CAMBRIDGE
Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

1

Introduction

1.1 BACKGROUND

Dispute resolution methods serve the noble idea of a harmonious society based on the rule of law, where problems are solved according to certain rules applied equally to every citizen and corporate entity. As such, they accomplish one of the most important social and civic objectives – that all those that are unlawfully harmed are entitled to access justice in order to recover damages from those liable for the harmful conduct. Traditionally, the party that wants to bring a lawsuit (or defend against it) bears the costs and faces the risks of the related litigation. For all those that have no resources to begin a formal dispute, all of the modern jurisdictions provide for a more or less functional legal aid system aimed at maintaining the legal fees and court expenses. The underlying consideration is that the lack of economic resources and the consequent impossibility to pay for legal costs and/or to face the litigation risks are the first and major barriers to access justice and solve disputes.[1] It is, however, only recently that access to justice has become an issue not only for those that are regarded as impecunious claimants by the legislations defining the thresholds of legal aid. The increases in the costs and complexities of litigation, and the economic constraints exacerbated by the recent financial crisis, are also effectively making the resolution of disputes more difficult for those entities with apparently sufficient resources.[2]

[1] A particular mention in this regard should be made of Mauro Cappelletti, whose studies on access to justice across Western welfare states are still landmark pieces of research. M Cappelletti (ed), *Access to Justice*, Milano: Giuffrè Editore/Alphen aan den Rijn: Sijthoff & Noordhoff, 1978, European University Institute. The Florence Access-to-Justice Project.

[2] It has indeed been argued that the crisis has had a direct impact on the demand for external finances to fund litigation: companies (and individuals) are now more risk averse; the crisis itself has engendered a series of disputes that would not have been filed before, and the investors are also trying to find different and more profitable asset classes. See J Croft,

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

There is reason to think that the intertwinement of these trends has affected the individuals' and companies' aversion to (litigation) costs and risks, stimulating a demand for alternative ways to access justice and solve disputes. This situation has, moreover, been preceded or paralleled by a series of changes in legislation and case law aimed at allowing – or at least easing – the possibility to maintain litigation by means other than those of the parties involved or legal aid. These changes have very often been justified with the possibility of guaranteeing the right of access to justice and equality of arms. They have nevertheless paved the way for the emergence of a series of methods to maintain disputes or other legal activities through alternatives to the parties' own funds or to legal aid. Among these, it was decided to focus attention on a new business practice that is thrilling for its capability of changing the equilibrium of access to justice and dispute resolution at a global level. In recent years a series of financially endowed and legally sophisticated entities have purported to relieve the parties to a dispute from the costs and risks related to disputes in exchange for a share of the recovery, only in case of victory, sometimes even transferring the claim to a controlled entity and prosecuting the dispute against the original defendant. This business practice is now commonly referred to as third party funding (TPF),[3] and it is often mentioned in relation to the emergence of a

'Litigation Finance Follows Credit Crunch', Jan. 27, 2010, *Financial Times*, available at www.ft.com/cms/s/0/7c98c38a-0ab1-11df-b35f-00144feabdc0.html (last vis. 2.2.2019). M Steinitz, 'Whose Claim Is This Anyway? Third Party Litigation Funding' (2011) *Minnesota Law Review*, Vol 95, N 4, 1268, 1283. These competitive constraints are also affecting the way in which lawyers are working, since they are more and more required to have a major involvement in disputes they are endorsed with. In practice this entails applying fees very often based on success in disputes or other achievements, rather than the more common hourly based fees. Georgetown Law – Centre for the Study of the Legal Profession, Report on the State of the Legal Market, 2017, available at http://legalsolutions.thomsonreuters.com/law-products/solutions/peer-monitor/complimentary-reports (last vis. 2.2.2019).

[3] This definition is not settled at a global level. It has been noted that '[t]he nomenclature to describe this kind of third-party capital investment in arbitration or litigation claims is all over the map and woefully undescriptive. It has been referred to as "third-party funding", "third-party litigation funding or financing", or most commonly "alternative litigation funding or financing".' MB De Stefano Beardslee, 'Non-Lawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup' (2012) *Fordham Law Review*, Vol 80, Issue 6, Article 16, 2791, 2796, footnote 22. Garber, referring only to the US context, proposes the term 'alternative litigation financing' to describe the 'phenomenon of . . . provision of capital . . . by non-traditional sources to civil plaintiffs, defendants, or their lawyers to support litigation-related activities'. In particular, he refers to 'entities other than plaintiffs, defendants, their lawyers, and defendants' insurers'. See S Garber, 'Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns' (2010) Rand Corporation Occasional Paper, 1, 1. Available at www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf (last vis. 2.2.2019). This definition has been somehow endorsed by the American Bar Association - Commission on Ethics 20/20, White Paper on Alternative Litigation Finance, 1, 1. Available at www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf (last vis. 2.2.2019). In this White Paper it is stated that: 'Alternative litigation finance ("ALF") refers to the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

market for legal claims.[4] TPF has emerged recently in the aftermath of the financial crisis mainly in some common law jurisdictions, and it is also expanding in the civil law ones. TPF is now receiving wide attention in the academic and professional sphere, although so far there have not been many authors that have provided a systematic view on this practice. More specifically, there was no scholarly or other contribution discussing thoroughly the civil law aspects related to TPF, which also constituted per se a limitation for the legal, economic and policy analysis of this practice. For this reason, it was decided to write this book on TPF, which therefore aims, without claiming to be exhaustive or otherwise to provide a static vision of the problem, to be the first attempt to do a comprehensive analysis of the TPF as a business phenomenon.

The book is divided into three logically consequential parts, having different but at the same time interrelated approaches. The first part is a comparative legal and factual overview, which starts with the history of some litigation funding practices in early civil law and common law jurisdictions, and then reports the main legal issues and facts related to the modern TPF practice. The second part is an economic analysis of the business phenomenon, which describes TPF in the wider litigation market context, and analyses its incentives both in private transactions and at a more

with a pre-existing contractual relationship with one of the parties, such as an indemnitor or a liability insurer'. In one of the first monographic publications on the matter, which analysed TPF mainly in relation to common law (English-speaking) jurisdictions, the chosen nomenclature was 'third party litigation funding'. See N Rowles-Davies and J Cousins QC, *Third Party Litigation Funding*, Oxford University Press, 2014, 320 p. An equivalent definition was also chosen in the civil law French context (and language), in a book edited by Professor Kessedjian of the University of Panthéon-Assas in Paris. See C Kessedjian (ed.), *Le financement de contentieux par un tiers*, Paris: Pantheon-Assas Paris II, 2012, and in another book focusing on shareholders' litigation funding, see W Chen, *A Comparative Study of Funding Shareholder Litigation*, Springer Singapore, 2017, 264 p. In another book, the chosen nomenclature was instead 'third-party funding', see L Bench Nieuwveld and V Shannon, *Third-Party Funding in International Arbitration*, Alphen Aan Den Rijn: Kluwer Law International, 2017 (2nd ed.). The same definition was chosen in a recent book edited by Professor Van Boom of the University of Leiden (in English), See WH Van Boom, 'Litigation Costs and Third-Party Funding', in WH Van Boom (ed.), *Litigation, Costs, Funding and Behaviour. Implications for the Law*, Routledge, 2017, 9 (and related footnote 23), and in the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, The ICCA Reports No. 4, available at www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf ('the ICCA-Queen Mary Report'). TPF was ultimately chosen as it seems the most appropriate way to refer to any type of funding or risk hedging instrument, by a third party, for any type of dispute-related cost.

[4] D Abrams and DL Chen, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) *University of Pennsylvania Journal of Business Law*, Vol 15, N 4, 1075. V Waye, *Trading in Legal Claims: Law, Policy & Future Directions in Australia, UK & US*, Adelaide: Presidian Legal Publications, 2008. M Abramowicz, 'On the Alienability of Legal Claims' (2005) *Yale Law Journal*, Vol 114, N 4, 697. JT Molot, 'A Market in Litigation Risk' (2009) *University of Chicago Law Review*, Vol 76, Issue 1, 367. MJ Shukaitis, 'A Market in Personal Injury Tort Claims' (1987) *Journal of Legal Studies*, Vol 16, N 2, 329.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

general social level. The third part, building on the first two, attempts to discuss the current legal, contractual, and regulatory issues related to TPF and to discuss some policy or other measures that could improve its use.

1.2 PROBLEM DEFINITION AND BASIC TERMINOLOGY

It is appropriate to introduce this book with the definition of the main problems at stake, providing an initial insight into the status of the literature and how this work attempts to develop it. Considering that it will be dealing with a series of new legal and economic problems, the definitions that follow aim initially (and, therefore, in general terms) at explaining what are the main issues discussed throughout this book. This section, moreover, gives a good understanding on how the book will attempt to 'connect the dots' in the existing academic, institutional and professional debates on TPF, also relying on the mainstream legal and economic literature.

1.2.1 *TPF*

Defining the features of TPF is not an easy task, especially if we consider that this business practice is at an initial stage, and professional investors have only recently stepped into this market. In the introduction to these paragraphs, TPF has been described as the professional practice of funding the dispute costs in exchange for a share of the sum recovered, only in case of victory, sometimes entailing the transfer of the claim, this not being made by lawyers or insurers. For this reason, it is proposed to provide quite an extensive definition of third party funders (or litigation financiers, or litigation funders, or litigation funds or funders), as any entity not a party to a dispute, which is neither a lawyer nor an insurer of that party, that professionally maintains the disputes' costs in exchange for a share of the sum recovered, only in case of victory, eventually transferring the claim to a controlled entity and prosecuting it against the original defendant.[5] This definition evidently entails a number of issues that will be addressed throughout the course of this book. From a more practical perspective, it is now worth distinguishing – relying on the above definition – two main TPF models: the first (maintaining the claims' costs in exchange for a share of the sum recovered) will be referred to as passive TPF, while the second (entailing more control and often, but not necessarily, the transfer of the claim – with related powers to control and settle litigation – to the funder) as active TPF. In this regard, it should be noted since the beginning that the existing literature and practice do not often juxtapose these two models, while they seem to aim at solving similar problems and/or contending the same market.

[5] This definition appears to be a decent *summa* of the existing academic definitions and description of the practice. See above at footnote 3 a series of doctrinal indications in this regard.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

TPF will be referred to as single practice or also, more generally, as a finance field; in this latter case, it can also be used as litigation finance or litigation funding. For explanatory purposes, it is worth clarifying that TPF is encompassed within the main legal finance field, which concerns any type of financing for legal services' related activities. This may range, for example, from the loans granted to law firms for purposes other than their clients' litigation to the venture capital provided to legal tech companies. In this regard, it is worth anticipating that it will attempt to define how TPF would distinguish itself from other legal finance instruments, using as its main criterion the analysis of the collateral applied to the transaction: if this is represented only by (part of) the eventual recovery from disputes, then it would be likely that this would be qualified as TPF. While this definition is not new in the literature, this book will define it in more specific terms, also making reference to the current practice(s).

1.2.2 *Funding Litigation in the Civil Law and in the Common Law Jurisdictions: Limits and Possibilities*

Funding or otherwise maintaining litigation for profit is not a novelty in global legal history, both in the civil law and in the common law jurisdictions. We will refer to the first as those jurisdictions of Roman traditions that now – after the Era of Codifications started with the French Code Napoleon – have mainly codified legal systems. Common law jurisdictions will instead be referred to as those of Anglo-Saxon origin, mainly based on the legal precedent (the *stare decisis* rule). In this regard, it is interesting to note that the prohibitions and/or limits to maintain litigation devised in these early jurisdictions are still present, in one way or another, in all of the modern civil law codes and/or bar regulations, in the civil law, and in the common law jurisprudence and legislation. The beginning of this book will analyse how these prohibitions and/or limits have emerged in the past and how they have then been abolished and/or limited, which will be a way to understand how TPF has emerged. The existing literature on TPF has not much discussed the historical roots of these rules, while their understanding is pivotal to the modern debate and practice.

For these reasons, it is now possible to initially define the main prohibitions and/or limits to fund or otherwise maintain litigation in both civil law and common law jurisdictions. With regard to the first, we will use the term *pactum de quota litis* (PQL) to refer to those fees totally or partially based on a fraction of the sum recovered, ideally charged by lawyers or other personnel involved in the judiciary. PQL was a term used first in medieval times associated with the prohibition for lawyers to enter into such agreement, initially devised in Ancient Rome. This prohibition has then been reiterated in basically all of the civil law jurisdictions, in the civil codes and/or in the bar regulations, and sometimes has also been extended to other personnel involved in the judiciary. Moreover, the term *redemptio litis* (RL) will be used to refer to the practice of assigning and/or selling claims,

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

which was then severely limited by the Roman Emperor Anastasius I. The *Lex Anastasiana* prohibited anyone who professionally purchased claims from obtaining from the dispute more than the price they had paid for the purchase, plus interest, or to obtain nothing if they simulated a donation. This prohibition/limit has then been reiterated in some modern civil codes, while in others it has been repealed as a way to favour business transactions.

With regard to the common law jurisdictions' prohibitions and/or limits to funding litigation, we will mainly make reference to the figures of champerty and maintenance. Maintenance is the support of lawsuits, including but not limited to a financial point of view, and it is directly linked to champerty, when the maintenance of a claim is provided for in exchange for a share of the recovery from the lawsuits. In this regard, it will be interesting to note how the third party funders have found a fertile terrain in the abolition and/or relaxation of such prohibitions that have occurred (at least) in the last few decades in some common law jurisdictions, where TPF has for the moment developed more. In this context, the comparison will also be a useful instrument to understand why TPF in civil law jurisdictions has developed less, but also the modalities in which it is likely that it will develop.

1.2.3 *Alternative Litigation Funding*

The definition of TPF presented above also excludes third party funders from being lawyers or (legal expenses) insurers. Indeed, these actors are also capable of professionally offering litigation costs and risk hedging services for a reward, depending on how the different regulatory frameworks impact on their capability of doing so. In this regard, any possibility of maintaining disputes for profit would be referred to as the alternative litigation funding (ALF) method, including, but not limited to, lawyers' success-based fees and legal expenses insurances. This definition is intended to refer to all those cases where a claim is maintained with resources (economic, human, or otherwise) alternative to those of the parties involved in a dispute, and that due to their professional nature are capable of competing one with the other.[6] In particular, apart from TPF, at this stage one can anticipate that the main (but not only) ALF would be: (1) any insurance contract aimed at covering the litigation expenses and/or hedging its risks; (2) any manner in which lawyers commit to bear all or part of the financial risk of the cases that they are engaged in, in exchange for a share of the expected sum recovered, or other fees based on success. We will refer to the first group as legal expenses insurance (LEI), which thus refers to all those contracts where an insurer commits to pay all or part of the legal expenses of the

[6] JPB De Mot, MG Faure and LT Visscher, 'Third Party Financing and Its Alternatives: An Economic Appraisal', in WH Van Boom, above at footnote 3, 31. It is, moreover, worth noting, specifically here but also in general throughout the book, that the word 'litigation' is often used in general terms as synonym of dispute, and not just as litigation in courts.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

client, in exchange for a premium. It is, moreover, worth anticipating that the LEI can be either before the event (BTE) or after the event (ATE), depending on the time at which the insurance is taken out in relation to the event that has given rise to litigation. We will instead refer to the second group as lawyers' funding, recalling a definition of some authoritative academics,[7] although it should be made clear that this generally does not entail a direct funding of the costs but just a waiver of them on a risk-sharing basis. It is, moreover, worth noting that we will use the term contingency fees (or, also, no win no fee or fees totally based on success) to refer to those fees totally based on a fraction of the potential recovery. We will instead use the term conditional fee agreements (CFAs or, also, fees partially based on success) to refer to those fees partially based on a fraction of the potential sums recovered from the claim. It is, moreover, worth anticipating that, as a way to distinguish between the different ALF (but also to see how these may complement each other), attention will be paid to who is backing the claim and how, to see which is the entity that is ultimately bearing the litigation costs and risks. An interesting way to look at it is to see what the consideration of the transaction is, although it should never be forgotten that, substantially, the various ALF may differ very much and/or complement each other.

For reasons of comprehensiveness, it should, moreover, be recalled that disputes could also be funded or otherwise maintained by means of other ALF, such as states' legal aid or other means (foundations, trade unions, or professional funds). In specific circumstances (i.e. market analysis), therefore, it is likely that these factors should also be taken into consideration. In this regard, it is worth anticipating that there is already some literature that has discussed the similarities and differences between TPF and other ALF.[8] This book will start from this literature and the

[7] C Hodges, J Peysner and A Nurse, 'Litigation Funding: Status and Issues' (2012) *Oxford Legal Studies Research Paper*, N 55, 136, available at SSRN: https://ssrn.com/abstract=2126506.

[8] For example, it has been argued that defence funding is the equivalent of ATE, as it would serve the same market function. Instead, it has been highlighted that there is a conceptual difference between lawyers' funding and TPF, since the first is supposed to be a small part of the main legal service, while the third party funders' main function would be the investment in lawsuits. M Steinitz, 'Whose Claim Is This Anyway?', above at footnote 2, 1302. As with regard to the relationships between TPF and legal aid, it has been argued that a major or minor presence of the latter impacts on the use of the first (and LEI). Certain states, like the UK and Sweden, are, moreover, considering pushing LEI to compensate for the cuts in legal aid. See MG Faure and JPB De Mot, 'Comparing Third Party Financing of Litigation and Legal Expenses Insurance' (2012) *Journal of Law, Economics and Policy*, Vol 8, N 3, 743. In the UK, moreover, the Conditional Fee Agreements Order of 1995 introduced conditional fee agreements for personal injury cases to replace the legal aid, which was removed by the Access to Justice Act of 1999. In this regard, see also some empirical evidence, at least with regard to the Dutch context, in MG Faure, T Hartlief and NJ Philipsen, 'Funding of Personal Injury Litigation and Claims Culture: Evidence from the Netherlands' (2006) *Utrecht Law Review*, Vol 2, N 2, 1. This article shows a certain amount of substitutability between LEI and legal aid and, more importantly, the fact that a wider presence of LEI does not increase the number of tort cases.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

related categorisations, to develop it further and try to give a systemic perspective. In this context, it will be interesting to see how and to what extent TPF could be 'a market solution for a procedural problem',[9] and in what circumstances it could be more efficient than other ALF. The first step in this regard would be to start defining them in the context of the market for litigation.

1.2.4 *The Litigation Market and the Litigious Rights as Asset Class*

The previous section briefly introduced a series of professional funding practices that would be potentially capable, in one way or another, of providing an alternative opportunity to access justice and solve disputes rather than using the parties' own funds. For this reason, we will take this as a starting point to define the litigation market, which encompasses all those actors that professionally, directly or indirectly, cover and/or manage the litigation costs, and/or assess and/or hedge the litigation risks. This initial (and partial) definition of the litigation market attempts to build on to the existing literature on the matter, which has already attempted to provide some interesting (although sometimes partial) indications.[10] This definition, moreover, gives the chance to identify three sublitigation markets: (1) TPF market, as the market composed by third party funders; (2) LEI market, as the market composed by legal expenses insurers; (3) legal services' market, as the market of legal professionals, identified as those who, according to their national rules, are entitled to provide legal services. It is to be noted, on the one hand, that only those lawyers and insurers who offer litigation-related services can be identified as actors in the litigation market and, on the other, that this market may also encompass professionals other than lawyers who are nevertheless providing services related to litigation (experts, bailiffs, etc.).

As a way to define the litigation market, and therefore to develop the existing literature on the matter, we will also define what the mentioned actors are competing for. In other words, to describe what could be the object of a TPF transaction and why this has not been bargained before. While there are indeed already a few academic contributions explaining what the assets at stake would be,[11] none seems to have really clarified – in legal and economic terms – why these assets have been bargained upon only recently, at least this extensively. For this reason, there will be an attempt to develop the existing law and economics literature explaining how

9 JT Molot, 'Litigation Finance: A Market Solution to a Procedural Problem', (2010) *Georgetown Law Journal*, Vol 99, 65.

10 See *inter alia*, D Abrams and DL Chen, V Waye and M Abramowicz, above at footnote 4.

11 M De Morpurgo, 'A Comparative Legal and Economic Approach to Third-Party Litigation Funding' (2011) *Cardozo Journal of International and Comparative Law*, Vol 19, 343, 349. See also AJ Sebok 'The Inauthentic Claim' (2011) *Vanderbilt Law Review*, Vol 64, N 1, 61, 63.

© in this web service Cambridge University Press www.cambridge.org

Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

property can be 'created',[12] to see whether similar considerations can be made for legal claims. To do so, it will start by analysing the series of changes (abolition and/or relaxation) to the prohibitions and/or limits to bargaining over litigation to discuss whether we can talk about a liberalisation of the litigation market. We will then attempt to argue that this liberalisation has allowed the emergence of a new asset class (i.e. litigious rights) representing any disputed right that could be the object of economic assessment and of transaction, and for which it is likely that there would be a demand.[13]

1.2.5 *TPF in Relation to a Market Failure in Access to Justice, to a Procedural Problem in Dispute Resolution, and to Externalities*

The opening of a new market and emergence of a new asset class alone might not explain why the TPF business would have been growing so fast in the recent years. There is reason to believe that a series of recent interrelated global trends have somehow pushed the emergence of this business phenomenon, namely increasing the barriers to access justice and solve disputes or, from another point of view, the individuals' and companies' aversion to disputes' costs and risks. Among these trends, certainly economic globalisation has played a role: the increase in the number of cross-border transactions has also increased the potential for disputes; on the other hand, it has also contributed to a more and more complex and sophisticated regulatory environment. In this context, the demand for legal and related services has also increased, and with it the procedural costs to access justice and solve disputes in cross-border matters. Almost in parallel, in the last decades states have started cutting the spending in judicial matters, including for legal aid, and increasing court costs, which has also made access to justice and dispute resolution more difficult. Last but certainly not least, the recent financial crisis (and the following credit crunch) has significantly contributed not only to making individuals and corporations more cost and risk averse but also to the increase in the number of disputes.[14] From an economic perspective, the increase of these cost and risk barriers seems to have made the litigation market less efficient, hence contributing to creating a market failure in access to justice.[15] In such market failure,

[12] S Shavell, *Foundations of Economic Analysis of Law*, Harvard University Press, 2004, 23.

[13] For explanatory purposes, it is worth noting that an asset to be disputed needs a claim to have been filed before a state tribunal, arbitral tribunal, or any other entity appointed to deliver an enforceable order; or, at least, a formal request for payment should be made to the defendant, and the latter denies (in full or in part) liability. It may also encompass 'dormant' or 'conditional' claims, although this is subject to the fact that the claim will arise, and/or the condition will happen.

[14] See M Steinitz 'Whose Claim Is This Anyway?', and J Croft, above footnote 2. This can be regarded as a negative externality of the financial crisis.

[15] The idea of a market failure in access to justice has initially been discussed by M Steinitz, Ibid., 1311, and by JT Molot, 'Litigation Finance: A Market Solution to a Procedural Problem', above

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70314-7 — Third Party Funding
Gian Marco Solas
Excerpt
More Information

litigious (property) rights are not or cannot be allocated efficiently because of certain barriers to litigate, and the legitimate owners cannot bear the related costs and risks. This failure also depends on the architecture of the dispute resolution procedure, which may create a procedural problem in dispute resolution.[16] The impact of this market failure and procedural problem will also depend on certain legal limitations or other conditions that prevent lawyers and insurers from maintaining litigation for a reward or, from another point of view, helping parties to overcome certain barriers to access justice and solve disputes. It is also worth noting that these barriers can be more or less high depending on the applicable rules on the allocation of legal costs, which consist of two main groups: (1) the American rule, according to which each party to a dispute pays for its own legal expenses, disregarding who wins or loses; (2) the loser pays rule (or *victus victori* or English rule, or cost-shifting rule), whereby the party who loses a dispute has to reimburse the legal expenses to the winner. In those contexts where the loser pays rule on costs applies, also the adverse cost risk[17] (i.e. the risk of paying the expenses of the counter-party in the case where the dispute is lost) will have to be considered. The interrelation of these problems prevents the alleged owners of litigious rights from enforcing them in an optimal manner, depending on whether these are impecunious parties, i.e. those risk-averse and money-constrained parties that could not begin a dispute with their own funds; or non-impecunious parties, i.e. those parties not constrained by lack of resources that may nonetheless prefer not to begin a dispute with their own funds. In this context, the book will discuss how TPF would contribute to addressing these problems of access to justice and dispute resolution in different legal contexts and for both impecunious and non-impecunious parties. From a more economic perspective, how TPF would help to overcome certain cost and risk barriers to a transaction, and to enforce efficiently certain property rights that were litigious, will be discussed.

In the context of a market failure in access to justice and a procedural problem in dispute resolution, and as a way to develop the existing literature on the matter, the book will also discuss the issue of TPF in relation to externalities. Externalities indeed happen when there are market failures, and prevent property from being allocated efficiently, i.e. in a way that it would be possible to do further transactions that would make someone else better off without making anyone else worse off. The scholarly debate on the externalities in relation to TPF is to date quite varied: some consider that the failure in access to justice and dispute resolution has per se been

at footnote 9, 83. For a more detailed explanation of this concept, both in general and in relation to the litigation market, see Chapter 4, Section 4.1.1.

16 JT Molot, Ibid.

17 Note that this definition has not been much used in the academic literature on TPF but is instead a term applied in the practice. Litigation funders offer coverage for this risk with insurance-type products. See www.burfordcapital.com/wp-content/uploads/2014/12/6_Burford_ATE_Insurance.pdf (last vis. 2.2.2019).

© in this web service Cambridge University Press www.cambridge.org