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TRIAL AS AN INVESTMENT:
IS LITIGATION FUNDING COMPATIBLE WITH
THE ITALIAN CIVIL PROCEDURAL LAW SYSTEM?

ABSTRACT. The present paper aims at examining the main aspects of litigation funding through the analysis of its evolution in the legal systems where it first emerged. In the second part, the author reviews the compatibility of such contract with the Italian civil procedural law system, assessing the main relevant issues.

CONTENT. 1. Legal expenses as an obstacle to the access to justice – 2. Litigation funding. Main concepts – 3. A historical background – 4. Some notes on comparative law – 5. The compatibility with the Italian civil procedural law system. An introduction – 6. The legal standing of the parties – 7. The impartiality of the judge – 8. The obligation to declare the existence of the funding – 9. The provisions regulating the legal expenses – 10. The risk of malicious litigation – 11. The deontological duties of the counsel – 12. Conclusions

1. Legal expenses as an obstacle to the access to justice

It is common experience that trial-related expenses can be an obstacle for individuals seeking justice, and by such means they can limit the exploitation of a right which, pursuing Article 24 of the Italian Constitution, is bestowed upon all.

The Italian legal system has developed several remedies, both public and private, with the main purpose of avoiding such issue and ensuring an effective access to justice for all citizens.

First, it is worth mentioning on this subject the so-called *patrocinio a spese dello*

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Stato (legal assistance paid by the State), set forth by Articles 74 *et seq.* of the d.p.r. 115/2002, which consists in an advancement of the trial-related legal expenses in favor of individuals whose taxable income as per the last filed tax return (to be intended as the one declared for the purposes of the so-called IRPEF, the tax imposed on individuals) does not exceed 9,926.22 euros.¹ However, individuals with an income higher than such amount, which is updated every year on the basis of the data collected by the *Istituto Nazionale di Statistica* (ISTAT), cannot have access to such assistance. Such remedy is then quite limited in its application.

Among private law remedies, on the other hand, it is worth mentioning insurance policies² that have the (either partial or exclusive) aim to cover the legal expenses required by law to defendants in the case of legal proceedings initiated against them.³

The same goal can also be achieved by a factoring contract, according to which one sells without recourse (*pro soluto*) credits to another individual, who will subsequently try and retrieve, also by means of a trial, the credits he/she acquired.⁴

Lastly, legal assistance services offered by various kinds of labor organizations in favor of their members also serve the purpose of allowing the access to justice for all individuals, regardless of their financial resources.

2. Litigation funding. Main concepts

Litigation funding is today to be included among private law remedies aimed at supporting access to trial.⁵ Although it has been employed for centuries in foreign

1 As a result of the granting of this benefit, some expenses that the law puts upon the party are paid by the latter only in case of conviction, whereas others are paid by the State only (Article 131). The State then proceeds to retrieve such expenses pursuant Articles 133 and 134, *i.e.*, by requesting them to the convicted counterparty or, if not possible, to the party that received the benefit, in case it obtained a financial compensation from the proceedings.

2 A. TINA, *Il rimborso delle spese legali nel contratto di assicurazione*, *Giur. comm.*, 2015, 685 *et seq.*

3 For example, it is common for individuals holding executive positions within a company to sign these policies in order to protect their finances in case a liability case is filed against them.

4 On this regard, it is worth mentioning that Article 1261 of the Italian civil code prohibits selling credits to judges, court office clerks, attorneys and notaries in relation to rights that are litigated before the judicial authority they belong to or within the judicial district they operate in.

5 For the qualification of this contract from a civil law standpoint, see I. GAMBOLI, *Prozessfinanzierungsver-*

legal systems, especially the common-law based ones, only recently has it been implemented by individuals in Italy and it is currently being studied by Italian scholars mainly for the aspects not related to litigation.⁶

In general terms, the litigation funding framework requires a subject who is not part of the litigation (a sponsor) to be willing to pay the legal expenses of one of the parties of the trial and also of the counterparty in case the financed subject is eventually convicted to reimburse such amount.

In case the financed subject wins at trial or if the parties reach an agreement, the subject has the obligation to transfer to the sponsor a percentage of what he/she is entitled to by the judgment or by the transaction. For this reason, the contract can also contain clauses that obligate the party to sell his/her future credit, thus granting the sponsor with the legal power to request the payment from the debtor.

That said, it is worth mentioning that litigation funding can take different legal shapes.

In fact, it can consist in a mortgage where the capital (plus the interests) is to be returned to the sponsor at the end of the litigation; or it can also be a contract whereby the sponsor has to pay the trial expenses, with the benefit of receiving a percentage of the outcome in case of victory of the financed subject; it can also be an insurance policy against the risk of conviction, with the legal consequence of an obligation on the sponsor to pay the legal expenses of the counterparty whenever required by the

träge. I contratti di finanziamento della lite nei paesi di lingua tedesca, <http://fundit.unito.it/ITA/risultati/publicazioni.html>, 23 *et seq.*

6 Among the first scholars in Italy to review such issue in general terms, see E. D'ALESSANDRO, «*Contratto di finanziamento della lite*»: mera operazione finanziaria finalizzata a trarre profitto dal processo civile ovvero strumento che agevola l'accesso alla tutela giurisdizionale?, *Int'l Lis*, 2016/2017, 142 *et seq.*; G. M. SOLAS, *Finanziare il contenzioso: esperienze a confronto*, *Contratto e impresa*, 2016, 184 *et seq.*; L. COPPO, *Il contratto di finanziamento della lite da parte di terzi: profili sostanziali*, <http://fundit.unito.it/ITA/risultati/publicazioni.html>, 2 *et seq.* It is also worth mentioning that Turin University Law School, together with Compagnia San Paolo, Turin Bar Association and Aida (International Association of Insurance Law, district of Piemonte and Valle d'Aosta) has started a research project on the issue, and, with a specific agreement, also Cassa Forense (the entity that handles the attorneys' pension funds in Italy) joined the initiative. On this, see C. MARTINETTI, *Finanziamento delle liti in Italia*, *Giur. arb.*, 2018, 150 *et seq.* and also the website fundit.unito.it.

Court in its judgment; it can cover all or part of the total amount of the trial expenses.⁷

From a subjective point of view, the funding can be dispensed by an individual (who can also be the attorney of the financed subject), a third legal subject, an insurance company, a bank, a governmental or non-governmental organization and even by a nation; on the other hand, the financed subject can also be an individual, a company or a public entity.

Depending on the different combinations of the subjects and the interests involved, and on the different shapes the agreement can take (being particularly crucial the case where the controversial right is sold to the sponsor), the sponsor's involvement in the trial can have different impacts. In fact, he/she can have a mere advisory role (so-called *passive funding*) or, on the opposite, he/she can hold the right to take litigation-related decisions instead of the party (*active funding*) or can play a role (although less decisive) in such decision process: for example, he/she can have the prerogative to give his/her opinion on some (or all) processual choices and can reserve the right to terminate the contract in case the financed subject undertakes a litigation path he/she does not agree on.

Such contract is usually employed in high financial value litigations proceedings to ensure a profit margin for the sponsor, and in particular in trials aimed at convicting the counterparty, but also, in some cases, at establishing or assessing a right,⁸ if such litigation can result in a financial profit for the plaintiff (and thus for the sponsor).⁹

Once specified that an economic analysis of law reveals very interesting issues on litigation funding and on the interests pushing a subject to sponsor a litigation,¹⁰ it

7 L. COPPO, *Il contratto di finanziamento della lite*, 4.

8 For example, the judicial action whereby one requires to be recognized as an heir to one's estate.

9 With reference to the processual role held by the financed subject, it must be noted that litigation funding, in light of the fact that the sponsor would only finance litigation proceedings that can ensure a profit margin, is mostly entered into by plaintiffs rather than defendants. Therefore, at least in principle, litigation funding in favor of a defendant is feasible only if the latter is also filing a conviction request against the plaintiff, or if the defendant is the one asserting a controversial right, e.g., in case he/she files an opposition to an injunction or if he/she initiates a judicial action to request the release of any seized assets.

10 E. D'ALESSANDRO, «*Contratto di finanziamento della lite*», 146 *et seq.*; D. S. ABRAMS-D. L. CHEN, *A market for justice: a first empirical look at third party litigation funding*, *University of Pennsylvania journal of business law*, 2013,

is worth mentioning that the present paper will however only consider the issues that such agreement presents from a civil procedural point of view, which have so far been reviewed by Italian scholars only with regards to international arbitration.¹¹

Thus, the present work aims at verifying the compatibility of the institute in question with the Italian procedural law system, by taking into consideration the main issues that might arise from its currently quite scarce application in Italy.

To do so, it may be convenient to start the analysis with some short considerations on the origins of the said contract and then by further exploring how this is employed in foreign legal systems, before focusing our attention on the domestic system.

3. A historical background

One of the most ancient forms of third party litigation funding can be found in the Attican law of the IV-V century b.C., where the so-called sycophants (*συκοφάντης*) were professionals in the trade of litigations.¹²

The success of sycophants was due to the difficulty for the average citizen to bear the costs of a trial, ranging from the expenses strictly connected to the litigation to the fees of several subjects who had to be employed by the individual. In fact, as the system did not provide for a legal representation, the individual had to employ a “ghost writer” for trying to win its case, *i.e.*, a professional in charge of drafting the speeches to pronounce before the Court (*λογογράφος*) and of teaching the parties rhetoric tricks (*σοφιστής*). It was also customary for the parties to pay bribes to witnesses and jurors: an additional cost for the trial.

1088 *et seq.* claim that subjects who operate in the litigation funding market are more inclined to sponsor litigation proceedings in the fields of commercial law, with written evidence, a value which is not lower than some hundred thousand dollars and a high percentage of successful results.

11 On this, see P. BERNARDINI, *Third party funding in international arbitration*, *Riv. arb.*, 2017, 1 *et seq.*; S. FORNI, *Il “Third Party Funding” nell’arbitrato internazionale*, *Contratti*, 2013, 965 *et seq.* For further considerations, see also F. AROSSA, E. MARCENARO, *Awarding costs in international arbitration: rules, impact of legal traditions, party and counsel perspective*, *Dir. comm. int.*, 2016, 665 *et seq.*

12 For the relevant literature, see L. COPPO, *Il contratto di finanziamento della lite*, 11 *et seq.* Among sycophants there were at least three different roles, only one of which was played by those subjects who financed a litigation undertaken by another subject in order to obtain a percentage of its positive outcome.

Roman law also knew litigation funding, as it set forth legal provisions related to the so-called *calumniatores*, individuals who initiated litigation procedures as plaintiffs in exchange for money or other benefits.¹³ Usually, their employment contract consisted in an early sale of the *res litigiosa*, as the financed subject agreed to give back to the sponsor a percentage of what he/she would have achieved at the end of the litigation. The goal of the financed subject was dual: on the one hand, obtaining the necessary resources to initiate the trial and, on the other hand, being replaced during the trial by subjects of a higher social rank who were better perceived by the Court.

Roman law prohibited individuals from selling the *res litigiosa* while the litigation was ongoing: if such provision was not respected, the contract was considered void. The reason behind was possibly, on the one hand, the need to avoid that a third subject could interfere in a trial he/she had no interests in and, on the other, to dissuade slanders.

However, such provisions were very restrictive as their application was limited to contracts concluded after the beginning of the dispute and thus did not regard the agreements that were reached before then. For such reason, starting from 506 b.C., the scope was broadened in order to comprehend also sales concluded before the beginning of the trial and it was also specified that the sponsor who “acquired” the litigation could sue the financed subject only in relation to the amounts that were deposited before the beginning of the trial.¹⁴

We can identify some similarities between the rise of third party litigation funding in England and the Attican and Roman systems.¹⁵

In fact, in England, at the beginning of the Middle Ages, both the trial by ordeal and the trial by battle or by combat were potentially dangerous for the physical safety of the parties. Thus, to avoid such risk, it was very common for the parties to engage

13 *Iustiniani Augusti Digesta seu Pandectae*, 3.6.1.

14 The reference is to the Constitution of the Emperor Anastasio, referred to in the *Iustiniani Codex* (4.35.22), which prohibited the sale *ante litem* as a response to the several litigation proceedings initiated by individuals who were considered as men trying to “devour” others’ property or fortunes. The ban would have then be confirmed by the following Constitution proclaimed by Iustinianus in 531 b.C. (*Iustiniani Codex* 4.35.23).

15 For further analysis of such issues, see M. RADIN, *Maintenance by Champerty*, *California Law Review*, 24, 1935, 57 *et seq.*

“champions”, who were paid to take part in the trial.¹⁶

Such tradition continued even after such processual forms ceased to exist: the champion became a subject who bought a percentage of the potential outcome of the litigation and in exchange provided payment in relation to the trial-related expenses. Considering that the large majority of proceedings at the time concerned property rights, the sponsor was usually granted a portion of the contentious land.

That is the reason why the litigation funding contract was called *champerty*, from the Latin word *campi pars* or *campi partus*, related to the expression *tenancy by champart* that described the right to dispose of somebody else’s property. It could be similar to the Italian right to property called *enfiteusi*, *i.e.*, that institution allowing a subject to dispose of an estate belonging to someone else as if he/she were the owner, in exchange for money.

The sponsor, in case of a positive outcome, became the owner of the portion of the land in question, whereas the financed subject kept a right to cultivate and dispose of such.

Right at the end of the Middle Ages, it was common for feudal lords to finance their vassals in order to enable them to claim their property rights on lands belonging to other lords, asking a portion of the disputed land as a reward for the positive outcome of the trial. Thus, vassals went to Court with their noble sponsor and entourage, who exerted a persuasive and sometimes intimidatory power on the judge: feudal lords could thus weaken their enemies by enabling individuals to file an actual property claim against them and diminish the length of their lands.

In order to ward off such practice, English sovereigns drew up, starting from 1275, a range of laws that banned the parties from prompting others to start a trial (*maintenance*) in exchange for money or other benefits (*champerty*). The violation of such prohibitions was not only a civil tort but it also entailed a criminal liability, considering that *champerty* and *maintenance* were crimes.

After that, both legislation and case law focused more on the fact that third party litigation funding resulted in an increment in litigation. Thus, the contract in

16 It is the so-called *campio conductivus*. For a review of such phenomenon, see P. H. WINFIELD, *The History of Conspiracy and Abuse of Legal Procedure*, Cambridge, 1921, 106 *et seq.*

question was considered legitimate only if the third sponsor had an interest in the trial that was not deemed emulative or speculative, like, for example, in case the sponsor was a close relative of the party or the loan was in any case granted for philanthropic purposes.

4. Some notes on comparative law

Coming to the modern days, each state of the United States has a different approach to the third party litigation funding agreements. Some states oppose the application of the bans against *champerty* and *maintenance* discussed above; others (and they are the majority) allow such contracts.¹⁷

The American Legal Finance Association (ALFA) was founded in 2004, adopting an ethical code for its members.¹⁸ Moreover, the ethical committee of the New York Bar Association drafted a report on some issues related to the institute.¹⁹

In Canada, such phenomenon is particularly common in relation to class actions.²⁰

17 For a detailed reconstruction of the different positions in the American states, see J. LYON, *Revolution in Progress: Third-Party Funding of American Litigation*, *UCLA Law Review*, 2010, 571 et seq., also for the case law of reference (especially 584 et seq.). In case law, please see the opinion released on 9 March 2016 by the Superior Court of the State of Delaware in the case *Charge Injection Technologies Inc. v. Du Pont de Nemours*, <https://courts.delaware.gov/opinions/download.aspx?ID=238000>, which claimed that the litigation funding contract was valid and effective.

18 It is an association comprising the most important sponsor companies operating in the USA and has the aim to guarantee some minimal standards, in terms of correctness, ethics and transparency in the litigation funding agreements. The activities of the association, which are directed solely at consumers, are listed in more detail on the website <https://americanlegalfin.com>, where a deontological code can also be found.

19 ABA Commission on ethics 20/20, *White Paper on Alternative Litigation Finance*, 2011, available on the website of the American Bar Association at: https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf. Such report is the result of the activities of a research group aimed at reviewing the impact of the alternative means of financing a litigation proceeding on the attorney-client relationship and on the professional and disciplinary liability of the first. Considering this, the report mainly focuses on the attorney's duties towards the financed subject and on the potential conflict of interests between the parties, but it deliberately does not analyze the opportunity of such means and their potential repercussions on civil law and litigation proceedings.

20 The leading case is the one decided by the Ontario Supreme Court on 21 March 2011, *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, www.canlii.org/en/on/onsc/doc/2011/2011onsc1785/2011onsc1785.

England is definitely the country where the third party litigation funding is most developed. The most common model includes a third subject paying for the litigation costs in exchange for a percentage of the pecuniary fine inflicted upon the defeated party by the Court in case of a positive outcome of the trial for the sponsored individual. In case of failure, on the other hand, the sponsor loses his/her investment and he/she is usually obligated to pay for the legal expenses of the counterparty. Moreover, the Lord Chief Justice, Mr. Rupert Jackson, in his report *Review of Civil Litigation Costs* has recently expressed positive remarks on the various models of litigation funding, by stating that they are an effective way of implementing access to justice.²¹ It is also worth mentioning that, considering that *champerty* and *maintenance* are no longer crimes under the Criminal Law Act of 1967 (although they are still suitable to originate tort liability), the possibility to sell one's judicial right to a third subject has become legitimate if the latter has a genuine commercial interest in the trial.

As previously stated, although litigation funding contracts have a specific tradition in common law systems, they are now applied also in some civil law systems and,

html. The case regarded an individual who decided to file a class action to obtain a certification declaring the admissibility of the class action itself so as to demonstrate he had the financial resources to support the judicial action. To do so, he asked the Court to validate a litigation funding agreement signed by an Irish Company, CFI, which committed itself to pay for the expenses of a trial in exchange "of 7 per cent of amount of settlement or judgment, subject to cap of \$ 5 million prior to pre-trial and \$ 10 million thereafter". The contents of the funding agreement were also reviewed by the potential class members and by the defendant. The Ontario Court had to sentence on the validity of such agreement and on its compatibility with the prohibition of *champerty* and *maintenance* aimed at protecting the justice administration «from abuse by the exploitation of vulnerable litigants» (§ 18 of the judgment). The Canadian Court firstly drew a parallel with the *contingency fee agreements* and then quoted the decision *McIntyre Estate v. Ontario* of the local Court of Appeal (Attorney General) (2002), 2002 CanLII 45046 (ON CA), 61 O. R. (3d) 257, [2002] O. J. no. 3417 (C. A.), stating that a contingency fee agreement is not *per se* prohibited by the *Champerty Act*, but the percentage attributed to the attorney needs to be evaluated, on a case by case basis, in terms of reasonableness and fairness. Thus, the Supreme Court approved the funding agreement brought to its attention because a) it concluded that the funding agreement was suitable to reach the purposes of class actions, as it enabled access to justice; b) the agreement left the control of the litigation to the representative plaintiff; c) the percentage agreed in favor of the sponsor (seven per cent) seemed reasonable, also in light of the risk undertaken by the latter, and even more of the existing coverage cap (five million Canadian dollars in case of a transaction during the pre-trial phase and ten million Canadian dollars in case the transaction took place after that).

21 Lord Jackson, *Review of Civil Litigation Costs: Final Report*, 2009, Ministry of Justice (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>), 335, § 4.4.

in particular, in the German one.²²

In fact, German case law provided that the *Prozessfinanzierungsverträge* are not contrary to public policy pursuant § 138 *Bürgerliches Gesetzbuch* (BGB); on the contrary, case law has claimed that said agreements, as commendably aimed at enabling the access to trial (*der Zugang zum Recht*), are valid and legitimate, and are not deemed to cause a misbalance between the parties, as they are mainly addressed to the plaintiff and not the defendant, in full coherence with their function of allowing individuals to file for a trial regardless of their financial condition.²³

The Austrian²⁴ and Swiss²⁵ case law have reached similar conclusions and have then considered litigation funding agreements as legitimate.

In France, such phenomenon is more limited, although in the past few years there have been some judgments that have incidentally stated that the “*contrat de financement de procès est sui generis et inconnu des Etats membres de l’Union Européenne à l’exception des pays de culture juridique germanique.*”²⁶

22 For an interesting analysis on this, see I. GAMBOLI, *Prozessfinanzierungsverträge*, 2 *et seq.*

23 *Oberlandesgericht (OLG) München, Urteil* 31 March 2015, 15 U 2227/14, which considered as valid and effective a litigation funding agreement whereby the sponsor would have obtained 50 per cent of the amount liquidated by the Court to the financed subject, in consideration of the complexity of the litigation in question and, consequently, the uncertain nature of the results. The German judges thought that such agreement did not meet neither the requirements of § 138 *Bürgerliches Gesetzbuch* (BGB) – thus it was not immoral – nor the ones of § 49 *Bundesrechtsanwaltsordnung* (BRAO), in its version valid before 30 June 2008 (on the prohibition of the contingency fee) as they both refer only to the attorney’s fees and cannot then be applied on the *Prozessfinanzierer*. Finally, § 34 of the decision, states that if the *Prozessfinanzierungsvertrag* was declared void, this would be to the detriment of the financed subject (who would have to pay, unexpectedly, the trial expenses) and not only of the sponsor.

24 *Der Oberste Gerichtshof (OGH)*, 27 March 2013, 6 Ob 224712b, <https://www.ris.bka.gv.at/Jus/>, which expressly states that § 879, Abs. 2, n. 2 does not make the litigation funding agreement void, as such provision only refers to attorneys, notaries, tax consultants and auditors.

25 Federal Court, 10 December 2004, 131/223, <http://www.servat.unibe.ch/dfr/c1131223.html>, and also Federal Court, 22 January 2015, 2C_814/04, *ibid.*

26 It is the judgment of 17 June 2006, RG no. 05/01038, released by *Cour d’appel* of Versailles, www.legifrance.gouv.fr, which reviewed a matter originating from a litigation funding agreement concluded by the Australian company *Jancom* and the German company *Foris* in relation to an arbitration procedure initiated against the French company *Onix*. *Jancom* had lost the case and wanted *Foris* to pay for the expenses: *Foris*, on the other hand, claimed that it was supposed to pay only within the limits of the agreed cap coverage agreed. As *Onix* did not receive what it was entitled to within the arbitration procedure by neither *Jancom* nor *Foris*, it went before the Nanterre Court.

In 2014, the *Club des Juristes* published a report on litigation funding and, after some discussion, the *Conseil National des Barreaux* adopted in 2017 some deontological guidelines on the matter.²⁷

In Spain, the issue has been analyzed by some scholars,²⁸ but it is not practiced in Court.

On the other hand, European law increased attention on such agreements. In particular, Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in EU countries and its accompanying communication explicitly refer to litigation funding in case of class actions, setting out a series of principles to respect: transparency on the origins of the funds; the power of the judge to suspend the trial in case of a conflict of interests or a lack of resources of one party whether it has been asked to pay the expenses to the counterparty; the surveillance by (a not better specified) public authority on the agreements.

Similar provisions are embodied in Article 16 of the Proposal of Recommendation of the European Parliament of 6 June 2017, which provides some advice to the Commission concerning the adoption of minimal common standards of civil procedure in the European Union.

5. *The compatibility with the Italian civil procedural law system. An introduction*

Based on the outcomes of the historical and comparative review undertaken above, we can now proceed to verify the compatibility of the litigation funding agreements with the main principles regulating the domestic processual system.

As we stated above, such contract is not currently governed by the Italian law

The French judge, in both the first and second instance, claimed a lack of jurisdiction, stating that France had no jurisdiction over the case neither in application of Article 2 of the EU Regulation 44/2001 (the defendant did not have a domicile in France), nor in application of Article 5 of the same Regulation (the litigation funding could not be considered a service contract, as the provision states that in such cases the jurisdiction is attributed to the judge of the place where the service is provided).

27 The integral work is available on the website www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-lefinancement-de-larbitrage-par-les-tiers.

28 For example, see O. COJO MANUEL, *Third- Party Litigation Funding: Current State of Affairs and Prospects for its Further Development in Spain*, *European Review of Private Law*, 2014, 439 *et seq.*

system. In the absence of applicable provisions, it is up to scholars to verify whether and to what extent it can be practically and legitimately applied. Before starting such analysis, it is also worth mentioning that the following thoughts can be applied also if the sponsor is a foreign subject, considering that, pursuant Article 12 of Law 218/1995, the civil trial taking place in Italy is regulated by Italian law.

The analysis of the civil procedural law aspects of litigation funding must be carried out from different perspectives, *i.e.*, the legal standing of the parties to the agreement within the trial, their potential impact on the impartiality and independence of the judge, the obligation to declare the existence of the funding and finally the interaction between the agreement and the provisions regulating trial expenses.

It is also important to consider that, despite the commendable aim of the contract at hand, it can be used in malicious ways and it is then important for the system to take appropriate remedies so as to avoid its erroneous interpretation and application.

Further considerations can be outlined, finally, also on the deontological aspects related to the position of the legal counsel representing his/her client within a judgment financed by a third party.

6. The legal standing of the parties

The first aspect to be taken into consideration is obviously the issue of legal standing.

On this aspect, it is firstly worth considering that within a litigation funding agreement, the sponsor usually acquires a portion of the litigated credit as a warranty before the litigation begins.²⁹

Thus, in the case where the existence of the agreement emerges within the trial, we should conclude that if it is ascertained that the financed subject started the proceedings only in the interests of the sponsor, his/her filing should be rejected – if that is the case *pro quota*, so in relation to the portion of the credit that had been sold –

²⁹ In this case, there would be the sale of a future credit, which case law considers admissible and immediately valid. See, among others, Court of Cassation, 10 December 2018, no. 31896, www.iusexplorer.it.

given the lack of ownership of the litigated right on the plaintiff.³⁰

As a consequence, clauses providing a sale of the credit before the beginning of the trial are difficult to apply in the Italian legal system, unless the sponsor acts as plaintiff, jointly with the financed subject whether the latter retained a part of the credit.

Obviously, as stated by Art. 111 of the Italian civil procedural code (c.p.c.), if the sale takes place after the trial started, the trial will continue between the original parties, although the sponsor will have the opportunity to intervene in the proceedings and ask for the ousting of the financed subject.

In this case, the major challenge is to identify a judicial remedy that protects the sponsor before the trial starts and insures that the financed subject complies with the agreement.

One way of achieving this would be to have a separate agreement that the parties are required to sign (pursuing the original contract) only after the trial started, whereunder the sponsor acquires the credit: in this case the sponsor would have legal standing to require the payment to the financed subject, also pursuing Article 2932 of the Italian civil code (c.c.).

Obviously, regardless of whether such clause is present or not, the sponsor has his/her own interests in the proceedings thanks to the litigation funding agreement and thus should be able to intervene in the trial initiated by the financed subject, pursuing Article 105, § 2, c.p.c.³¹

Furthermore, should the defendant be acquainted with the litigation funding agreement, he/she could ask the judge to summon the sponsor, pursuing Articles 106 and 269 c.p.c., in order to ask for the conviction of the latter; it could also be the judge to summon the sponsor on his/her own initiative, pursuing Article 107 c.p.c.³²

30 The Court, on its own initiative, shall acknowledge it in any stage and instance of the trial. See Court of Cassation, joint sessions, 16 February 2016, no. 2951, *Resp. civ. prev.*, 2017, 2, 517.

31 In case the sponsor has a legal interest to support the reasons of the financed subject: on this, among others, see Court of Cassation, 30 December 2016, no. 27528, *www.iusexplorer.it*.

32 On the application of such provision, see Court of Cassation, 9 January 2013, no. 315, *www.iusexplorer.it*.

7. *The impartiality of the judge*

Shifting the focus from the parties to the subject called to decide on the trial, either a state-appointed judge or an arbitrator,³³ one of the most interesting issues is what happens if there is a conflict of interests between the latter and the sponsor: such issue is even more problematic in case the sponsor does not intervene in the proceedings.³⁴

As well known, Article 51, § 1, c.p.c. lists the cases in which the judge must withdraw from a given litigation: for the same reasons, he/she can be rejected by the parties. Moreover, § 2 of the same provision states that the judge can request authorization to withdraw from the engagement where deemed necessary. Similarly, Article 815 c.p.c. lists the cases in which the arbitrator can be rejected by the parties, which are the same laid down in Article 51, § 1, c.p.c.; obviously, with regard to a single proceeding, the parties of an arbitration can agree upon other cases in which the arbitrator cannot accept the engagement or can be rejected by the parties.

Besides the obvious differences, it is worth noting that both provisions mentioned above list cases in which the lack of impartiality of the judge originates from a given relationship with the parties or their appointed counsels.

Therefore, currently, the relationship with the sponsor cannot be taken into consideration, unless he/she intervenes in the judgment.

However, such conclusions do not seem satisfying, also in case the sponsor has not acquired the credit as a warranty for his/her investment. In fact, for example, in case of arbitrations and, even more so, in case of arbitrations administered by third organizations, it is not unusual for private judges or for the institute controlling the arbitration to have financial relations with the sponsors: in this case, assuming that what said above is correct, such relationship would be irrelevant unless the sponsor is a part of the judgment or an appointed counsel of the party.

Obviously, it is desirable for these cases to be regulated by the legislature in order to take into account the relationship between the sponsor and the judge. To do

33 This problem was already considered in international arbitration, where it is commonly thought that there is a duty of disclosure on the private judges concerning their relationships with the parties and the sponsors.

34 F. AROSSA, E. MARCENARO, *Awarding costs in international arbitration*, 665 *et seq.*

so, it would also be necessary to establish an obligation on the parties to declare in the trial the existence of a litigation funding agreement: this issue will be further analyzed in the paragraph below.³⁵

8. *The obligation to declare the existence of the funding*

The considerations outlined above lead to wonder whether the Italian legal system requires the parties to declare before the judge if they have a litigation funding agreement and in what terms.

On this aspect, it is worth considering that, in international arbitrations, such declaration is considered as a best practice and some institutes have explicitly stated so in their regulations.³⁶ Following this example, also domestic arbitration institutes could proceed this way. On the contrary, within traditional trials (and arbitrations, in lack of the clauses referred to above), at the moment there does not seem to be an obligation on the parties in such sense. However, when possible, the judge could request the parties to exhibit the litigation funding contract, with the exception of confidential parts³⁷ if necessary, although such order could conflict with the confidentiality clauses in the contract,³⁸ which however could be considered recessive before an order issued by a jurisdictional authority.³⁹ Such solution has one limit: Italian law does not provide for any remedies to force a party to comply with an exhibition order issued by a judge.

However, if during the trial a specific evidence on the existence and contents of

35 On this regard, it is worth mentioning that, similarly to other arbitration organizations, Article 20 of the Regulation of the Milan Chamber of Arbitration of 2019 states that “the arbitrators shall submit their statement of independence to the Secretariat within the time limit it sets” and “in the statement of independence the arbitrator shall disclose, specifying the time and duration (...) any relationship with the parties, their counsel and any other person or entity involved in the arbitration, even on a financial relationship basis.” However, in case the parties have not previously communicated the existence of a litigation funding agreement, the arbitrators have no knowledge of the existence of a third subject involved in the arbitration.

36 F. AROSSA, E. MARCENARO, *Awarding costs in international arbitration*, 665 *et seq.*

37 For an example on this, see *Muhammet Çap & Şehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case no. ARB/12/6), Procedural Order no. 3, 12 June 2015.

38 P. BERNARDINI, *Third party funding*, 1 *et seq.*

39 See Arezzo Court, 31 January 2017, no. 123, www.iusexplorer.it.

the agreement emerged, the lack of compliance could be considered as a proof that confirms said existence and contents.⁴⁰

De iure condendo, one potential solution would be to introduce in the civil trial an obligation on the party to declare such agreement when he/she initiates the trial or after the trial, if the agreement is concluded later.⁴¹ Such declaration could only regard the main contents of the agreement, *i.e.*, the parties involved, either directly or not, in the funding and whether the credit was sold before the trial started, and it would serve as a solution to those independence-related issues referred to above.

Some claimed that such obligation would have negative consequences, as it could influence the judge on the merits of the case⁴² or, at least, his/her final decision on the allocation of the trial expenses.⁴³

Such argument, however, does not seem conclusive, as the existence of a litigation funding agreement does not seem *per se* suitable to influence the outcome of the trial, considering that the evaluation carried out by the sponsor is based on elements which, at least partially, are different from the ones taken into account by the judge. Thus, the litigation funding agreement could be considered as a mere statement from the party, like, for example, a legal opinion lodged within the trial in order to support the plaintiff.⁴⁴

9. The provisions regulating the legal expenses

A further issue to consider is whether, at the end of the trial, the judge can liquidate the trial expenses in favor of the sponsor or, in case of a negative outcome for the financed subject, can convict the sponsor to pay the amount: obviously only in case

40 Among others, see Court of Cassation, 27 January 2017, no. 2148; Court of Cassation, 22 December 2014, no. 27231; Court of Cassation, 27 August 2004, no. 17076, all in *www.iusexplorer.it*.

41 F. AROSSA, E. MARCENARO, *Awarding costs in international arbitration*, 665 *et seq.*

42 Considering that the decision to sponsor a litigation proceeding depends on the likelihood of a positive outcome, judges might consider such agreement as an element pointing towards the validity of the plaintiff claim.

43 F. AROSSA, E. MARCENARO, *Awarding costs in international arbitration*, 665 *et seq.*

44 In this sense, see among the most recent judgments, Court of Cassation, 28 June 2018, no. 17063; Court of Cassation, 2 August 2012, no. 13914, both at *www.iusexplorer.it*.

the latter is a party of the proceedings.

At present, such scenario does not seem possible, considering that, pursuing Article 91 *et seq.* c.p.c., the trial expenses can be liquidated only in favor of the party or of the legal counsel, the latter in case he/she declared to have anticipated such expenses and his/her fees have not been paid. At the same time, the order to pay the expenses of the counterparty can be issued against the party and, besides that, only against its representatives and subjects holding a power of attorney, pursuing Article 94 c.p.c.

However, in abstract it is possible for the financed subject to ask the Court to be exonerated from liability and to file a request for the sponsor to sustain the costs of the trial.

Similarly, under the ligation funding agreement and in cases where he/she has not acquired the credit, the sponsor can intervene in the trial and request that the financed subject be ordered to transfer him/her a portion of the award recognized by the Court, besides the expenses paid by the counterparty.

It must be said that such solutions, although in principle viable, require the sponsor to be highly involved in the trial, whereas in the other legal systems he/she does not formally become a party of the litigation.

Another very common issue is whether the financed subject can ask the counterparty to compensate him/her for the payments he/she made in relation to the agreement.

To address such issue, it is necessary to first clarify the nature of the percentage of the *res litigiosa* that is recognized to the sponsor in case of a positive outcome for the financed subject.⁴⁵

In other terms, if that payment is considered as a cost, it cannot be sustained by the counterparty, as it is not technically a trial expense, considering that such expenses are limited to the fees of the counsels and the taxes paid in the context of the trial.

On the contrary, if the percentage of the *res litigiosa* is considered a detriment that the financed subject had to pay so as to have access to justice, this could be considered as a cost of the trial, which the losing defendant could then be convicted to pay pursuing Article 1224, § 2, c.c. The obligation referred to above shall obviously apply

45 P. BERNARDINI, *Third party funding*, 1 *et seq.*

only if the plaintiff proves within the trial that he/she paid such amount and that, in lack of other economic resources to sustain the trial expenses, the agreement was the only way he/she had to initiate a judicial proceeding.⁴⁶

10. The risk of malicious litigation

Another issue which was already outlined in the historical background is the potential malicious employment of litigation by the sponsor.

The claim of the plaintiff could in fact be specious and financed only to damage another subject, for business-related or even political reasons.⁴⁷

Such issues have all been faced, also recently, by foreign legal systems and have contributed to create some serious doubts on the admissibility of the litigation funding, which could be seen in this light as instrumental in increasing litigation⁴⁸ by using trials for unlawful purposes.

In fact, the first European law provisions on the matter already mentioned above represent an attempt to avoid such negative consequences.

For example, Article 16, § 1, letter b), of the proposal of Resolution of the European Parliament of 6 June 2017 on the adoption of common minimal standards of civil procedure in the European Union sets out the prohibition for a competitor or an employee of the defendant to sponsor a class action against the latter.

Such approach must be considered positive, as it does not prohibit litigation funding in itself, which, as already mentioned, has in principle a commendable aim, but avoids a malicious employment of the instrument.

46 On this, it can be mentioned the principle of law stated by Milan Court, 21 July 2016, no. 9205, [www.eclgal.it](http://www.ecllegal.it), 27 September 2016, with a note of G. Parisi, which recognized to the winning party in trial, as damages pursuing Article 1224 c.c., the reimbursement of the expenses paid to initiate the optional mediation proceedings.

47 On this, the example of Paula Jones is extremely famous. She sued her employer, who was at the time the Arkansas Governor and future President of the United States, Bill Clinton, only thanks to the financial sponsorship from a powerful political opponent of the latter: the case is *Clinton v. Jones*, 520 US 681 (1997); *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996).

48 Actually, one of the most frequent criticism within foreign systems on the litigation funding is that such can lead to an increment of litigation, with a consequent prolongation of the length of the trial. On this, among others, see D. S. ABRAMS, D. L. CHEN, *A market for justice*, 1075 *et seq.*, on a study on the Australian law system.

In Italy such consequences can be avoided by a strict application of the remedies already present in our legal system, *e.g.*, the conviction of the party acting with malicious intent or serious negligence within the trial, pursuing Article 96 c.p.c.⁴⁹ Such remedy, however, could be used directly against the sponsor only if he/she is a party of the trial: otherwise, the defendant can separately sue him/her to have him/her declared liable for enabling the financed subject to maliciously initiate a trial against himself/herself.

11. The deontological duties of the counsel

The issue of the compatibility of the litigation funding with the Italian procedural system involves also some aspects related to the legal provisions, also of deontological nature, regulating the legal counsels' activities.

One of the first matters that arise on this aspect is related to the duty of confidentiality of the attorney. As set out in Article 28 of the deontological code approved by the *Consiglio nazionale forense* (National Bar Association) on 31 January 2014, regardless of the subject who actually appoints the attorney as a legal counsel for the party, the counsel cannot disclose to third subjects information and documentation he/she acquires during his/her professional engagement. Such circumstance could be considered problematic for the sponsor, as the attorney could not disclose information to him/her and he/she could then not take part in the strategic choices related to the trial (obviously, in lack of an authorization to do so from the client).

Such issue could actually be overcome if the retainer of the counsel was signed directly by the sponsor in relation to the activities to perform in favor of the financed subject.

The deontological code grants this possibility and expressly distinguishes the "client", who is the one that appoints (and pays) the counsel, from the "assisted party," which is the subject represented in the trial. In such case, Article 28 does not underline any differences between the two subjects and the counsel could thus freely share with the sponsor every piece of information and documentation related to the proceedings.

49 For some first evaluations about the so-called *responsabilità processuale aggravata* and on its relations with non-contractual liability, see L. P. COMOGLIO, *sub art. 96, Commentario del codice di procedura civile*, edited by L. P. COMOGLIO et al., I. PADOVA, 2012, 1256 *et seq.*

However, the issue could rise again in case of a conflict of interests between the client (here the sponsor) and the assisted party, for example in the event that the financed subject wishes to settle the case, whereas the sponsor prefers to reach a judgment.

Here, if the conflict cannot be resolved, the counsel would be obligated to renounce his/her engagement, pursuing all the necessary activities to assist the parties before the appointment of a new counsel, according to Article 24 of the deontological code.

12. Conclusions

All the considerations outlined above make evident that litigation funding is a very effective instrument that enables subjects who lack the necessary resources to have access to justice.

Moreover, it is worth mentioning that such contract is in principle compatible with the Italian prosecution system, although it could present some potential issues that however could be solved thanks to the relevant general principles.

In any case, the same issues lead to believe that, if such phenomenon became increasingly widespread in Italy in the years to come, detailed rules will be necessary because it cannot be put solely in the hands of scholars and case law.