2009, Vol. 58, No. 6, pp. 889-954.

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Even in other common law systems, especially in the USA (with the exceptions of California and Wisconsin[32]) and England[33], which are recognized as leading jurisdictions for litigation funding[34], there are generally no state laws or federal regulations mandating the disclosure of financing agreements by the financed party. It also appears that the courts in these jurisdictions do not typically require such disclosure. [35]

In Australia, the obligation to disclose the existence of TPLF agreements varies depending on whether it involves class actions[36], an area where Australia is a leader in TPLF use, or individual actions. In class actions, extensive transparency is demanded towards the court and other parties. While the funded party is allowed to redact certain information regarding the funding, the court has the authority to order the production of unredacted litigation funding agreements[37]. However, outside the class action context, professional confidentiality in court proceedings can enable parties to object to orders to produce documentation related to TPLF. [38]

Pursuant to the Italian law, there are no specific rules that compel parties to disclose the existence of agreements with third parties for funding litigation and it's even doubted if TPLF is a legit activity. Additionally, parties are not required to disclose agreements related to the compensation agreed upon with the defendant. Furthermore, there is no inherent obligation to disclose the existence of the third-party funding that can be derived from legal provisions like Article 88 or Article 96 of the Civil Procedure Code, which respectively state the principle of loyalty and liability for abuse of process. Such an obligation would presuppose that TPLF is considered potentially detrimental to the interests of the other party or of the trial, which is not explicitly stated in the Italian law.

It is also highly unlikely that the counterparty could obtain a court order under Article 210 of the Italian Civil Procedure Code for the presentation of the financing contract. This is because it would be necessary to demonstrate that the papers related to the TPLF are "necessary" in the context of the trial. Unless these records can provide essential evidence for the case, it is improbable that such an order would be granted. Additionally, most likely any confidentiality agreements within the financing contract would be considered, provided they do not result in significant harm to a third party and do not breach confidentiality.

Finally, mutual obligations of confidentiality within the financing agreement may also affect the financed party's ability to make any disclosures concerning TPLF-related matters.

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[32]Wisconsin law requires parties, without receiving a discovery request from the other party, to "provide to the other parties any agreement under which any person, other than an attorney authorized to charge a contingent fee representing a party, is entitled to receive relief conditioned on and out of any proceeds of the civil action, whether by settlement, judgment or otherwise." At the judicial level, this rule requires disclosure of "any person or entity that is not a party and provides funding for some or all attorneys' fees and expenses for litigation on a non-recourse basis." Likewise, the Northern District of California (ND Cal. LR 3-15) costs expressly requires parties to disclose the identity of funders – but only in class and collective actions.

[33] See LEINEN, *Striking the Right Balance: Disclosure of Third Party Funding*, in *Oxford University Commonwealth Law Journal*, 2020, 115-138.

[34] See MULHERON, *England's Unique approach to the self regulation of third party funding: a critical analysis of recent developments*, in *The Cambridge Law Journal*, 2017, Vol. 73, No. 3 (November 2014), pp. 570-597.

[35] See. SPANGLER, CHIN FEMAN, *How Courts Are Shaping Disclosure Of 3rd-Party MDL Funding, Law360,* April 16, 2020, in https://www.law360.com/articles/1264346/how-courts-are-shaping - disclosure - of - third -party - mdl - financing. At most, in some places – like Singapore, for ex. - lawyers are professionally obligated to declare the existence of a TPLF agreement and the identity of the financier. Failing to comply with this obligation can result in disciplinary sanctions for lawyers.

[36] HILL, *Financing the Class: Strengthening the Class Action Through Third-Party Investment*, in *The Yale Law Journal*, 2015, Vol. 125, No. 2, pp. 484-532.

[37] *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455.

[38]See *Hastie Group Ltd (in liq) v Moore*, where the defendant had obtained a court order to disclose a report that had been shared with a potential litigation funder. However, the Court of Appeal overturned that decision and upheld the claim of legal professional privilege.

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In conclusion, this overview highlights how the regulatory approaches to TPLF across various jurisdictions may diverge, with some placing a heavier emphasis on transparency and disclosure requirements and others lacking any substantial rules nor having any procedural tool to elicit said disclosure.

2. Litigation costs

Another relevant problem is linked to litigation costs.

In the British legal system, specifically in England and Wales[39], Section 51 of the Senior Courts Act 1981 grants the court the authority to order the funder to pay litigation costs if they have financed the losing party's litigation, regardless of the terms of the TPLF agreement. This is a notable difference from the U.S. system, where the funder can be ordered to pay fees only as provided for in the contract. British jurisprudence also recognizes the right of the winning party to take legal action against the financier to seek reimbursement of legal expenses.[40]

On the other hand, among civil law systems, in Germany and France there are no provisions allowing for the direct condemnation of the funder to pay litigation costs. In these cases, the financed party can only request reimbursement according to the terms stipulated in the financing agreement.[41] It's worth noting that German funders typically include insurance against such risks in their agreements.[42] Additionally, upon the request of the opposing party, the financier often provides a guarantee for adverse costs, which the defendant can request in specific situations, such as when the claimant's registered office is located outside the European Union.

In Italy, there is a provision under Article 94 of the Civil Procedure Code that allows the condemnation of legal fees on a third-party, but it applies exclusively to certain categories of individuals, such as benefitted heirs, guardians, trustees, and those who represent or assist a party in court. This category does not include third-party funders, which means they are typically not subject to condemnation for litigation costs under current Italian law.[43]

Subsequently, to sum up also on this second subject, we can witness once more an amount of differences between diverse jurisdictions, with a more developed rule for common law-based legal systems and an almost complete lacking of regulations, not even at the level of general best practice principles, for civil law-based jurisdictions: where, as of now, the funder's non-involvement in the trial generally excludes the possibility of the financier being directly liable for the litigation costs. At most, the funder may be required to repay the fees in accordance with the terms specified in the third-party funding contract.

3. Other issues related to TPLF agreements.

Third-Party Litigation Funding (TPLF) frequently engenders divergent interests among the involved parties: on one facet, TPLF funder, whose predominant interest resides in financial gain, has financially invested in the litigation with the explicit objective of realizing a return on investment. Conversely, the party being funded, although

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[39]See BLINDERMAN, DEMPSEY, *Korchin*, The *Third Party Litigation Funding Law Review*: *USA*, at *https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/usa*.

[40]See Arkin v Borchard Lines Ltd (nos 2 and 3) [2005] EWCA Civ 655, [2005] 1 WLR 3055, where the court limited the financier's liability in respect of the financier's costs being ordered; Excalibur [2016] EWCA Civ 1144; Julie Anne Davey [2019] EWHC 997 (Ch). *Contra*, ChapelGate Credit Opportunity Master Fund Ltd v James Money [2020] EWCA Civ 246, in which the funder was ordered to pay the full amount of the litigation costs.

[41] In a case involving the payment of costs in an international arbitration, the defendant who had prevailed in the arbitration sought to collect the costs from the third-party financier in front of the French courts. The Commercial Court of Nanterre initially ruled in favor of this request. However, the decision was later overturned by the Court of Appeal of Versailles on June 1, 2006.

[42]See *below*, § 3.

[43] See. AA.VV., *Prospettive del third party funding in Italia*, edited by D'Alessandro, Milan, 2019, p. 56; MERLONE, LUPANO, *Third party litigation funding: minimum claim value*, in *European Journal of operational research*, vol. 298, 2, pp. 738 ff.;

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sharing the desire for a favourable legal outcome, often harbours broader considerations extending beyond pecuniary interests. This party may be more inclined to explore settlement options, even at the cost of foregoing potential financial benefits, or to admit certain facts: that is, in other words, disposing of the dispute and its outcome.

Within the framework of numerous standard TPLF agreements, provisions mandating that the funded party secure prior consent from the funder for specific actions are quite common. These actions typically encompass pivotal decisions such as the finalization of settlements or the initiation of withdrawal from legal proceedings. Such provisions serve to mitigate the potential for conflicts of interest between these two stakeholders, each pursuing distinct objectives.

Germany, much like England in the common law context, as said before, stands out among civil law jurisdictions that allow for the use of TPLF, and it's particularly interesting to see how the issue is being approached over there in terms of evidentiary matters.

This pertains specifically to the financed party's ability to make a confession. While the confidentiality obligation typically found in TPLF agreements does not generally serve as an obstacle, it can become a limitation when the financed party voluntarily seeks to dispose of the right subject to the lawsuit.

Indeed, although the financed party may make a confession or may admit certain facts related to the dispute – a possibility that might also exist in Italy under Articles 2730 and following of the Italian Civil Code – as the party having control over the right brought before the court, the German contract law stipulates that the financed party must obtain the financier's consent before engaging in any legal actions that presuppose the disposal of the subject-matter of the case. Under this model, spontaneous confession, or confession through formal examination of the financed party must be preceded by the funder's consent; failure to obtain such consent may constitute a breach of the financing contract. [44]

The issue exists and works also in the opposite way when a third-party funder might exert influence on the funded party to adopt certain cost-saving measures. These measures could involve limiting the exchange of pre-hearing information, advocating for abbreviated pre-hearing written submissions, or expediting the hearing process, among other potential actions[45].

III. THE PROHIBITION OF CONTINGENCY FEES AND OF THE ASSIGNMENT OF DISPUTED CREDIT

1. The atypical Nature of TPLF Contracts

As previously mentioned, in some jurisdictions there is no specific regulation for third-party litigation funding, like in Italy, or if there is, a certain difficulty in classifying the third-party funding agreements is very common. The main hesitations are usually linked to the existence of some general limits[46] on which we are going to expand in a bit[47], which may even cast doubt on the possibility of setting up such a contract.

[44] See. MERLONE, LUPANO, *Third party litigation funding: minimum claim value*, op. cit., loc. cit.

[45] CHAN, "Proposed Guidelines for the Disclosure of Third-Party Funding Arrangements in International Arbitration", 26 Am. Rev. Int'l Arb. (2015, no. 2), 308-309.

[46] Which are also present in systems such as Germany or France, where the TPLF is still used. On the merits of the agreement underlying the TPLF, see, among others, FORESTA, *La (discutibile) conferma della non meritevolezza degli "interest rate swaps" con funzione di "macro hedging"*, in *Nuova giurisprudenza. civil com.*, 2022, I, p. 749; BALESTRA, *Introduzione al diritto dei contratti*, 2nd ed., Il Mulino, 2021, pp. 50 ff.; CIPRIANI, *Appunti sul giudizio di meritevolezza del contratto*, in *Riv. dir. privato*, 2021, p. 487.

[47] See par. III, 2.

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From a contractual perspective, by the way, it's generally believed that such an agreement could be considered, for instance in Italy much like in France, as a unique and atypical contract. This would align with the fundamental principle of contractual freedom (stated, for ex., in Article 1322, paragraph 2, of the Italian civil code[48]).

In this context, the Third-Party Litigation Funding (TPLF) agreement can be viewed as a standalone contract that doesn't neatly fit into other standard contract categories within the legal system. Unlike somewhat similar contracts such as mortgages and insurance agreements, TPLF contracts are not directly comparable. Firstly, the consideration provided by the third-party financier (the funder) is not a loan repayment to the litigant. Moreover, the litigation funding agreement is specifically linked to a particular legal dispute, as opposed to offering general risk coverage.

Likewise, in the French legal system, although third-party litigation funding is somewhat popular in practice, as mentioned earlier, there are no specific regulations governing it. As a result, the principles of civil law related to commercial contracts come into play, and the legitimacy of these agreements is based on the principle of contractual freedom, even though it is also essential to note that the French system does not bind the courts to the parties' intended characterization of the agreement. Therefore, while respecting the parties' intentions, the court may reclassify the agreement as a typical contract (e.g., insurance or a company) as needed.

2. Prohibition of Contingency Fees and Assignment of Disputed Credit.

There are also many problems in justifying the TPLF agreements on the additional side of the compatibility with two important key concepts.

The first one is related to the prohibition of contingency fees agreements and of the assignment of the disputed credit. This prohibition means that in many jurisdictions – usually civil law-based systems - lawyers are not allowed to receive a share of the assets involved in a case or the outcome of the legal dispute as compensation, whether in full or in part.

In Italy, for instance, this prohibition is outlined in Article 13, paragraph 4, of Law No. 247 of December 31, 2012 (commonly known as the "Forensic Professional Law") and Article 25, paragraph 2, of the Forensic Code of Conduct.

It must be said that recent dissent and criticism have been directed towards this institution due to its outdated nature and the absence of a similar prohibition in common law-based systems. Critics argue that this prohibition contributes to portraying civil law systems as old-fashioned or out of step with modern legal practices [49]. Nevertheless, the limit remains.

At least, when analysing the potential impediments posed by the prohibition of quota lite agreements (the sharing of legal fees based on the outcome of a case, a.k.a. contingency fees) in relation to Third-Party Litigation Funding (TPLF), it's important to note that jurisprudence on the legitimacy of this interdiction has clarified that said prohibition is applicable exclusively to the activities carried out within the jurisdiction by authorized legal professionals. It does not pertain to or affect other professional figures who may work alongside the client.

This suggests that the forbiddance may not be subject to an expansive interpretation that affects the parties involved in TPLF.

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[48] The Italian litigation funding market is relatively nascent. However, in the past eighteen months, a short number of domestic funds have been established, and the first cases have been funded, particularly in antitrust matters, based on art. 1322 c.c. which states: "*[Parties] may . . . conclude contracts that do not belong to the categories that have a particular discipline, provided they are aimed at achieving interests worthy of protection according to the legal system"*.

[49] On the topic, *ex multis*, cf. COLLURA, *Il divieto del patto quota lite "quid iuris"?*, in *Contratti*, 2020, p. 720; CARBONE, *Il patto di quota lite e il palmario,* in *Foro it.*, 2018, p. 3548; TOSCHI VESPASIANI, *Il codice deontologico forense: i compensi dell'avvocato e il patto di quota lite*, in *Studium iuris*, 2015, p. 777; BOTTONI, *Il ritorno del morto presunto. Considerazioni sul diritto del patto di quota lite alla luce della nuova disciplina dell'ordinamento professionale*, in *Rass. for.*, 2013, p. 27; PERFETTI, *Riflessioni a margine del divieto del patto di quota lite*, in *Riv. dir. civ*, 2013, p. 413.

What prompts further consideration regarding the compatibility between TPLF and this kind pf prohibition is the fact that the latter has not been able to be ignored even in those countries, such as Germany, that nevertheless unequivocally recognize the possibility of third-party litigation funding.

However, it's probably true that one key factor supporting this compatibility is the extraneous nature of third parties to the scope of the prohibition. In this sense, the prohibition mustn't apply to third parties, and, in the context of a legal dispute, the TPLF institution itself would be considered a third party, this distinction implyig that the prohibition may not directly conflict with TPLF arrangements.

3. Potential Compatibility Between such Prohibitions and TPLF

What we previously said reflects the fact that what needs careful consideration is whether the underlying rationale for prohibiting quota lite agreements, whose aim is to prevent the commercialization of legal disputes and to uphold the dignity of the legal profession, can also be applied to legal institutions that provide financing for legal disputes.

Setting aside the substantial differences between the responsibilities of lawyers (who provide legal services) and funders (who offer financial support) and acknowledging the third-party role of the funder in relation to the dispute, the key factor that could support the compatibility of these two is the funder's inability to influence the outcome of the dispute.

The terms of the funding contract, such as the payment of litigation expenses and the potential extent of the right to compensation[50] by the funding institution, are determined at the time of contract formation. The potential transfer of the disputed right, in the lawyer-client relationship, not only would not be driven by the necessity to finance the litigation but also isn't influenced by the risk of having to cover expenses if the case results unfavourably.[51]

On the matter, it's also interesting to notice that in jurisdictions like Germany, where contingency fees agreements are prohibited as well, a common practice has emerged in contractual arrangements. The financed party typically includes an insurance policy for covering costs in case of an unfavourable outcome. This type of insurance policy is often referred to as an "after the event" insurance policy, and it provides comprehensive coverage for expenses resulting from a loss in the legal dispute. This approach effectively limits the obligation taken on by the financier concerning the costs of the dispute.

More specifically, within German contracts, there is a clause known as "Abtretung der streitigen Ansprüche" that is important to mention. This clause likely relates to the assignment of disputed claims, which may be part of the contractual arrangements in cases of litigation funding. It reflects the practice of the financed party transferring their right to the disputed claims to the financier. Under this clause: (i) the financed party commits to transferring the disputed right to the financier, through a separate and pre-litigation agreement, while maintaining the operation's confidentiality; (ii) upon the transfer, the financier authorizes the financed party to litigate on its behalf and in the company's interest; (iii) the financier retains the option, if necessary, to disclose the transfer and undertakes to reassign the transferred right to the financed party, without additional costs, once the latter fulfils all contractual obligations.

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[50]Jurisprudence allows the determination of the compensation between the party and the lawyer as a percentage of the value of the deal. See Trib. Bologna, 12.6.2020, n. 881; Court _ Nola, 19.9.2019. The interpretation finds support in the new regulatory data of the art. 13, paragraph 3, ln 247/2012, which allows the agreement "as a percentage of the value of the deal or of what the recipient of the service is expected to benefit from, not only on a strictly financial level".

[51]On the topic of compatibility between the prohibition of the quota litigation agreement and the TPLF, see DE PAMPHILIS, *"Litigation Funding": I modelli di finanziamento del contenzioso tra luci e ombre,* op. cit., loc. cit.; D'ALESSANDRO, *"Contratto di finanziamento della lite": mera operazione finanziaria a trarre profitto dal processo civile ovvero strumento che agevolava l'accesso alla tutela giurisdizionale?*, op. cit., loc. cit.

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4. Balancing Confidentiality Obligations and Prohibitions on the assignment of disputed credits

Another issue refers to the compatibility between the prohibition on the assignment of contentious claims, and the duty of secrecy and confidentiality of lawyers, and specifically the one concerning the relationship with the client and the represented party.

Also in this case, the rationale behind the prohibition lies in the need to safeguard the dignity, independence, and professionalism of individuals operating in the legal sector, as evident from the literal wording. The neutrality of funding entities might justify their receipt of a percentage of the successful outcome of the dispute as compensation for their services, or their role as assignees of potential litigious claims.

The problem has been approached in Italy, focusing on how to assess the compatibility between the prohibition on the assignment of disputed credits, as outlined in Article 1261 of the Italian civil code, and the legal professional's duty of confidentiality, stipulated in the Forensic Code of Conduct and, in more general terms, in Article 1324 of the Italian civil code, about "unilateral deeds", which refer to actions or deeds undertaken by a single party without requiring the consent or agreement of another party (There are also specific references to the relationship with clients and assisted parties in Article 2825 of the Italian civil code).

Regarding the duty of confidentiality, it's important to note that the financing entity, third parties, and any subsidiary or associated bodies are required to maintain confidentiality regarding information acquired during negotiations as part of their due diligence activities when entering into the contract.[52]

As for the prohibition under Article 1261 of the Italian civil code, interpreting this ban while aiming to reconcile it with the institution of TPLF[53] requires considering that the prohibition applies only when the transferee holds certain roles, such as magistrate, judicial official, judicial officer, lawyer, attorney, or advocate. Furthermore, it prohibits such individuals from engaging in these activities only with respect to disputed credits within the jurisdiction in which they operate. This limitation is mainly due to concerns about conflicts of interest.

But the financing entity is a third-party, so its impartiality could be the reason that can justify the circumstance of the receipt of a percentage of the successful outcome of a dispute as compensation for their services or their role as assignees of disputed credits.

IV. TPLF and arbitration.

1. Specific Points in TPLF Agreements for arbitration

The use of Third-Party Litigation Funding (TPLF) in the context of disputes subject to arbitration brings about even more significant changes to the content of the agreement. [54] In addition to the usual due diligence

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[52] International Council for Commercial Arbitration (ICCA), Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4, April 2018, www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf (last accessed 17 September 2022) (ICCA-Queen Mary Report), 25.

[53] This interpretation could face challenges from case law that broadly interprets the concept of "rights over which a dispute has arisen" as outlined in Article 1261 of the Civil Code. According to this interpretation, the prohibition applies even when the dispute has not yet been brought before a judicial authority. The underlying rationale behind Article 1261 of the Civil Code is to prevent speculation on disputes by individuals who are in some way connected to them. This perspective is illustrated in a case from November 20, 2018, with reference number 29834, in the Court of Cassation.

[54] The theme of the relationship between arbitration and TPLF is a recurring topic in nearly all the contributions dedicated to litigation financing. In addition to the authors previously mentioned in Section 1, note 1, particular attention is given to the perspectives of arbitration experts, as highlighted in, *ex multis*, LEINEN, *Striking the right balance: disclosure of third-party funding,* in *Oxford University Commonwealth*

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responsibilities of the funder and disclosure of information related to procedure costs (including compensation to the funder in case of victory) and confidentiality agreements, TPLF agreements in arbitration settings must indeed address several specific points as:

- Costs Determination: i.e. defining which expenses the financing company will cover, such as legal fees, arbitrators' fees, and arbitration institution costs.
- Oversight and Control: i.e. specifying the extent to which the funder can oversee the party's decisions throughout the arbitration process, from selecting arbitrators to potential settlements.
- Enforcement Costs: i.e. deciding who will be responsible for the costs associated with enforcing the arbitral award if the outcome is favourable.
- Contract Modifications: i.e. establishing procedures for altering the contract's conditions, if necessary.
- Dispute Resolution: i.e. outlining mechanisms for resolving disputes that may arise between the party and the funder.
- Liability for Opposing Party Costs: i.e. determining whether, in the event of failure, the financing company will be responsible for covering the opposing party's costs.

It's worth noting that the funder, while not completely devoid of interest in the arbitration process, may in fact try to intervene in various aspects, such as arbitrator selection, choice of applicable rules, appointment of lawyers, costs, and settlements. They may also request access to confidential arbitration documents and information.

This, on the other hand, it's not to be seen necessary as a complete deal-breaker.

The use of litigation funding in arbitration do also have advantages, indeed.

In common law countries, as well as in France and Germany within the civil law context, access to third-party financing can incentivize parties to pursue arbitration as in important and effective alternative dispute resolution mechanisms, meanwhile helping to alleviate the burden on the court system. Such prospects could make the TPLF institution appealing even in those countries, like Italy, where TPLF is quite new and overall speaking still approached with caution.

Additionally, the presence of a litigation financing agreement can be beneficial for the opposing party, as it allows for an assessment of the financial stability of the party receiving funding. This information can be valuable when considering injunctions or precautionary measures and may also influence decisions regarding the reimbursement of litigation expenses. [55]

2. Lack of State-Level regulation and disclosure Obligations in Different Jurisdictions

What hinders the positive aspects of using litigation funding and brings attention to the even more delicate issues it poses in arbitration is, once again and mostly, the lack of regulation at the state level.

Law Journal, 2020, pp. 115 ff.; KS QTIASHAT, A. QTAISHAT, *Third Party Funding in Arbitration: Questions and Justifications*, in https://doi.org/10.1007/s11196-019-09635-2, 2019; HOWIE, MOYSA, *Financing Disputes: Third-Party Funding in Litigation and arbitration*, in 57 *Alberta Law Review*, 2019, pp. 465 ff.; FRIGNATI, *Ethical Implications of Third-Party Funding in International Arbitration*, 32(1), *Arbitration International*, 2016, p. 506; FURNO, Il *"Third Party Funding" nell'arbitrato internazionale,* in *I Contratti*, 2013, 10, p. 967; ISHIKAWA, *Third party participation in investment treaty arbitration*, in *The International and Comparative Law Quarterly* , 2010, Vol. 59, No. 2, pp. 373-412; LEINEN, *Striking the right balance: disclosure of third-party funding,* op. cit., loc. cit.; JONES, '*Third-Party Funding in International Arbitration: Useful Experience from Australia*' , in *BCDR International Arbitration Review* 5, 2018, no. 2, pp. 335–352; Kaldermis, Gibbs, *Third-party funding in international arbitration – lessons from litigation?*, *Kluwer Arbitration Blog* (December 15, 2014), http://arbitrationblog.kluwerarbitration.com/ 2014/12/15/third-party-funding-in-international-arbitration-lessons-from-litigation/.

[55] See. DE PAMPHILIS, cited earlier; DE NOVA, *The impact of a litigation funding agreement*, cit., 823 ff.

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In this context, the primary concerns in systems allowing TPLF in arbitration revolve around the significant impact of litigation financing on a party's autonomy in shaping its defence strategy.

It's in fact essential to establish limits that prevent third-party funders from interfering with the technical defence, altering the primary goal of safeguarding the party's interests, or gaining direct control over the case. In essence, doubts may arise not only about the genuine identity of the party in a substantial sense, as can occur in litigation, but more crucially in arbitration. Here, where the parties will greatly influence the selection of arbitrators and procedural rules, the issues often revolve around identifying the party truly holding decision-making authority and, consequently, the concrete interest being pursued.

Addressing this issue, consequently, starts with the requirement for the financed party to disclose the existence of the third-party funding. This becomes particularly relevant in arbitration, where the matter inevitably intersects with concerns about the independence and impartiality of the arbitration process. Thus, potential conflicts of interest towards the financing company must be considered. The disclosure obligation becomes crucial, and it needs to be determined whether it should also encompass information regarding any affiliations with the financed party and the funder. [56].

Currently, it appears that the legal systems permitting the use of TPLF have not substantially addressed the need for specific regulations in these areas. There is still uncertainty regarding whether the obligation to disclose TPLF should be unconditional at the outset of the procedure or triggered during arbitration based on specific case-by-case issues.

The extent of disclosure is also in question – whether it should be limited to acknowledging the existence of the TPLF or if the terms of the agreement should also be disclosed; additionally, it raises the question of whether disclosure should be mandatory only to the arbitration panel or if it should extend to the other involved parties. Lastly, there's consideration about whether different disclosure standards should exist for various dispute resolution mechanisms, and if so, what justifies these varying standards [57].

In civil law systems, it might be interesting to analyse what happens in France and Germany, the two countries that allow TPLF.

In France, TPLF is considered in arbitration, but there is no formal requirement to disclose the existence of a dispute financing agreement. This obligation is not outlined in professional ethical rules or arbitration procedures.

In Germany, where state-level regulation is lacking, arbitration institutions have established their own rules regarding TPLF. The most prominent institution in Germany, the DIS, has discretion in allocating and reimbursing expenses in arbitration cases. Unlike state judicial disputes, there are no strict limits on the recoverable expenses, and the court has broad authority to determine which expenses are eligible for reimbursement and what portion should be paid[58].

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[56] FURNO, *"Third Party Funding" nell'arbitrato internazionale*, op. cit., loc. cit., offers the example of the case in which a lawyer is the defender of a party who receives financing from the *funder* Alfa and, in the same period, was the arbitrator in another case in which one of the parties obtained financing from the same *funder* Alpha.

[57] Opponents of the idea of mandating TPF disclosure in arbitration argue that such an obligation should only arise in specific circumstances, particularly in the context of verifying arbitrators' impartiality and independence. On a procedural level, they suggest that the TPF agreement should be treated as documentary evidence. From this perspective, disclosing financing-related information should be the exception rather than the rule, contrary to the current standard practice. The primary concern with mandatory disclosure is the fear that it may lead to unnecessary disclosures, potentially unfairly prejudicing the party that sought funding. See. LEINEN, *Striking the right balance: disclosure of third-party funding,* op. cit., loc. cit.

[58]See articles 32 to 36 of the Arbitration Rules of DIS, available at
https://www.disarb.org/fileadmin/user_upload/Werkzeuge_und_Tools/2018_DIS-Arbitration-Rules.pdf

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In the case of *ad hoc* arbitrations, the court has discretion in determining cost allocation between the parties, with the outcome on the merits often playing a significant role unless otherwise agreed by the parties.

In Switzerland, instead, although there is no specific regulation governing the use of TPLF, this kind of agreement is generally accepted and even encouraged by jurisprudence[59].

There, the use of litigation financing has also found relevance in the context of the Federal Law on the Free Movement of Lawyers (BGFA), which places an ethical obligation on lawyers to inform their clients about the possibility of resorting to litigation financing. However, from a procedural standpoint, Swiss law does not impose any disclosure obligation regarding TPLF, whether in court or out of court.

3. International arbitration as the main source of new rules for TPLF

3.1 The IBA Guidelines

Due to lack of regulations on the matter, the void has mainly been filled starting from the rules adopted by the most important international organizations of lawyers or arbitration chambers across the world dealing with international arbitrations.

In 2014, one of the first and most effective move towards regulating litigation financing in international arbitration came from the International Bar Association (IBA), which was the first to explicitly tackle the issue of declaring third-party funding (TPF) concerning the independence and impartiality of arbitrators[60].

The modifications they made to the existing guidelines are intended to provide arbitrators with clear guidance on situations that could pose a conflict of interest, affecting their impartiality and independence. Arbitrators are now required to declare such situations when accepting their appointment and throughout the arbitration process if these conflicts arise later.

While this regulation serves as a useful tool for arbitrators, it also provides a normative basis for parties' lawyers to raise objections regarding arbitrator incompatibility. Consequently, it has become a reference point for those considering challenging an arbitrator and for judges tasked with verifying the qualifications for recognizing foreign awards.

It's worth noting that the IBA guidelines, while not legally binding as they fall under soft law instruments, have gained significant influence. In practice, many national arbitration regulations align with the principles established within these guidelines [61].

Since their introduction, these instructions have gained widespread acceptance within the international arbitration community and continue to serve as guidance when making decisions about arbitrator appointments or disclosing relevant circumstances (disclosure).

They are applicable to both international commercial arbitration and investment protection arbitration, whether parties are represented by lawyers or other non-lawyer representatives. These guidelines emphasize the principle the arbitrator's impartiality and independence from the start to the end of the arbitration process.

Broadly, the IBA guidelines consist of two parts.

The first part outlines "General Principles on Impartiality, Independence, and Disclosure." It establishes the fundamental principles regarding the impartiality and independence of arbitrators and their obligation to disclose any conflicts of interest.

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[59](BGE 31 (2004) I 223 and Federal Court 2C_814/20142C_814/2014)

[60] LEINEN, *Striking the right balance: disclosure of third-party funding,* op. cit., loc. cit.

[61] See. QUEEN MARY, WHITE, HOUSES, *International Arbitration Surveys: The Evolution of International Arbitration*, 2018, p. 9 <www.arbitration.qmul.ac.uk/media/ arbitration/docs/2018-International-Arbitration-Survey-report.pdf>.

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The second part provides the "Practical Application of the General Principles." This includes the well-known red, orange, and green "lists" that illustrate specific situations where the aforementioned general principles should be applied.[62]

The provisions relating to the TPLF are contained in the first section.[63] The question of whether to disclose the existence of third-party financing is particularly valuable when considering issues related to conflicts of interest and, consequently, the disclosure obligations of arbitrators and parties, while each potential conflict must be assessed on a case-by-case basis, allowing a party to declare the presence of third-party financing provides the arbitrator with the opportunity to evaluate the necessity of disclosure in relation to such circumstances.

In order to prevent potential conflicts of interest, the International Bar Association (IBA) has likewise broadly defined the terms "third-party funder" and "insurer" as encompassing "any individual or entity that provides financial support or other significant assistance to a party in pursuing their own claim or defending against the claims of others, and who possesses an economic interest in the dispute or a responsibility to indemnify someone from the consequences of the award".[64]

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1. [62] THE "RED LIST" CONSISTS OF A SET OF SIGNIFICANT CIRCUMSTANCES THAT SHOULD LEAD THE ARBITRATOR TO REFUSE THE APPOINTMENT DUE TO THE POTENTIAL FOR BIAS. THESE CIRCUMSTANCES ARE CATEGORIZED AS EITHER INDISPENSABLE OR WAIVABLE. INDISPENSABLE CIRCUMSTANCES ARE THOSE THAT, ONCE KNOWN BY THE PARTIES, CANNOT BE EXCUSED OR WAIVED, AND THE PARTIES CANNOT CHOOSE TO OVERLOOK THEM. FOR INSTANCE, ONE INDISPENSABLE CIRCUMSTANCE IS WHEN THE ARBITRATOR OR THEIR LAW FIRM IS CURRENTLY PROVIDING SUBSTANTIAL ASSISTANCE TO A PARTY OR AN AFFILIATE OF THAT PARTY. IN CONTRAST, THE "ORANGE LIST" DESCRIBES LESS SERIOUS SITUATIONS COMPARED TO THE RED LIST. THESE CIRCUMSTANCES MUST STILL BE DISCLOSED BY THE ARBITRATOR IF THEY OCCUR, BUT THEY MAY BE SUBJECT TO A WAIVER, EVEN IMPLICITLY, OF THE RECUSAL OBJECTION. THIS WAIVER CAN OCCUR IF THE PARTIES, DESPITE BEING AWARE OF THESE CIRCUMSTANCES, DO NOT RAISE OBJECTIONS WITHIN THE ESTABLISHED TIMEFRAME. AN EXAMPLE FROM THE ORANGE LIST IS A SITUATION SIMILAR TO THE ONE MENTIONED ABOVE, BUT IN THIS CASE, THE TURNOVER DOES NOT NEED TO BE SIGNIFICANT. LASTLY, THE "GREEN LIST" OUTLINES CASES THAT DO NOT INVOLVE CONFLICTS OF INTEREST, AND IN THESE CASES, THE ARBITRATOR IS NOT OBLIGED TO DISCLOSE ANY INFORMATION TO THE PARTIES. THE PURPOSE OF THE GREEN LIST IS TO PROVIDE GUIDANCE TO AVOID EXCESSIVE DISCLOSURE OF INFORMATION. ON THE TOPIC SEE, AMONG MANY, MARETTI, *LE LINEE GUIDA DELL'INTERNATIONAL BAR ASSOCIATION (IBA) SUI CONFLITTI DI INTERESSE NELL'ARBITRATO INTERNAZIONALE*, , IN *GIUR. ARB.*, 2019, I, PP. 83 FF.

[63] The Subcommittee has conducted a thorough examination of several issues that have had an impact on international arbitration since 2004. These issues include topics like the implications of what's known as the "advance waiver," the question of whether one should disclose when acting simultaneously as an arbitrator and a lawyer for a party in separate proceedings involving similar legal issues (referred to as "issues conflicts"), concerns about the independence and impartiality of administrative secretaries and arbitral tribunals, and the matter of third-party funding. The Guidelines are the result of the Subcommittee's research and conclusions on these matters. You can find more details in the introductory report to the Guidelines on page ii.

[64]See the explanation of the principle referred to in the art. 6. This rule, under the heading "Relations", establishes:

a) Each arbitrator is generally considered to be a representative of the law firm in which he works, however, in considering the relevance of facts or circumstances to determine the existence or otherwise of a conflict of interest, or the need to make a disclosure, the activities of the arbitrator's law firm, if any, and the arbitrator's relationship with it, must be considered on a case-by-case basis. The fact that the law firm's activities involved one of the parties does not necessarily constitute a conflict, nor does it give rise to a duty of communication.

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In addition to disclosing the existence of third-party financing, parties are generally required to fulfil a broader obligation to inform various stakeholders in the arbitration process. This includes informing the arbitrator, the Arbitral Tribunal, other parties involved, and the arbitral institution or other appointing authority (if applicable) about any direct or indirect relationships between the party and the arbitrator. This obligation also extends to any relationships between the arbitrator and individuals or entities with a direct economic interest in the party or a duty of compensation related to the arbitration award. Parties are expected to do this voluntarily and promptly.[65]

The issue of arbitrator disclosure becomes particularly relevant when considering the possible regulation of third-party litigation financing (TPLF) in the Italian legal system, where, as previously explained, TPLF is relatively unknown and not in widespread use in Italy due to legal constraints and related concerns.

3.2 *Singapore International Arbitration Center* (SIAC) *and Hong Kong*

The other jurisdictions recognized by legal experts as pioneers in introducing TPLF regulation in arbitration are Singapore and Hong Kong[66].

In 2016-2017, while Singapore and Hong Kong took steps to liberalize third-party financing in arbitration[67], they also became the first jurisdictions to introduce the requirement to disclose the existence and identity of the financier at the beginning of arbitration proceedings. [68]

Likewise, if one of the parties belongs to a group of companies with which the arbitrator's law firm has a relationship, the situation must be assessed on a case-by-case basis but does not necessarily give rise to a conflict of interest or ground a duty to disclose.

b) If one of the parties is a legal person, any natural or legal person who exercises control or a dominant influence over it or has an economic interest in it or a duty to hold anyone harmless with respect to the consequences of the award to be made in the arbitration, may be regarded as having the identity of the party.

[65]Rule 7, containing "Duties of the Parties and the Arbitrator" a) the subsequent sections of the provision establish that:

"b) Each party shall disclose to the arbitrator, the Arbitral Tribunal, the other parties and the arbitral institution or other appointing authority (if any) the identity of its counsel in the arbitration and any relationship between them and an arbitrator, such as belonging to the same chamber of barristers. The party should do so on its own initiative, as soon as possible, and whenever there is a change in the team representing it.

c) To comply with General Principle 7(a), a party must conduct investigations and share all relevant information in its possession.

d) The arbitrator has the duty to carry out reasonable investigations to identify possible conflicts of interest, as well as facts and circumstances that may give rise to doubts regarding his impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge if the arbitrator has not made due investigation."

[66]BAO, *'Third Party Funding in Singapore and Hong Kong: The Next Chapter'*, in 34 *Journal of International Arbitration*, 2017, pp. 387 ff; WINGFIELD, *Third Party funding* for Arbitration: An Opportunity for *Singapore* to. Lead the Way in *Regulation*, in 18 *Asian Dispute Review*, 2016, pp. 182 ff. In Hong Kong, amendments were made to the Civil Code to accommodate the legal implications of third-party funding in arbitration cases. This change permits any party without a legitimate interest to participate in the case. he Ministry of Justice in Hong Kong initiated a national dialogue on August 8th, 2018, which spanned two months, aiming to collect written opinions on the best practices for third-party funding. The outcome of this dialogue led to a legal amendment that became effective on February 2nd, 2019, falling under Chapter 609 of the Arbitration Act.

[67]In Hong Kong, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill of 2016 brought amendments to the Arbitration Ordinance. These changes effectively rendered the doctrines of champerty and maintenance inapplicable to third-party funding of arbitration, as well as related court or mediation proceedings. On the other hand, in Singapore, the legality of third-party funding was initially confined to international arbitration cases. However, in contrast to Singapore, Hong Kong does not impose such limitations, allowing third-party funding to be utilized in both domestic and international arbitration proceedings.

[68] SIM, *Third Party Funding in Asia: whose duty to disclose?*, at *http://arbitrationblog.kluwerarbitration.com/2018/05/22/third-party-funding-asia-whose duty-disclose/*. LEINEN, *Striking the right balance: disclosure of third-party funding, op. cit., loc. cit.*

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The *Singapore International Arbitration Center* (SIAC), more specifically, was the first major arbitral institution to tackle the matter of TPLF disclosure in international arbitration[69], granting arbitrators the discretion to request the disclosure of the existence and identity of a third-party financier. Additionally, arbitrators could inquire about the financier's stake in the outcome of the proceedings and the specifics of the relationship, including whether the financier had taken on the responsibility for adverse costs. [70]

In Hong Kong, parties have been required to disclose the existence of third-party litigation funding (TPLF) since 2017. This disclosure must occur either at the outset of the arbitration or, if the TPLF agreement was entered into after the arbitration had begun, within fifteen days from the commencement of the proceedings[71].

Regardless of the chosen approach, it's however important to note that most recommendations regarding disclosure obligations are not legally binding. The IBA Guidelines (and the ICC Guidance Note: see *infra, § 3.3*) serve as advice rather than a mandatory requirement. In contrast, the only disclosure requirements that have a compulsory nature in international arbitration seem to be the legislative reforms in Hong Kong and Singapore, the new CIETAC International Investment Arbitration Rules, and certain provisions found in draft investment treaties.[72]

3.3 ICC and ICSID rules on TPLF and arbitration

Another notable example is the ICC Rules, which were updated in 2021. According to Article 11(7) of the ICC Rules, unless the parties agree otherwise, a party that has utilized litigation financing must promptly inform the arbitral tribunal and the other parties about the existence and identity of any third party who has entered into an agreement to finance claims or defences and has a financial interest in the outcome of the arbitrated dispute[73].

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[69]On the topic of the relationship between arbitration international and TPLF, *ex plurimis*, see LAMM, HELLBECK, *Third Party Funding in Investor-State Arbitration*, in B. Cremades & A. Dimolitsa (eds.) Dossier X: *Third Party Funding in International Arbitration* (ICC Publishing, Paris, 2013), pp. 101–102; KHALDOUN S. QTIASHAT, ALI K. QTAISHAT, *Third Party Funding in Arbitration: Questions and Justifications*, op. cit., loc. cit.

[70]Among similar experiences we can list the Arbitration Commission (CIETAC), which has also introduced arbitration rules for disputes between investors and the State, which require mandatory disclosure by the financed entity regarding the existence and nature of the agreement and to provide detailed information relating to the third-party financier (art. 27); and the International Center for Settlement of Investment Disputes (ICSID), which has also proposed changes to the ICSID Arbitration Rules, proposing to require the financier to disclose the existence and identity of the third-party financier. See §3.3.

[71]See the Arbitration and Mediation (Third Party Funding) Legislation (amendment) Order 2017, s. 98U, available at https://www.elegislation.gov.hk/hk/2017/6!en

[72] GOLDSMITH, MELCHIONDA, *The ICC's Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction*, Kluwer Arbitration Blog, (14 March 2016) available at <http://kluwerarbitrationblog.com/2016/03/14/the-iccs-guidance-note-on-disclosure-andthird-party-funding -a-step-in-the-right-direction/> (last accessed 18 August 2017); check also also "Standard 6" of the IBA Guidelines on Conflicts of Interest in International Arbitration, and Explanation to Standard 6 (b), available at <https://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ ArbitrationMultipleLang.aspx>

[73] Art. 11.7: "In order to assist future arbitrators and referees in fulfilling their duties referred to in articles. 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties of the existence and identity of any third party that has entered into an agreement for the financing of claims or defenses and on the basis of which he has an economic interest in the outcome of the arbitration.". Art. 11.2: "Before appointment or confirmation, a potential arbitrator must sign a declaration of acceptance, availability, impartiality and independence. The prospective arbitrator shall notify the secretariat in writing of any fact or circumstance that may be of a nature to cast doubt on the independence of the arbitrator in the eyes of the parties, as well as any circumstance that may cast reasonable doubt on the impartiality of the arbitrator. referee. The Secretariat will provide this information to the parties in writing and will set a deadline for any comments from them.". Art. 11.3: "An arbitrator shall immediately communicate in writing to the Secretariat and to the parties any fact or circumstance of a similar nature to that referred to in Article 11, paragraph 2, concerning the impartiality or independence of the arbitrator that may emerge during the arbitration".

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The objective pursued is to prevent a conflict of interest between the arbitral tribunal, the disputing parties and third parties, such as third-party funders. The requirement to declare the existence of financing serves an important purpose, as it enables the examination of potential conflicts of interest. These conflicts may indeed not only arise between the arbitrator and the parties but also extend to the funder, who may appear unrelated to the dispute at first glance[74].

Another noteworthy example is provided by the new ICSID arbitration rules, which were approved by Member States on March 21, 2022, and came into effect on July 1, 2022. Rule 14(1) of these rules mandates that the financed party must provide a written communication disclosing the name and address of any non-party from whom they have received funds, either directly or indirectly, for the continuation or defence of the proceeding. This includes funds obtained as donations, contributions, or in exchange for a fee contingent upon the outcome of the proceeding.

If the financier is a legal entity, the notice must also include the names of individuals and entities that own and control that legal entity. However, the arbitral tribunal retains the discretion to request further information regarding the contents of any financing agreement.

It is worth noting that while this approach may seem comprehensive in terms of providing information to help arbitrators assess their impartiality in relation to the dispute, it could potentially have unintended consequences for the financed party. This concern is not primarily related to confidentiality agreements, as they have limits when confronted with the authority of the arbitral tribunal. Instead, the issue revolves around the fact that financing agreements typically include the financier's analysis of the case during the due diligence phase, which might reveal weaknesses in the defence strategy or anticipate terms for a potential settlement.

3.4. The Milan Chamber of Arbitration's Rules on TPLF

However, the arbitration ruled by arbitration chambers sector stands out as an area where progress has been made also in Italy, a place where TPLF is still generally regarded with suspicion.

The Milan Chamber of Arbitration, in 2019, introduced Article 43 titled "Financing from Third Parties." This article mirrors the Asian model and mandates that "a party who receives financing from a third party related to the arbitration proceedings and its outcome must declare the existence of the financing and the identity of the financier." Furthermore, this declaration must be repeated during the proceedings, if necessary due to changing circumstances or at the request of the Arbitral Tribunal or the General Secretariat.

If the financing arrangement is established before the arbitration begins, the disclosure should be made in the initial submission or subsequently if the financing agreement is entered into during the proceedings.

While this rule places an obligation on the party to disclose the existence of the funding, it remains unclear how this information can effectively influence the proceedings. This raises questions about whether it will also impose an obligation on the arbitrator to disclose potentially relevant circumstances regarding the existence of financing to protect their impartiality and independence, especially considering recent reforms in civil procedure known as the "Cartabia Reform"[75], which considerably stressed the accent on the duty of disclosure[76]: the expansion of disclosure requirements to include circumstances related to third-party litigation financing (TPLF) adds an additional layer to the declaration of independence and impartiality that arbitration institutions typically expect from arbitrators.[77]

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[74]Consider the case in which the arbitrator is a member of the company that provided support to the financier.

[75] D.lgs. 149/2022.

[76]The reference is to the articles. 813 and 815 cpc, as amended by d.lgs no. 149/2022, which placed the obligation on arbitrators to declare in writing the existence of relevant circumstances with reference to their necessary independence and impartiality, the lack of which may justify the party's request for recusal.

[77] See SALVANESCHI, *Le nuove norme in materia di arbitrato*, in *Riv. Dir. Proc.*, 2023, 2, 73; BOVE, *Riforma cartabia: il nuovo processo civile (i parte) - la riforma dell'arbitrato*, in Giur. It., 2023, 2, 447; AMENDOLAGINE, *Arbitrato: le principali novità introdotte dal d.lgs. n. 149/2022*, in *Contratti*, 2023, 1, 611.

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The Milan Chamber of Arbitration (CAM) serves as an effective reference model, although it may not fully address the complexities that arise from the use of TPLF in arbitration, which mirrors issues encountered in international contexts, particularly considering the lack of any regulations at the state level.

Like the issue of disclosure, in situations involving TPLF issues arise also concerning the appointment of arbitrators. Specifically, the question of whether and to what extent the third-party funder can influence the selection of panel members is being raised in this case.

While the party primarily benefiting from the litigation is the financed party in substance, it's challenging to imagine that they can entirely exclude the involvement of the financier. This is because, as previously mentioned, the financier also has a vested interest in the successful outcome of the dispute. This dynamic adds a whole new complexity to the arbitration process in cases involving TPLF. [78].

V. FINAL CONSIDERATIONS

In recent decades, major jurisdictions worldwide, including those in Europe, have grappled with constrained budgets in civil justice systems. This has led to an increase in litigation volume, resulting in delays, complexity, and soaring costs. Consequently, certain individuals and entities find it increasingly challenging, if not impossible, to pursue meritorious claims, both individually and collectively. In this perspective, TPLF comes as a huge opportunity to be able of accessing justice.

But as any beneficial breakthrough, it comes with a cost. While TPLF aims to balance the financial status of parties and improve fairness, it also introduces risks and challenges, including those related to disclosure, conflicts of interest, costs and compatibility with other traditional principles like the prohibitions of contingency fees in many legal systems.

Furthermore, the regulatory landscape for TPLF currently varies significantly across jurisdictions, making it hard to fully understand how it works. Plus, while traditional third-party litigation funding is increasingly regulated, the funding of arbitration, a global and relatively recent phenomenon, remains largely unregulated. Europe, in particular, faces scepticism and a lack of comprehensive regulation. Concerns often revolve around issues of control, disclosure, and conflicts of interest.

In the absence of more robust regulation, it's important to note that these contracts don't have a fixed format. This means parties can negotiate customized solutions that work for their specific circumstances. The flexibility to structure agreements according to their needs is essential, given the intricate nature of third-party funding contracts.

This is to be kept in mind especially when dealing TPFL in arbitration, in which concerns become even more pronounced.

When assessing whether TPLF is permissible in a specific international arbitration case, practitioners may need to take into account the laws of multiple relevant jurisdictions. This includes considering the applicable arbitration rules, the laws of the jurisdiction where the arbitration is conducted, the governing law of the jurisdiction where an award will be enforced, and potentially the laws of the home jurisdiction of the parties' counsel. And it's worth noting that some jurisdictions, such as Ireland, have significant exceptions to the acceptance of TPLF due to common law prohibitions like champerty and maintenance. This legal landscape should be a crucial factor when selecting the arbitration seat.

Moreover, international arbitration proceedings typically maintain a high level of confidentiality, which restricts the disclosure of detailed third-party funding agreements. Nonetheless, this confidentiality can give rise to conflicts of interest. As a result, it is advisable for TPLF agreements to include provisions that thoroughly address the disclosure of conflicts of interest, thereby safeguarding the best interests of all parties involved.

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[78] v. MARTINETTI, LANDI, in AA.VV., *Prospettive del third party funding in Italia*, op. cit., pp. 61 ff.

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Finally, it's essential to remember that one of the fundamental principles of TPLF is that funders possess the right to participate but should refrain from exerting control over arbitration proceedings or their outcomes. Although funders depend on cooperation, they may also aim to maximize their investments, which could impact the balance of power. This aspect should be considered when dealing with TPLF.

In Italy, the situation reflects these global challenges but with some peculiarities. The lack of specific regulation for TPLF in the Italian legal system highlights the need to develop a regulatory framework that balances transparency, fairness, and access to justice. The adoption of guidelines and best practices, such as those proposed by the American Bar Association and other professional organizations, can offer a useful model for addressing the ethical and legal concerns associated with TPLF.

However, it is essential for Italy to consider its own cultural and legal specificities in creating such regulations. For example, concerns regarding the influence of funders on legal strategies and the risk of conflicts of interest must be addressed to protect the integrity of the judicial process. But with the growing body of judicial decisions and rulings from international arbitration tribunals, we can hope to establish a legal framework for TPLF also in Italy.

It's clear indeed that third-party litigation funding is not a passing trend and will continue to play a significant role in the litigation and arbitration landscape. Striking a balance between fairness, transparency, and regulation is then of utmost importance. A comprehensive legislative and judicial approach, both on a domestic and international level, can address industry concerns while establishing TPLF structures that are widely accepted. Predictability and robust regulation are indeed essential to instil confidence in the TPLF industry, benefiting all parties, arbitrators, and third-party funders alike.