

Developments in Third-Party Litigation Funding in Europe and Beyond

Written by Adrian Cordina, PhD researcher at Erasmus School of Law, project member of the Vici project 'Affordable Access to Justice' which deals with costs and funding of civil litigation, financed by the Dutch Research Council (NWO)

This blog post reports on a conference on Third Party Litigation funding (TPLF) as well as some other activities in the area of costs and funding, including a new project by the European Law Institute on TPLF.

(1) Conference 'The Future Regulation of Third-Party Funding in Europe'

22 June 2022, Erasmus University Rotterdam

The right of access to civil justice continues to be constrained by the cost, complexity and delays of litigation and the decline in legal aid. Private litigation funding methods like third-party litigation funding (TPLF) and alternative dispute resolution (ADR) methods have been developing, which address these challenges to a certain extent. The debate on whether and to what extent TPLF should be regulated in Europe has also been gathering pace. On the one hand, proponents argue that it facilitates access to civil justice whilst, on the other hand, critics say that there may be risks of abuse. These issues were critically discussed during the conference 'The Future Regulation of Third-Party Funding in Europe' held on the 22nd of June 2022. It concluded the online seminar series on 'Trends and Challenges in Costs and Funding of Civil Justice' organised by Erasmus School of Law in the context of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO). Team members of the project are project leader Xandra Kramer, and Eva Storskrubb, Masood Ahmed, Carlota Ucin, Adriani Dori, Eduardo Silva de Freitas, Adrian Cordina, assisted by Edine Appeldoorn.

The series commenced in December 2021 with a general session that addressed several topics related to access to justice and costs and funding, including collective redress and litigation costs reforms, and a law-and-economics

perspective. The second seminar in January 2022 was dedicated to legal mobilisation in the EU. The third one in February addressed the impact of public interest litigation on access to justice, and the fourth one in March, litigation funding in Europe from a market perspective. The April seminar focused in on austerity policies and litigation costs reforms, and the May session was dedicated to funding and costs of alternative dispute resolution (ADR).

The aim of this seventh and final conference of the seminar series was to reflect on the need and type of regulation of TPLF from different points of view. By seeking to engage representatives from both academia and stakeholders, the conference aimed to foster a lively exchange and contribute to the debate. The event was introduced by a keynote speech by Professor Geert Van Calster (KU Leuven, Belgium) who examined the key issues in TPLF.

The first panel was chaired by Xandra Kramer and addressed the current status quo of the regulation of TPLF and the possibilities of further regulation. Paulien van der Grinten outlined the situation of TPLF in the Netherlands from the point of view Senior Legislative Lawyer at the Ministry of Justice and Security. The presentation of Johan Skog (Kapatens, Sweden) highlighted the lack of factual basis in the European Parliament Research Service Study for the concern of TPLF giving rise to excessive and frivolous litigation. David Greene (Edwin Coe, England) centred his presentation around a critical outlook on litigation costs and funding and the merits and demerits of TPLF in England and Wales. Following the presentations of the first panel, a discussion among the participants and attendees ensued, including discussant Quirijn Bongaerts (Birkway, The Netherlands). Amongst others, the question of disclosure of funding was debated.

The second panel was chaired by Eva Storskrubb (Uppsala University and Erasmus University Rotterdam) and focused on the modes and levels of regulation of TPLF. With respect to the Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation, also examined in an earlier entry in this blog, Kai Zenner (European Parliament, Head of Office (MEP Axel Voss)) focused on the process which led up to the Draft Report and the risks of TPLF. Victoria Sahani (Professor, Arizona State University) approached the issue of TPLF from the perspective of arbitration, both commercial and investor-State arbitration. Finally, wrapping up the second panel and providing reflections connected to the preceding panelists, Albert Henke (Professor, Università degli Studi di Milano) addressed the issue of regulation and the multiple variables it

faces.

The conference was held in hybrid format. In spite of some coordination challenges that this posed, both the live audience and online attendants found the opportunity to comment on the presentations and interact with the speakers, also with the use of the chat function. The discussions and interventions showed how opportune the timing of the conference was, as it was held at a period when the Draft Report is being deliberated and scrutinised, and when the debate on regulating TPLF is taking centre stage at a European and international level.

A more extensive conference report is scheduled for publication in the Dutch-Flemish journal for mediation and conflict management (Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement (TMD)).

(2) Further activities and publications on costs and funding

Recently, a special issue of Erasmus Law Review, edited by Vici members Masood Ahmed and Xandra Kramer on Global Developments and Challenges in Costs and Funding of Civil Justice (available open access). This Special Issue contains ten articles and is introduced by an editorial article by Ahmed and Kramer. It includes articles on different aspects of costs in six jurisdictions. John Sorabji focuses on legal aid insurance and effective litigation funding in England and Wales; David Capper on litigation funding in Ireland; Michael Legg on litigation funding in Australian class actions; Nicolas Kyriakides, Iphigeneia Fisentzou and Nayia Christodoulou on affordability and accessibility of the civil justice system in Cyprus; Jay Tidmarsh on shifting costs in American discovery; and Dorcas Quek Anderson on costs and enlarging the role of ADR in civil justice in Singapore. Three papers focus on general topics. Ariani Dori inquires in her paper whether the fact-finding process that supports the preparation of the EU Justice Scoreboard, as well as the data this document displays, conveys reliable and comparable information. Adrian Cordina critically examines, including from a law-and-economics perspective, the main sources of concern leading to the scepticism shown towards TPF in Europe, and how the regulatory frameworks of England and Wales, the Netherlands, and Germany in Europe, and at the European Union level, the Representative Actions Directive addresses these concerns. In view of the UKSC's finding of non-infringement of Article 6 ECHR in *Coventry v. Lawrence* [2015] 50, Eduardo Silva de Freitas argues that a more holistic view of the procedural guarantees provided for by Article 6 ECHR is called for to properly

assess its infringement, considering mainly the principle of equality of arms.

Some of the papers will be presented during an online seminar that will take place at the end of 2022.

(3) ELI project on Third Party Litigation Funding

The importance of Third Party Litigation Funding is also highlighted by the adoption of a new project by the European Law Institute (ELI) on TPLF. The commencement of the two-year-long project was approved by the ELI Council in July 2022. It will be conducted under the supervision of three reporters (Professor Susanne Augenhöfer, Ms Justice Dame Sara Cockerill, and Professor Henrik Rothe) assisted by researchers Adriani Dori and Joseph Rich, and with the support of an International Advisory Committee. The project's main output will be the development of a set of principles (potentially supplemented by checklists) to identify issues to be considered when entering into a TPLF agreement. Adriani will participate as a project member (together with Mr Joseph Rich). The final outcome is expected in September 2024.