THE QUESTION OF THE APPLICABILITY OF THIRD-PARTY FUNDING IN HUNGARY: A COMPARATIVE LEGAL ANALYSIS*

Sándor Boros[1]

In the case of enforcement of substantive law during a civil suit or arbitration, several expenditures could arise on the litigant's side, which circumstance may prevent or limit the enforcement of claims by the party whose rights have been violated, particularly in cases where the amount involved in the dispute is rather high. The concept of third-party funding (TPF) developed in common law legal systems – which allows a third party to finance the expenditures which could occur on the litigant's side – offers a solution to this problem in accordance with the requirements of the market economy. Nowadays it can be observed that TPF is gaining more and more significance, including in countries with civil law legal systems, in spite of the fact that its normative regulation has not yet been established, therefore TPF agreements are being concluded without any regulations and control across Europe. It may provide opportunities for abuse and application of unfair terms for litigation financiers.

1. Introduction

The question of being able to finance the procedural costs is a crucial issue for any type of judicial proceedings. Society has an essential interest in the legislator creating a legal environment in which both natural and legal persons could enforce their rights efficiently, without any obstacles. Regarding to ordinary court proceedings the right to access to court is a constitutional right. The importance of the ability to finance the costs arising in connection with both ordinary court and arbitration[2] proceedings is that it fundamentally affects the enforcement of the substantive legal claim of the party whose rights have been violated, since costs already arise during the initiation of the proceedings, which – especially in the case of proceedings with a high value of litigation – constitute expenses on the claimant's side, for which they do not have sufficient liquid funds to advance payment. This is especially true in the case of natural persons, and small and medium-sized enterprises, especially in cases where the opposing party is a company with a strong capital base, for which the initiation of proceedings against it does not cause financial difficulties.

A solution to this problem is third-party funding, i.e. the mechanism of the financing of procedural costs by a third party, the essence of which is that a third party – not involved in the legal dispute – pays, with procedural terminology: advance the procedural costs incurred by the party asserting its claim and the fee of its legal representative for a predetermined share of the costs, which is paid out to the financier

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[1] *Sándor Boros*, PhD Student, Géza Marton Doctoral School of Legal Studies, University of Debrecen.

[2] Arbitration proceedings is the alternative of the ordinary court proceedings. Arbitration courts are private courts, composed of one or more arbitrators, which are entrusted by the parties with the arbitration agreement or clause to decide their civil dispute.

in case the party asserting the claim wins the case. Considering the fact that TPF is a legal institution of the Anglo-Saxon legal culture, which nowadays, despite the lack of normative regulation, is gaining more and more importance in countries subscribing to the continental legal culture, the aim of this study is to serve as a reference point for the placement and regulation of TPF in the Hungarian legal system.

In order to achieve the target objective, the second chapter will present the regulatory models of the Anglo-Saxon legal system involved in the study using the tool of legal comparison. In the third chapter, the provisions in the Hungarian legal environment that can be identified as facilitating the enforcement of claims are outlined, as well as the arguments for and against TPF, with a strong emphasis on the relevant constitutional court and ordinary court practice. At the end of the study, as part of the conclusions, a proposal for an optimal regulatory model is outlined by evaluating the results of the research.

2. TPF in the common law legal family

2.1. Australia

The TPF scheme was first applied in the 1990s in Australia (Marquais & Grec 2020, 50). Initially, third-party financing was used to enforce insolvency proceedings, and after the turn of the millennium, its scope was gradually extended to include civil and commercial litigation, as well as arbitration proceedings (Geisker & Luff 2021). According to a recent survey, nearly 50% of lawsuits filed in federal courts over the past six years were funded by third parties (Stroble & Welikson 2020).

Prior to 2006, the financing of court proceedings by a third party, specifically for profit, was prohibited due to the doctrines of maintenance[3] and champerty[4]. These doctrines therefore constituted an obstacle to the application of TPF for a long time. The turning point in Australian jurisprudence was the *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Limited* decision of the High Court of Australia in 2006, in which the court stated that the financing of the procedural costs by a third party does not constitute an abuse of process, and is not contrary to public policy objectives.

Once the obstacle preventing the application of TPF disappeared, the jurisprudence developed the framework of the regulation. In its *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd.* decision, the Federal Court of Australia declared that a third-party funding arrangement and a power of attorney in a lawsuit together constitute an organised investment scheme falling within the scope of section 9 of the Corporations Act, and therefore such organised investment schemes are required to be registered and managed by a public company holding an Australian Financial Services Licence (hereinafter: AFSL).

The High Court of Australia addressed the issue of the nature and regulation of TPF in its *International Litigation Partners Pte Ltd. v Chameleon Mining NL* decision. The case involved a legal dispute between a funder and client. The funded client sought to

[3] The point of the doctrine is that it prohibited the provision of assistance to persons who did not have a bona fide interest in the given proceedings.

[4] Under the doctrine, it was forbidden to conclude a contract in which a party not involved the legal dispute and a litigant divided the proceeds of a lawsuit between themselves.

rescind a funding agreement under Section 925A of the Corporations Act and thereby avoid payment of the funder's commision. The client argued that the funding agreement was a financial product and that the funder did not hold an AFSL. The High Court of Australia concluded that the funding agreement constituted a credit facility rather than a financial product and, while it did not require the funder to have an AFSL, it did require an Australian credit licence.

As a consequence of the development of case law by the Australian jurisprudence, the legislature amended the Corporations Act by the Corporations Amendment (Litigation Funding) Regulations 2020 to include the requirement that investors funding a lawsuit must obtain a license issued by the Australian Securities and Investments Commission, which entitles them to provide financial services. The new regulations include a requirement to act honestly, efficiently and fairly, maintain an adequate level of competence, and organizational resources; act carefully and with caution, and act with the interests of the financed party in mind; treat parties who belong to the same group equally, and treat those who belong to different groups fairly.

Considering the changes implemented in the amendment, it can be stated that the Australian regulatory model categorizes TPF as a purely financial service.

2.2. England and Wales

The commercial volume of TPF agreements has doubled in the past three years in the United Kingdom, resulting in the amount of money managed by litigation investment funds exceeding £1.9 billion (Harnowo 2021). Similar to Australia, as a result of the maintenance and champerty doctrines, the use of TPF was also prohibited in England and Wales. The aforementioned doctrines were developed during the Middle Ages in England and their application was primarly manifested in that wealthy landowners often funded litigation in order to seize land from weaker parties (Veljanoski 2012, 406). The jurisprudence saw the modern relevance of the doctrines in protecting the purity of the justice system. In this regard, judge Lord Denning stated the following in the Re Trepca Mines decision: *„The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses...".*

In England and Wales, the passing of the Criminal Law Act 1967 formally eliminated the archaic legal bars of maintenance and champerty to third party funding, which created the opportunity for English judicial practice to promote the development of the legal institution (Petit & Kajkowska 2019). The process of breaking down the doctrines – in judicial practice – was observed between 2002 and 2005. During this period several decisions were made that allowed increasing scope for the use of TPF to ensure the widest possible access to justice. As stated in paragraph 71 of the judgement in *Arkin v Borchard Ltd & Others*, it is desirable that a party who does not have enough money to enforcement his claim but has a sufficiently valid claim should be able to bring his claim before the court through a litigation funder, with the result, it is justified to encourage the litigation funders to provide litigation funding service. In *Factortame Ltd v Secretary of State for the Environment*, the court stated at paragraph 91 that the claimants had great difficulty in proving the damage they had suffered, so that the lack

of funding for the suit posed a real risk. The contract between the claimants and their litigation funder allowed them to go to court. In 2013, Lord Neuberger, the President of the Supreme Court, stated that access to the courts is a right, and the state should not stand in the way of individuals availing themselves of that right (Neuberger 2013, 20). It should be noted that Lord Neuberger's statement is based on Jeremy Bentham's conclusion in his „*Defence of Usury*", according to which *„(…) so long as the expense of seeking relief at law stands on its present footing [which is to say it is expensive], the purpose of seeking that relief [i.e., funding] will of itself, independently of every other, afford a sufficient ground for allowing any man, or every man, to borrow money on any terms on which he can obtain it."* (Bentham 1818, 128).

The most significant instrument for the regulation of TPF is the legal self-regulatory instrument published in November 2011 by the Civil Justice Council – an agency of the Ministry of Justice –, the Code of Conduct for Litigation Funders (hereinafter: Code), which has the fundamental aim of protecting funded clients. The Ministry of Justice entrusted the Association of Litigation Funders of England and Wales (hereinafter: Association) with the administration of the sector's self-regulation in accordance with the Code. The Association's stated objective is to ensure best practice and ethical behaviour among litigation funders, working to improve the use and application of litigation funding as part of the rational management of financial risk in dispute resolution and actively shaping the law and regulation of TPF. The current English legal framework consists of the Code of Conduct for Litigation Funders, its supervision by the Association and periodic judicial oversight of funding arrangements and agreements.

The Code [Code of Conduct for Litigation Funders January 2018] essentially summarizes the main obligations of the litigation funder, which are the following: maintain adequate financial resources to meet their funding obligations; take reasonable steps to ensure that the funded party shall have received independent advice on the terms of the litigation funding agreement; not take any steps that cause or are likely to cause the funded party's lawyers to act in breach of their professional duties; not seek to influence the funded party's lawyers to cede control or conduct of the dispute to the funder; not include in any litigation funding agreement a right to terminate the agreement at the pure discretion of the funder; behave reasonably in exercising rights to terminate for material breach of the litigation funding agreement by the funded party.

In England and Wales, TPF is basically self-regulatory in nature, with ethical and behavioural standards at the core of self-regulation. In addition to the self-regulatory mechanism, English case law is of particular relevance, not least the recent *Essar Oilfield Services Limited v. Norscot Rig Management Private Limited* decision of the London High Court that a party to an arbitration is entitled not only to the costs of litigation causally connected with the enforcement of a substantive right but also to the amount payable to the third party who funded the litigation. Under paragraph 16 and 17 The High Court drew its conclusion from the provisions of Article 59(1)(c) of the Arbitration Act of 1996 – which allows the reimbursement of other costs – and Article 31(1) of the International Chamber of Commerce Arbitration Rules. In support of its legal reasoning, the court also stated that the Civil Procedure Code only uses the category of "costs" and consequently does not allow for the recovery of costs paid by the litigant to its funder.

2.3. Singapore

As a consequence of the maintenance and champerty doctrines, the use of the TPF scheme was forbidden in Singapore too. The change occurred in 2017, when the legislator abolished the application of the doctrines, and at the same time allowed – with limited effect – the conclusion of litigation funding agreements for international arbitration and related proceedings (De Patoul 2021). In contrast to the English and Welsh solution, Singapore also created the possibility of applying TPF at the level of normative, binding regulation, as the law on the regulation of TPF entered into force in 2017 [Civil Law Act (Chapter 43) Civil Law (Third-Party Funding) Regulations]. Under the law, two conjunctive conditions are needed for the validity of the litigation funding agreement: the litigation funding agreement must be concluded with a qualifying third-party funder; and it must be subject to one of the limited dispute resolution procedures. A qualifying third-party funder is a funder who carries on its principal business, in Singapore or elsewhere, for the purpose of funding the costs of dispute resolution proceedings to which the funder is not a party and has a paid-up share capital of not less than $5 million or the equivalent amount in foreign currency or has managed assets of not less than $5 million or the equivalent amount in foreign currency. Until very recently, prescribed dispute resolution proceedings were limited to: international arbitration proceedings, as well as court and mediation proceedings arising from or in any way connected with international arbitration proceedings; applications for a stay of proceedings and any other application for the enforcement of an arbitration agreement; proceedings for, or in connection with, the enforcement of an award or a foreign award.

As a consequence of the Civil Law (Third-Party Funding) (Amendment) Regulations 2021, the scope of prescribed dispute resolution proceedings was broadened to include the following: arbitration proceedings (thus domestic arbitrations are now included); court or mediation proceedings arising from, proceeding from, or in any way connected with any arbitration proceedings; proceedings commenced in the Singapore International Commercial Court and appeal proceedings arising from any decision made in proceedings commenced in the Singapore International Commercial Court.

Similar to the English solution, tools of self-regulation can be found in Singapore too. Lawyers in Singapore shall meet the provisions of the Legal Profession Act and the Legal Profession (Professional Conduct) Rules. Both legal instruments have been amended due to the coming into effect of the Civil Law Act (Chapter 43) Civil Law (Third-Party Funding) Regulations, which allowed lawyers to introduce funders to their clients, and to advise on and also draft litigation funding agreements. It should be emphasized that, under the law, obligations were imposed on lawyers with respect to the disclosure of the existence of a litigation funding agreement and the funder's identity. Besides the regulations related to lawyers, foreign lawyers providing legal representation in proceedings commenced before the Singapore International Commercial Court shall also comply with the Legal Profession (Representation in Singapore International Commercial Court) Rules.

3. The applicability of TPF in the Hungarian legal system

3.1. Arguments for the application of TPF

3.1.1. Facilitating claim enforcement

According to Section 8 Paragraph (1) of the Rules of Proceedings [A Magyar Kereskedelmi és Iparkamara mellett működő Állandó Választottbíróság Eljárási Szabályzata; hereinafter: Rules of Proceedings] of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, the costs of the arbitration shall include the registration fee, the arbitration fee, the arbitration expenses, and the costs of the parties. Under the Annex 2 – Fee Chart of the Rules of Proceedings, the arbitration fee consists of the administrative fee, the arbitrator's fee, the reserve fund, taxes, and duties. The mentioned cost elements are determined using percentage rates based on the value of the subject of the procedure, in a progressive way; furthermore, the extent of the administrative fee, the arbitrator's fee, and the reserve fund has no upper limit. Thus one of the most significant disadvantages of arbitration proceedings is that, in cases where the amount involved in the dispute is rather high, the initiation of the arbitration proceedings is much more expensive than initiating a civil lawsuit, where the extent of duty is limited by law (Gyöngyösi 2018, 199). According to the Government Decision No. 1267/2013 (17 May 2013), which ordered the codification of the Code of Civil Procedure, the direct aim of the revision is to create a modern Code of Civil Procedure that is in line with international practice and expectations, which ensures the effective enforcement of substantive rights, and which, based on the results of jurisprudence and case law, regulates the procedural legal relations in a transparent and coherent manner, taking into account the technical achievements, thus facilitating the situation of citizens seeking justice.

Section 80 of Act CXXX of 2016 on the Code of Civil Procedure [2016. évi CXXX. törvény a polgári perrendtartásról; hereinafter: Pp.] defines the concept of court costs: *„The costs of court proceedings shall include all expenses the party has necessarily incurred during or prior to the proceedings in a causal relationship with the enforcement of a right in the action, including the loss of income stemming necessarily from having to appear before the court."* By interpreting the mentioned concept, it can be established that the legislator did not define – not even by way of example – the categories of court costs, thus essentially all costs which are necessarily and reasonably related to the enforcement of the right being sued can be considered court costs. In the case of civil lawsuits, the most frequent and in many cases the most significant cost is the duty which has to be paid when the procedure is initiated, the amount of which is regulated by the Act XCIII of 1990 on Duties [1990. évi XCIII. törvény az illetékekről; hereinafter: Itv.]. Itv. declares different rates of duty in connection with the first instance, appeal, and review procedure.[5] Besides the duty, the other "classical" cost

[5] As a general rule, the rate of duty in civil proceedings of the first instance is adjusted to the amount in dispute at the time the proceedings were initiated, but it shall be 6% of the amount in dispute, with a minimum of HUF 15,000 and a maximum of HUF 1,500,000 [Section 39 Paragraph (1) of Itv.; Section 42 Paragraph (1) Point a) of Itv.]. As a general rule, in the case of an appeal, the rate of duty in civil proceedings of the second instance shall be 8% of the value of the claim or part of the claim disputed in

elements arising during civil litigation are the lawyer's fees and, in cases when an expert is appointed, the remuneration of the expert and their contributors. Other relevant costs justified by the parties (e.g. travel expenses) and costs arising in connection with the appearance of witnesses in court are also included in court costs.

On the basis of the above, it can be stated that both arbitration and ordinary court substantive law enforcement are causally linked to several cost elements. The prepayment of costs – taking into consideration the financial capacity of the party enforcing the claim – can significantly influence the enforcement of the claim. In connection with this, the Commentary to the Pp. 1 stated that, *„Enforcement of the fundamental right to access the law and access to court often requires significant financial resources from the parties"* (Völcsey 2018, 412).

Article XXVIII Paragraph (1) of the Fundamental Law of Hungary declares the right of access to court as a part of the right to a fair trial, according to which *„In the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* In accordance with the above-mentioned constitutional provision, it can be stated that the state must provide the right of access to court, which in the most general sense means that everybody has the right to initiate court or other claim enforcement proceedings in order to enforce his or her claim (Kengyel 1989, 137). However this does not automatically mean that a party involved in a legal dispute can actually go to court, given that the costs of civil proceedings or arbitration, as detailed above, may not be affordable for a financially disadvantaged party. In this context, the Hungarian Constitutional Court pointed out in its Decision No. 1074/B/1994 that the state must create a real opportunity to exercise the right of access to court, consequently, regardless of their financial situation or legal knowledge, the judicial avenue of claim enforcement in the courts must be open to everyone. A similar legal conclusion was reached by the Constitutional Court in its Decision No. 539/B/1997. According to the point of view of the Constitutional Court, the state must create a support system which includes the support of expenses related to the enforcement of the substantive legal claim in action.

Article 6 of the Act XXXI of 1993 on the announcement of the European Convention on Human Rights [1993. évi XXXI. törvény az emberi jogok és alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezmény és az ahhoz tartozó nyolc kiegészítő jegyzőkönyv kihirdetéséről; hereinafter: Convention] also declares the right to a fair trial, which inludes the right of access to court (Király 2011, 23). In the Delcourt v. Belgium case, the European Court of Human Rights stated that, under the Convention, the right to a fair administration of justice is paramount in a democratic society, and therefore a restrictive interpretation of Article 6(1) is not possible. From this, it can be concluded that, Article 6(1), which is also applicable to civil cases, enshrines – in terms of content – one aspect of the guarantee of legal equality, under which no one can be denied access to court, i. e. the possibility of legal enforcement. In connection with the practice of Article 6, the Handbook of the

the remedy proceedings, but not less than HUF 15,000 and not more than HUF 2,500,000 [Section 39 Paragraph (1) of Itv.; Section 46 Paragraph (1) of Itv.]. In the case of the review procedure of the Curia, the rate of duty shall be 10%, but not less than HUF 50,000 and not more HUF 3,500,000 [Section 39 Paragraph (1) of Itv.; Section 50 Paragraph (1) of Itv.].

European Court of Human Rights states that the practical and effective nature of the right to access to court can be impaired due to the high procedural costs serving as a deterrent (Európa Tanács/Emberi Jogok Európai Bírósága 2013, 14). This right must therefore be provided, even by permitting discounts on court costs. However, providing cost discounts is only one form of enabling access to justice, and may also include, for example, more financially favorable legal representation measures or professional legal advice (Király 2011, 24).

3.1.1.1. Facilitating claim enforcement in civil proceedings

The question of claim enforcement – taking into consideration the above-mentioned constitutional and human rights court practice – the support system should be highlighted, the categories of which the legislator defined in the Pp. and Itv., while the requirements for the use of each category are defined in the Act CXXVIII of 2017 on the application of cost exemption and the right to suspension of payment of costs in civil and administrative court proceedings [2017. évi CXXVIII. törvény a költségmentesség és a költségfeljegyzési jog polgári és közigazgatási bírósági eljárásban történő alkalmazásáról; hereinafter: Kmt.]. In this context, the Commentary to Pp. 1 states that *„The purpose of cost allowances is that no one should be excluded from the justice simply because of limited financial opportunities"* (Völcsey 2018, 412). It should also be stressed that *„Pp. regulates cost allowances in the framework of legal aid in a similar way to the previous law, but in a non-exhaustive manner, in order to create the possibility of effective and efficient enforcement of the law."* (Aszódi 2019, 234).

According to Kmt., the party is entitled by law to cost exemption if the party's disposable monthly net income does not exceed the minimum amount of full old-age benefits at any given time – which is HUF 28,500 in 2022 – and he or she has no assets [Section 5 Paragraph (1) Point a) of Kmt.]. Pursuant to the law, the party shall be granted cost exemption if the party's disposable monthly net income exceeds HUF 28,500, but the court, taking into consideration the party's other circumstances, declares that the party's livelihood is jeopardized [Section 5 Paragraph (2) of Kmt.]. In this context, the Commentary to Pp. states that *„The threat to livelihood must be direct and serious, otherwise the rule would apply to almost the entire population of the country, as because of the unforeseeability of the future, anyone can lose their assets due to a bad decision, so in this sense, everyone's livelihood can be jeopardized"* (Szécsényi-Nagy 2018, 420).

Under the General Justification of Kmt. the law aims to achieve the possibility of effective access to justice mainly by regulating the right to the suspension of payment of costs. According to the Kmt., a party shall be granted the right to the suspension of payment of costs in full if the party's disposable monthly net income does not exceed 30% of the national average gross monthly income – published by the Hungarian Central Statistical Office [Központi Statisztikai Hivatal; hereinafter: HCSO] – of the second year preceding the current year and he or she has no assets [Section 6 Paragraph

(1) of Kmt.].[6] The party shall be granted the right for the suspension of payment of costs in full or partially if the party's disposable monthly net income exceeds the extent laid down in Section 6 Paragraph (1) of Kmt., but the court, taking into consideration the party's other circumstances, finds that the duty and the expected amount of costs incurred during the proceedings, or a specified proportion of this amount, or the advance payment or prepayment of the duty or the itemized cost would mean a burden on the party which is disproportionate to the party's income and property conditions. During the examination of the income and property conditions of natural persons, the rules detailed in connection with individual cost exemption shall be applied (Szécsényi-Nagy 2018, 423). Regarding the subject-specific cost exemption and the subject-specific right to the suspension of payment of costs, it is necessary to emphasize that the scope of these is relatively limited, basically covering actions concerning civil status, labor disputes, actions concerning compensation for damage caused by mining operations, and actions for damages or for the payment of restitution connected with harm to life, or harm to physical integrity or health resulting from criminal offences [Section 2 Paragraph (1) of Kmt.; Section 3 Paragraph (1) of Kmt.]. With regard to the individual duty exemption detailed by Itv., it should be highlighted that it does not extend to natural persons and profit-based business associations [Section 5 Paragraph (1) of Itv.].

The system of cost allowance, as a state mechanism facilitating claim enforcement is missed by many natural persons considering that, on the one hand, according to the calculations of the Ministry of Innovation and Technology, 855 thousand employees were employed on the minimum wage or the guaranteed minimum wage in 2021 (Hornyák 2021), and on the other hand that, according to the data of the HCSO, in 2021, more than 3 million people had an income that reached the gross average wage. As a consequence, it can be stated that in Hungary almost 4 million people are not entitled to either cost exemption or the right to the suspension of payment of costs, despite the fact that an income exceeding the statutory minimum laid down in Kmt. does not necessarily mean that paying the duty when the proceeding is initiated and the prepayment of costs incurred during the procedure does not cause hardship for the party. The courts, acting in their discretionary power, as defined in the Kmt., may grant cost allowance even if the objective legal conditions for it are not met, considering that in these cases it can only be allowed if the party's livelihood is jeopardized, a requirement which significantly narrows the availability of the cost allowances granted by discretion. However, the discretionary granting of the right for the suspension of payment of costs will undoubtedly alleviate the tensions outlined above.

3.1.1.2. Facilitating claim enforcement in arbitration proceedings

In arbitration proceedings, there is no legal institution similar to the cost allowance laid down in Pp. and Kmt., thus, if the plaintiff is not able to pay in advance the fee which has to be paid at the beginning of the arbitration proceedings due to its financial situation, this also means that it cannot enforce its claim due to financing difficulties.

[6] In 2022, the data for the year 2020 must be taken into consideration, in which year, according to the data of the HCSO, the national average gross monthly salary was HUF 403,600, 30% of which is HUF 121,800.

The Budapest-Capital Regional Court [Fővárosi Törvényszék] pointed out the financing difficulties associated with arbitration procedings in its No. 19.G.41.344/2012/6. judgment. In its judgment, the court stated that the costs of arbitration proceedings are high and may impose such a level of burden on the party, which he or she may not be able to bear based on his or her income or asset situation, so this circumstance may adversely affect the possibility of enforcing a claim. In accordance with the above-mentioned point of view by the Budapest-Capital Regional Court, several judgments have established as a fact that arbitration proceedings are more expensive than ordinary court proceedings.[7] However we also find decision, under which procedural costs do not necessarily represent a significantly higher cost of enforcement compared to the state court proceedings, due to the shorter duration of the arbitration procedure and the absence of appeal procedures [Decision Gf.II.30.165/2013 of the Regional Court of Szeged].

3.1.2. Transfer of financial burden and risk

Prior to initiating the enforcement of a substantive law, either in state court or through arbitration, there may be occur various business aspects on the side of the business whose rights have been violated, which need to be consider before initiating a costly procedure. Among the factors to be considered, the risk of bearing the court costs is of particular importance.

By application of TPF, the claimant company has the possibility to transfer the risk of the court costs to the litigation funder, thus essentially outsourcing the business risk from its own company.

In addition to outsourcing the business risk associated with the court costs, TPF also provides an opportunity to promote efficient and effective management of money, regarding that the claimant company is not deprived of the financial resources that it would have to use to finance the proceedings, and can therefore use them for other, more important developments and investments.

Litigation funding also gives the opportunity for the company to avoid having to show the backup for the procedure as an accrued expense in its balance sheet [Meier 2017, 17].

3.1.3. Freedom of contract

Section 6:59 of Act V of 2013 on the Civil Code [hereinafter: Ptk.] declares the principle of freedom of contract, which contains three main components, which are the following: the freedom to conclude a contract, the freedom to choose the contracting partner and the freedom to shape the content of the contract. The Commentary edited by György Wellmann (Vékás 2022) in relation to the freedom to shape the content of the contract, declares that the starting point of the Ptk. is that the participants of property transactions are generally able to enforce and protect their interests in their contractual

[7] For example, see Decision BDT 2013. 3028; Decision BDT 2013. 2944; Decision P.21819/2012/9. of the Szeged Regional Court [Szegedi Törvényszék]; Decision G.40160/2012/13. of the Kecskemét Regional Court [Kecskeméti Törvényszék].

relations, therefore private law should only intervene as narrowly as possible. Above all, this means that the contracting parties determine the content of their contract based on mutual agreement between their needs and interests (Vékás 2022, 94).

Freedom of action related to substantive law thus allows to parties of litigation funding agreement to determine by own the content of the contract, their rights and their obligations, thus managing the neuralgic points.[8] The litigation financier acts as a contracting partner of the party, consequently the influence of the litigation financier on the case cannot be greater than the party allows. Therefore, it is up to the party to decide what influence the litigation financier can exert on the procedure.

3.2. Arguments against the application of TPF

3.2.1. The fee of the litigation financier

In case of successful claim enforcement, the claimant is obliged to pay to the litigation financier the part of the amount awarded to him as determined in the litigation funding agreement, which reduces the amount of money realised by the claimant.

3.2.2. Infringement of the principle of disposition

Section 2 paragraph (1) of Pp. declares the principle of disposition, under which the parties may dispose freely of their actionable rights, which right to dispose is fully enforced regarding to the procedure in the sense that they themselves decide whether to exercise their rights under the law (Wopera 2019, 37).

In the event of for example the parties stipulate in the litigation funding agreement the right of the litigation financier to approve the settlement or the withdrawal of the action, the right of the financed party to dispose is impaired, since the party cannot independently dispose on the conclusion of the settlement or the withdrawal of the action.

3.2.3. Reimbursement of court costs of the opposing party

Among of the general rules of allocation of court costs, Pp. regulates as a general rule that the court costs of the successful party shall be covered by the unsuccessful party. Where each party succeeds on some and fails on other heads, the party shall cover the costs of the opposing party in proportion of his losing [Section 83 Paragraph (1) and (2) of Pp.].

TPF raises problems in connection with to the reimbursement of court costs awarded in favour of the opposing party, especially if the litigation funding agreement contains that the litigation financier is not obliged to pay them. The reimbursement of court costs awarded to the opposing party raises concerns even if the litigation funding agreement does not exclude the obligation to pay them, having regard that the judgment is not

[8] In any case, the rights of the litigation financier in the conclusion of a possible settlement are considered such.

enforceable against the litigation financier, because he is not a party to the suit (Moses 2017, 270).

4. Conclusions

Due to the high amount of procedural costs, in many cases the claimant party's right to go to court – which is set out in the Fundamental Law of Hungary – is impaired, thus a tension can be observed between the party's fundamental right and his or her financial opportunities. The possibilities offered by the system of cost allowance aimed at reducing procedural costs are not available to natural persons who are not entitled to them on the basis of their income, property or social circumstances. Furthermore, no cost allowance is available at all to alleviate financing difficulties related to arbitration proceedings.

The use of third-party financing, whose primarily function, according to common law jurists, is to facilitate the exercise of the right to go to court, can be used to remedy the problem, without burdening public finances. Furthermore, the use of the TPF can also have several advantages in case of the company whose rights have been infringed has the necessary money to finance the procedure, as it can reallocate them to investments that can improve the efficiency of its management.

Regarding the regulation of TPF, taking into consideration the peculiarities of the Hungarian legal system and society, the application of a mixed system seems optimal, as it would be justified to extend its scope to both arbitration and state court proceedings. As a consequence of freedom of action related to substantive law, the construction of TPF can be fitted without any obstacles to the system of Hungarian civil substantive law, which contract law principle provides that the parties freely determine the content of the litigation funding agreement, thus the financed party may consider the contractual obligations undertake by him in exchange for the benefits of third-party funding of the lawsuit, which may limit his right to dispose. Consequently, the influence of the litigation financier on the case cannot be greater than the party allows. For the purpose of create the suitable content of the litigation funding agreement, at the same time it is worth using a lawyer's contribution. In order to ensure transparency and full knowledge of the motives behind a party's conduct in the procedure, it seems necessary to disclose the fact of litigation funding. Because of that during the reception of the legal institution it would be justified to amend the Pp. in such a way that the claimant would be obliged to declare the fact of the litigation funding in the statement of claim and to attach the full content of the litigation funding agreement to the statement of claim, because the litigation financier – despite having a direct economic interest in winning the case –, is not a party to the proceeding and the judgment therefore is not enforceable against him, i.e. the defendant cannot proceed against the litigation financier to reimburse the court costs awarded in favour of him. The interests of the defendant can be protected by the institute of security for court costs regulated by Section 595 of Pp., the applicability of which is based on the fact that in the event of claimant's fail, the claim for court costs awarded in favour of defendant could not be enforced against the litigation financier. In order to provide effective protection, the amendment of the Pp. is justified in such a way that the civil proceedings concerned by the litigation funding should be placed in the particular types of procedures. In this

context, it would be possible for the legislator to stipulate that the statement of claim must contain the fact of litigation funding, and to attach the litigation funding agreement to the statement of claim. By applying the institute of security for court costs in this context, the defendant would be entitled to submit a request for security for court costs if the claimant's statement of claim shows that the claimant's litigation is carried out by litigation funding. If the court grants the request, the claimant is would be obliged to deposit with the court the amount of the security set by the court. Amendments of the same nature are needed in the field of arbitration claim enforcement, which could be introduced in Act LX of 2017 on Arbitration by codifying a new chapter.

As a litigation funding service is a financial service, it also justifiable to place the construction within the system of financial law. In order to efficiently protect the interests of the party, it would be necessary to amend Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises to require financial institutions providing litigation funding service to obtain a licence issued by the Central Bank of Hungary [Magyar Nemzeti Bank] as a supervisory body. Furthermore, it is also necessary to set out specific conditions for the litigation funding service, in which case it seems justified to significantly increase the minimum amount of initial capital from HUF 100 million for financial enterprises which provide litigation funding service, in order to ensure the maintenance of adequate financial resources. It would also be essential to set out the requirement that, if the interests of the financed party and the litigation financier are in conflict with each other, in such a case the litigation financier must give preference to the interest of the financed party. Another important condition may be that the litigation funder must act fairly, refrain from any conduct contrary to the interests of the party, and refrain from influencing the lawyer of the financed party.

As a consequence of the analysis, it can be determined that the domestic application of TPF can be beneficial in facilitating both state court and arbitration claim enforcement. The application of TPF can be particularly useful for natural persons who have become unemployed as a result of the recent economic crisis and are unable to repay their loans, as well as for small and medium-sized enterprises facing liquidity problems due to their debts, and drastically rising energy and fuel prices.

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