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# Global Developments and Challenges in Costs and Funding of Civil Justice

Masood Ahmed & Xandra Kramer\*

## 1 Introduction

Access to justice is a basic human right<sup>1</sup> and a fundamental constitutional principle.<sup>2</sup> It is also a right which, as Lord Reed succinctly put it in *R (on the application of Unison) v. Lord Chancellor*,<sup>3</sup> is ‘inherent in the rule of law’.<sup>4</sup> It is the cornerstone of a liberal democratic society. The right of access to civil justice continues, however, to be undermined and severely restricted as a consequence of disproportionate and crippling litigation costs, the complex nature of the civil court process and the severe delays that exist before justice is obtained.<sup>5</sup> The matter is made worse by the rapid decline of public legal aid in many countries, which has meant that those with limited means are increasingly unable to vindicate and enforce their legal rights.<sup>6</sup> Furthermore, the reduction of state funding of the civil justice system by successive governments<sup>7</sup> and, in particular, the substantial increase in the number of individuals who are forced to litigate, if they do, without legal advice or representation, has put unprecedented pressure on the courts to

continually ration their limited resources in managing cases.

Against that background there have been two prominent developments, each of which seeks to mitigate the problems associated with litigation costs and funding, and thereby increase access to justice. The first is the emergence of private forms of litigation funding in the wake of the gradual decline in civil legal aid. These include legal expenses insurance, contingency fee agreements, damages-based agreements (DBAs)<sup>8</sup> and third-party funding (TPF). The second development is the attempt by policy makers and the judiciary to reform the rules on litigation costs to make them more predictable, transparent and proportionate. Reforms to costs rules include the introduction of fixed recoverable costs (FRCs),<sup>9</sup> costs shifting rules<sup>10</sup> and the greater use of costs sanctions by the courts.<sup>11</sup>

While these developments are welcome in trying to bridge the access to justice gap, they also raise challenges, are surrounded by legal uncertainty and are not always effective or available to those who require assistance. For example, the TPF market is either unregulated, as in the United Kingdom,<sup>12</sup> or, as Legg would argue, is becoming increasingly regulated, as in Australia.<sup>13</sup> Furthermore, in Europe, TPF is primarily available for high-value commercial disputes, thereby excluding lower value claims.<sup>14</sup> In addition, certain more risky or commercially less interesting (idealistic) claims may go unfunded. TPF also raises major ethical concerns including the real risk of conflicts of interest between the

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1 See Art. 6 (1) (Right to a Fair Trial) of the European Convention on Human Rights and Art. 47 (Right to an effective remedy and to a fair trial) of the EU Charter on Fundamental Rights. For a detailed discussion of Art. 6 and access to justice, see J.H. Gerards and L.R. Glas, ‘Access to justice in the European Convention on Human Rights system’, 35(1) *Netherlands Quarterly of Human Rights* 11 (2017).

2 For example, see Art. 30 of the Cypriot Constitution.

3 *R (on the application of Unison) v. Lord Chancellor* [2017] UKSC 51.

4 *Ibid.*, at [66].

5 The EU Commission Justice Scoreboard 2021 considers costly and lengthy judicial proceedings as the main impediment to access to justice.

6 See, for example, the comments of Lord Justice Briggs in *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales, 2015); Lord Justice Briggs in *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016); and The Lord Chancellor, the Lord Chief Justice, and the Senior President of Tribunals, *Transforming Our Justice System* (September 2016), [www.gov.uk/government/publications/transforming-our-justice-system-joint-statement](http://www.gov.uk/government/publications/transforming-our-justice-system-joint-statement) (last visited 19 May 2022). For a discussion of the decline of legal aid, see R. Smith, ‘After the Act: What Future for Legal Aid?’ *Tom Sargent Annual Lecture* (2012) and the contribution of J. Sorabji in this issue.

7 This is certainly true of the UK.

8 DBAs are discussed later in this article.

9 The UK government has consulted on extending fixed recoverable costs to most civil cases with a value of up to £100,000 see [www.gov.uk/government/consultations/fixed-recoverable-costs-consultation](http://www.gov.uk/government/consultations/fixed-recoverable-costs-consultation) (last visited 19 May 2022). They are also consulting on extending fixed recoverable costs to lower value clinical negligence disputes see [www.gov.uk/government/consultations/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims](http://www.gov.uk/government/consultations/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims) (last visited 19 May 2022). Singapore and Cyprus are on the cusp of major reforms – see the contributions by D. Quek Anderson and N. Kyriakides respectively in this issue.

10 For example, Qualified one way costs shifting (QOCS).

11 For example, the English courts have discretion under CPR Part 44 to penalise a party in costs for unreasonable litigation behaviour, both before and after formal proceedings were issued. For a discussion of the use of these powers in relation to the unreasonable refusal to engage with alternative dispute resolution procedures, see the contribution by D. Anderson Quek in this issue.

12 On the issue of regulation of the TPF market, see the contributions by A. Cordina and M. Legg in this issue.

13 *Ibid.* See also J. Tidmarsh’s contribution on the concerns with TPF in this issue.

14 *Ibid.*

commercial incentives of the private funder, the professional obligations of lawyers and the rights and expectations of clients. As for private legal expenses insurance, not all potential litigants may qualify for insurance cover, and if they do, they may be unable to pay the necessary premiums; and contingency fee agreements may be inherently unfair to the unsuccessful party in the litigation.

There are also potential wider opportunities to develop funding options for particular jurisdictions. In his detailed critique of TPF in Ireland, Capper<sup>15</sup> argues that one of the reasons why TPF should be reformed is because of Ireland's status as the only common law country remaining in the European Union post-Brexit, which presents an opportunity to develop a 'common law legal hub' for litigation and other forms of dispute resolution. The judiciary and policy makers have also introduced procedural reforms to control litigation costs. These reforms in some common law jurisdictions include, for example, controlling the unpredictable and disproportionate costs of disclosure<sup>16</sup> and promoting the role of alternative dispute resolution (ADR) procedures to encourage the early resolution of disputes which may save costs for the parties as well as preserve the courts' finite resources.

This special issue of the *Erasmus Law Review* brings together articles by civil procedure scholars which focus on a number of European jurisdictions (England and Wales,<sup>17</sup> Cyprus and Ireland) as well as the United States, Australia and Singapore. A wider perspective of the costs of court adjudication and its impact on access to justice within the European Union is also provided through a detailed analysis of the EU Justice Score Board.<sup>18</sup> The articles provide a detailed critical perspective of costs rules, funding arrangements, recent procedural developments and the impact on access to civil justice. In this article, we briefly consider the right of access to justice and the evolving concept of 'justice' before focusing on private modes of funding civil litigation. We then consider procedural developments and reforms which aim to increase access to justice by controlling litigation costs. The increasingly significant role played by ADR within the civil justice system and its impact on costs and funding are also discussed before ending with concluding remarks.

## 2 Access to Justice and the Evolving Concept of 'Justice'

The civil justice system enables disputing parties to vindicate and, where necessary, enforce their legal rights and obligations under the general auspices of the state. It also provides the basis for the consensual resolution of disputes through ADR procedures and the means to enforce settlement agreements. The civil justice system must be accessible to all those who need to use it. In their seminal work on access to justice, Cappelletti and Garth<sup>19</sup> explained that the term 'access to justice' serves to focus on two basic purposes of the legal system: first, the system must be equally accessible to all; second, it must lead to results that are individually and socially just. It is the former purpose of the civil justice system – access to justice – which is still or has even become increasingly difficult to achieve.

The term 'access to justice' is frequently referred to in civil justice scholarship and policy documents and is increasingly referred to both judicially and extrajudicially. Access to justice is not, however, an easy concept to define. The traditional but narrow understanding of the right is to equate the term 'access to justice' to a litigant's right to have access to the civil courts or, to put it another way, to have his day in court, and to imply that 'justice' can only be dispensed by the courts. This understanding of access to justice is evident within English jurisprudence. In *Unison*,<sup>20</sup> Lord Reed explained that access to justice was 'the constitutional right of unimpeded access to the courts'<sup>21</sup> and emphasised that access to justice was 'inherent in the rule of law'. Although his Lordship appeared to impliedly acknowledge that access to the courts provided the backdrop for the consensual settlement of disputes, this judgment firmly focused on the right for disputing parties to have access to the civil courts. Lord Reed explained the relationship between a citizen's right to access the courts and the rule of law when he said,

At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the parliament which makes those laws includes members of parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by parliament, and the common law created by the courts themselves, are applied and enforced. That

15 See the contribution of D. Capper in this issue.

16 See later for a discussion of the Disclosure Pilot Scheme in the Business and Property Courts of England and Wales. See also the contribution of J. Tidmarsh in this issue on the reforms to the American costs rules regarding discovery.

17 Hereinafter 'England' or 'English'.

18 See the contribution of A. Dori in this issue.

19 M. Cappelletti and G. Garth, 'Access to Justice: e Newest Wave in the World-wide Movement to Make Rights Effective', 27 *Buffalo Law Review* 181 (1978). See also M. Cappelletti and B. Garth, 'Access to Justice and the Welfare State: An Introduction', in M. Cappelletti (ed.), *Access to Justice and the Welfare State* (1981) 1 and E. Storskrubb and J. Ziller 'Access to Justice in European Comparative Law' in F. Francioni (ed.), *Access to Justice as Human Right* (2007).

20 *R (on the application of Unison) v. Lord Chancellor* (n. 3).

21 *Ibid.*, at [76]. Emphasis added.

role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by parliament may be rendered nugatory, and the democratic election of members of parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.<sup>22</sup>

When reflecting on extrajudicial statements and civil justice policy documents, it is evident that the English senior judiciary has taken divergent approaches to the meaning of access to justice. In his major review of the structure of the civil courts, Lord Justice Briggs viewed the civil courts as existing primarily to ‘provide a justice service rather than merely a dispute resolution service’, which encompassed recourse to an ‘expert, experienced and impartial court for obtaining of a just and enforceable remedy’.<sup>23</sup> In contrast, the Master of the Rolls, Sir Geoffrey Vos, has more recently embraced a wider understanding of access to justice to encompass ADR. In a series of recent extrajudicial speeches, Sir Geoffrey has set out his future vision of a wholly digitised civil justice system which integrates sophisticated ADR procedures that will provide the parties ‘with a continuing drive to help then find the best way to reach a satisfactory solution’.<sup>24</sup> Sir Geoffrey further explained,

The whole system will be focused on resolution. ... Continuous mediated interventions will be integrated into the whole digital justice system, making use of every available kind of dispute resolution from on-line or telephone to in-person mediations, early neutral evaluations or the use of AI to suggest outcomes.<sup>25</sup>

Also, in other jurisdictions and at the EU level, the concept of access to justice has evolved to also encompass ADR. While in the 1990s the European Commission referred to access to justice meaning access to courts,<sup>26</sup> the acknowledgement of the importance of alternative ways to resolve consumer disputes soon resulted in a broader understanding of this concept.<sup>27</sup> As the 2002 EU Green Paper on ADR noted, ‘ADRs are an integral part of the policies aimed at improving access to justice’.<sup>28</sup> The pre-

amble of the 2008 Mediation Directive states that ‘the objective of securing better access to justice ... should encompass access to judicial as well as extrajudicial dispute resolution methods’.<sup>29</sup> The more recent instruments on ADR, in particular the Consumer ADR Directive,<sup>30</sup> have also contributed to the integration of ADR within the EU access to justice spectrum. Lastly, while Article 6 of the ECHR (European Convention on Human Rights) and Article 47 of the EU Charter on Fundamental Rights formally do not encompass access to out-of-court dispute resolution procedures, the case law of the Court of Justice on mandatory ADR has acknowledged the importance of ADR in supporting the administration of justice.<sup>31</sup>

This approach transforms the notion of justice to include a variety of dispute resolution methods, including the civil courts and ADR procedures. In doing so, it broadens the nature and characteristics of a civil justice system that goes beyond simply perceiving it as court adjudication and access to the civil courts.<sup>32</sup> This multifaceted approach to access to justice is also becoming a defining feature in other parts of the world, including in Singapore’s civil justice system. As Quek Anderson explains in the present issue, ADR has been promoted in Singapore not merely because of its economic virtues of saving costs and time but also for its inherent value in creating a justice system with diverse dispute resolution options ‘bringing a consensual dimension to the quality of justice, and helping parties find the most suitable forum to fit their needs’.<sup>33</sup>

Gaining access to the court does not necessarily ensure that parties have *effective* access to justice and other procedural factors will be necessary for the right of access to be exercised properly. Commenting on the UK Supreme Court’s decision in *Coventry v. Lawrence*,<sup>34</sup> Silva de Freitas cogently argues that the right to fair trial under Article 6 of the ECHR is not simply limited to the right of access to a court and that without the procedural guarantee of equality of arms, access to a court cannot be exercised meaningfully.<sup>35</sup> There are also challenges in trying to measure the quality of access to justice across different civil justice systems. As Dori observes in her detailed critique of the EU Scoreboard’s approach in measuring the costs of judicial services, ‘the idiosyncrasies of the national systems and the heterogeneity of

22 *Ibid.*, at [66].

23 LJ Briggs, *Civil Courts Structure Review: Final Report* (n. 6).

24 The Right Hon. Sir Geoffrey Vos ‘The Relationship between Formal and Informal Justice’, Hull University Friday 26 March 2021 at [7-8].

25 The Right Hon. Sir Geoffrey Vos ‘The Future for Dispute Resolution: Horizon Scanning’, *The Society of Computers and Law*. Sir Brian Neill Lecture 2022. Online – Thursday 17 March 2022 at [6].

26 See, for example, ‘European Commission, Green Paper on Access of consumers to justice and the settlement of consumer disputes in the single market’, COM (1993) 576 final.

27 A. Biard, J. Hoevenaars, X.E. Kramer and E. Themeli, ‘Introduction: The Future of Access to Justice – Beyond Science Fiction’, in X.E. Kramer, A. Biard, J. Hoevenaars & E. Themeli (eds.), *New Pathways to Civil Justice: Challenges of Access to Justice*, (2021) 1-20, at 6-7.

28 European Commission, ‘Green Paper on Alternative Dispute Resolution in Civil and Commercial Law’, COM (2002) 196 final, para. 9.

29 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ 2008, L 136/3, no. (5).

30 Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ 2013, L165/63.

31 Joined cases *Rosalba Alassini v. Telecom Italia SpA* (C-317/08), *Filomena Califano v. Wind SpA* (C-318/08), *Lucia Anna Giorgia Iacono v. Telecom Italia SpA* (C-319/08) and *Multiservice Srl v. Telecom Italia SpA* (C-320/08), ECLI:EU:C:2010:146; *Livio Menini, Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa* (C-75/16), ECLI:EU:C:2017:457.

32 M. Ahmed, ‘Moving on from a Judicial Preference for Mediation to Embed Appropriate Dispute Resolution’, 70(3) *Northern Ireland Legal Quarterly* 331 (2019).

33 See the contribution by Quek Anderson in this issue.

34 *Coventry v. Lawrence* [2015] UKSC 50.

35 See the contribution of E. Silva de Freitas in this issue.



national judicial statistics impact how individual characteristics should be measured and compared across EU jurisdictions' and therefore it is challenging to accurately measure access to justice.<sup>36</sup>

### 3 Private Funding of Litigation

The gradual decline of civil legal aid has caused a major shift towards the private sector in financing litigation. This shift has led to the creation and promotion of various private funding models such as legal expenses insurance, contingency fee agreements and TPF. Although the policy rationale underpinning these funding models is to increase access to justice for those with limited means, they raise particular concerns including the commodification of justice, conflicts of interest between the various parties to the funding arrangement and the lack of regulation. Similar concerns also relate to DBAs – a funding option which is beginning to develop in England and Scotland.<sup>37</sup> A DBA is a funding arrangement between a lawyer and a client whereby the lawyer's fees are dependent upon the success of the case and are determined as a percentage of the damages received by the client. Under a DBA, a lawyer may not recover costs more than the total amount chargeable to the client under the DBA and will not receive anything in the event that the case is unsuccessful.<sup>38</sup>

In England, DBAs were introduced as part of Sir Rupert Jackson's package of reforms to civil litigation costs.<sup>39</sup> Taking inspiration from the Canadian system, Sir Rupert favoured introducing DBAs, explaining that it was 'desirable that as many funding methods as possible should be available to litigants'<sup>40</sup> to increase access to justice. Also, the Scottish government has recently introduced DBAs through the enactment of Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Prior to the 2018 Act, lawyers were prevented from enforcing *pacta de quota litis* – agreements for the share of a litigation – otherwise known as DBAs. Although DBAs were not *pacta illicita* (unlawful agreements), they could not be enforced if challenged by a client. The Taylor Review on *Expenses and Funding of*

*Civil Litigation in Scotland*<sup>41</sup> concluded that, given the limited availability of legal aid, DBAs should be permitted as a means of promoting access to justice. The recommendations of the Taylor Review are now reflected in the 2018 Act and subordinate legislation.<sup>42</sup>

It is clear to see why DBAs are being promoted and encouraged by policy makers and the judiciary.<sup>43</sup> DBAs provide another option for litigants to finance their disputes. They increase the choice and variety of funding options available to litigants and can, more broadly, encourage competition within the private sector funding market to improve existing funding models and encourage funders to think more innovatively in creating new funding options. However, DBAs are, like TPF, unregulated and there are no means by which they are monitored. Furthermore, it has been argued that, given the potential financial risks to non-commercial clients in particular of having to potentially pay a large percentage from their damages to their lawyers, appropriate safeguards are necessary, including the provision of easily accessible information to educate and inform prospective clients of the nature and, more significantly, the implications and risks of entering into DBA arrangements. It has also been argued that the necessary professional regulatory bodies<sup>44</sup> must also carefully monitor the development of DBAs, including collating relevant data on, for example, the types of DBAs being offered, the rate of take-up and the types of clients entering into DBAs.

One of the potential strengths of DBAs is that they can be used to fund collective redress actions and thereby increase access to justice for many who would otherwise be unable to bring claims. Indeed, DBAs can provide further impetus to the EU's Directive<sup>45</sup> on collective redress scheme for consumer disputes. In doing so, the concerns regarding the lack of appropriate safeguards and the need to monitor DBAs may be effectively addressed by the EU Directive.

36 See the contribution of A. Dori in this issue.

37 For a detailed discussion of the latest developments, see M. Ahmed, 'Revisiting Hybrid Damages-Based Agreements', 1 *Journal of Personal Injury Law* 33 (2022). See also R. Mulheron 'The Damages-Based Agreements Regulations 2013: Some Conundrums in the "brave new world" of Funding', 32(2) *Civil Justice Quarterly* 241 (2013).

38 The Explanatory Memorandum to the English legislation which governs DBAs – SI 2013 No. 609 The Damages-Based Agreements Regulations 2013 – defines DBAs at para. 2.1 as an agreement between 'a private funding arrangement between a representative and a client whereby the representative's agreed fee (the payment) is contingent upon the success of the case, and is determined as a percentage of the compensation received by the client'. The relevant legislative definition is to be found in s58AA of the Courts and Legal Services Act 1090.

39 Lord Justice Jackson *Review of Civil Litigation Costs: Preliminary Report* (May 2009); Lord Justice Jackson *Review of Civil Litigation Costs: Final Report* (December 2009).

40 Lord Justice Jackson *Final Report* Ch. 12, at [para. 4.2].

41 Available at [http://www.cicm.com/wp-content/uploads/2013/07/Resources\\_GovCon\\_2012\\_TaylorReview\\_ReviewOfExpensesAndFundingInCivilLitigationInScotland.pdf](http://www.cicm.com/wp-content/uploads/2013/07/Resources_GovCon_2012_TaylorReview_ReviewOfExpensesAndFundingInCivilLitigationInScotland.pdf) (last visited 19 May 2022). See also the Scottish Government's *response Review of Expenses and Funding of Civil Litigation in Scotland: A Report by Sheriff Principal James A Taylor Scottish Government Response* (2014).

42 The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020.

43 In the leading decision of *Zuberi v. Lexlaw Limited* [2021] EWCA Civ 16 the English Court of Appeal provided important judicial clarification and guidance on DBAs by confirming that lawyers are permitted to charge time costs upon the early termination of a DBA. For a critique of the decision, see M. Ahmed 'Revisiting Hybrid Damages-based Agreements' (n 29).

44 The Bar Standards Board and the Solicitors Regulatory Authority in England and Wales.

45 Directive 2020/1828/EU of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1. Also referred to as the EU Representative Actions Directive for consumers (RAD). For a critique of the Directive, see D. Fairgrieve and R. Salim 'Collective Redress in Europe: Moving Forward or Treading Water?', 71(2) *International & Comparative Law Quarterly* 465 (2022) and A. Biard and X. E. Kramer, 'The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?' 27 *Zeitschrift Fur Europaisches Privatrecht* 251 (2019).

The Directive, which was adopted in November 2020 and will be effective as of 25 June 2023, introduces a right of collective redress across the EU. It requires Member States to put in place procedures by which ‘qualified entities’ will be able bring representative actions to seek injunctions, damages and other redress on behalf of a group of consumers who have been harmed by a trader who has allegedly infringed EU law. Although the Directive does not prohibit TPF (whether TPF or other funding arrangements) of collective redress actions, Article 10 restricts its use by requiring Member States to ensure that conflicts of interest between funders and claimants are prevented. Member States must also ensure that any TPF does not have an impact on the protection of the consumers’ interests, including by ensuring that decisions taken by the qualified entity are not unduly influenced by the funder or that the action is not funded by a competitor of the defendant. The Directive further provides that the courts will be required to assess compliance with these limitations and will be able to take appropriate measures, if necessary. These obligations on Member States provide effective safeguards for the use of DBAs while allowing DBAs to be used as another means of funding collective actions and increasing access to justice. Interestingly, in June 2021, the European Parliament published a Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation.<sup>46</sup> This report and the recommendations show a concern about the growth of TPF in Europe and the intention appears to be to limit the use of TPF schemes by imposing strict requirements. It remains to be seen whether the European Commission will follow up on this European Parliament initiative.

## 4 Costs Rules and Procedural Reforms

As well as promoting private funding options to increase greater access to justice, policy makers and the judiciary have introduced procedural mechanisms in an effort to make litigation costs more proportionate, predictable and transparent. The English civil justice system is undergoing wide-ranging reforms, including the digitisation of the civil court process, and Singapore and Cyprus are both on the cusp of implementing radical changes to their civil justice systems. In his discussion of the forthcoming reforms to the Cypriot civil justice system, Kyriakides notes that ‘it is expected that the coherency of the reformed civil procedure rules will provide transparency and clarity to parties involved in civil litigation’.<sup>47</sup> One of the ways in which civil justice systems have tried to control costs is through FRCs. FRCs set out the

amount of legal costs that can be recovered by the winning party at different stages of litigation, from pre-issue to the court hearing.<sup>48</sup> A fundamental principle of FRCs is that the recoverable costs are ‘fixed’, so that parties have certainty as to the amount of costs they may recover, at different stages of litigation, when a judge allocates a claim to a particular band. FRCs are a defining feature of the German system and one which other European countries have adopted. FRC was also a major recommendation of Sir Rupert Jackson’s reforms,<sup>49</sup> and at the time of writing, the UK government is consulting on proposals to extend FRCs to higher value civil claims.<sup>50</sup> Although FRCs have obvious benefits for the parties, their lawyers and the wider civil justice system, it should not be perceived as a stand-alone procedural mechanisms which simply qualifies the costs of certain procedural steps. FRCs should be developed and implemented in tandem with other procedural innovations, reforms and funding options to truly enhance access to justice. Furthermore, developing DBAs in line with the UK government’s introduction of FRCs will bring about greater costs certainty and transparency for non-commercial clients. Similarly, Sorabji persuasively argues for the introduction of a mandatory before-the-event insurance scheme with FRCs and the abolition of costs shifting.

Although the principal policy rationale underpinning procedural reforms is to increase access to justice by controlling costs, there are potential dangers that those reforms may inadvertently undermine access. Take, for example, the recent proposal in America to introduce costs shifting in the discovery exercise. The American rule on costs in civil litigation is that each party is responsible for paying its own costs and legal fees, including those associated with discovery. However, because discovery is a major feature of American litigation and is likely its largest cost component, Rule 26 of the Federal Rules of Civil Procedure was amended in 2015 to make explicit the power of the trial judge to shift the responding party’s discovery costs to the requesting party. Although a major procedural reform in American civil procedure, Tidmarsh notes that a principal concern with the reform is the potential adverse impact it may have on access to justice. He explains that disputes involving asymmetrical information often involve a smaller or weaker party with little information suing a larger commercial party with more information. In this scenario, cost shifting may place a large financial burden on the weaker party, thereby deterring them from pursuing

46 European Parliament, Draft Report with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), 17 June 2021.

47 See the contribution of N. Kyriakides in this issue.

48 FRCs were first implemented for road traffic accident cases with a value of up to £10,000 damages in 2010.

49 Sir Rupert Jackson, *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* (2017), available at [www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf](http://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf) (last visited 19 May 2022). See also Lord Justice Jackson ‘Confronting Costs Management’, *Harbour Lecture* (13 May 2015); Lord Justice Jackson ‘Was It All Worth It?’, *Lecture to the Cambridge Law Faculty* (5 March 2018); and Sir Terrance Etherton MR, ‘Civil Justice After Jackson’, *Cockerton Memorial Lecture* (2019), Liverpool Law Society 15 March 2018.

50 See above n. 8.

their claims through the courts.<sup>51</sup> A further example of procedural innovations which may inadvertently undermine access to justice is the Disclosure Pilot Scheme (DPS),<sup>52</sup> which is currently operating in the Business and Property Courts of England and Wales. As with discovery in America, disclosure<sup>53</sup> in the English system has traditionally been an expensive and time-consuming process, both for the parties and the courts. The difficulties with disclosure were highlighted by the *RBS Rights Issue Litigation* in which Mr. Justice Hildyard severely rebuked the parties for ‘an unfocused disclosure process, which has fanned out exponentially and extravagantly without sufficient control and direction’.<sup>54</sup> In an effort to remedy these problems, the senior judiciary, in partnership with the profession and policy makers, introduced the DPS. In *UTB LLC v. Sheffield United Ltd*,<sup>55</sup> Sir Geoffrey Vos explained that the DPS was

intended to affect a culture change. The Pilot is not simply a rewrite of CPR Part 31. It operates along different lines driven by reasonableness and proportionality.

Despite the noble aims of the DPS, the profession has raised concerns. A recent evaluation<sup>56</sup> has revealed that compliance with the DPS is in fact undermining its objectives. The evaluation feedback revealed that 85% of respondents felt that complying with DPS had actually increased costs; 71% stated they believed the DPS increased the burden on court time and 78% did not identify any cultural change in the disclosure process following the introduction of the DPS. These findings are concerning given that the DPS has now been operating for over 2 years and has been adjusted and amended on several occasions. Despite these efforts, the DPS appears to suffer from the same problems as those associated with the traditional disclosure regime under CPR Part 31 – high costs, complexity of the system and delays – which all run counter to achieving greater access to justice.

## 5 Costs and Funding Implications of ADR

ADR procedures are an essential and necessary aspect of modern civil justice systems.<sup>57</sup> In addition to the economic and practical virtues of ADR, it also has, as noted earlier, the potential to transform the nature of civil justice by creating a justice system with diverse dispute resolution options and helping disputants to find the most suitable forum to fit their needs. Australia, for instance, has crafted a justice system which includes a range of dispute resolution services within the court process as well as outside of it, and Singapore will soon introduce compulsory ADR.<sup>58</sup>

Despite the economic and practical virtues of ADR, the power of the courts to penalise parties for unreasonably refusing to engage with ADR and the application of the factors which the courts use to assess unreasonable behaviour in refusing to engage with ADR (for example, the merits factor)<sup>59</sup> appear to have brought about greater complexity in the cost-effectiveness of ADR.<sup>60</sup> Quek Anderson argues that the expanded role of ADR in the civil justice system will have a positive impact on access to justice only when the court engages in a holistic and accurate assessment of the factors with an accurate comparison of the respective implications of ADR and litigation.<sup>61</sup>

A further point to note in respect of the English civil justice system is the inconsistent and divergent approaches taken by the courts on the issue of compulsory ADR, which further exacerbates the problems of determining the cost-effectiveness of ADR for the parties. The issue of whether the courts have the powers to compel parties and, more significantly, whether courts should exercise those powers, has been a controversial one which has resulted in two distinct and divergent judicial schools of thought: the ‘orthodox’ school of thought, which formally rejects the idea of compulsory ADR and seeks to uphold the right of litigants to go to trial, and the pro-ADR school of thought, which, although officially rejecting compulsory ADR, impliedly compels the parties to engage with ADR through the

51 See the contribution of J. Tidmarsh in this issue.

52 The Disclosure Pilot Scheme (DPS), introduced on 1 January 2019, pursuant to Practice Direction (PD) 51U of the Civil Procedure Rules. Various revisions have been made since the DPS was implemented.

53 CPR Part 31 sets out the rules on the disclosure and inspection of documents.

54 *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch).

55 *UTB LLC v. Sheffield United Ltd and others* [2019] EWHC 914 (Ch). See also *McParland & Partners Ltd and another v. Whitehead* [2020] EWHC 298 (Ch); *Lonestar Communications Corporation LLC v. Kaye and others* [2020] EWHC 1890 (Comm); *Energy Works (Hull) Ltd v. MW High Tech Projects UK Ltd and another* [2020] EWHC 1699 (TCC); *Pipia v. BGEO Group Ltd (formerly known as BGEO Group plc)* [2020] EWHC 402 (Comm); *Breitenbach and others v. Canaccord Genuity Financial Planning Ltd* [2020] EWHC 1355 (Ch); and *The State of Qatar v. Banque Havilland SA and others* [2020] EWHC 1248 (Comm).

56 The Third Interim Report on the Disclosure Pilot Scheme (25 February 2020), available [www.judiciary.uk/announcements/update-on-the-operation-of-the-disclosure-pilot-scheme-disclosure-pilot/](http://www.judiciary.uk/announcements/update-on-the-operation-of-the-disclosure-pilot-scheme-disclosure-pilot/) (last visited 19 May 2022).

57 B. Billingsley and M. Ahmed ‘Evolution Revolution & Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada’, 45(2) *Common Law World Review* 186 (2016).

58 See the contribution of Quek Anderson in this issue. Also, in other jurisdictions compulsory ADR is emerging, for instance, in Italy, Norway and Belgium. See X.E. Kramer, J. Hoevenaars & E. Themeli, ‘Frontiers in Civil Justice – Privatising, Digitising and Funding Justice’, in X.E. Kramer, J. Hoevenaars, B. Kas and E. Themeli (ed.), *Frontiers in Civil Justice Privatisation, Monetisation and Digitisation* (2022).

59 The factors used by the courts in assessing unreasonable refusal to engage with ADR were set out by the English Court of Appeal in *Halsey v. Milton Keynes General NHS Trust* [2004] 1 WLR 3002 – is the contribution by D. Quek Anderson for further details.

60 For a detailed critique of the Halsey ‘merits factor’ see M. Ahmed, ‘The Merits Factor in Assessing an Unreasonable Refusal of ADR: A Critique and a Proposal’, 8 *Journal of Business Law* 646 (2016).

61 See the contribution of Quek Anderson in this issue.



threat of cost sanctions.<sup>62</sup> The evolving ADR jurisprudence on the issue of compulsory ADR has been inconsistent and contradictory and sends out confusing messages to the profession on the extent of their ADR obligations. It also means that the courts are inconsistent in exercising their costs powers, which creates further complexity in assessing the overall cost-effectiveness of ADR for the civil justice system.

The Civil Justice Council's<sup>63</sup> recently concluded that compulsory ADR may not undermine the right to a fair trial where litigants are able to withdraw from the ADR process and continue to seek court adjudication, it will be for the senior judiciary to dismiss the orthodox approach to compulsory ADR. The Civil Justice Council's conclusions have been endorsed and supported by Sir Geoffrey Vos in his recent extra-judicial speech to the Chartered Institute of Arbitrators in which he argued that the question of compulsory mediation will become moot in the digital justice system that is currently being built.<sup>64</sup> However, the courts must grasp the *Halsey* nettle and finally and definitively dismiss the orthodox approach to compulsory ADR, thereby allowing a more consistent body of jurisprudence to develop. Until then, the jurisprudential inconsistencies will continue to undermine the ongoing reforms which seek to further integrate ADR procedures within a future online civil justice system.

The integration of ADR procedures within an online civil justice system may offer the greatest opportunity to fully realise the cost-effectiveness of ADR to the parties and the courts.<sup>65</sup> The fundamental aim of the current English reforms is to modernise the civil court process by moving away from an expensive, complex and slow paper-based system to an efficient online court process that is 'just, proportionate, and accessible to everyone'.<sup>66</sup> A number of recent online schemes have been implemented within the English civil justice system;<sup>67</sup> for ex-

ample, court users<sup>68</sup> are able to issue proceedings for money claims through the Online Civil Money Claims (OCMC),<sup>69</sup> which incorporates a mediation 'opt-out' stage before the parties are permitted to proceed to the final stage of judicial determination. The opt-out mediation stage of OCMC represents a significant judicial and policy shift which recognises the increasing significance of ADR in the resolution of disputes and gives practical effect to a wider understanding of access to justice. It also provides firm foundations to give practical effect to Sir Geoffrey Vos' future vision of an online justice system which will include sophisticated integrated ADR procedures. As Sir Geoffrey explained,

My vision for civil justice in England and Wales will allow all claimants to start their claims online, creating a single transferable data set, allowing vindication of legal rights either within the online space or, for the most intractable cases that are not resolved by mediated intervention, by the most efficient judicial resolution process.<sup>70</sup>

To help facilitate the digitisation of the civil courts, the UK government has very recently promulgated the Judicial Review and Courts Act 2022,<sup>71</sup> which will establish an Online Procedures Committee (OPC). The OPC will be responsible for drafting appropriate procedural rules so that 'disputes may be resolved quickly and efficiently ...'<sup>72</sup> through the online environment. Compare the wording of the 2022 Act with that of the Civil Procedure Act 1997, which, inter alia, established the Civil Procedure Rule Committee (CPRC) following the Woolf reforms of the 1990s.<sup>73</sup> Under s1(3) of the 1997 Act, the CPRC must exercise its powers 'with a view to *securing that the civil justice system is accessible, fair, and efficient*'.<sup>74</sup> The emphasis here is on access to the civil justice system in the traditional sense of access to the court and its procedures. The wording used in the 2022 Act clearly reflects policy objectives to modernise the civil justice system through the digitisation of its procedures and processes. It is particularly interesting to note that the powers of OPC must be exercised so disputes 'are resolved quickly and efficiently,' which reflects the wider understanding of the purpose of the civil justice system in providing parties with appropriate forms of dispute resolution procedures and therefore embodies a wider notion of access to justice.

62 See M. Ahmed, 'Formulating a More Principled Approach to ADR within the English Civil Justice System', in X.E. Kramer, J. Hoevenaars, B. Kas and E. Themeli (eds.), *Frontiers in Civil Justice Privatisation, Monetisation and Digitisation* (2022).

63 Civil Justice Council Compulsory ADR (June 2021), <https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf> (last visited 19 May 2022).

64 The Right Hon. Sir Geoffrey Vos Master of the Rolls 'Mandating Mediation: The Digital Solution' Chartered Institute of Arbitrators: Roebuck Lecture 8th June 2022.

65 Lord Justice Briggs, *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales, 2015); Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016); The Lord Chancellor, the Lord Chief Justice, and the Senior President of Tribunals, *Transforming Our Justice System* (September 2016), available at [www.gov.uk/government/publications/transforming-our-justice-system-joint-statement](http://www.gov.uk/government/publications/transforming-our-justice-system-joint-statement) (last visited 19 May 2022); HMCTS Chief Executive, Susan Acland-Hood, 'Modernising the Courts and Tribunal Service: Future of Justice Conference', (14 May 2018).

66 The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, *Transforming Our Justice System* September 2016 available at [www.gov.uk/government/publications/transforming-our-justice-system-joint-statement](http://www.gov.uk/government/publications/transforming-our-justice-system-joint-statement) (last visited 19 May 2022).

67 Other examples include the electronic filing of court documents (known as CE Filing) in the Business and Property Courts and the Supreme Court and the Disclosure Pilot in the Business and Property Courts.

68 Both litigants in person and legally represented court users.

69 Practice Direction 51R.

70 Sir Geoffrey Vos, Master of the Rolls, 'Reliable data and technology: the direction of travel for Civil Justice', *Law Society Webinar on Civil and Law-Tech* (Thursday 28 January 2021), available at [www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-reliable-data-and-technology-the-direction-of-travel-for-civil-justice/](http://www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-reliable-data-and-technology-the-direction-of-travel-for-civil-justice/) (last visited 19 May 2022). Add 2022 speeches including to Worshipful Soc of Arbitrators April 2022.

71 Judicial Review and Courts Act 2022.

72 s18(3)(c)

73 The Rt Hon Lord Woolf, *Access to Justice Interim Report* (Lord Chancellor's Department 1995); The Rt Hon Lord Woolf, *Access to Justice Final Report* (Lord Chancellor's Department 1996).

74 Emphasis added.



Finally, ADR may also complement and enhance the effectiveness of litigation funding models. Sorabji convincingly argues that a mandatory before-the-event expenses insurance scheme would need to be integrated within the wider English civil justice reforms and that distinct advantages of doing so would be to promote consistency across government and judicial policy, which would thereby promote the successful implementation of the new scheme, and the promotion of the principle of proportionality, which has been a central feature of English civil procedure.<sup>75</sup>

## 6 Conclusion

There is no doubt that enhancing access to justice remains a continuing challenge for most civil justice systems. The costs and procedural reforms and funding options have at their core the aim of bridging the justice gap left by the decline of civil legal aid, and they should be applauded for providing alternative means for parties to access justice. There are, however, legitimate concerns. Private funding options should be monitored and regulated so that they strike the correct balance between ensuring that they remain attractive to the litigation market and lawyers while at the same time protecting the interests of the parties and fulfilling the aim of increasing access to justice. This can only be achieved through constructive and continuing engagement between the private sector, policy makers, the profession and the judiciary. It is also important to avoid developing private funding options in isolation to other procedural reforms that are taking place in the civil justice system and vice versa; a wider approach should be taken whereby private funding models develop in tandem with procedural reforms, such as FRCs and ADR. Finally, policy makers and the judiciary must ensure that procedural reforms actually achieve their efficiency objectives rather than inadvertently increasing complexity, delay and costs, which are the enemies of justice.

<sup>75</sup> See the contribution of J. Sorabji in this issue.

# Legal Expenses Insurance and the Future of Effective Litigation Funding

John Sorabji\*

## Abstract

For nearly forty years, from the end of the 1940s, the primary form of litigation funding in England and Wales was civil legal aid. From the start of the 1980s, however, there has been a steady withdrawal from that model. Successive governments have reduced the amount of public funds committed to civil legal aid, while also removing significant areas of law from its scope. In tandem with the winnowing away of legal aid has been the promotion of a number of forms of private litigation funding through statutory reform and common law developments. One form of funding has not, however, been subject to promotion by either the government or the judiciary: before-the-event legal expenses insurance. This article looks at the potential role that such legal expenses insurance could have as the primary form of litigation funding in the future.

**Keywords:** litigation funding, legal expenses insurance, mandatory insurance.

## 1 Introduction

Litigation funding in England and Wales is at a crossroads. Since the 1940s the primary means by which individuals, who could not afford to litigate, were able to secure effective access to justice was, broadly, through being able to draw on a publicly funded civil legal aid scheme.<sup>1</sup> Public funding was the paradigm. By 2016, that paradigm was no longer in place. As Smith put it, that post-War system was ‘*bust*’;<sup>2</sup> both political support for civil legal aid had declined substantially and financial provision by the state to the scheme had been reduced to the lowest possible level. In effect, civil legal aid had been cut to ‘*the lowest level of service that [would] comply with [the UK’s] minimum obligations under the European Convention on Human Rights at the least possible cost*’.<sup>3</sup>

This had been achieved by UK governments from the 1990s successively reducing the level of legal aid funding available, while promoting its replacement by private funding mechanisms.<sup>4</sup> The one such area where there has, however, been no real development in terms of litigation funding is the use of before-the-event (BTE) legal expenses insurance, that is to say, insurance taken out before an individual suffers the insured harm. The only significant attempt to consider the issue was carried out by the Civil Justice Council in 2017.<sup>5</sup> It, however, did no more than carry out an evidential study on the limited extent to which BTE insurance was currently in use as a means of litigation funding in England.<sup>6</sup> It made no significant reform recommendations.<sup>7</sup> BTE insurance is in contrast to after-the-event legal expenses insurance or ATE insurance, which is taken out after an individual has suffered the relevant harm as a means, in the context of litigation, to provide cover for any adverse legal costs that may accrue further to the litigation. This article focuses on BTE insurance.

Notwithstanding these various reforms, which have focused on private funding mechanisms, no comprehensive reappraisal of the state’s approach to litigation funding has been carried out. While the Bach Commission recommended the reinvigoration of legal aid in 2017,<sup>8</sup> there appears little prospect at present that that

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1 The introduction of legal aid schemes across the world as a means to secure practical and effective access to justice, and equality before the law for all citizens, is properly noted to form the first wave of the post-1945 ‘Access to Justice Movement’. See, for instance, B. Garth & M. Cappelletti, *Access to Justice, the Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *Buffalo Law Review* 181 (1978).

2 R. Smith, *Evidence to the Access to Justice Commission* (31 March 2016).

3 R. Smith, ‘After the Act: What Future for Legal Aid?’, *Justice Tom Sargant Annual Lecture 2012* at 2 (2012) [www.justice.org.uk/data/files/resources/332/After-the-Act-what-future-for-legal-aid.pdf](http://www.justice.org.uk/data/files/resources/332/After-the-Act-what-future-for-legal-aid.pdf).

4 See J. Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No Win No Fee Funding*, (2012).

5 Civil Justice Council, *The Law and Practicalities of Before-The-Event (BTE) Insurance – An Information Study* (2017) [www.judiciary.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf](http://www.judiciary.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf). Some limited consideration had been given to the broader issue of BTE insurance in R. Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009) (The Jackson Costs Review) Vol. I, chapter 13. It yielded no real reform recommendation in the *Final Report* (December 2009), chapter 8.

6 Civil Justice Council, *ibid.*, at 90 and following, provides details concerning the extent to which BTE legal expenses insurance is currently available in England. Typical examples of its availability are through mandatory car insurance policies or through home contents insurance policies. Such policies typical cover, for instance, legal expenses concerning road traffic accident claims, home insurance claims and employment law disputes.

7 An examination of how BTE legal expenses insurance could be developed in respect of personal injury litigation was, however, set out after the Jackson Costs Review; see R. Lewis, ‘Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?’, 74(2) *Modern Law Review* 272 (2011).

8 The Bach Commission on Access to Justice, *The Crisis in the Justice System in England and Wales – Final Report* (Fabian Society) (2017). The Bach Commission was established by the Fabian Society at the request of Jeremy Corbyn, MP, then leader of the Labour Party, and Lord Falconer, then shadow Lord Chancellor in 2015. It was to undertake a review of the legal aid system. Its principal recommendation was that a ‘Right to Justice Act’ be

will come to pass. The trend does seem to be, as Smith indicated, that the age of legal aid has passed. This article is based on that assumption being correct. It takes it as a given that the UK government will not undo the reforms of the last thirty years and reinstate a comprehensive legal aid scheme (not that the provision of civil legal aid was ever fully comprehensive). It takes as its starting point that there is a need to reconsider how the state makes provision for litigation funding. Its focus is that the state could put in place a comprehensive litigation funding scheme available to all its citizens: one that is therefore more comprehensive in scope than the provision of civil legal aid was from its inception up to 2013.

The basis of such a scheme would be mandatory BTE legal expenses insurance. This article outlines the scheme and the building blocks necessary to give effect to it. As such, it first situates the proposal in the context of the move from legal aid to private litigation funding mechanisms in England and Wales. It then elaborates the nature and scope of the scheme. Having done so, it considers what is necessary to put such a scheme in place: the introduction of fixed recoverable costs and the abolition of costs-shifting. It concludes by looking at the final building block of such an approach: the introduction of mandatory alternative dispute resolution (ADR). The aim is to provide a template for the introduction of a litigation funding scheme to secure effective access to justice for individuals in England and Wales that is based on state regulation, individual responsibility and state assistance where necessary.

## 2 The Background to Reform

England and Wales has a long tradition of providing some degree of assistance to the impecunious to enable them to litigate and thus achieve a degree of access to justice. Until the 1940s the main method through which this was achieved was known as the *in forma pauperis* procedure.<sup>9</sup> This was a limited power that enabled courts to direct, by order, that individuals who could not afford to hire lawyers could be represented free of charge. It also provided for the remission of court fees. It was most famously relied on in the case of *Donoghue v. Stevenson* [1932] AC 562,<sup>10</sup> which is the foundational basis for the modern tort of negligence in the UK. Apart from that specific instance of its use, it did not provide anything

approaching a comprehensive approach to litigation funding. It was, for instance, subject to a £25 means-test in terms of the litigant's capital, an earnings means-test, and the need to obtain an opinion from Counsel that their claim or defence had merit. If these criteria were satisfied the applicant needed to find a solicitor willing to act free of charge, and they remained liable to pay for disbursements, e.g. the cost of, for instance, experts' reports. Moreover, it required an applicant to characterise themselves publicly as a 'pauper', which, as Goriely notes, carried with it such a degree of social stigma that it acted as a disincentive to resort to the procedure. Given these factors, individuals rarely resorted to it.<sup>11</sup> With the development of the UK's welfare state in the 1940s, this process was, following recommendations by the Rushcliffe Committee, replaced by a publicly funded legal aid scheme: the Legal Aid and Advice Act 1949.<sup>12</sup> From then until the early 1990s, legal aid was the main form by which the state provided legal assistance to individuals who had meritorious civil (and criminal and family) claims with litigation funding.

While the scope of application of civil legal aid was never fully comprehensive, i.e., it never applied to all causes of action, it was significant. As the Bach Commission noted in 2016, '*In the 1980s, around 80 per cent of households were eligible to civil legal aid...*'<sup>13</sup> That was, however, its zenith. From that point onwards, successive governments have pursued a common objective: the reduction of civil legal aid and its replacement by privately funded forms of litigation funding. Put broadly, the main reasons for this shift from public to private funding were the following: concerns that legal aid, and particularly criminal legal aid, was an increasing burden on public expenditure;<sup>14</sup> a political shift away from the welfare state, as evidenced by the privatisation of nationalised industries during and after the 1980s; and, as Hynes and Robins put it, it is an issue that does not attract the attention or concern of the public and can thus more easily form the focus of governmental budget reductions.<sup>15</sup> Moreover, as Genn has argued cogently, the view was taken by successive governments that the civil justice system simply provided the means to confer private benefits, i.e., consumer benefits, on individuals rather than as a means by which the state gave effect to the rule of law through rights-vindication.<sup>16</sup> This view made the necessity of financial assistance by the state difficult to justify. These various shifts in perspective saw the reduction of legal aid matched by the legalisation of previ-

introduced, which would enshrine a legal right to reasonable and affordable legal assistance. While this was to be achieved through reform to civil legal aid, it did not recommend that that reform render access to civil legal aid universal or that it should apply to all civil causes of action. It was, in essence, a recommendation to recreate, with some enhancements, civil legal aid as it was before 2013: see the *Final Report*, at 7-9.

9 *Brunt v. Wardle* 133 Eng. Rep. 1254, 1257; 11 Hen. VII, c.12 (1494); 23 Hen. VIII, c.15 (1531). For a discussion of the process, see R. Egerton, *Legal Aid* (1998).

10 As noted in E. Ryder, *Slaying The Sixth Giant: The Denial Of Justice* (November 2019), at [4] [www.judiciary.uk/wp-content/uploads/2019/12/2019\\_17\\_12\\_-SPT-Speech-Bolton.pdf](http://www.judiciary.uk/wp-content/uploads/2019/12/2019_17_12_-SPT-Speech-Bolton.pdf).

11 T. Goriely, 'Gratuitous Assistance to the "ill-dressed": Debating Civil Legal aid in England and Wales from 1914 to 1939', 13(1) *International Journal of the Legal Profession* 41, at 42-3 (2006).

12 See, W. Jowitt, 'Legal Aid in England', 24 *New York University Law Quarterly Review* 757 (1949); A. Elson, 'The Rushcliffe Report', 13(2) *University of Chicago Law Review* 131 (1946).

13 The Bach Commission on Access to Justice, *The Crisis in the Justice System in England and Wales - Interim Report* (Fabian Society) (2016), at 8.

14 For a detailed outline of the expansion and retreat of legal aid, see Sir Henry Brooke, *The History of Legal Aid - 1945 to 2010* (2016) [https://sirhenrybrooke.me/2016/07/16/the-history-of-legal-aid-1945-to-2010/#\\_ftn1](https://sirhenrybrooke.me/2016/07/16/the-history-of-legal-aid-1945-to-2010/#_ftn1).

15 J. Hynes & S. Robins, *The Justice Gap* (2009), at 22.

16 H. Genn, *Judging Civil Justice* (Hamlyn Lectures) (2010).



ously prohibited forms of litigation funding. In 1990, a form of contingency fee agreement, the conditional fee agreement or CFA,<sup>17</sup> was introduced by the Courts and Legal Services Act 1990<sup>18</sup>. CFAs were subject to expansion in 1999<sup>19</sup> and were, at that time, to be supplemented by the legalisation of statutorily regulated third party litigation funding.<sup>20</sup> The latter statutory scheme was not, however, introduced. The courts, eventually, in 2004, developed the common law to permit the use of third party litigation funding on the ground that it promoted access to justice.<sup>21</sup>

In 2013, as part of a series of reforms intended to reduce the cost of civil litigation, this trend reached its own zenith via the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): CFAs were subject to statutory reform, a further form of a contingency fee agreement was introduced, the damages-based agreement or DBA,<sup>22</sup> and civil legal aid was subject to a final round of swingeing reductions.<sup>23</sup> The upshot of this was that civil legal aid was available to less than a third of the population and, that too, in a limited number of areas. As the Bach Commission explained it,

LASPO has accelerated a longstanding crisis in the numbers of people entitled to legal aid. In the 1980s, around 80 per cent of households were eligible to civil legal aid, but by 2008 that figure had dropped to 29 per cent. LASPO has further worsened the situation

by removing most cases involving housing, welfare, debt, immigration, employment and medical negligence law from scope. Hundreds of thousands are now going without the legal aid they require. The number of litigants in person is rising, and the number of 'acts of assistance' granted through legal aid has been falling consistently since 2009/10. While a figure that does not differentiate between assisting with simpler and more complex cases, it nevertheless provides an indication of the overall decline in levels of legal aid assistance.<sup>24</sup>

Civil legal aid's reduction in scope may, arguably, have been mitigated if the private funding mechanisms did provide an effective replacement for it. That, however, has not been the case. If it had been, there would not, for instance, have been a growth in the number of individuals who have had to litigate without legal assistance (litigants-in-person), as the Bach Commission noted.<sup>25</sup> That ought to be unsurprising. CFAs and DBAs operate effectively, in so far as they do, where a claimant is likely to receive significant damages and thus be able to use those funds to reimburse any sums due to their lawyers from them. Third party funding operates effectively only in particularly high value claims, such as to justify a commercial third party funder providing the resources to enable individuals to litigate.

The background, then, from 1990 has been one of a sharp reduction of civil legal aid and its attempted replacement with private funding mechanisms. The upshot, however, has been the growth of litigants-in-person and, in many cases, individuals not litigating at all. In both cases we see a reduction in access to justice. Notwithstanding the Bach Commission and its recommendation to reinvigorate the provision of legal aid, there is no apparent government appetite to do so. Even if there were, it is not necessarily the case that a legal aid scheme consistent with the one in place prior to 1990 would present an optimal approach to the provision of financial assistance to impecunious litigants. Rather than reinvigorate civil legal aid, a better approach may be to reform the provision of legal expenses insurance.

17 CFAs, as originally introduced, enabled litigants to instruct lawyers on the basis that they would become responsible for paying them only in the event that their claims succeeded. In the event that they lost no payment was due. If, however, they succeeded, the lawyer became entitled to their normal fee and an additional success fee. Their client was responsible for paying both aspects of their lawyer's fees.

18 Courts and Legal Services Act 1990, s.58.

19 Access to Justice Act 1999, s.27. The expansion was intended to make reliance on them more attractive. This was to be achieved by providing that the success fee (as well as insurance premiums payable by litigants for policies that covered their potential liability for adverse costs awards) could be recovered from, i.e., paid for by, the losing party to litigation. The consequences of this reform were to result in an era of satellite costs litigation in which losing defendants sought to avoid liability for such additional payments. The upshot was, ultimately, the reform, following on from the Jackson Costs Review, of the abolition of success fee recovery via LASPO. For an overview of the adverse consequences of this reform see, for instance, S. Kalish, 'The English Costs War, 2000-2003, and a Moment of Repose', 83 *Nebraska Law Review* 114 (2004); D. Marshall, 'A Short History of the Costs Wars', 20(4) *APIL Focus* 24 (2010).

20 Access to Justice Act 1999, s.28.

21 *Gulf Azov Shipping Co Ltd v. Idisi* [2004] EWCA Civ 92 at [54].

22 DBAs were a product of the Jackson Costs Review introduced by LASPO, s.45. They are intended to operate, as with a CFA, on a contingency basis. In this case a client agrees to pay their lawyer a percentage of any damages they recover in the event of success in litigation. The percentage is over and above the lawyer's normal hourly billed fees, which are recoverable, in principle, via the normal cost-shifting rule from the losing party. The success fee is not recoverable from the losing party. In the event that they do not succeed, no fee becomes due. This form of contingency fee has, in England and Wales, been little utilised owing to defects in the legislation that introduced it. See, further, *The Damages-Based Agreements Reform Project* [www.qmul.ac.uk/law/research/impact/dbarp/](http://www.qmul.ac.uk/law/research/impact/dbarp/).

23 Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part 2 and Schedule 1 (list of areas not covered by public funding). For a summary of the developments in litigation funding from 1990 to 2021, see A. Zuckerman, *Zuckerman on Civil Procedure – Principles of Practice* (2020) at 1495 and following, and 1557.

24 The Bach Commission on Access to Justice, *The Crisis in the Justice System in England and Wales – Interim Report* (2016), at 8. Further criticisms of the approach taken to reduce civil legal aid by LASPO were made by the National Audit Office in its consideration of those reforms: National Audit Office, *Implementing Reforms to Civil Legal Aid* (HC 784 SESSION 2014-15 20 November 2014) [www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf](http://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf); and see, N. Byrom, 'Cuts to Civil Legal Aid and the Identity Crisis in Lawyering: Lessons from the Experience of England and Wales', in A. Flynn & J. Hodgson (eds.), *Access to Justice and Legal Aid* (2017).

25 *Ibid.*, at 8 and following.

### 3 The Scope of the Proposed Legal Expenses Insurance Scheme

Having set out the background and raised the issue of the replacement of civil legal aid and its privately funded alternatives by a reinvigorated BTE legal expenses insurance scheme, the question is, what characteristics should such a scheme have. Particularly, what characteristics should it have that would make it an improvement on civil legal aid.

The starting point is to take account of the fact that civil legal aid was based on the proposition that no one should be denied access to justice, and equality of arms in litigation, on grounds of impecuniosity. It helped to transform those aspects of the right to fair trial from being mere theoretical commitments into real and practical ones.<sup>26</sup> It did so in classic welfare state terms by providing, via general taxation, a fund on which individuals could draw to finance civil litigation if their claim passed a merits test. Access to civil legal aid was not available to all cases irrespective of their merit. Only those claims that were, and are, assessed to pass a merits test were eligible for the scheme. Equally, those who could draw on the scheme had to demonstrate need, i.e., a specific degree of impecuniosity was and is required.<sup>27</sup> If we are to replace civil legal aid with a funding regime that is better than it, the starting point must be that it provides equal or better provision.

It was previously noted that civil legal aid was never fully comprehensive in terms of its scope. Nor did it ever apply to all citizens in England and Wales. It was not, unlike the National Health Service (in principle at least), universal. One clear way in which a reinvigorated legal expenses insurance scheme could improve on civil legal aid, and its privately funded alternatives, is to ensure that it is universal. It ought, therefore, to be available to all forms of civil claim; i.e., its substantive scope ought to be wider than that available now or at any time under the legal aid scheme. In addition, it ought to be available to all citizens, should they choose to use it. It should thus be universal both in scope and in coverage. As an insurance scheme that is to secure universal coverage, membership will need to be mandatory. A permissive scheme, which individuals could join if they chose to do so, would be unlikely to ever approach universality. Many individuals are, as where healthcare provision is concerned, likely to adopt the attitude that they are unlikely to ever need such insurance cover. They are thus unlikely to join the scheme. Moreover, an optional scheme is also one, as is the case in Germany, where before-the-event legal expenses insurance is optional, that is likely to attract those with higher incomes rather than those with lower incomes; i.e., it will do little if anything to secure effective access to justice for all, par-

ticularly the impecunious.<sup>28</sup> Failure to join the scheme, in the absence of viable funding mechanisms, would thus leave many citizens when, and if, the need arose for their rights to be vindicated, unable to secure effective access to justice. A mandatory scheme would overcome this problem. It would ensure that it was available whenever necessary to any citizen.

Ensuring that the scheme was mandatory would have another advantage. As has been argued before in the context of both mandatory health insurance schemes and mandatory publicly funded legal expenses insurance schemes, the mandatory nature of such a scheme ensures that the insurance premiums are kept as low as possible. As Choudhry, Trebilcock and James have argued, where legal expenses insurance is mandatory across society, a diverse risk pool is created.<sup>29</sup> It will ensure that individuals who are at low risk of having to call on the fund are part of the scheme, just as those who are at higher risk are part of it. It will thus remove the possibility that those who are low risk refuse to take part in the scheme, thus leaving those who are at higher risk seeking entry to the scheme. Should that happen, and the scheme be one that only those with a high risk of having to draw on the legal expenses insurance contributing to it, individual insurance premiums are likely to be high. High premiums are likely to price the impecunious out of the scheme. A mandatory universal scheme would thus help to promote lower insurance premiums for all members of the scheme, thus enabling its price to be within the range of the majority of society. This links to two further features of the scheme.

First, it helps address the question of how premiums are to be funded for those who are unemployed, who are in receipt of some form of welfare benefit or who are children. In order to ensure that the scheme is universal, such individuals must come within the scheme. The general principle underpinning payment of premiums ought to be, as Butler argued in respect of mandatory health insurance, that it is primarily the responsibility of individuals to put in place adequate provision to enable them to vindicate their rights: to ‘*avoid placing demands on society by protecting*’ themselves.<sup>30</sup> Linked to that, however, is the principle, as he puts it, that society is under a moral obligation to ensure that its members do not suffer from the absence of effective access to justice.<sup>31</sup> Consistently with these points, those who can afford the price of premiums ought to be responsible for their payment; i.e., mandatory membership of the scheme is married with the mandatory requirement to pay the premiums. However, consistently with the second point, society ought to take responsibility for paying (through general taxation) the premiums of those individuals who cannot afford to do so for the reasons

26 *Airey v. Ireland* (1979) 2 EHRR 305.

27 As discussed in Zuckerman, above n. 23, at 1558.

28 As noted in S. Choudhry et al., ‘Growing Legal Aid in Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance’, in M. Trebilcock et al. (eds.), *Middle Income Access to Justice* (2012), at 396.

29 *Ibid.*

30 S. Butler, *Assuring Affordable Healthcare for All Americans*, The Heritage Lectures (2018), at 6.

31 *Ibid.*, makes the same point, but for the ‘*unavailability of health care*’.

noted previously, i.e., they are unemployed, they are social welfare recipients, or they are children whose parents are unable to pay their premiums for the foregoing two reasons.<sup>32</sup>

Secondly, the mandatory scheme would provide a mandatory minimum level of provision. A mandatory universal scheme ought to provide the basis for a low premium scheme because low-risk scheme members should outnumber the high-risk members. Given a low premium structure, the possibility of citizen choice and competition between legal expenses insurance providers could be stimulated. Both arise from the possibility that different levels of insurance cover could be developed above the mandatory minimum level of cover. Higher premiums could be charged for additional levels of coverage, e.g., for a higher coverage ceiling, which could enable the insured to instruct a wider range of lawyers. The range of lawyers would then be determined by their charging rates and the amount of cover the insured has obtained. It could thus help to promote not only effective access to justice but also a wider range of choice for individuals over their legal representative.

It is important to note here that the proposal does not envisage, as has been suggested by Choudhry, Trebilcock and James, for instance, that such a mandatory scheme be operated by the state.<sup>33</sup> They raise the question, in respect of their proposal for the creation in Canada of a mandatory BTE legal expenses insurance scheme, whether it should be operated by a public body or not. The main advantage of a single, state-run body, being responsible for the scheme would undoubtedly be that it would maximise diversity across the risk profile of insured members of the public. It would thus help to promote a low level of premium. If a number of competing private insurers operated in the market owing to their numbers they may not have a sufficient risk profile among their insured to enable them to provide as low a level of premium. That advantage could, however, be overcome through the fact of competition in the insurance market. A number of private insurers competing for insureds could lead to them offering a range of policies and premiums that are targeted to maximise individuals taking out their policy with them. Competition could produce better results in terms of premium prices than a monopoly or single dominant state-run insurance provided.

There are further problems with the single-state run insurance provider option. First, as with other monopolies or near monopolies, it could stifle innovation in the insurance marketplace. On its own a single-state-run insurer would have little incentive to innovate in its provision of insurance policies. Equally, if it were the domi-

nant player in the market, it would have little incentive to innovate. Secondly, a single-state-run insurer could lead to private sector insurers exiting the market or choosing not to enter it. This would particularly be the case if the means by which individuals were required to take out their policies was achieved through auto-enrolment in a basic policy provided by the state body.<sup>34</sup> If auto-enrolment operated in that way, there would likely be a real problem in terms of individual insureds moving to other insurers after they had been auto-enrolled in the default policy. If private insurers offered equivalent default policies, the insured would have no incentive to move provider. If they offered different and better policies, they would still have to overcome the incumbency effect that would favour insureds remaining with the state-run insurer. In both situations, in addition to a reduction in innovation, the reduction in competition could harm the development of a BTE insurance market that offered a range of policies at a range of prices, and through competition helped to keep insurance premiums low to the benefit of insureds and the state itself.

Secondly, and looking wider than the insurance market, if a single entity, state-owned or run or otherwise, were responsible for all of the BTE insurance policies that would transform it into the monopoly or near monopoly supplier of instructions to law firms, it would make those law firms dependent on the state for their work. In principle, such a consequence is difficult to reconcile with the principle, implicit in the constitutional commitment to the rule of law, of independence of the legal profession from the state.<sup>35</sup> It is because financial dependence on the state could be used to influence both how the legal profession is structured – it could be used to promote consolidation of the profession and thus reduce competition, which in turn could result in a loss of client choice and a reduction in standards of service and innovation in the legal services market – and how it deals with types of cases. In the latter respect, such influence could be brought to bear on decisions relating to the management of claims and decisions concerning when and on what basis to settle. No doubt, regulatory measures could be put in place to limit the possibility that adverse practical consequences might flow from a single state-run BTE provider acting as a monopoly supplier of instructions and funding to law firms. Such measures would not, however, overcome the principled objection that no single entity should be in such a position as to render the legal profession dependent on it. Regulatory measures might mitigate the possibility that such a monopoly position might be abused, but it is doubtful that they could properly limit the more subtle influence that it could have on lawyer behaviour.

32 Choudhry et al., above n. 28, raise the concern that state-funded premiums may be more expensive than previous legal aid schemes. A mandatory national scheme ought, however, to produce sufficiently low premium levels such that that result is not realised, particularly where the civil justice system is, as now, subject to significant digitisation reforms to reduce its cost and which also promote effective pre-action dispute resolution such as that noted later regarding multi-tier dispute resolution.

33 Choudhry et al., above n. 28.

34 The use of a default option would arise through auto-enrolment. In order to ensure that everyone was brought within the scheme, i.e. to ensure that it was a mandatory scheme, there would be a need to ensure that policies were taken out each year. This could be done, as it is done through the auto-enrolment scheme for workplace pensions (see [www.gov.uk/workplace-pensions](http://www.gov.uk/workplace-pensions)), through auto-enrolment with a single insurance provider.

35 Constitutional Reform Act 2005, s.1; Legal Services Act 2007, s.1(1)(b) and (f).



The better approach to developing the provision of a mandatory scheme would be to provide for its administration by as wide a range of private sector insurers as possible, subject to regulatory oversight, as is the case for the insurance industry generally.<sup>36</sup> Auto-enrolment into the baseline scheme could be achieved through the creation of a central insurance exchange with which each member of the public was to be registered, which would automatically allocate those individuals who did not choose their provider with one of the insurers randomly. Such random allocation would, however, need to be calibrated so that it maintained diversity in the risk pool for each insurer. Such exchanges could also provide information from each of the insurers in the market as to the other policies they offered over and above the baseline and the premiums applicable to them. Thus, it could facilitate more effective competition in the market in terms of policy and price. Such an approach would also not raise the problem of a single insurer securing a position vis-a-vis law firms such that they became dependent on it, and thus susceptible to influence from it. It would thus also help to maintain a healthy, independent, legal sector.

The proposed approach to litigation funding would thus see the state mandate every individual in England and Wales to take out BTE legal expenses insurance to cover all civil legal claims with a private sector insurance provider. They would have to take out a minimum level of insurance, although they could opt for higher levels of cover. Where an individual could not afford to pay the premium either because of unemployment or because they were in receipt of welfare benefits, the state would provide them with the means to pay. Thereby, the scheme would be universal in scope and applicability. It would be such as could attract lower premiums than if it was an optional scheme. It would give primacy to individual responsibility to secure effective access to justice, while minimising their need to draw on the state for support. And, importantly, it would ensure that society also fulfilled its duty not only to provide an effective framework to secure access but also to assist those who could not otherwise afford the premiums. It should also be noted that the introduction of such a scheme ought to be without prejudice to the continued development of other forms of private litigation funding. As with any other insurance policy, there ought to be no requirement to draw on it. Individuals ought to continue to be able to choose whether to utilise one of the other forms of litigation funding. Having outlined the nature of the proposed mandatory scheme, the question arises as to what needs to be put in place within the structure of the civil justice system to facilitate its creation. This is examined next.

36 Regulation is carried out by, for instance, the Prudential Regulatory Authority. Regulation of mandatory BTE legal expenses insurance policies could come within its remit. Equally, it could come with an expanded remit for the Legal Services Board, the oversight regulator for the legal profession in tandem with the Prudential Regulatory Authority.

## 4 The Search for Predictability

The main structural difficulty within the civil justice system that the introduction of a comprehensive mandatory insurance scheme faces is the unpredictability of litigation costs. As is well known, the default position in England and Wales is that the loser-pays rule applies: the losing party in litigation is required to indemnify the successful party in respect of the costs they incurred as a result of having to litigate. Losing parties are thus required to pay their own legal expenses as well as those, as assessed by the court as reasonable and proportionate,<sup>37</sup> incurred by their opponent. While litigants have the ability to control their own costs, they have little ability to control the costs incurred by their opponent. This poses a problem for the development of an effective mandatory BTE legal expenses insurance scheme. As Peysner has argued, a precondition for the development of such schemes is predictability. Absent predictability such schemes cannot develop.

the basic problem is that you can't inject BTE insurance into an environment where costs remain uncertain.<sup>38</sup>

Peysner has cogently set out how this point is borne out by the evidence from jurisdictions where there are healthy, voluntary, BTE legal expenses insurance markets.<sup>39</sup> In Germany, for instance, where there is a well-established fixed recoverable costs regime for civil litigation, there is a well-developed BTE legal expenses insurance market, which, as Peysner has argued, is an underpinning of its development.<sup>40</sup> Predictability in terms of potential costs risk enables insurance providers to assess and price risk effectively. Unpredictability provides for the opposite, and where it is difficult to assess risk insurance premiums are likely to be high if insurance is available at all.

If a mandatory BTE legal expenses insurance scheme is to be capable of effective introduction in England and Wales, costs predictability is likely to be required. To a certain extent reforms over the last eight years have moved significantly towards improving costs predictability. At the same time as LASPO was introduced, changes were made to the Civil Procedure Rules to introduce prospective costs management.<sup>41</sup> This requires parties to litigation to seek to agree an overall budget

37 CPR r.44.3.

38 J. Peysner cited in J. Robins, 'Legal Insurance – Will Britain Buy It', *The Guardian* (28 May 2010) [www.theguardian.com/law/2010/may/28/legal-insurance-uk-germany](http://www.theguardian.com/law/2010/may/28/legal-insurance-uk-germany).

39 Also see B. Hess & R. Hubner, 'Germany – National Report', in C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation – A Comparative Perspective* (2010), at 348-49; Lewis, above n. 7, at 278.

40 As Peysner notes, Germany's fixed recoverability regime has been in place since the 19th century. It has thus been in place for as long as Germany has promoted the use of BTE legal expenses insurance and is one of the bases on which it has developed. And see J. Peysner, *Costs in Personal Injury Cases: Searching for Predictable Costs*, *Journal of Personal Injury Law*, (2002) (2/2) 166.

41 CPR Pt 3, Section II.

for the litigation at the start of proceedings, which is then subject to court approval. Variations to the budget are intended to be allowed rarely. The approved budget provides the basis for cost recovery at the conclusion of proceedings. This, in principle, imposes greater discipline on parties in terms of work done during the litigation and thus provides greater clarity and predictability as to the overall potential costs of litigation. Equally, there has been an expansion of fixed recoverable cost regimes. The CPR, when it was introduced, operated two fixed recoverable costs regimes, one on the small claims track and the other on the fast track.<sup>42</sup> Those regimes have been bolstered by the expansion of fixed recoverable costs regimes for a number of specific types of claim, e.g. personal injury claims arising from road traffic accidents, employers' liability and public liability claims, low-value intellectual property claims, and certain claims involving HM Customs and Revenue.<sup>43</sup> In September 2021, after thirty years of attempted reform to introduce a general fixed recoverable cost regime, the UK government announced that it would introduce such a regime for civil claims up to a value of £100,000.<sup>44</sup> In all likelihood, by the end of 2022 England and Wales will have not only a generally applicable fixed recoverable cost regime but also, where that does not apply, an established costs management regime. Both ought to play an important part in giving English and Welsh litigation a similar degree of costs predictability to that in place in Germany through the operation of its fixed recoverability regime. The problem identified by Peysner as lying behind the lack of a well-developed legal expenses insurance market would thus have been resolved.

While the introduction of fixed recoverability ought to put England and Wales in a position to develop such an insurance market, it may not be sufficient to provide a basis for a viable mandatory BTE legal expenses insurance scheme. For that something more may be necessary. Fixed recoverability's expansion may provide predictability, but it may not necessarily produce a level of fee recoverability that would enable a mandatory scheme to operate effectively. This may be the case owing to the fact of recoverability. The possibility of costs liability, even at a fixed and predictable rate, may result in insurance premiums for a mandatory scheme to be set at a level that would make the scheme politically problematic and less acceptable to the public. If the state is to mandate payment of insurance premiums, it ought reasonably to take such steps as are necessary to minimise the likely cost of such premiums for individuals and for the taxpayer; the latter of whom is to be responsible for payment of the premiums of individuals, noted before, who are unable to pay them.

In order to minimise the likely cost of litigation rather than a scheme of fixed recoverability, it may be necessary to abolish the English cost-shifting rule. In other words, rather than continue with the current scheme of fixed recoverability, it may be necessary to move to a fixed fee regime where there is no possibility of costs recoverability. In that way, insurance premiums could be set at a lower level than would otherwise be the case as each insured would only have to bear their own, predictable, fixed litigation costs. Such an approach would be far more transparent, as Zuckerman notes, than the current approach even within a system of fixed recoverability.<sup>45</sup> Equally, it would have the important advantage of completely eliminating from English and Welsh litigation satellite litigation over costs.<sup>46</sup> On its own, fixed recoverability would not completely eliminate such litigation. As such, the possibility of such costs, and their potential extent, would need to be factored into any assessment of the level at which a mandatory insurance premium were to be set.

Currently, it is, however, likely that an argument to abolish cost recoverability would be resisted. It was a matter not, for instance, considered to any real degree by the last significant reform of civil litigation costs, even though the issue was clearly within those reforms' terms of reference.<sup>47</sup> It has recently been said to be an 'unrealistic' prospect.<sup>48</sup> Such resistance should, however, be contextualised. It stems from the status quo. It does not take account of any consideration of reform in the broader context of a significant shift in the approach taken to litigation funding. Viewed as a reform to be carried out separately from any reform to litigation funding, it is reasonable to accept that the abolition of cost-shifting is unrealistic. As part of a coherent package to reform litigation funding, the prospect of its abolition may not be so unrealistic. On the contrary, if understood to be an essential element of those reforms, its abolition could be entirely realistic and reasonable. Of course, whether that is the case depends on a broad political acceptance of the case for giving effect to the right of access to justice through a mandatory BTE insurance scheme. That case has not yet been made; it is not yet an issue that has been raised in the UK.

What can be said at this stage is that the advent of fixed recoverability, as noted by representatives of the insurance industry in 2017,<sup>49</sup> is already anticipated to reduce the level of existing voluntary BTE legal expenses insurance premiums. Increasing the level of certainty in costs further by abolishing cost-shifting, while lowering potential costs by eliminating the possibility of costs liti-

42 CPR Pt 27 and Pt 28.

43 For a discussion see Zuckerman, above n. 23, at 1490 and following.

44 For a discussion of the history of this approach, see: J. Sorabji, 'The Long Struggle for Fixed Cost Reform', in A. Higgins (ed.), *The Civil Procedure Rules* (2020), at 20. And see Ministry of Justice, *Extending Fixed Recoverable Costs in Civil Cases: The Government Response* (September 2021).

45 Zuckerman, above n. 23, at 1563.

46 Ibid.

47 Ibid., noting Jackson, above n. 5, Vol. I, Chapter 46. As Lord Clarke MR, who set the terms of reference for the Review, noted, it was to 'address the indemnity rule. [And would] do so with an open mind ...'; see Lord Clarke, *The Woolf reforms: A singular event or an ongoing process*, in D. Dwyer, *The Civil Procedure Rules Ten years On* (2009), at 48.

48 As noted in Zuckerman, above n. 23, at 1564.

49 As reported in Civil Justice Council, *The Law and Practicalities of Before-The-Event (BTE) Insurance – An Information Study* (November 2017), at 147.

gation, ought to lead further down that road, as should making such a scheme mandatory for the reasons noted previously. If these steps were taken there is every prospect that the cost of a mandatory scheme would be viable for individuals required to pay its premiums, and for the state. This raises a potential problem. A successful mandatory BTE scheme, facilitated through a fixed costs regime and the abolition of cost-shifting, might provide the basis for the rapid expansion of litigation. The reserve army of disputes that currently go unlitigated for financial reasons might now be litigated. Such an eventuality might pose resource problems for the civil courts in having to manage those claims. It may also have broader societal problems; it could fuel the creation of a genuinely more litigious culture. To mitigate those potential drawbacks the creation of a mandatory BTE scheme would need to have one further element to it. It is to that which I now turn.

## 5 The Introduction of Mandatory Alternative Dispute Resolution

The central aim underpinning the introduction of a mandatory BTE legal expenses insurance scheme would be to increase access to justice. It ought not, however, to necessarily increase access to courts, i.e. access to litigation. Such an outcome would be inconsistent with the promotion of alternative forms of dispute resolution in England and Wales since the introduction of the Woolf reforms in 1999.<sup>50</sup> It would also fail to take proper account of more recent developments arising from the digitisation of the civil courts and their processes. Those developments are based on the incorporation of online forms of dispute resolution into English and Welsh procedure, which followed on from the Briggs *Civil Courts Structure Review* and the HMCTS digitisation court reform programme.<sup>51</sup> More recently, it has been announced that the intention is to go further than that. Present proposals are that the civil courts, through the development of an online portal, should be able to provide access to a wide range of dispute resolution methods, including complaints schemes and Ombudsman schemes, before they initiate formal legal proceedings.<sup>52</sup> A mandatory BTE legal expenses insurance scheme would

need to be integrated into these reforms, which implicitly expand the concept of 'access to justice' beyond access to the court.<sup>53</sup> More importantly, there are distinct advantages to such a scheme from integration with these developments.

The most obvious advantage of taking an integrated approach would be that of consistency across government and judicial policy.<sup>54</sup> With both advocating the promotion and incorporation of ADR into civil court procedures, any proposal to create a mandatory BTE insurance scheme would have little prospect of success if it tended to subvert that general policy. If it simply focused on providing individuals with access to litigation before courts it would inevitably do so. Linking it, then, with the wider general policy of promoting the use of a variety of dispute resolution methods, both formal and informal, would tend to have the opposite effect. It would promote its prospects of successful implementation. Equally, it would promote the prospects of successful implementation of the wider goal of promoting ADR processes. If individuals were required through, for instance, a mandatory multi-tiered dispute resolution clause<sup>55</sup> in their BTE insurance policies to engage constructively and in good faith with other forms of dispute resolution before they were able to access 'litigation' funding, there would necessarily be an increased uptake in complaints schemes, in Ombudsman schemes, lawyer-led negotiation, mediation and other forms of ADR and ODR. It could thus help to embed the shift away from litigation. Promotion of the shift towards using ADR rather than necessarily resorting to litigation could, in this way, have further advantages.

For the state it could help to promote the principle of proportionality, which has been the overarching principle of English civil procedure since the Woolf reforms were introduced.<sup>56</sup> Promoting the use of a variety of ADR and ODR methods would help ensure that should there be, as might be expected, an increase in the number of individuals who are able to take steps to vindicate their rights, that increase would not overwhelm the courts' resources. It would help to ensure that an increase in claiming did not result in an increase in the number of claims issued and the demand for adjudication. On the contrary, by requiring those taking advantage of their

adjudication [www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf](http://www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf).

50 See, for instance, B. Billingsley and M. Ahmed, 'Evolution, Revolution and Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada', 45(2-3) *Common Law World Review* (June/September 2016), 186.

51 See, for instance, M. Briggs, *Civil Courts Structure Review – Interim Report* (December 2015); M. Briggs, *Civil Courts Structure Review – Final Report* (July 2016); Joint Statement of Lord Chief Justice, Senior President of Tribunals and the Lord Chancellor, *Reforming HM Courts and Tribunals Service* (25 July 2013).

52 See, for instance, Sir Geoffrey Vos MR, *The Relationship between Formal and Informal Justice* (2021) on the intended approach, which will use the online court portal to provide a means to direct potential litigants to other forms of dispute resolution as well as the intention for the civil justice system to focus on resolution in a broad sense rather than, necessarily,

53 As Sir Terence Etherton put it, the approach to access to justice would expand under the digitisation reforms of English and Welsh civil justice to include various forms of ADR and ODR, *The Civil Court of the Future*, at [20] and following [www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf](http://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf).

54 See Ministry of Justice, *Dispute Resolution in England and Wales – A Call for Evidence* (2021), at 4-9, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1014647/dispute-resolution-cfe.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014647/dispute-resolution-cfe.pdf).

55 The growth of which is generally supported in England and Wales. See, for instance, *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); *Ophen Operations UK Ltd v. Invesco Fund Managers Ltd* [2019] EWHC 2246; *HC Trading Malta Ltd v. Savannah Cement Ltd* [2020] EWHC 2144; *Taylor Wimpey UK v. Harron Homes Ltd* [2020] EWHC 1190 (TCC).

56 See CPR r.1.1.



insurance to first seek to resolve their disputes in ways other than via litigation, the insurance scheme could help maintain the CPR's aim of ensuring that only those disputes that cannot be resolved consensually should result in litigation and adjudication. An increase in claiming would not necessarily then result in an increased call by litigants on the courts' resources. For individuals the benefits of this approach could accrue in two ways. First, at a general level, a requirement to engage in various forms of ADR and ODR before moving to litigation could help to ensure that insurance premiums were set at a low rate. By promoting early settlement, the mandatory BTE insurance scheme could help to ensure that those individuals who drew on it incurred limited expenditure. By reducing the prospect that large numbers of individuals would draw down their full financial entitlement under their insurance policy, it might then be possible for insurers to set the premiums at a lower rate than they would have to if all those who drew on their insurance used it to litigate claims to judgment. Such a consequence would also provide a wider benefit to the state and the public generally: lower premiums would result in a lower call on general taxation to fund the premiums payable by the state for those individuals who are unable to pay their own premiums. Secondly, at an individual level, this approach would help them to gain the benefit of engagement with ADR. One continuing problem that ADR's promotion has had over the last twenty years has been to fully embed it within dispute resolution so that its benefits, e.g., early resolution or the availability of forms of resolution that could not be provided by a court judgment, were available generally. Requiring its use as part of a scheme to fund litigation would achieve that end. Done this way, those benefits would not come at the expense of an individual's ability to litigate and seek to resolve their dispute via a court judgment. By enabling individuals to litigate through a court process after having engaged in ADR, the mandatory BTE insurance scheme would overcome any possible complaint that it acted as a fetter on the right of access to justice qua access to a court and judgment. On the contrary, the scheme would both promote ADR and facilitate access to court and judgment. On the face of it, requiring mandatory BTE legal expenses insurance to incorporate a form of multi-tiered dispute resolution clause might seem to contradict the very aim of such insurance: to promote effective access to justice. Looked at more broadly, such a clause can, however, be seen to go beyond promoting the prospects that such a form of litigation funding could be introduced by integrating it with wider current reforms. As importantly, it ought to provide a means to enable the scheme to operate more effectively by promoting lower insurance premiums, while securing the achievement of wider societal and individual benefits. It ought, therefore, to form part of the design of any such scheme.

## 6 Conclusion

The introduction of civil legal aid in England and Wales in the 1940s was a product of the general creation at the time of the Welfare State. The Rushcliffe Report, which gave birth to it, was consistent in aim and approach to that of the Beveridge Committee, which provided the blueprint for the UK's Welfare State. The extent to which legal aid was available was never, however, such as to cover the entire population of the UK. Nor did it ever cover all types of legal dispute. Its scope may have waxed and waned from its inception, but it could not properly be said to have ever been a fully comprehensive scheme in the way that the National Health Service was intended to be accessible to all members of the public. As with the provision of healthcare, the UK model was one among many.<sup>57</sup> Since the 1990s successive UK governments have moved away from the 1940s model. In doing so, and in promoting the use of various private litigation funding mechanisms, there has been no detailed consideration of whether, and if so how, those mechanisms could provide a fully comprehensive litigation funding regime.

Public policy may have shifted away from a welfarist model to a more market-centred one through the promotion of CFAs, DBAs and – through court initiative rather than government action – third party litigation funding, yet what has been lacking has been any attempt to fashion not only a replacement for civil legal aid but one that was more comprehensive than its predecessor. This article accepts the premise that the age of civil legal aid is over. It rejects, however, the idea that the inevitable consequence of that is the present position in England and Wales: a patchwork of private funding mechanisms that neither fully replace civil legal aid provision nor, as a necessary consequence, improve on it. On the contrary, it suggests that there is a way in which it is possible to build on the introduction of fixed recoverable fees and the broader redesign of the civil justice system to create a system that secures more effective and universal litigation funding for all citizens. That system is one of mandatory BTE legal expenses insurance. If such an approach were adopted it would contextualise the last thirty years of litigation funding as a brief interregnum between the age of civil legal aid and the age of comprehensive litigation insurance.

57 See, for instance, K. Niemitz, *Universal Healthcare without the NHS: Towards a Patient Centred Health System* (2016) and J. Bartholomew, *The Welfare of Nations* (2015) for a comparison of different approaches to healthcare delivery.

# Money, Blackmail and Lawsuits

## Revisiting *Coventry v. Lawrence* and the Principle of (In)equality of Arms

Eduardo Silva de Freitas\*

### Abstract

The right to a fair trial under Article 6 ECHR (European Convention on Human Rights) provides one of the procedural guarantees of access to justice. One of the elements on which access to justice under Article 6 ECHR depends is party resources. The concern for equality of arms is that both parties should be able to effectively argue their case before a court, not being impeded by a lack of resources that undermines the tools of their pleading. Such an equality is subject to case-specific analysis. The *Lawrence* ruling is a ruling on the compatibility of the regime of recoverability of conditional fee agreement (CFA) additional liabilities under the Access to Justice Act 1999 with Article 6 ECHR. The majority in the UK Supreme Court (UKSC) ruled, under a proportionality test, that there was no infringement of Article 6 ECHR because the introduction of the recoverability of CFA additional liabilities was a necessary measure for England to adopt in the pursuit of access to justice under its margin of appreciation. In this article, I will argue 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. The aim of this article is, therefore, to investigate how the principle of equality of arms should have informed the UKSC's decision in *Lawrence*.

**Keywords:** right to a fair trial, access to justice, equality of arms, conditional fee agreement, after the event insurance.

## 1 Introduction

Litigation costs and funding are intertwined, both mechanistically and in their impact on access to justice.<sup>1</sup> Litigation costs, consisting essentially of court and lawyer fees, can be prohibitively expensive in different stag-

es of civil proceedings, to a point in which access to justice will be hindered. Prohibitively expensive litigation costs have been extensively dealt with by the European Court of Human Rights (ECtHR) over the last decades, under allegations of violation of the right to a fair trial. These violations entailed initial costs,<sup>2</sup> appeal fees<sup>3</sup> and, more closely related to the topic at hand, costs payable at the end of the lawsuit.<sup>4</sup> The battle over the compatibility of rules on litigation costs with the right to a fair trial has gained particular attention regarding the latter issue, as some Central and Eastern European countries imposed excessive *ex post* fees on litigation against the state.<sup>5</sup>

In England, not only litigation costs have grown sharply<sup>6</sup> but also significant cuts to legal aid have been made for balancing public expenditure.<sup>7</sup> In common law systems, a significant costs burden is imposed on litigants since such litigation costs are expected to be disbursed by the litigants themselves.<sup>8</sup> Legal scholarship has recently pointed to the possibility that the Scottish system of

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1 C. Hodges, S. Vogenauer & M. Tulibacka, 'The Oxford Study on Costs and Funding of Civil Litigation', in C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (2010) 3, at 4.

2 See *Kreuz v. Poland*, ECHR (2001) No. 28249/95; *Weissman v. Romania*, ECHR (2006) No. 63945/00.

3 See *Tolstoy Miloslavsky v. UK*, ECHR (1995) No. 18139/91; *Podbielski and PPU Polpure v. Poland*, ECHR (2005) No. 39199/98.

4 See *Stankov v. Bulgaria*, ECHR (2007) No. 68490/01; *Stankiewicz v. Poland*, ECHR (2006) No. 46917/99; *Klaur v. Croatia*, ECHR (2013) No. 28963/10; *Cindrić and Bešlić v. Croatia*, ECHR (2016) No. 72152/13.

5 *Ibid.* Concerns over advantages granted to the state as a litigant have also been expressed before the Court of Justice of the European Union (CJEU). In *Case C-205/15 Directia Generală Regională a Finanțelor Publice Brașov (DGRFP) v. Vasile Toma and Biroul Executorului Judecătoresc Horatiu Vasile Cruduleci*, an exemption on public bodies to pay certain court fees was deemed compatible with equality of arms. The CJEU made an important distinction between this case and the ECtHR cases about *ex post* fees in litigation against the state I just mentioned in paras. 55 and 56 of such a ruling. For a more detailed analysis of limitations to litigation costs imposed by European Union (EU) law, see J. Krommendijk, 'Is there Light on the Horizon? The Distinction between 'Rewe Effectiveness' and the Principle of Effective Judicial Protection in Article 47 of the Charter after *Orizzone*', 53 *Common Market Law Review* 1395, at 1395-1418 (2016). EU law no longer applies to the United Kingdom (UK). The UK left the EU on 31 January 2020.

6 A. Zuckerman, 'Lord Justice Jackson's Review of Civil Litigation Costs – Preliminary Report', 28 *Civil Justice Quarterly* 435, at 436 (2009).

7 Hodges, Vogenauer & Tulibacka, above n. 1, at 23.

8 J. Peysner, 'England and Wales', in C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (2010) 289, at 290. For a discussion on the market imbalances embedded in the provision of legal services in the English litigation system, see A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2013), at 1307-1308; N. Dunne, 'Liberalisation and the Legal Profession in England and Wales', 80 *The Cambridge Law Journal* 274, at 274-307 (2021). A perspective on this matter from a civil law country can be found in A. Lejeune and A. Spire, 'The Role of Legal Intermediaries in the Dispute Pyramid: In-

court fees – under which the costs of administration of the civil justice system are expected to be met by the users of the court system themselves – might trigger violation of the right to a fair trial in individual cases.<sup>9</sup> Coupled with the unavailability of legal aid, this burden prompted the surge of conditional fee agreements (CFAs), together with legal expenses insurance (before-and after-the-event), as prominent means of financing individual claims.<sup>10</sup>

CFAs were introduced in the English legal system by the Courts and Legal Services Act 1990. Differently from contingency fee arrangements, in CFAs a normal charge out rate is agreed but payable only if the lawyer wins the case together with a success fee. This success fee, which is also referred to as CFA uplift, is an increase in the normal charge out rate because the lawyer is working under a CFA.<sup>11</sup> In parallel, the English Law Society developed the concept of after-the-event (ATE) insurance, which consists of an insurance policy under which, after the event potentially giving rise to litigation took place, the insurer is obliged to bear the losing party's litigation costs.<sup>12</sup> CFAs and ATE insurances facilitated access to justice for selected claimants, since they no longer needed to fund the lawsuits themselves (in the first case) or face the risk of adverse costs orders (in the second case). However, it also made litigation costs for defendants rise even more with the introduction of the recoverability of CFA success fees and ATE premiums (additional liabilities) under the Access to Justice Act 1999.<sup>13</sup> This recoverability, discussed below in further detail, was one of the main issues dealt with by Sir Rupert Jackson's Review of Civil Litigation Costs,<sup>14</sup> in which four flaws were identified.

equalities before the French Legal System', 17 *International Journal of Law in Context* 455, at 455-72 (2021).

9 B. Christman and M. Combe, 'Funding Civil Justice in Scotland: Full Cost Recovery, at What Cost to Justice?', 24 *The Edinburgh Law Review* 48, at 64-9 (2020).

10 Peysner, above n. 8, at 294.

11 *Coventry v. Lawrence* [2015] UKSC 50.

12 *Ibid.*

13 Zuckerman, above n. 6, at 436. Recently, the recoverability of the cost of third party litigation funding was advocated in response to the *Financial Times'* editorial on the matter, see [www.ft.com/content/ffb22ddd-ec52-4321-9591-5842d57c9f85](http://www.ft.com/content/ffb22ddd-ec52-4321-9591-5842d57c9f85).

14 Sir Rupert Jackson identified the existence of CFAs as the main cause for disproportionate legal costs in English Civil Justice. The reforms to the CFA regime he proposed sought to remedy such lack of proportionality, see J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (2014), at 202. The reforms he proposed consisted of (a) the removal of the obligation of the losing party to pay CFA success fees and (b) a raise of 10% in the value of damages awarded to victims of tort to compensate for them having to bear the costs of CFA success fees themselves, see [www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf). Importantly, in the context of assessment of litigation costs in English Civil Justice, 'proportionality' is measured by two criteria: individual proportionality and collective proportionality. Individual proportionality is the ratio between the resources the parties spend on the proceedings and the compensation they expect to obtain from it. Collective proportionality is the share of public expenditure to be spent on the proceedings when compared to other proceedings, see Sorabji, above n. 14, at 167. These concepts of individual and collective proportionality are, however, not to be confused with the proportionality test discussed in this article. The proportionality test that the UKSC applied in *Lawrence* consisted of a scrutiny, under European human rights law, of

One of the flaws identified, namely, the 'chilling' effect of the regime, consisted of the threat that defendants could potentially face excessively high costs in case of defeat, since all the court fees together with the additional liabilities would have to be paid for. In such cases, the defendant could feel, for example, pressured to settle at an early stage.<sup>15</sup> This flaw was centrepiece to the UK Supreme Court's (UKSC) landmark ruling in *Coventry v. Lawrence (Lawrence)*.<sup>16</sup> The majority of the UKSC recognised the existence of such a flaw and that defendants indeed suffered this 'chilling' effect. However, it held that a rule obliging defendants to pay court fees together with the additional liabilities was within England's margin of appreciation under the European Convention on Human Rights (ECHR) to choose the means for achieving the objective of promoting access to justice.<sup>17</sup> In the aftermath of the UKSC's ruling in *Lawrence*, equality of arms has been effectively removed as a core concern regarding disparities in parties' ability to afford litigation. As will be explained in Section 2, the principle of equality of arms is one of the key guarantees of access to justice. Equality of arms is understood here as the legal requirement of equality of party resources. It is the guarantee of access to justice according to which a minimum balance between the quality of legal representation, as well as the opportunities afforded by procedural rules for presenting a case, afforded to each party, must be ensured.<sup>18</sup> One of the goals of setting up legal aid schemes is to promote equality of arms.<sup>19</sup> The failure of the UKSC to consider how such a guarantee should serve as a parameter for judging cases indicating disparities in legal resources, in my view, rings an alarm bell regarding the future of equality of arms in UK constitutional and human rights adjudication.<sup>20</sup>

The *Lawrence* case concerned the challenging, by the respective defendants, of the compatibility of the regime of recoverability of additional liabilities with Article 6 ECHR. The majority in the UKSC ruled, under a proportionality test, that there was no such infringement because it was a necessary measure for England to adopt in the pursuit of access to justice under its margin of appreciation.<sup>21</sup>

In this article, I will argue 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. But

the means employed by England under its margin of appreciation to pursue the objective of achieving access to justice. The goal of this latter proportionality test was to assess the compliance of such means with Art. 6 ECHR.

15 *Ibid.*

16 *Coventry v. Lawrence* [2015] UKSC 50.

17 *Ibid.*

18 M.A. Shapiro, 'Distributing Civil Justice', 109 *The Georgetown Law Journal* 1473, at 1487-1490 (2021).

19 X. Kramer, 'Legal Aid', in C.U. Schmid, J.R. Dinse & T. Wakabayashi (eds.), *Encyclopedia of Private International Law* (2017) 1088, at 1089.

20 A concrete example of the continuity of this disregard for equality of arms was a reuse of the *Lawrence* guidelines in a recent case, namely, *R (on the application of Leighton) v. Lord Chancellor* [2020] EWHC 336 (Admin), further discussed below.

21 *Coventry v. Lawrence* [2015] UKSC 50.



I will add a further inquiry into the rationale behind the assessment made by the majority of the UKSC, pushing the argument away from the proportionality test suggested. The reason for rejecting this proportionality test, as will be explained below, is because it focuses on the system as a whole, which is inappropriate for dealing with equality of arms.

The aim of this article is, therefore, to investigate how the principle of equality of arms should have informed the UKSC's decision in *Lawrence*. In doing so, I intend to demonstrate that there is a flaw in the majority's assessment of infringement of Article 6 ECHR in resorting to this type of proportionality test. To demonstrate the tensions between the *Lawrence* guidelines and equality of arms under Article 6 ECHR, this article will describe both before pointing out where the UKSC *Lawrence* ruling erred in its assessment of infringement of Article 6 ECHR (Sections 1 to 3). Furthermore, there will be a discussion on how the *Lawrence* ruling made its way into the post-Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) case law on access to justice (Section 4). Finally, the arguments will be brought together to demonstrate the shortcomings in the ruling associated with a lack of due concern for equality of arms (Sections 5 and 6).

## 2 Access to Justice, Access to a Court and Equality of Arms

Lord Reed has described the essence of access to justice in the UK legal system in *R (on the application of UNISON) v. Lord Chancellor (UNISON)*. Under this conception, access to justice is implied in the notion that the United Kingdom is a democratic state governed by the rule of law. This conception is a counterpoint to the other notion offered by one of the parties to the *UNISON* case according to which courts provide a public service like others and the benefits of such a service are restricted to its direct users (the parties to a specific lawsuit).<sup>22</sup> The ECtHR case law also adopts this rule of law conception under Article 6 ECHR.<sup>23</sup>

The counterpoint, provided by Lord Reed in *UNISON*, to the idea that courts provide a public service like others is as follows. Both the democratic exercise of voting for parliament to enact statutes and the law-making role of common law courts would be rendered meaningless

without the possibility of properly enforcing such laws. Laws represent 'the institutional form of the life of a people represented under the light of the understandings of group or class interests and collective ideals that make sense of them'.<sup>24</sup> Therefore, the power of courts to give effect to laws is in public interest, and the benefits from the exercise of such a power are not restricted to the parties to a specific lawsuit. This assertion does not concern public law solely but also the ascertainment of the legal content of private law rules for the purpose of application in future cases.<sup>25</sup>

Outside the realm of UK case law, however, it is fair to state that this link between rule of law and access to justice is not so straightforward. Both access to justice and rule of law are not easily defined concepts, never mind the link between the two.<sup>26</sup> To discuss in-depth the theoretical possibility of this link is out of the scope of this article. Therefore, I will work under the assumption pointed by Lucy according to which access to justice entails at least three elements. The first element is legal knowledge or, in other words, the requirement that governing laws are made public and are in clear language. The second element is the provision of legal advice without which, although publicly available, legal rules may not be properly understood by its addressees. Finally, the third element is the ability to bring legal proceedings before a court – access to courts.<sup>27</sup> This section focuses on the two latter elements: access to courts (Section 2.1) and legal advice, the latter being discussed under the heading of equality of arms (Section 2.2).

### 2.1 The Right of Access to a Court

The right to a fair trial under Article 6 ECHR provides one of the procedural guarantees of access to justice.<sup>28</sup> As mentioned earlier, under the ECtHR case law this right to a fair trial must be construed considering the notion of rule of law – the protection of rights by judicial means being one of its paramount aspects. This right is an accessory guarantee to private autonomy, which protects individuals from the state acting against them without recourse to judicial oversight.<sup>29</sup> Moreover, one of the impacts of the welfare state on access to justice is the idea that assistance should be provided for those who are not able to afford legal representation.<sup>30</sup>

22 *R (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51. Discussion about this conception can be found in A. Higgins, 'The Costs of Civil Justice and Who Pays?', 37 *Oxford Journal of Legal Studies* 687, at 691-6 (2017); A. Weale, 'Principles of Access: Comparing Health and Legal Services', in E. Palmer, T. Cornford, Y. Marique & A. Guinchard (eds.), *Access to Justice: Beyond the Policies and Politics of Austerity* (2016) 41, at 45-7. An in-depth discussion of this distinction can be found in T. Cornford, 'The Meaning of Access to Justice', in E. Palmer, T. Cornford, Y. Marique & A. Guinchard (eds.), *Access to Justice: Beyond the Policies and Politics of Austerity* (2016) 27, at 30-5. The CJEU ruled on this matter in Case C-279/09 *DEB v. Germany* [2010] ECR I-13849.

23 *Běleš v. Czech Republic*, ECHR (2002) No. 47273/99.

24 R. Unger, *The Universal History of Legal Thought* (2021), at location 169. Kindle Edition.

25 *R (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51. See also C. Parker, *Just Lawyers: Regulation and Access to Justice* (1999), at 41-56.

26 W. Lucy, 'Access to Justice and the Rule of Law', 40 *Oxford Journal of Legal Studies* 377, at 384-5 (2020). An illustration of the different perspectives on the matter can be seen in a hypothetical dialogue between an American and a European lawyer about legal aid in J. Maxeiner, 'A Right to Legal Aid: The ABA Model Access Act in International Perspective', 13 *Loyola Journal of Public Interest Law* 61, at 79-81 (2011).

27 *Ibid.*

28 *Brown v. Stott* [2003] 1 AC 681, 694.

29 M. Cappelletti and J. Gordley, 'Legal Aid: Modern Themes and Variations Part One: The Emergence of a Modern Theme', 24 *Stanford Law Review* 347, at 354-5 (1971).

30 M. Cappelletti and B. Garth, 'Access to Justice and the Welfare State: An Introduction', in M. Cappelletti (ed.), *Access to Justice and the Welfare State*

The right of access to a court under Article 6 ECHR has two dimensions: positive and negative. In its positive dimension, the right of access to a court under Article 6 ECHR demands a positive obligation to guarantee such access for litigants, for example, but not necessarily, through a legal aid scheme.<sup>31</sup> The negative dimension consists of the state's duty to not impose barriers to such access. Since the abolition of self-help with the emergence of politically organised systems of dispute resolution, the legal process is the means to protect rights.<sup>32</sup>

In the UK legal system, Article 6 ECHR has two functions. The first is to serve as a parameter to declare legislation incompatible with the ECHR.<sup>33</sup> Such a declaration of incompatibility does not impinge upon the validity of the legislation concerned<sup>34</sup> (the Human Rights Act 1998 preserved the doctrine of parliamentary sovereignty).<sup>35</sup> The second function is, in an overlap with the common law right of access to a court, to prevent the executive from taking action that undermines such a right unless parliament so authorises explicitly or by necessary implication.<sup>36</sup>

In turn, the common law right of access to a court is a manifestation of the principle of legality in UK constitutional and administrative law.<sup>37</sup> The United Kingdom does not have a written constitution. Therefore, the legal content of constitutional rights is defined by the common law. Differently from those enshrined in written constitutions, these rights are not parameters for scrutinising legislation enacted by the parliament.<sup>38</sup> The doctrine of parliamentary sovereignty prevents the judiciary from engaging in judicial review of primary legislation.<sup>39</sup> Rather, constitutional rights under the UK common law prevent the executive from taking action that undermines such rights unless parliament so authorises explicitly or by necessary implication. Or, in other words, from infringing the principle of legality that is, along these lines, a principle of statutory interpretation. In this sense, the protection that the common law right of access to a court affords, as a trigger of the principle of

legality, is against administrative acts.<sup>40</sup> As Bingham put it, judicial review consists of judges 'reviewing the lawfulness of administrative action taken by others'.<sup>41</sup> Building on these foundations and considering the long-established recognition of the right of access to a court in the UK common law, Laws J stated in *R v. Lord Chancellor, ex parte Witham* that 'the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right'.<sup>42</sup>

## 2.2 Equality of Arms

A second element on which access to justice depends is party resources.<sup>43</sup> Often, the effectiveness with which one will litigate her case is proportional to the resources she is able to spend on the proceedings. Although this is not always the case, since both a lawsuit can be cheap to pursue and a not so expensive lawyer can perform good legal representation, a lot of other costly tools can be necessary for effective litigation. Examples are the need to pay for expensive technical evidence, expert opinions, travel expenses of witnesses, and so on. The concern for equality of arms is that both parties should be able to effectively argue their case before a court, not being impeded by a lack of resources that undermines the tools of their pleading. Importantly, such an equality is subject to case-specific analysis,<sup>44</sup> meaning that a ruling on an infringement of the principle of equality of arms is based 'inter alia' upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively'.<sup>45</sup> As Shapiro explains, '[g]iven that party resources matter insofar as they enable a party to litigate effectively against her opponent, equality of party resources must be ruled at the level of the individual lawsuit, not the civil justice system as a whole'.<sup>46</sup> Legal scholarship<sup>47</sup> and the United Nations Committee on the Elimination of Racial Discrimination<sup>48</sup> have criticised this current approach to assessing infringement of the principle of equality of arms. In their view, more precise criteria

(1981) 1, at 4; M. Cappelletti, 'Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and School Trends', 25 *Stanford Law Review* 651, at 715 (1973); E. Storskrubb and J. Ziller, 'Access to Justice in European Comparative Law', in F. Francioni (ed.), *Access to Justice as Human Right* (2007) 310, at 313-14.

31 L. Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights', in Y. Haack and E. Brems (eds.), *Human Rights and Civil Liberties in the 21st Century* (2013) 69, at 122.

32 D. Squires, 'Access to a Court after *Witham*, *Lightfoot* and *Saleem*', 6 *Judicial Review* 38, at 43 (2001); Marie-Anne Frison-Roche, 'Le droit d'accès à la justice et au droit', in R. Cabrillac (ed.), *Libertés et droits fondamentaux* (2009) 497, at 523.

33 Human Rights Act 1998, Section 4(2).

34 Human Rights Act 1998, Section 4(6)(a).

35 J. Goodwin, 'The Last Defence of *Wednesbury*', *Public Law* 445, at 466 (2012).

36 *R (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51.

37 J.N.E. Varuhas, 'The Principle of Legality', 79 *Cambridge Law Journal* 570, at 581 (2020).

38 There are also countries, such as France and the Netherlands, with written constitutions and no judicial review of enacted legislation.

39 *R v. Lord Chancellor, ex parte Witham* [1998] QB 575.

40 Varuhas, above n. 37, at 582.

41 T. Bingham, *The Rule of Law* (2011), at 61.

42 *R v. Lord Chancellor, ex parte Witham* [1998] QB 575 (emphasis added).

43 L.M. Friedman, 'Access to Justice: Social and Historical Context', in M. Cappelletti and J. Weisner (eds.), *Access to Justice: Promising institutions* (1978) 1, at 12-13; See also M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', 9 *Law & Society Review* 95, at 95-160 (1974).

44 Shapiro, above n. 18, at 1487-1490.

45 *Steel and Morris v. UK*, ECHR (2005) No. 68416/01.

46 Shapiro, above at n. 189, at 1487-1490.

47 M. Lillard, 'McGoliath v. David: The European Court of Human Rights Recent Equality of Arms Decision', 6 *German Law Journal* 895, at 899-901 (2005); J. Pollock and M. Greco, 'It's Not Triage if the Patient Bleeds Out', 161 *University of Pennsylvania Law Review* PENNumbra 40, at 42-4 (2012); M. Davis, 'Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law', 122 *Yale Law Journal* 2260, at 2280-2281 (2013).

48 U.N. Human Rights Comm., General Comment No. 32, 90th Sess., 9-27 July 2007, UN Doc. CCPR/C/GC/32 (23 August 2007).

should be set for establishing when the lack of legal aid impacts equality of arms negatively.<sup>49</sup>

Criticisms aside, the law as it stands is that the assessment of a possible infringement of the principle of equality of arms is to be made on a case-by-case basis. This rule is essential to abide by the standard set by the ECtHR in the Article 6 ECHR case of *Steel and Morris v. UK*, explained below, according to which a party's equality of arms is negatively affected if she is placed 'at a substantial disadvantage'.<sup>50</sup> To verify whether a party is placed at a substantial disadvantage, it is necessary to assess whether such disadvantages are present in the specific case (hence the need for a case-by-case assessment). Part of the problem with the majority of the UKSC's ruling in *Lawrence* is that, instead of prioritising the specificities of the case at hand, the role played by the recoverability of additional liabilities in the English system for allocation of legal costs was the focus of attention.

A concrete example, for illustrative purposes,<sup>51</sup> of the necessity to judge equality of arms on a case-by-case basis was set forth in Case C-543/14 *Ordre des barreaux francophones et germanophone*, ruled by the CJEU (Court of Justice of the European Union).<sup>52</sup> In this case, Belgium had revoked the value-added tax (hereafter 'VAT') exemption to services provided by lawyers under the Belgian legal aid scheme. This revocation was challenged before the *Cour constitutionnelle* on grounds that it limited access to justice rights, including equality of arms.<sup>53</sup> The case was then referred to the CJEU. The reason why the CJEU ruled that equality of arms was *not* negatively affected is as follows. Under Article 168(a) Council Directive 2006/112 (EU VAT Directive), taxable persons who acquire goods or services in connection with taxable transactions from another taxable person can deduct the VAT due from such acquisition.<sup>54</sup> Therefore, non-taxable final consumers who hire legal services will also have to pay for such taxable services but without having the right to deduct.<sup>55</sup> After outlining the more

general notion of equality of arms referred to earlier, the CJEU found no violation of such a right. More notably, AG Sharpston opined in this case comparing it to the ECtHR Article 6 case of *Steel and Morris v. UK* (explained in more detail below). Such a comparison was made to argue that, although both cases concerned the interaction between legal costs and equality of arms, the latter consisted of a fact-specific situation that cannot be compared to the challenging of a VAT rule in the abstract.<sup>56</sup> The CJEU concurred with such a conclusion, holding that a general rule on VAT is not sufficient to create a substantial disadvantage for one of the parties.<sup>57</sup> In my view, this is consistent with the idea mentioned earlier that equality of arms is to be ruled on a case-by-case basis since the specificities of the case are paramount to deciding whether the disparity of party resources affects equality of arms negatively.

### 3 Judgment of (the Majority of) the UKSC

This section will explain the majority of the UKSC's ruling in *Lawrence*. *Lawrence* is a ruling on the compatibility of the regime of recoverability of additional liabilities under the Access to Justice Act 1999 with Article 6 ECHR. The sequence in which the topics will be explained is roughly the same followed by the majority of the UKSC. Firstly, for contextualisation, there will be a brief description of the factual background to the nuisance claim underlying the ruling as well as the amount of the legal costs involved. Secondly, I will explain the legal environment in which the Access to Justice Act 1999 was enacted, inaugurating the recoverability of additional liabilities in the English legal system (Section 3.1). Thirdly, I will describe the four flaws of the recoverability regime pointed out by Sir Rupert Jackson in his Review of Civil Litigation Costs (Section 3.1.1). The need to explain these flaws stems from the centrality of the third flaw in both the defendant's and the majority of the UKSC's assessments of infringement of Article 6 ECHR. Fourthly, there will be a brief description of the ECtHR ruling in *MGN v. UK* (Section 3.1.2). This is the case in which the recoverability regime was deemed incompatible with the ECHR but from which the majority of the UKSC attempted to distinguish *Lawrence*, on grounds that such a case concerned Article 10 ECHR (freedom of expression) rather than Article 6 ECHR. Finally, I will explain the majority of the UKSC's ruling itself (Section 3.2), which draws on elements from the issues described in all the sections to which I just referred.

49 *Ibid.*

50 *Steel and Morris v. UK*, ECHR (2005) No. 68416/01. In *Stankiewicz v. Poland*, the ECtHR decided on a rule under which Polish public authorities were exempt from paying legal costs in proceedings in which they, acting as a party, lost the case (as opposed to ordinary parties, which had to pay such costs in case of losing). This rule was deemed incompatible with Article 6 ECHR, on grounds that privileges granted to public authorities for the protection of the legal order 'should not be applied so as to put a party to civil proceedings at an undue disadvantage vis-à-vis the prosecuting authorities', see *Stankiewicz v. Poland*, ECHR (2006) No. 46917/99. Although the ECtHR did not expressly mention equality of arms in this ruling, Advocate General (AG) Kokott has interpreted it as concerning equality of arms, see Case C-530/11 *Commission v. UK* [2014] ECLI:EU:C:2014:67, Opinion of AG Kokott.

51 Illustrative because, as mentioned before, the United Kingdom left the European Union.

52 Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:605.

53 K.K.E. Elgaard, 'The Impact of the Charter of Fundamental Rights of the European Union on VAT Law', 5 *World Journal of VAT/GST Law* 63, at 84-5 (2016).

54 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347, 11.12.2006, 1-118, Art. 168(a).

55 Elgaard, above n. 53, at 86.

56 Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:605, Opinion of AG Sharpston.

57 Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:605.



### 3.1 Facts of the Case (in a Nutshell) and Legal Background to the Dispute

As mentioned earlier, CFAs were introduced in the English legal system through the Courts and Legal Services Act 1990. Under the Courts and Legal Services Act 1990, fees associated to CFAs were not recoverable. ATE premiums were also not recoverable under the Courts and Legal Services Act 1990.<sup>58</sup> After public consultation, the Access to Justice Act 1999 was enacted, to implement the policy pursued by the British government at the time to allow for the recoverability of additional liabilities. The rationale behind this policy was to impose the full costs of litigation on the losing party. And, to achieve this policy goal, a Costs Practice Direction (hereafter ‘CPD’) was put in place. Paragraph 11.9 of the CPD stated that success fees and ATE premiums could not be ‘reduced simply on the ground that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate’.<sup>59</sup>

*Lawrence* was a dispute regarding nuisance. The claimant argued that the speedway activities performed on the nearby defendant’s track was producing excessive noise. The High Court of Justice of England and Wales (High Court) ruled the case in favour of the claimant, finding that indeed the case at hand constituted nuisance.<sup>60</sup> The defendant was therefore deemed liable for the costs of the dispute alongside 60% of the additional liabilities. The Court of Appeal of England and Wales (Court of Appeal), however, reversed the ruling and (consequently) the costs order along with it.<sup>61</sup> Finally, the UKSC reversed the Court of Appeal’s decision,<sup>62</sup> reinstating the High Court’s judgment and the issuing of the costs order of 60% of the additional liabilities, which amounted to £129,004 – CFA success fee – and £183,000 – ATE premium.<sup>63</sup>

#### 3.1.1 The Four Flaws Identified in the Jackson Review of Civil Litigation Costs

The *Lawrence* ruling is a ruling on the compatibility of the regime of recoverability of additional liabilities under the Access to Justice Act 1999 with Article 6 ECHR. This recoverability system was a key element of the CFA regime under the Access to Justice Act 1999.<sup>64</sup> The CFA regime had four flaws that were among the main causes for disproportionate legal costs in English Civil Justice.<sup>65</sup> The first, second and fourth flaws, although also potentially giving rise to an infringement of Article 6 ECHR,<sup>66</sup> were not the focus of attention in *Lawrence*. It is undisputed between the UKSC Justices that it was the third flaw pointed out by the Jackson Review that had the potential to render the CFA regime under the Access to

Justice Act 1999 incompatible with Article 6 ECHR.<sup>67</sup> However, I will briefly point out in this section the four flaws identified by Sir Rupert Jackson because the fourth flaw has a material impact on the transposition, by the UKSC, of the recognition of the aim of achieving access to justice in *MGN v. UK* as a justification for the measure at hand. All the four flaws were also the ECtHR’s starting point of analysis in *MGN v. UK*, discussed in the next section.

The first flaw identified by Sir Rupert Jackson was the lack of eligibility requirements for entering a CFA. Under the Access to Justice Act 1999, the only step for entering a CFA was finding a lawyer who was willing to take on the respective case. The same holds true as regards ATE insurances. The problem to which this situation gave rise was that wealthy companies and insurers who could bear their own legal costs would enter CFAs to avoid these legal costs and impose such a burden on consumers.<sup>68</sup> The imposition of these costs on consumers stems from the fact that, whilst these companies which entered CFAs would not have to pay any lawyer fees in advance, on top of that, the recoverability of CFAs shifted these costs towards consumers.

The second flaw of the scheme was that judicial control over the litigation costs, including the success fees, could only be made at the end of the proceedings. At that point, virtually all costs had already been incurred and it was no longer possible to reject them on grounds of unreasonableness. This flaw afforded parties (especially claimants) whose winning prospects were good the opportunity to ‘free-ride’ on legal expenses without the need to worry on how excessive they would be, since ultimately the losing party would pay. Furthermore, in case this party was covered by ATE insurance, the respective lawyers also would bear no costs.<sup>69</sup>

The third flaw of the CFA recoverability regime, as mentioned earlier, was its ‘chilling’ or ‘blackmailing’ effect. Given that the costs imposed on the losing party could be so high (hence the situation in *Lawrence*), defendants might have felt threatened by the possibility of losing (and thereby having to pay such costs). Such a hesitance could reach a point where the defendant would prefer to settle at an early stage even in cases where a meritorious defence could have been presented.<sup>70</sup>

The fourth flaw of the regime was the lawyers’ ability to ‘cherry pick’ the cases in which they thought to have better chances of winning. This possibility undermined the main aim of the scheme to promote access to justice, since prospective claimants who did not pass the lawyers’ case screening criteria would remain unrepresented for their claims.<sup>71</sup>

58 *Coventry v. Lawrence* [2015] UKSC 50.

59 *Ibid.*

60 *Lawrence v. Fen Tigers Ltd* [2011] EWHC 360 (QB).

61 *Coventry (t/a RDC Promotions) & Anor v. Lawrence & Ors (Rev 1)* [2012] EWCA Civ 26.

62 *Coventry v. Lawrence* [2014] UKSC 46.

63 *Coventry v. Lawrence* [2015] UKSC 50.

64 *Ibid.*

65 Sorabji, above n. 14, at 202; Zuckerman, above n. 8, at 1386-1388.

66 See below in Section 6.

67 *Coventry v. Lawrence* [2015] UKSC 50.

68 [www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf).

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

### 3.1.2 Previous Recognition of Incompatibility of the System With the ECHR: *MGN v. UK*

The compatibility of the CFA regime under the Access to Justice Act 1999 with the ECHR had been already subject to a ruling by the ECtHR, before *Lawrence*, in *MGN v. UK*.<sup>72</sup> In this case, which was among the legal arguments put forward by the defendant in *Lawrence*, a violation of the ECHR had been found. This case did not concern Article 6, but Article 10 ECHR. Such a difference in the legal basis for claims against a potential ECHR violation was one of the reasons upon which the majority of the UKSC, in *Lawrence*, distinguished it from *MGN v. UK*.<sup>73</sup> In short, the British tabloid newspaper *Mirror* published a front-page story about supermodel Naomi Campbell's supposed efforts to quit drug addiction with a picture of her disguising by wearing 'jeans and a baseball cap'. She then sued *Mirror*, who lost the case and was directed to pay her lawyer's success fees under the respective CFA.<sup>74</sup> *Mirror* challenged the compatibility of this ruling by the UK House of Lords with Article 10 ECHR. The claim was that the obligation to pay success fees was a violation of *Mirror's* freedom of expression right. The ECtHR's starting point of analysis was the four flaws identified in the Jackson Review. The 'depth and nature of the flaws in the system' were deemed to impose a costs burden on defendants in defamation cases to such an extent that it prevented them exercising their freedom of expression.<sup>75</sup> Although these flaws were present in any type of lawsuit (i.e., not only defamation cases), the ECtHR ruled that the margin of appreciation afforded to Council of Europe (CoE) Contracting States to impose measures restricting freedom of expression had been violated by the United Kingdom. In this sense, the CFA regime under the Access to Justice Act 1999 was deemed incompatible with Article 10 ECHR.<sup>76</sup> *MGN v. UK* was a key case on which the defendant relied to argue the breach of Article 6 ECHR in *Lawrence*. It was also based on *MGN v. UK* that the UKSC decided that the regime sought to achieve the legitimate aim of pursuing access to justice.<sup>77</sup> This specific matter regarding *MGN v. UK* and the pursuit of access to justice as a legitimate aim for the CFA regime discussed here will be revisited below in more detail.

### 3.2 The UKSC's Assessment of (Non-) infringement of Article 6 ECHR

The main contention in this judgment was whether the regime of recoverability of additional liabilities under the Access to Justice Act 1999 infringed Article 6 ECHR. The defendant's argument focused on the fact that, under such a regime, 'non-rich' respondents may be held back from defending themselves in court given the

blackmailing effect identified in the third flaw mentioned in the Jackson Review.<sup>78</sup>

The majority of the UKSC took a proportionality approach for assessing such a claim. After describing the outcome of *MGN v. UK*, the UKSC went on to explain (a) the differences between the margin of appreciation in an international human rights context, such as that of the ECtHR and in the assessment of legislative discretion by national courts; (b) how legislative measures, when they interfere in human rights, can still nevertheless be justified on grounds of necessity and proportionality.<sup>79</sup> The main case cited to draw the boundaries in which the proportionality test would take place is *Animal Defenders v. UK*. According to the ECtHR in *Animal Defenders v. UK*, governmental measures that pursue legitimate aims can be deemed compliant with the ECHR the more convincing the rationales for such a measure are.<sup>80</sup>

The majority of the UKSC then went on to analyse the concrete specificities of the recoverability regime under the Access to Justice Act 1999 to verify whether its interference in Article 6 ECHR was a necessary and proportional measure to achieve a legitimate aim. The majority of the UKSC accepted the aim of promoting access to justice as legitimate, given its previous recognition as such in *MGN v. UK*. In the majority's words, '[t]here was no dispute that the ban amounted to an interference with article 10 rights, was prescribed by law and pursued a legitimate aim. The issue was whether the interference was proportionate to the legitimate aim.'<sup>81</sup> Then, as to the necessity and proportionality of the scheme, the UKSC ruled that the foreseeability of the possible receivable amounts of CFA uplifts – guaranteed by Paragraph 11.9 of the CPD – was key to encouraging lawyers to enter CFAs in the first place. As the majority of the UKSC stated, '[i]f legal representatives knew that reasonable success fees were liable to be reduced on the grounds that, when added to the base costs, the total appeared to be disproportionate, this would have been likely to deter them from entering into CFAs.'<sup>82</sup> With regard to ATE premiums, the majority of the UKSC relied on the rationale provided for the recoverability of ATE premiums in *Rogers v. Merthyr Tydfil County Borough Council*.<sup>83</sup> In this latter ruling, the Court of Appeal deemed the ATE insurance market to be 'integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid world'.<sup>84</sup> According to the UKSC, to allow for the revision of the costs of additional liabilities on grounds of infringement of Article 6 ECHR would bring uncertainty, thereby undermining the scheme's capability to achieve the sought aim of

72 No complaint was made regarding the obligation to pay the respective ATE premium.

73 *Coventry v. Lawrence* [2015] UKSC 50.

74 *Campbell v. MGN Ltd* (No 2) [2005] UKHL 61.

75 *MGN v. UK*, ECHR (2011) No. 39401/04.

76 *Ibid.*

77 *Coventry v. Lawrence* [2015] UKSC 50.

78 *Ibid.*

79 *Ibid.*

80 *Animal Defenders v. UK*, ECHR (2013) No. 48876/08.

81 *Coventry v. Lawrence* [2015] UKSC 50.

82 *Ibid.*

83 *Rogers v. Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134.

84 *Ibid.*

promoting access to justice. The scheme was therefore deemed necessary and proportionate.<sup>85</sup>

## 4 The Post-LASPO Costs Regime and R (on the Application of Leighton) v. Lord Chancellor

One of the outcomes of the Jackson Review, also considering the four flaws identified, was the recommendation that the recoverability of additional liabilities should be removed.<sup>86</sup> This removal effected by the LASPO.<sup>87</sup> In this section, I will explain why, despite such a removal, it remains relevant to discuss the (lack of) accuracy of the *Lawrence* ruling in its assessment of infringement of Article 6 ECHR. In short, the reason is that the majority of the UKSC's reasoning in *Lawrence* made its way into the more recent case law regarding the compatibility of rules on litigation costs with Article 6 ECHR. Furthermore, LASPO also introduced key changes to the English legal aid system. As part of the cuts in the legal aid system for balancing public expenditure mentioned earlier, LASPO changed financial eligibility requirements for the granting of legal aid and excluded several areas of law from legal aid coverage. Regarding the cuts in the legal aid system, LASPO's aim was essentially to enhance the efficiency of public spending in this area.<sup>88</sup> With respect to the withdrawal of legal aid for certain areas of law, LASPO had the objectives of channelling resources to more important<sup>89</sup> cases and of increasing litigants' reliance on self-representation, private litigation funding and alternative dispute resolution mechanisms.<sup>90</sup>

Self-representation has indeed increased after the enactment of LASPO, most notably in family law cases.<sup>91</sup> It is out of the scope of this article to assess whether this increase in self-representation triggered by LASPO infringes Article 6 ECHR.<sup>92</sup> Nevertheless, three matters in

that respect should be mentioned. Firstly, in *Steel and Morris v. UK*, the fact that the applicants had to repeatedly resort to self-representation influenced the ECtHR's ruling in finding a breach of the principle of equality of arms.<sup>93</sup> In addition, Sorabji points out two problems with the increase of self-representation that have recently triggered further debates in the realm of legal philosophy<sup>94</sup> concerning the commodification of justice, the latter topic being discussed more in-depth in Cordina's contribution to this Special Edition.<sup>95</sup> The first problem pointed out by Sorabji is that, since self-represented claimants may not have the required knowledge to present their case properly, judges often 'step down' from their neutral and passive role to assist the party in formulating their claim in legal terms.<sup>96</sup> This attitude undercuts one of the core justifications of the adversarial legal system – pushing it towards a more inquisitorial essence<sup>97</sup> – according to which such a system provides for better judicial impartiality.<sup>98</sup> The reason why judges 'stepping down' to assist one of the parties undercuts the adversarial character of proceedings is as follows. Under an inquisitorial legal system, the judge can trigger the bringing of evidence and then later rule on the evidence she summoned herself. This combination of roles places a significant hurdle on the ability to impartially assess such evidence. Since, under adversarial legal systems, all evidence is expected to be presented by the parties, such a hurdle does not exist. If, however, the judge 'steps down' to assist one of the parties, this combination of roles resembles that which exists in inquisitorial legal systems.<sup>99</sup> The second problem pointed out by Sorabji is the 'McKenzie friend' problem, which consists of litigants being assisted by people who are not qualified lawyers. Against properly represented parties, the disparity in the quality of legal representation that the 'McKenzie friend' problem gives rise to is the entrenchment of economic inequalities in the justice system.<sup>100</sup> In the long term, this entrenchment allows for the wealthier to exert control over such a system and set its terms of use.<sup>101</sup>

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85 *Coventry v. Lawrence* [2015] UKSC 50.

86 [www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf); Recoverability of ATE premiums is still possible under the conditions outlined by the Courts and Legal Services Act 1990, Section 58C.

87 N. Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (2018), at 155.

88 <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>.

89 '[I]mportance' is understood here as the appertinment of the case to matters regarding 'the individual's life, liberty, physical safety and homelessness' as well as the factor of involvement of the state in the dispute, see *Ibid.*

90 *Ibid.*

91 J. Sorabji, 'Austerity's Effect on English Civil Justice', 8 *Erasmus Law Review* 159, at 164 (2015).

92 For that purpose, see F. Hawken, 'Failed Justice: The Impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the Legal System of England and Wales', 24 *Coventry Law Journal* 129, at 129-35 (2019); E. Uncovska, 'The Impact of Legal Aid Cuts on the Right to a Fair Trial', 24 *Coventry Law Journal* 136, at 136-42 (2019).

93 *Steel and Morris v. UK*, ECHR (2005) No. 68416/01.

94 F. Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (2019), at 51-69; S. Agmon, 'Undercutting Justice – Why Legal Representation Should Not Be Allocated by the Market', 20 *Politics, Philosophy & Economics* 99, at 99-123 (2020); A. Sharon and S. Agmon, 'Justice and the Market', in A. Dorfman and A. Harel (eds.), *The Cambridge Handbook of Privatization* (2021) 85, at 85-101. For responses to these philosophical arguments, see M. Gilles and G. Friedman, 'Examining the Case for Socialized Law', 129 *Yale Law Journal* 2078, at 2078-2111 (2020); A. Higgins, 'What Price Are We Willing to Pay for the Dream of Equal Justice?', *Oxford Journal of Legal Studies* (forthcoming 2021).

95 A. Cordina, 'Is It All That Fishy? A Critical Review of the Prevalent Concerns Surrounding Third Party Litigation Funding in Europe', 14 *Erasmus Law Review* (2022).

96 Sorabji, above n. 91, at 165-7.

97 *Ibid.*

98 Agmon, above n. 94, at 108.

99 *Ibid.*

100 Sorabji, above n. 91, at 168. A similar problem exists in the United States, see D.L. Rhode, *The Trouble with Lawyers* (2015), at 38-51.

101 Wilmot-Smith, above n. 94, at 64. One flagship example in this sense is the legitimisation, in the United States, of the control of employees' proce-



You may still (and fairly so) ask yourself why I am raising all these concerns about a recoverability regime that is no longer in place. The reason is that, although the regime has been revoked by LASPO, the reasoning that guided the UKSC's ruling in *Lawrence* was reiterated in the 2020 High Court ruling in *R (on the application of Leighton) v. Lord Chancellor*. And it does not stop there. The High Court extended the reach of this reasoning beyond Article 6 ECHR to include the common law right of access to a court as well.<sup>102</sup> The High Court ruled that '[i]f the Article 6 challenge succeeds, the common law challenge will succeed, and vice versa'.<sup>103</sup> This latter statement is grounded on *Lawrence* coupled with *UNISON*. Lord Reed stated in *UNISON*, with regard to the common law right of access to a court, that 'the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve'.<sup>104</sup> However, this complete overlap between the criteria for assessing the infringement of Article 6 ECHR and the common law right of access to a court does not exist. It is true that proportionality plays a role in assessing, on a case-by-case basis, whether an infringement of the principle of equality of arms is the result of inadequacy between the interference in Article 6 rights and the state's means to achieve the aim supporting the measure scrutinised.<sup>105</sup> Nevertheless, as I will demonstrate in Sections 5 and 6, the criteria used by the UKSC in *Lawrence* for such an assessment is inadequate when equality of arms is at stake. Consequently, since equality of arms is a component of Article 6 ECHR, there cannot be a complete overlap between the criteria for assessing the infringement of Article 6 ECHR and the common law right of access to a court.

*R (on the application of Leighton) v. Lord Chancellor* was a case in which the High Court ruled on whether the fact that qualified one-way costs shifting (QOCS) was not applicable to claims regarding discrimination against people with disabilities meant a breach of Article 6 ECHR.<sup>106</sup> QOCS is a litigation costs regime for personal injury claims under which, in case the claimant loses the lawsuit, she will not have to pay for the defendant's costs. If the defendant loses, however, she will have to pay for the claimant's costs.<sup>107</sup> This regime was proposed in the Jackson Review as a substitute for the need for claimants to take out ATE insurance whilst still being

safeguarded against a potential costs liability.<sup>108</sup> Regarding defendants, as Sir Rupert Jackson put it, '[i]t would be substantially cheaper for defendants to bear their own costs in every case, whether won or lost, than to pay out ATE insurance premiums in those cases which they lose'.<sup>109</sup> Although equality of arms was not clearly at stake in *R (on the application of Leighton) v. Lord Chancellor*, one of the arguments of the appellant was that the non-applicability of QOCS undermined the 'rebalancing costs liabilities between claimants and defendants'.<sup>110</sup> It is out of the scope of this article to discuss the correctness of the High Court's ruling in this case. I am not suggesting here that QOCS in any way breaches the principle of equality of arms under Article 6 ECHR.<sup>111</sup> But it is important to mention that the means through which the High Court found no breach of Article 6 ECHR was to follow the UKSC's ruling in *Lawrence*.<sup>112</sup> Thus, contending the *Lawrence* ruling remains relevant to discuss the future of equality of arms in UK constitutional and human rights adjudication.

## 5 Article 6 ECHR Is Not Limited to the Right of Access to a Court

In *Hamilton v. Al Fayed*, (then) Hale LJ said, 'I would not be so presumptuous as to assume that access to the courts and access to justice were synonymous'.<sup>113</sup> Perhaps not surprisingly, the now Lady Hale is one of the dissenting justices in *Lawrence* whose opinion I am going to in part defend. Therefore, I will now pose my first objection to the UKSC's assessment of (non-)infringement of Article 6 ECHR, which is intrinsically linked to Lord Clarke's dissenting opinion (with whom Lady Hale agreed): it limited the view on access to justice under Article 6 ECHR to the right of access to a court. The point about equality of arms which, in Lord Clarke's words, has 'great force' is the following quotation by Zuckerman about the ECtHR ruling in *MGN v. UK*:

The last point raises an issue of equality of arms. Equality of arms requires that both parties should be afforded an equal and reasonable opportunity to advance their respective cases under conditions that do not substantially advantage or disadvantage either side. Yet, an individual defendant without the benefit of a CFA is in a worse position than the CFA claimant because he is ex-

dual rights in arbitration to avoid class actions, see *Lamps Plus, Inc. v. Varela*, 587 U.S. \_\_\_\_ (2019).

102 *R (on the application of Leighton) v. Lord Chancellor* [2020] EWHC 336 (Admin).

103 *Ibid.*

104 *R (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51.

105 'The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate.... It may therefore be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings', see *Steel and Morris v. UK*, ECHR (2005) No. 68416/01.

106 *R (on the application of Leighton) v. Lord Chancellor* [2020] EWHC 336 (Admin).

107 Andrews, above n. 87, at 140.

108 [www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf).

109 *Ibid.*

110 *R (on the application of Leighton) v. Lord Chancellor* [2020] EWHC 336 (Admin).

111 A proper discussion about the compatibility of QOCS with the right of equality of arms under Article 6 ECHR (considering *Steel and Morris v. UK* and not *Lawrence*) can be found in A. Higgins, 'A Defence of Qualified One Way Cost Shifting', 32 *Civil Justice Quarterly* 198, at 210-11 (2013).

112 *R (on the application of Leighton) v. Lord Chancellor* [2020] EWHC 336 (Admin).

113 *Hamilton v. Al Fayed* [1998] QB 1175.



posed to the risk of having to pay as much as twice the claimant's reasonable and proportionate costs. The way in which the success fee is calculated compounds the inequality and the unfairness because the magnitude of the 'reasonable' success fee is in inverse proportion to the strength of the claimant's case. The riskier the claimant's case, the greater the success fee that his lawyer may legitimately charge. It follows that the stronger the defendant's prospect of success and the more he has reason to insist on his rights the more he would have to pay the claimant by way of success fee, in the event that the claimant wins.<sup>114</sup>

Regarding the claimant's Article 6 rights, one can say that the majority was correct to focus on the right of access to a court. Indeed, a CoE Contracting State's freedom to design its litigation financing system, including the latter's recourse to private funding, falls within the scope of such a right.<sup>115</sup> However, the majority's ruling makes unclear assertions about the defendant's Article 6 rights. It is explicitly acknowledged that the competing claims of both parties have Article 6 ECHR as their legal basis. Or, in other words, it is the claimant's Article 6 access to justice rights against the defendant's Article 6 access to justice rights. And although, as mentioned, on the side of the claimant the content of such a right is clear, on the side of the defendant this content is blurred.

Two passages of the majority's judgment even seem to steer this content towards equality of arms. The first passage is the assertion that 'at least in the absence of a widely accessible civil legal aid system (which had ceased to exist by 1999), it is impossible to devise a fair scheme which promotes access to justice for all litigants'.<sup>116</sup> I interpret this part of the judgment as acknowledging equality of arms as an aspect of access to justice under Article 6 ECHR. The reason why I interpret it in this way is because, in this context, 'fair scheme' would be one that does not suffer from the third flaw identified in the Jackson Review – the blackmailing effect caused by the possibility of having to pay additional liabilities. The second passage is the majority's assertion accepting that 'in a number of individual cases, the scheme might be said to have interfered with a defendant's right of access to justice'.<sup>117</sup> I also identify this passage as taking equality of arms into account for the same reasons as the first one. Its reference to the interference in Article 6 rights caused by the Access to Justice Act 1999 scheme is also grounded on the third flaw identified in the Jackson Review. In my view, disparities of legal costs are inherently associated with the third flaw identified in the Jackson Review since it is such a disparity that causes the blackmailing effect on defendants with less resources to fight in court. The same can be said with regard to the recoverability of ATE premiums in defamation cases. As pointed in the Jackson Review,

under this recoverability regime, a wealthy superstar could take out ATE insurance before suing a small scandal sheet and the costs of the respective premium would be imposed on such a defendant.<sup>118</sup>

Nevertheless, the second part of the core of the majority's reasoning against the defendant's 'most sustained argument' limited access to justice under Article 6 ECHR to the right of access to a court. Such an argument requested the UKSC to rule that the amount of costs payable by the defendant should be calculated considering (a) all base costs, additional liabilities, as well as (b) the personal circumstances of the defendant<sup>119</sup> – contrary to what Paragraph 11.9 of the CPD provides. The (a) first request will be dealt with in the section below. As regards (b) the second request, the UKSC ruled that the ECHR did not require, in terms of legal costs, any regard for the personal circumstances of the parties.<sup>120</sup> Indeed, the extent to which individual financial conditions are considered by the ECtHR to assess the proportionality of legal costs can be quite narrow.<sup>121</sup> Be that as it may, the due proportionality of legal costs as a prerequisite of access to justice under Article 6 ECHR is an element of the right of access to a court, in the sense that such costs are legitimate as far as they do not impair the essence of such a right.<sup>122</sup>

That said, as explained in the first section of this article, access to justice also depends on party resources and equality of arms demands that, at the level of the individual lawsuit, both parties can effectively argue their case before a court. The case law of the ECtHR outlines the conditions under which the lack of litigation funding can be legally deemed to affect equality of arms negatively. In *Steel and Morris v. UK*, a case in which the applicants had been denied legal aid, the ECtHR held that a CoE Contracting State is not expected to achieve 'total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage'.<sup>123</sup> Therefore, the criteria to evaluate if the party's equality of arms is negatively affected by her ability to obtain funding is whether she is placed 'at a substantial disadvantage'. The ECtHR then ruled in *Steel and Morris v. UK* that, in that case, although in some procedural acts the applicants had been assisted by *pro bono* lawyers, such assistance was not enough to remove the disadvantage they faced given the complexities of the proceedings. Consequently, equality of arms was negatively affected – amounting to a violation of Article 6 ECHR.<sup>124</sup>

The reason why, in *Lawrence*, the dissenting justices found there to be a substantial disadvantage to the de-

114 Zuckerman, above n. 8, at 1399.

115 *Airey v. Ireland* App, ECHR (1979) No. 6289/73.

116 *Coventry v. Lawrence* [2015] UKSC 50.

117 *Ibid.*

118 [www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf).

119 *Coventry v. Lawrence* [2015] UKSC 50.

120 *Ibid.*

121 *Tolstoy Miloslavsky v. UK*, ECHR (1995) No. 18139/91.

122 *Ibid.*

123 *Steel and Morris v. UK*, ECHR (2005) No. 68416/01.

124 *Ibid.*

fendants was based on doctrinal scholarship quoted earlier already arguing for the incompatibility of the Access to Justice Act 1999 CFA regime with equality of arms as well as the disparities of legal costs present in the case.<sup>125</sup> The former reason is of course problematic because, as stressed throughout this article, if equality of arms is to be ruled on a case-by-case basis the system itself cannot be the object of analysis. As I said before, the disparities of legal costs, in their turn, are inherently associated with the third flaw identified in the Jackson Review since it is such a disparity that causes the black-mailing effect on defendants with less resources to fight in court. Again, the same can be said with regard to the recoverability of ATE premiums in defamation cases.

What was not pointed out clearly, however, and it is one of the main aims of this article to do so, is that the rationale behind the majority's assessment of non-infringement of Article 6 ECHR had only right of access to a court as its background. The reason why it did so, as mentioned, is because it relied on the fact that the ECHR does not require, in terms of legal costs, any regard for the personal circumstances of the parties. Even though this is not entirely true, that is the case when what is at stake is access to a court, not equality of arms.

For example, in *Tolstoy Miloslavsky v. UK*, in which the reasonableness of an order for security for costs was ruled on (and indeed the personal circumstances of the applicant were mentioned only marginally), the ECtHR stated that such a measure falls within the scope of regulations by the State that may interfere in the right of access to a court.<sup>126</sup> This same categorisation was given to a rule that made initial litigation costs proportional to the value of the claim regardless of other factors in *Weissman v. Romania*.<sup>127</sup> In this latter example, the ECtHR once again deemed this measure as a restriction of the right of access to a court that, although implied in the ECHR, may be subject to regulation by the state.<sup>128</sup> Differently from *Tolstoy Miloslavsky v. UK*, however, in this ruling the ECtHR stated that 'the applicant's ability to pay [the fees] and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court'.<sup>129</sup>

This narrow view falls short of entailing the full scope of the procedural guarantees of access to justice provided for by Article 6 ECHR and does not include equality of arms as a parameter. Therefore, in my view, the majority of the UKSC should have instead focused on whether the aforementioned disparities of legal costs were present. In the terms set by the ECtHR, this scrutiny would need to assess whether each party was 'afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary'.<sup>130</sup> To rule otherwise is to

allow for a breach of the principle of equality of arms as outlined in *Steel and Morris v. UK*.

## 6 '[A]n Exercise of a Wholly Different Character'? Reading *MGN v. UK* Together With *Steel and Morris v. UK*

As explained in the third section of this article, the UKSC assessed infringement of Article 6 ECHR through a proportionality test taken from *Animal Defenders v. UK*, according to which governmental measures that pursue legitimate aims can be deemed compliant with the ECHR the more convincing the rationales for such a measure are.<sup>131</sup> The UKSC also stated that since this was not, like *MGN v. UK*, a case concerning Article 10 ECHR, a proper scrutiny of the parties' arguments required 'an exercise of a wholly different character'.<sup>132</sup> It was acknowledged that the ECtHR rejected the claim that the designing of such a system fell within the legislators' discretion since it was made after 'wide consultation' and sought to achieve the legitimate aim of achieving access to justice.<sup>133</sup>

Nevertheless, the type of compliance test then undertaken by the majority, although engaging in a more in-depth analysis of the legal context in which the system emerged, is still not in line with the need to take the principle of equality of arms into account. There are two reasons for this discrepancy, explained below. First, (a) even within the boundaries of such a test, it is not outright clear that the legitimate aim of providing access to justice can be achieved by the CFA regime under the Access to Justice Act 1999. Second, (b) the legal content of the principle of equality of arms demands that its infringement be assessed on a case-by-case basis, preventing analyses that focus on the system.

As regards the first reason (a), the UKSC ruled that the aim pursued by the CFA regime under the Access to Justice Act 1999 – achieving access to justice – was legitimate, since it was recognised as such in *MGN v. UK*.<sup>134</sup> Or was it? The UKSC's automatic transposition of the recognition of such a legitimacy seems too quick. As remarked by the UKSC itself, *MGN v. UK* was an Article 10 ECHR case rather than an Article 6 ECHR case.<sup>135</sup> Different from Article 10 ECHR, Article 6 ECHR does not have a list of derogating exceptions such as those provided for by Article 10(2) ECHR.

In *MGN v. UK*, the exception on which the ECtHR relied to deem the CFA regime under the Access to Justice Act 1999 a legitimate aim was 'the protection of the rights of

125 *Coventry v. Lawrence* [2015] UKSC 50.

126 *Tolstoy Miloslavsky v. UK*, ECHR (1995) No. 18139/91.

127 *Weissman v. Romania*, ECHR (2006) No. 63945/00.

128 *Ibid.*

129 *Ibid.*

130 *Steel and Morris v. UK*, ECHR (2005) No. 68416/01.

131 *Coventry v. Lawrence* [2015] UKSC 50.

132 *Ibid.*

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

others'.<sup>136</sup> Since the system under analysis had as its objective the promotion access to legal services through recourse to private funding, the ECtHR accepted that the aim sought was legitimate.<sup>137</sup> However, the feasibility of attainment of this very same objective was put to doubt by the ECtHR later in the judgment due to the fourth flaw identified by Sir Rupert Jackson mentioned earlier:

The fourth flaw was the fact that the regime provided, at the very least, the opportunity, it not being possible to verify the confidential financial records of solicitors and barristers, to 'cherry pick' winning cases to conduct on CFAs with success fees. The Court considers it significant that this criticism by Jackson LJ would imply that *recoverable success fees did not achieve the intended objective of extending access to justice* to the broadest range of persons: instead of lawyers relying on success fees gained in successful cases to fund their representation of clients with arguably less clearly meritorious cases, lawyers had the opportunity to pursue meritorious cases only with CFAs/success fees and to avoid claimants whose claims were less meritorious but which were still deserving of being heard.<sup>138</sup>

With respect to the second reason (b), the UKSC also ruled that the recoverability regime under the Access to Justice Act 1999 was a proportional means through which to achieve the proclaimed objective of promoting access to justice.<sup>139</sup> The test used for reaching such a conclusion was taken from *Animal Defenders v. UK* but with a more in-depth analysis of the specificities of both the regime itself as well as the fact that it was a case concerning Article 6 ECHR.<sup>140</sup> For avoiding any doubt, the UKSC itself remarked in what is, in my view, the *ratio decidendi* of this ruling that, for the reasons explained in paragraphs 58 to 63, it was 'necessary to concentrate on the scheme as a whole'.<sup>141</sup> The reasons explained in paragraphs 58 to 63 are, in their turn, references to case law on why the margin of appreciation granted to legislators may, in some cases, inevitably deny rights to some if the justifications given for such a measure are appropriate, *Animal Defenders v. UK* being one of the leading cases.<sup>142</sup> Under European human rights law, this type of proportionality test is also called review *in abstracto*. It is a standard of review used by the ECtHR when competing rights are colliding. According to this standard, if the ECtHR case law is duly considered by national courts and legislators, and the quality of the legislative work and judicial review is deemed sufficient, the Contracting States enjoy a wider margin of appreciation in finding a balance between the competing rights concerned. This standard of review thus replaces the proportionality test *in concreto*, in which it is the ECtHR itself that analyses

whether the measure at hand complies with its case law.<sup>143</sup>

As mentioned earlier, the justification relied on by the UKSC to dismiss the defendant's arguments was that, should there be room for discretion to consider *ex post* all base costs when calculating CFA uplifts, the uncertainty as to the receivable amount would discourage lawyers from entering CFAs in the first place, thereby undermining the whole system.<sup>144</sup> With regard to ATE premiums, the majority of the UKSC relied on the rationale according to which the ATE insurance market is 'integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid world'.<sup>145</sup>

In this sense, the incompatibility of the UKSC's reasoning with the principle of equality of arms under Article 6 ECHR becomes clear. Although the UKSC said it would be performing 'an exercise of a wholly different character',<sup>146</sup> it is difficult to see how different it is from the original *Animal Defenders v. UK* except for the fact that the analysis of the system itself was more in-depth. At the end, both are relying on the proportionality and said legitimacy of the 'system as a whole' to justify the corresponding measures taken. But, again, if equality of arms is to be ruled at the level of the individual lawsuit, then one cannot rule on such a right taking the 'system as a whole' as its object of analysis. This becomes even clearer when comparing *Lawrence* with the above-mentioned case of *Ordre des barreaux francophones et germanophone*, in which, instead of concrete personal circumstances of litigants, the discussion focused on legal rules in abstract (and therefore the principle of equality of arms was deemed not infringed).<sup>147</sup>

In the atypical situation of the *Lawrence* case, the rule that legitimised the ruling prevented the scrutiny of the individual lawsuit. When such a rule is in place, its incompatibility with the principle of equality of arms stems from its very essence: it is necessary to analyse the particularities of the imbalances between the parties at the level of the individual lawsuit to assess an infringement of the principle of equality of arms. That is the case here with Paragraph 11.9 of the CPD mentioned earlier. In my view, the UKSC did not deem this rule incompatible with equality of arms precisely because it analysed 'the system as a whole'. Therefore, this rule was viewed as an essential part of the overall scheme and as falling within the legislators' margin of appreciation, bypassing the fact that it prevented the scrutiny of individual cases considering equality of arms under Article 6 ECHR.

136 *MGN v. UK*, ECHR (2011) No. 39401/04.

137 D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (2014), at 662.

138 *MGN v. UK*, ECHR (2011) No. 39401/04 (emphasis added).

139 *Coventry v. Lawrence* [2015] UKSC 50.

140 *Ibid.*

141 *Ibid.*

142 *Ibid.*

143 O. Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', 28 *The European Journal of International Law* 819, at 835-8 (2017).

144 *Coventry v. Lawrence* [2015] UKSC 50.

145 *Ibid.*

146 *Ibid.*

147 Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:605.



On this point, it is worth mentioning that the principle of equality of arms as currently defined by the ECtHR has German origins,<sup>148</sup> and the domestic endorsement of rights as a precondition for their acceptance by national courts is embedded in the UK's legal culture. This translates into a judicial tendency to favour the legislative margin of appreciation in detriment of rights as defined by the ECtHR.<sup>149</sup> This does not mean that the principle of equality of arms has not, in the past, been defined more strictly in Germany itself. In his dissenting opinion in *Dombo Beheer BV v. Netherlands*, Judge Martens referred to the German interpretation of the principle of equality of arms. In doing so, he stated that such a principle 'can only have a formal meaning: both parties should have an equal opportunity to bring their case before the court and to present their arguments and their evidence'.<sup>150</sup> Nowadays, however, the German interpretation of the principle of equality of arms does impose an obligation on the State to provide for a minimum legal aid.<sup>151</sup>

## 7 Conclusion

Access to justice under Article 6 ECHR is not limited to the right of access to a court. Article 6 ECHR provides, among others, the procedural guarantee of equality of arms without which the right of access to a court cannot be exercised meaningfully. The recoverability of additional liabilities was introduced in the English legal system with the goal of removing costs barriers for potential claimants and shifting such a burden towards losing parties. This burden, in some cases such as *Lawrence*, gave rise to litigation costs that were considerably high. The threat of being liable for costs of such a magnitude acted as a potential deterrent either for parties bringing claims in the first place or for defendants to properly advance their arguments – thereby incentivising early settlement. The UKSC, in *Lawrence*, by adopting a narrow concept of access to justice, failed to acknowledge the role of equality of arms and did not give a proper weight to it in assessing the infringement of Article 6 ECHR, which, according to the dissenters, was caused by the disparities in legal resources present in the case.

From this perspective, *Lawrence* is an atypical case. As mentioned earlier, the rule that legitimised the ruling – Paragraph 11.9 of the CPD – prevented the scrutiny of the individual lawsuit and, in this sense, its incompatibility with the principle of equality of arms stems from its very essence. To say this is very different from ruling

on the role played by Paragraph 11.9 of the CPD as a component of a system for allocation of legal costs. The use of a proportionality test that analyses the system as a whole, such as that devised in *Lawrence*, is not appropriate for dealing with cases in which disparities in legal resources may be present. Equality of arms is to be ruled at the level of the specific lawsuit, not of an entire system for allocation of legal costs. This proportionality test was reiterated by the High Court in *R (on the application of Leighton) v. Lord Chancellor*, which extended its reach to entail the common law right of access to a court. It should, however, be abandoned. The procedural guarantee of equality of arms is jeopardised by this test, and it runs the risk of remaining neglected in future judgments should this proportionality test continue to be used.

148 J. Langbein, 'The German Advantage in Civil Procedure', 52 *The University of Chicago Law Review* 823, at 843 (1985).

149 N. Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism', in T. Campbell, K. Ewing & A. Tomkins (eds.), *Sceptical Essays on Human Rights* (2001) 120, at 128-9.

150 *Dombo Beheer BV v. Netherlands* (1993) No. 14448/88.

151 A. Stadler, 'Third Party Funding of Mass Litigation in Germany: Entrepreneurial Parties – Curse or Blessing?', in L. Cadet, B. Hess & M. Isidro (eds.), *Privatizing Dispute Resolution: Trends and Limits* (2019) 209, at 224.

# Litigation Funding in Ireland

David Capper\*

## Abstract

Costs are a severe barrier to access to justice in Ireland. Taxpayer support for litigation is virtually non-existent and contingency fees are not permitted. Lawyers may take cases on a speculative 'no foal no fee' basis but two decisions of the supreme court in recent years invalidated both direct third-party funding of another's lawsuit (*Persona Digital Telephony v. Minister for Public Enterprise* [2017] IESC 27) and the assignment of a legal claim to a third-party (*SPV Osus Ltd v. Minister for Public Enterprise* [2018] IESC 44). This paper reviews these two decisions and challenges the supreme court's reliance on the ancient common law principles of maintenance and champerty. This is significantly out of line with the approach of senior courts in other common law jurisdictions. The access to justice problem was acknowledged by the judges and the Irish Law Reform Commission is studying the issue. With the withdrawal of the United Kingdom from the European Union, Ireland has been presented with the opportunity to become a major common law 'hub' for legal services. Litigation funding would assist it to embrace this opportunity. The paper also takes a brief look at third-party costs orders in Ireland, used only in cases where altruistic funders provide funding for litigation. The paper's basic message is that, subject to appropriate regulation, third-party litigation funding should become lawful in Ireland.

**Keywords:** litigation funding, direct third party funding, assignment of claims, maintenance and champerty, third party costs orders.

## 1 Introduction

In his foreword to the Civil Justice Review, the outgoing President of the High Court in Ireland, Mr Justice Peter Kelly, acknowledged that Ireland was a high-cost legal jurisdiction.<sup>1</sup> Access to justice has been acknowledged to be a fundamental right guaranteed by Article 34 of the Irish Constitution,<sup>2</sup> and the European Court of Human Rights held in *Airey v. Ireland*,<sup>3</sup> that the unavailability of legal aid to enable the applicant to seek a judicial separation from her physically abusive husband was a denial of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. Yet, de-

spite the imperatives seemingly demanded in this, the supreme court denied that the state was under a constitutional obligation to provide legal aid for civil non-family litigation in *Magee v. Farrell & Ors*,<sup>4</sup> although the obligation to provide legal aid for someone charged with a criminal offence potentially carrying a serious risk of imprisonment was acknowledged in that case.

There is no civil non-family legal aid in Ireland. Contingency fees are unlawful under Section 149 of the Legal Services Regulation Act 2015, and there is no exact equivalent of the English conditional fee authorised by Section 58A of the Courts and Legal Services Act 1990. 'No foal, no fee' agreements, under which no professional fee will be charged to a solicitor's client in the event that the case is lost, have been in use for a significant period of time and are the nearest thing Ireland has to cost sharing arrangements between lawyers and clients.<sup>5</sup> After-the-event insurance is lawful.<sup>6</sup> Ireland follows the 'loser pays' costs rule and, in light of the very high costs of litigation, the losing party will likely face a crippling financial burden. The court does have discretion to vary or depart from this normal practice but there is no specific 'access to justice' or 'impecunious litigant' ground for doing so.<sup>7</sup> A scan of cases on BAILII indicates a very large number of litigants in person.

It is in the above context that Ireland's refusal, so far, to accept third-party litigation funding requires assessment. The structure of the paper is as follows. The next section discusses the current position with regard to conventional third-party litigation funding where A finances litigation brought by B against C in exchange for a share of any recovery obtained by B. Then, the paper discusses what may be described as an alternative form of litigation funding where B assigns its law suit against C to A for a discounted price. Since Ireland rejected third-party litigation funding in the conventional form, it was no surprise that this kind of litigation support was also rejected, but the supreme court's decision in *SPV Osus Ltd v. HSBC International Trust Services Ireland Ltd*<sup>8</sup> merits discussion because decisions from common law apex courts on assigning rights to litigate are a relative rarity. The third substantive section of the paper discusses third-party costs orders, a very important subject for those jurisdictions that embrace litigation funding.

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1 *Review of the Administration of Civil Justice* (Department of Justice and Equality, October 2020).

2 *Greenclean Waste Management Ltd v. Leahy p/a Maurice Leahy and Co Solicitors* (No 2) [2014] IEHC 314, [23-24] (Hogan J).

3 [1979] 2 EHRR 305.

4 [2009] IESC 60.

5 *McHugh v. Keane* (unreported, 16 December 1994, High Court); *Synnott v. Adekoya* [2010] IEHC 26 (Laffoy J).

6 *Greenclean Waste Management Ltd v. Leahy* [2014] IEHC 314.

7 H. Biehler, D. McGrath & E. McGrath, *Delaney and McGrath on Civil Procedure* (4th ed., 2018), 24-05-24-77.

8 [2018] IESC 44.

The issue is also important in Ireland because it is only the commercial funding of litigation by third parties with no interest in the litigation other than as a way to make money that is currently banned in this jurisdiction. The final substantive section will discuss and support the current officially sponsored consideration of reform in this area.

## 2 Funding Another's Claim

To recap, this section discusses cases where A provides funding for B's claim against C, in return for a share of any damages B recovers in the case. The Supreme Court of Ireland considered the legal legitimacy of this funding arrangement in *Persona Digital Telephony Ltd v. Minister for Public Enterprise*.<sup>9</sup> The litigation that it was proposed to fund in this case was extremely complex and involved what Clarke J described as some of the most serious factual allegations made since the foundation of the Irish state in 1921.<sup>10</sup> The supreme court declared the funding arrangements illegal as violative of the ancient common law principles of maintenance and champerty. In brief, maintenance is the support of another's litigation without justification or excuse, and champerty is maintenance in consideration of a share of any recovery made. Maintenance and champerty have their origins in medieval times when rich landowners frequently bought up others' rights to sue as a way of harassing their enemies and acquiring more landholdings with the political and social influence this brought. Public administration and the civil justice system were weak at this time and unable to prevent the corruption of public justice which so frequently accompanied this misuse of litigation.<sup>11</sup> The approach of the supreme court in *Persona Digital* is in marked contrast to that of several other common law jurisdictions where the ancient principles of maintenance and champerty are also part of the law. Ireland treats third-party support for litigation that does not come from a pre-existing interest in the claim as automatically involving maintenance and champerty. England, by contrast, looks to the origins of maintenance and champerty in the corruption of public justice, and permits third-party financial support so long as there appears to be no tendency to corrupt justice. Purchasing or supporting another's claim in the conditions of medieval England would almost inevitably have corrupted justice but this is not the case today.<sup>12</sup> So long as the

funder does not attempt to control the litigation, but confines itself to a consultative and advisory role, there is no reason to invalidate its involvement. Indeed, courts in England welcome third-party support for litigation because it overcomes the obvious access to justice problems highlighted above. Common law jurisdictions like the United States, Canada, Australia and New Zealand have embraced litigation funding subject to similar safeguards. In those jurisdictions, of course, the problem of the overbearing feudal baron did not exist.<sup>13</sup> Ireland, however, takes the position that third-party litigation support is inherently risky and should not be allowed.

Why Ireland has taken such a cautious and conservative approach to third-party litigation funding when its access to justice problems appear so severe seems curious.<sup>14</sup> The significance attached to maintenance and champerty as obstacles to litigation funding may be, in part, attributable to two factors. First, by the Statute Law Revision Act 2007, maintenance and champerty have remained crimes and torts in Ireland. This is in contrast to the position in England and Wales where Sections 13(1) and 14(1) of the Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty, although Section 14(2) retained the invalidating rules of public policy. Clarke J seems to have attached some significance to this in *Thema International Fund Plc v. HSBC Institutional Trust Services Ireland Ltd*<sup>15</sup> and Donnelly J's first instance judgment in *Persona Digital*<sup>16</sup> clearly does. Dunne J downplayed its significance in *Persona Digital*, pointing out that there had been no prosecutions for either of these crimes since the foundation of the state,<sup>17</sup> and McKechnie J in his dissenting judgment described it as unseemly for the state to be trying to block litigation brought against it by relying on crimes and torts apparently never invoked in the state's history.<sup>18</sup> The insignificance of this matter is shown by comparing the position in New Zealand where third-party litigation funding is permitted notwithstanding the continued existence of maintenance and champerty as crimes and torts.<sup>19</sup> The issue is whether litigation fund-

9 [2017] IESC 27. M. Baldock, 'Persona (non?) Grata: *Persona Digital Telephony v. Minister for Public Enterprise* [2017] IESC 27', 37(2) *Civil Justice Quarterly* 186 (2018); D. Capper, 'Third Party Litigation Funding in Ireland: Time for Change?', 37(2) *Civil Justice Quarterly* 193 (2018); D. Capper, 'Supreme Court Rejects Litigation Funding', 41 *Dublin University Law Journal* 197 (2018).

10 [2017] IESC 27, [2.1].

11 P.H. Winfield, 'The History of Maintenance and Champerty', 35 *Law Quarterly Review* 50 (1919); M. Radin, 'Maintenance by Champerty', 24 *California Law Review* 48 (1935).

12 *Giles v. Thompson* [1994] 1 AC 142 (HL); *R (on the application of Factortame Ltd) v. Secretary of State for Transport, Local Government and the Regions* (No

8) [2002] EWCA Civ 932, [2003] QB 381 (CA); *Hamilton v. Al Fayed* (No 2) [2002] EWCA Civ 665, [2003] QB 1175 (CA); *Arkin v. Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 2 Lloyd's Rep 187 (CA); *Massai Aviation Services v. Attorney General* [2007] UKPC 12.

13 R. Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Appraisal of Recent Developments', 73 *The Cambridge Law Journal* 570, 573 (2014).

14 Ireland is not entirely alone in thinking that legislation is needed to remove any doubt about the validity of third-party litigation funding. In Singapore, the Civil Law (Amendment) Act 2017 abolished the torts of maintenance and champerty while retaining the rule of public policy. This was a prelude to the creation of an exemption from maintenance and champerty in the context of international commercial arbitration by the Civil Law (Third Party Funding) Regulations 2017. Hong Kong allows third-party litigation funding in domestic and international arbitrations through the Arbitration and Mediation (Third Party Funding) (Amendment) Ordinance 2017.

15 [2011] IEHC 357, [5.3].

16 [2016] IEHC 187, [27], [73].

17 [2017] IESC 27, [27].

18 [2017] IESC 27, [35] (McKechnie J).

19 *Saunders v. Houghton* [2010] 3 NZLR 331 (CA).



ing is maintenance or champerty, not whether this, in turn, is also criminal or tortious.

Of probably greater significance in explaining this reluctance to embrace third-party litigation support was that, when the courts in England were diminishing the potency of maintenance and champerty in the 1990s, the courts in Ireland breathed new life into the doctrines in two decisions concerned with heir-locator contracts. Heir-locators do what their name suggests, they locate heirs. If a solicitor administering an estate is having trouble finding the person entitled to inherit a share of it, perhaps because the individual is a distant relative who emigrated to a far-flung part of the world long ago, the research skills of an heir-locator paid on a 'bill by the hour' basis can be extremely valuable. However, heir-locators have been known to pick up the estates of 'no known heirs' deceased individuals listed on a public register. They then trace an heir and contract with that person to place him or her in possession of their inheritance, payment to be on a contingency basis. The heir will be told that he or she *may* be entitled to inherit from the estate of a distant relative, and that no charge will be incurred to the heir-locator for their work if nothing is recovered. If anything is recovered, the heir-locator will be paid a very significant share (one-third or 40% being far from unusual) for their work. What the heir is told is economical with the truth at best and downright dishonest at worst. There is no risk of nothing being recovered as the research has been done and the heir-locator knows that the heir is entitled to the inheritance. The heir cannot be given any significant information, such as the name of the deceased or any other heirs, as he or she would then be able to instruct a solicitor to recover their entitlement at a fraction of the heir-locator's contingency fee. The iniquity of these contracts is easy to see and maintenance and champerty have proved to be very useful devices for invalidating them and ensuring the heir-locator could not walk away with a wholly undeserved payment for work they were never asked to do and which in no way merits the enormous fee charged.

The first of these cases, *McElroy v. Flynn*,<sup>20</sup> illustrates the fact pattern more clearly. The heir-locator called on one of the two heirs (a brother and sister) one January evening and told her a story similar to the one above. When the heir asked if the deceased was a named individual, the heir-locator falsely answered that it was not. Blayney J invalidated the heir-locator contract that was made that January evening on the ground that it *savoured* of maintenance and champerty. He also made it clear that if it had been necessary to do so, he would have decreed rescission of the contract for the heir-locator's fraudulent misrepresentation about the name of the deceased. In this case, misrepresentation would have fitted the facts rather better than maintenance and champerty because there would have been no legal proceedings to which improper support could have been given. But misrepresentation is not a bulletproof de-

fence to the enforcement of an heir-locator contingency fee contract because a false statement will not always be made and, being oral, may be difficult to prove. Neither can there be certainty as to whether the contract is voidable on the ground of undue influence or unconscionable bargain as some cases might not fit that fact pattern. Maintenance and champerty offer the desired outcome every time. In light of the supreme court's subsequent acceptance of this as the invalidating ground of heir-locator contingency fee contracts in *Fraser v. Buckle*,<sup>21</sup> this is where the law on these contracts currently stands. But by expressing the Irish judiciary's unease with legal services being paid for any other way than by the client paying the lawyer for services the Taxing Master certifies as right and proper, the task of litigation funders in persuading the court that their support for litigation was innocent became difficult. Maintenance and champerty, dormant doctrines of the common law, were stirred to life and continue today to make their presence felt.

However, there are some limits to the revival of maintenance and champerty. The Irish courts have acknowledged that these doctrines are not to be extended, especially since this would have a negative impact upon access to justice. So, in *O'Keeffe v. Scales*,<sup>22</sup> the supreme court refused to allow a cause of action to be stayed on the ground that it was being unlawfully maintained. The defendant would have to sue the maintainer in the tort of maintenance after the proceedings were over. There was to be no satellite litigation in advance of trial to determine if proceedings were being supported by a third party and what interest the latter might have.<sup>23</sup>

The rejection (for now anyway) of third-party litigation funding should be seen less as a reluctance to change the law<sup>24</sup> and more as a consciousness of the sheer size and scale of the new course that would have to be plotted. To remain faithful to precedent and the ancient principles of maintenance and champerty, all the Irish courts really had to do was what courts in other common law jurisdictions had done. This was to recognise that maintenance and champerty were rooted not in the support for another's litigation but the corruption of justice. So long as third-party funding did not involve corruption of justice, there is no reason to invalidate the funding arrangements in any particular case. But the supreme court seemed uncomfortable with the case-by-case adjudication that a test of corruption of justice would involve. It would cause uncertainty, likely prove to be unpredictable and generally give rise to lengthy satellite litigation. If there was a risk that litigation funding might cause corruption of justice in some cases,

20 [1991] ILRM 294 (Blayney J).

21 [1996] 1 IR 1 (Sct). D. Capper, 'The Heir-locator's Lost Inheritance', 60 *Modern Law Review* 286 (1997).

22 [1998] 1 IR 290 (Sct).

23 D. Capper, 'Staying a Maintained Cause of Action', 114 *Law Quarterly Review* 563 (1998).

24 Note, however, that in *Thema International Fund Plc v. HSBC Institutional Trust Services Ireland Ltd* [2011] IEHC 357, [5.6], Clarke J remarked that courts in other jurisdictions had changed the law and the courts in Ireland should not follow.

this was reason not to allow it in any case.<sup>25</sup> A prophylactic approach was preferred. A detailed regulatory scheme would be required and this would be better designed by the legislature. This is the body constitutionally charged with law reform and better equipped to formulate the detailed rules that the judicial process, which must concentrate on deciding the case before the court, cannot do so well.<sup>26</sup> But if the legislature failed to act, Clarke J served notice that the access to justice problem was so pressing that the courts would be forced to introduce law reform by judicial decision.<sup>27</sup> The emphasis on the need for regulation is reasonable. In England and Wales, the only regulatory framework is voluntary regulation through the Association of Litigation Funders (ALF) voluntary Code of Conduct. Somewhat concerning, Professor Rachael Mulheron pointed out that in 2014, only seven out of 16 recognised funders were members of the ALF.<sup>28</sup> Sir Rupert Jackson has emphasised the value of litigation funders being members of the ALF and adhering to the Code,<sup>29</sup> and the *Excalibur* case should serve as a salutary warning about the problems non-member funders can cause.<sup>30</sup>

So, where we are with litigation funding in the conventional sense is as follows. If the funder is providing the funding with a view to making profit for itself from any damages recovered, and not because of any pre-existing interest it has in the litigation, this is something which in Ireland would be invalidated as contrary to public policy because it infringed the ancient principles of maintenance and champerty. The supreme court has acknowledged the access to justice context and signalled to the legislature that reform of the law is required. The story of that law reform so far is told in the fourth substantive section of this paper. However, it should be emphasised that it is appropriate for a person with a legitimate interest in the litigation, such as the shareholders of the claimant in *Thema International Fund Plc v. HSBC Institutional Trust Services Ireland Ltd*,<sup>31</sup> to provide litigation support. This is not maintenance or champerty.

### 3 Assigning a Claim

What is contemplated here is that, instead of B suing C with A's financial support, B assigns the claim to A for a discounted price. A takes over the prosecution of the case and B largely drops out of the picture, although A will need B's assistance in the provision of discovery, making witness statements, and ultimately giving evidence if the case goes to trial. B will often receive money 'upfront' for the claim although the contract of assignment may make payment conditional upon the happening of certain events such as settlement or a favourable judgment, or the performance of certain acts by B such as providing discovery and giving evidence. What B receives by way of payment is likely to be more secure than if A funds B to prosecute the claim, and the quantum would probably be less than B would receive if the case were successfully taken to settlement or trial with A's financial support, although a litigation funder's 'cut' of damages recovered is often large in any event. A, as the new claimant, will be liable to pay costs to the defendant if the case is lost but would very frequently be required to pay the successful defendant's costs under a third-party costs order even where A was simply funding B's case. B gets a measure of relief from the stress and anxiety of litigation and will not even be nominally liable for costs if the case fails.

There does not appear to have been very much use made of assignment in England or Ireland as a means of delivering access to justice for litigants. There is some evidence of its use for this purpose in the United States where claimants in urgent need of money to pay hospital bills or basic necessities have made use of it.<sup>32</sup> How attractive assignment would be to funders and funded parties is largely a matter of speculation at the moment but it could prove to be something they are willing to experiment with as the litigation funding industry develops.<sup>33</sup> It merits discussion in this paper because of the decision of the Supreme Court of Ireland in *SPV Osus Ltd v. HSBC Institutional Trust Services Ireland Ltd*.<sup>34</sup> The specific context of that case was not, however, expressly one of access to justice.

The facts of this case were extremely complex, but for present purposes, the following brief summary should suffice. An investment fund called Optimum Strategic (OS) was owed sums totalling nearly \$2.9 billion by the bankrupt Bernard Madoff empire. Approximately \$1.5 billion of these claims were secured and the remainder

25 This was how O'Donnell J explained the reluctance to embrace case by case adjudication in the analogous context of assignment of a right to litigate in *SPV Osus Ltd v. HSBC Institutional Trust Services Ireland Ltd* [2018] IESC 44, [19], [82].

26 *Persona Digital Telephony v. Minister for Public Enterprise* [2017] IESC 27, [3.7] (Clarke J).

27 *Ibid.*, [4.1-4.4]. McKechnie J's dissenting judgment in *Persona Digital* was driven by the need to address the access to justice problem. He proposed making no order in the case to give the legislature an opportunity to address the problem.

28 R. Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments', 73 *Cambridge Law Journal* 570, 578 (2014).

29 R. Jackson, *Review of Civil Litigation Costs: Final Report* (2009), paras. 2.4 and 2.12.

30 *Excalibur Ventures LLC v. Texas Keystone Inc* [2016] EWCA Civ 1144, [2017] 1 WLR 2221 (CA); D. Capper, 'Litigation Funder's Liability for Costs', 36 *Civil Justice Quarterly* 287 (2017).

31 [2011] IEHC 357 (Clarke J).

32 H.R. Weinberg, 'Tort Claims as Intangible Property: An Exploration from an Assignee's Perspective', 64 *Kentucky Law Journal* 49 (1975); P.C. Choharis, 'A Comprehensive Market Strategy for Tort Reform', 12 *Yale Journal on Regulation* 435 (1995); P.T. Morgan, 'Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims', 66 *Missouri Law Review* 683 (2001); M. Abramowicz, 'On the Alienability of Legal Claims', 114 *Yale Law Journal* 697 (2005).

33 Assignment did not much feature in the Woodsford study of litigation funding. See S. Friel (ed.), *The Law and Business of Litigation Finance* (2020).

34 [2018] IESC 44; G. Rogers, 'Litigation Funding, Assignment of Actions and Access to Justice', 18 *Hibernian Law Review* 93 (2019); D. Capper, 'Three Aspects of Litigation Funding', 70 *Northern Ireland Legal Quarterly* 357 (2019).

unsecured. The structure of OS did not facilitate investors in realising their entitlements, so a scheme was designed with the approval of the United States Bankruptcy Court for the Southern District of New York, whereby investors in OS could swap their shares in OS for shares in a special purpose vehicle (SPV Osus). These shares could be traded on financial markets so that investors were able to liquidise their entitlements more conveniently. Most OS investors exchanged their shares in OS for shares in SPV Osus and then sold these on. Distressed debt investors eventually came to own 93% of the shares in SPV Osus and then turned their attention towards making something out of the \$1.4 billion of unsecured claims. In the case being discussed, SPV Osus made claims against the defendant custodians of OS's investments who were based in Ireland for, inter alia, breach of contract, breach of fiduciary duty and misrepresentation. The issue before the supreme court was whether these claims savoured of maintenance and champerty. Through the various share exchanges above, the claims had been assigned by shareholders in OS to SPV Osus in the very clear anticipation that future shareholders in SPV Osus would seek to litigate the claims and enhance the value of their shareholding.

Why this might be a problem and its relevance to assigning a claim so as to obtain access to justice must now be explained. A debt is a chose in action presumptively assignable under Section 136 of the Law of Property Act 1925 in England and Wales and Section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. However, there is a long-standing principle in both England and Ireland that a bare right to litigate cannot be assigned. The essential reason for this is that buying and selling rights to sue is considered to be trafficking in litigation and contrary to public policy. It is the very thing that the rich landowners did in medieval England and which the courts at that time banned as tending towards the corruption of public justice.<sup>35</sup> Clearly, if assigning a right to claim damages is contrary to public policy, then assignment is effectively useless as a means of delivering access to justice.

In light of the supreme court's decision in *Persona Digital*, its decision in *SPV Osus* that the assignment of the claims to be litigated in that case were also contrary to public policy came as no surprise. What needs to be done now is to explain why, as matters of legal doctrine and legal policy, the supreme court came to this conclusion. There are two stages to this analysis. The first stage is to explain the difference between a 'debt or other legal chose in action' which may be assigned and a 'bare right to litigate' which may not. The second is to explain what is so objectionable about assigning a bare right to litigate.

The distinction between a debt or other legal chose in action and a bare right to litigate is less than perfectly clear. If a right to litigate is ancillary to a property right in the sense that the property right could not be enjoyed without exercising the right to litigate, there is no ob-

stacle to assignment.<sup>36</sup> A debt which is not subject to any serious dispute can be assigned,<sup>37</sup> but if it is clear that legal proceedings will have to be resorted to in order to recover the debt, the assignment may well be invalidated.<sup>38</sup> The existence of any serious dispute about the debt would tip the case into a claim for damages for breach of contract or tort. The House of Lords has held that in these cases, the assignee has to have a pre-existing legitimate interest in the claim before the assignment can survive a challenge based on maintenance and champerty.<sup>39</sup> Before getting to this matter in detail, it is worth mentioning one Irish case concerned with the assignment of a debt. This was *Pepper Finance Corporation (Ireland) DAC v. Emerald Properties (Irl) Ltd and Ors.*<sup>40</sup> After the commencement of proceedings against guarantors of a very large lending facility which had been called in, the loan was assigned to the claimants. The defendants objected that this was the assignment of a bare right to litigate. The judge ruled that it was the assignment of a debt. He attached significance to the fact that the assignee was assigned the whole of the debt and that there was no division of any recovery between assignor and assignee. There was no discussion in this context of the defendants' disputation of the debt but it might be significant to point out that their attempt in these proceedings to dismiss an application for summary judgment failed.

In the seminal decision of *Trendtex Trading Corporation v. Credit Suisse*,<sup>41</sup> Trendtex sold a very large quantity of cement to a company in Nigeria, payment to come via a letter of credit issued by the Central Bank of Nigeria. Trendtex had originally acquired the cement with the assistance of Credit Suisse, which issued a letter of credit in its favour for this purpose. The Central Bank of Nigeria defaulted on its letter of credit obligations and Trendtex was unable to repay Credit Suisse. Having no other realistic prospect of being paid for the cement it enabled Trendtex to acquire, Credit Suisse took an assignment of Trendtex's claim in damages against the Central Bank of Nigeria. Credit Suisse sold on the assigned claim for a sum modestly in excess of what it paid for it, but that second assignee settled it for a sum more than seven times the amount it paid. Trendtex challenged the assignment to Credit Suisse as involving trafficking in litigation. The House of Lords held that if the assignment of this claim had stopped with Credit Suisse, there would not have been a problem. Credit Suisse clearly had a legitimate interest in taking an assignment of Trendtex's claim against the Central Bank of Nigeria and litigating it for its own benefit. It had no other realistic prospects of being paid for the cement it enabled Trendtex to acquire. It did not, however, have a

35 See n. 11 above and text.

36 *Williams v. Protheroe* (1829) 3 Y & J 129 (Best CJ); *Dawson v. Great Northern and City Railway Co* [1905] 1 KB 260 (CA); *Ellis v. Torrington* [1920] 1 KB 399 (CA).

37 *Camdex International Ltd v. Bank of Zambia* [1998] QB 22 (CA).

38 *Laurent v. Sale & Co* [1963] 1 WLR 829 (QBD).

39 *Trendtex Trading Corporation v. Credit Suisse* [1982] AC 679 (HL).

40 [2021] IEHC 114 (Quinn J).

41 [1982] AC 679 (HL).



legitimate interest in onward trafficking of the claim to another party which itself had no interest other than seeking to make the substantial profit it made from taking that assignment.

In *SPV Osus*, the supreme court did not consider that any of the assignees of the shareholdings in what was originally OS had a legitimate interest in taking those assignments. Their interest was to make profit from litigating claims in court. The fact that this was accepted in Wall Street as a legitimate way for investors in a bankrupt corporation to realise their entitlements made no difference. The court looks to the legitimate interest of the assignee in *taking* the assignment, not the interest of the assignor in *making* it.<sup>42</sup> This approach would seem to require any legitimate interest of the assignee to predate the assignment. It would not allow the assignment of a large number of small claims to a commercial aggregator of claims for reasons of efficiency and convenience, an arrangement which met with the approval of Stuart Isaacs QC, sitting as a deputy high court judge, in *Casehub Ltd v. Wolf Cola Ltd*.<sup>43</sup> It might not allow the three personal litigants in *Jeb Recoveries LLP v. Binstock*<sup>44</sup> to assign their claims to a limited liability partnership in which they were the only partners.

What is said to be objectionable about assigning a right to litigate is that this involves trafficking in litigation. But the problem with this is simply assumed, and never really demonstrated. In *Massai Aviation Services v. Attorney General*,<sup>45</sup> Lady Hale pointed out that ‘trafficking’ is a pejorative. In and of itself, it is not objectionable; what matters is the thing being trafficked. If this is people or drugs, it is obviously bad, but why is trafficking in litigation bad? There is no sensible reason to fear that assignment will result in courts getting flooded with bad cases because commercially minded assignees do not buy up weak claims from which they will earn nothing. If a claim is good, why should there be any objection to it being brought by an assignee, especially if the victim of the wrong lacks the means to pursue it?<sup>46</sup> In *SPV Osus*, O’Donnell J maintained that courts were in the business of vindicating people’s rights and resolving disputes between the parties, not in facilitating funders to make profit.<sup>47</sup> ‘It would be foolish not to recognise that the practice of law is a business, but the administration of justice is not’.<sup>48</sup> The rhetoric may be towering but the reasoning does not scale the same heights. There is not a lot of justice in someone with a good claim having to abandon it because they lack the means to assert it. Litigation funding and assignment enable impecunious

parties to achieve a measure of justice; imperfect justice, it may be conceded, but better than none at all.

If the rule about assignments were changed so that they were presumptively valid, there would still be cases where the assignment in the specific case should be barred. Some examples can be given from the reported cases. In *Simpson v. Norwich and Norfolk University Hospital NHS Trust*,<sup>49</sup> Mrs Simpson, whose late husband’s last days in the defendant’s hospital were made more uncomfortable than necessary because he contracted MRSA, took an assignment of another patient’s medical negligence claim for MRSA in order to highlight deficiencies in the defendant’s infection control. She had earlier settled a claim against the trust which she brought on behalf of her husband’s estate. The Court of Appeal refused to allow the assigned claim to proceed because Mrs Simpson lacked a legitimate interest in the assignor’s claim. There was no access to justice grounds capable of supporting this claim because it was sold for a mere £1. It should also be regarded as an abuse of the court’s process. In *Body Corporate 160361 (Fleetwood Apartments) v. BC 2004 Ltd and BC 2009 Ltd*,<sup>50</sup> the assignment to one defendant of the plaintiffs’ claims against two other defendants was declared contrary to public policy because it was potentially going to alter the statutory contribution regime applicable to joint tortfeasors for the benefit of the assignee defendant and to the disadvantage of those other defendants. If access to justice is to be facilitated by permitting more frequent assignment of claims, there will have to be a shift in focus towards allowing assignment unless this is shown to be contrary to public policy in the particular case. The supreme court in *SPV Osus* was against this because it would involve the uncertainty of case-by-case adjudication and satellite litigation.<sup>51</sup> In harmony with the supreme court’s approach in *Persona Digital*, there was a clear preference for the bright line rule over discretionary justice.

So, for the moment at least, Ireland has firmly set her face against the assignment of rights to litigate unless the assignee has a legitimate interest, probably pre-existing the assignment, in the assigned claim. This will effectively prevent assignment from serving as a vehicle allowing claimants to secure more effective access to justice. However, all hope is not lost because the supreme court indicated, mainly through the short concurring judgment of Clarke CJ, that legislative reform consisting of an effective regulatory regime would be welcome. As in *Persona Digital*, it was indicated that the courts may have to take action themselves if the legislature made no effort.<sup>52</sup>

42 See A. Tettenborn, ‘Assignment of Rights to Compensation’, *Lloyd’s Maritime and Commercial Law Quarterly* 398-406, at 392 (2006), criticising the approach of the courts on this ground.

43 [2017] EWHC 1169 (Ch), [2017] 5 Costs LR 835.

44 [2015] EWHC 1063 (Ch). This was to provide the assignors with protection against costs’ liability if their claims failed. Among the reasons why the court upheld the assignment was that the defendant could more easily obtain security for costs against the LLP.

45 [2007] UKPC 12, [19].

46 A.J. Sebok, ‘The Inauthentic Claim’, 64 *Vanderbilt Law Review* 61 (2011).

47 [2018] IESC 44, [86-87].

48 [2018] IESC 44, [91].

49 [2011] EWCA Civ 1149, [2012] QB 640 (CA).

50 [2014] NZHC 1514, [2014] 3 NZLR 758.

51 *SPV Osus Ltd v. HSBC Institutional Trust Services Ireland Ltd* [2018] IESC 44, [82] (O’Donnell J).

52 *Ibid.*, [2.1-2.9].

## 4 Third-Party Costs Orders

The access to justice issue here is the defendant's access to justice.<sup>53</sup> Defendants with limited resources sued by a claimant who lacks the means to pay the defendant's costs should the case fail may find themselves on the horns of a dilemma. It may ultimately be cheaper to settle the claim than to fight the case to judgment and then find that the claimant is unable to satisfy a costs order in the defendant's favour. In Ireland, security for costs may be ordered against the claimant if the latter is based outside the jurisdiction under the Superior Court Rules Order 29 and against a company under Section 52 of the Companies Act 2014, and this provides some measure of protection in advance. But the defendant's application may not succeed and the jurisdiction to award security is available only in the two specific cases mentioned, not simply because the claimant may be unable to satisfy a costs order. Where the litigation is funded by a third party, a costs order against it may be the just price the claimant's side of the dispute has to pay.

The position in England can essentially be stated as follows. Where litigation is funded by a third party for commercial profit and the defendant is the successful party, the funder is likely to be made answerable for the defendant's costs. The jurisdiction to make a third-party costs order is derived from Section 51 of the Senior Courts Act 1981. The House of Lords first recognised this jurisdiction in *Aiden Shipping Co Ltd v. Interbulk Ltd*,<sup>54</sup> and it may potentially be exercised against all third-party funders, whether the financial support is for commercial profit or other reasons. So far as commercial funders are concerned, the position was originally that a third-party costs order was generally limited to the amount of funding they provided. This was the *Arkin* cap, named after the decision in *Arkin v. Borchard Lines Ltd*,<sup>55</sup> and can be explained in terms of the nascent state of litigation funding in England at that time. The courts did not want to place excessively heavy burdens on the third-party funding industry for fear of killing it off altogether. Now that litigation funding is well established in England, it seems that third-party costs orders against commercial funders will not routinely be limited by the *Arkin* cap.<sup>56</sup> Amongst the wide range of other third-party funders are two broad classes of funders to whom a different approach may be taken. First, there are persons connected to the claimant, for example, directors or shareholders of the claimant company or a connected company within the same corporate group. As these persons may stand to benefit from successful litigation but are not normally liable for paying the costs if it fails, a third-party costs order may well be made against

them.<sup>57</sup> Secondly, there are 'pure' funders, who may be members of the claimant's family or other persons supporting the litigation out of sympathy with the claimant. A third-party costs order is not likely to be made against them.<sup>58</sup>

As Ireland does not 'do' commercial litigation funding at present, third-party costs orders will not be made in cases falling into the *Arkin* and *Chapelgate* class. But the supreme court has issued an important judgment in a case where the funder was the majority shareholder in the claimant company and would likely have benefitted handsomely from a successful outcome. This decision, *Moorview Development Ltd v. First Active Plc*,<sup>59</sup> based the jurisdiction to make third-party costs orders on Superior Court Rules Order 15, rule 13, concerned with joining a third party as a party to the action, and Section 53 of the Supreme Court of Judicature Act (Ireland) 1877, which is worded similarly to Section 51 of the Senior Courts Act 1981 in England.

In *Moorview*, the company sued the defendant for a wide range of reliefs arising out of the collapse of a property development project that consigned Moorview to insolvency. The litigation was supported by Moorview's principal shareholder, Mr Brian Cunningham, and in essence alleged that the defendant was responsible for the collapse of the project and Moorview's ensuing insolvency. The case proved to be almost devoid of merit and was dismissed without the necessity of the defendant calling any evidence. The defendant argued that costs should be awarded against Mr Cunningham because of his abuse of the corporate form. As principal shareholder, he stood to benefit from successful proceedings without being liable for costs if it failed. Mr Cunningham argued that this was an illegitimate piercing of the corporate veil but McKechnie J, for the supreme court, had little difficulty rejecting this argument.<sup>60</sup>

Mr Cunningham's second defence had rather more substance to it. This was that third-party costs orders should not be made in cases brought by insolvent companies because the right to seek security for costs provided the defendant with sufficient protection. McKechnie J agreed that security for costs should ordinarily be sought against a potentially insolvent company but failure to do so could not be regarded as a jurisdictional bar. In agreement with Clarke J at first instance, McKechnie J pointed out that where the company was arguing that its insolvent condition was brought about by the defendant's actions, ordering security for costs tended to pre-judge the issue.<sup>61</sup> The claimant's access to justice rights have to be weighed against the defendant's at this point.

McKechnie J provided the following non-exhaustive list of factors that were relevant to the exercise of the judicial discretion to make a third-party costs order in a case

53 D. Capper, 'Three Aspects of Litigation Funding', 70(3) *Northern Ireland Legal Quarterly* 357, 365 (2019).

54 [1986] 1 AC 965 (HL).

55 [2005] EWCA Civ 655, [2005] 2 Lloyd's Rep 187 (CA).

56 *Chapelgate Credit Opportunity Master Fund Ltd v. Money* [2020] EWCA Civ 246 (CA).

57 *Dymocks Franchise Systems (NSW) Pty Ltd v. Todd* [2004] UKPC 39, [2004] 1 WLR 2807 (PC).

58 *Hamilton v. Al Fayed (No 2)* [2002] EWCA Civ 665, [2005] QB 1175 (CA).

59 [2018] IESC 33.

60 [2018] IESC 33, [69-77].

61 [2018] IESC 33, [63].

brought by a company, emphasising that none of them were requirements that had to be satisfied.<sup>62</sup>

- a. The extent to which it might have been reasonable to think that the company could meet any costs if the case failed;
- b. The degree to which the non-party would benefit from the litigation if successful, including whether it had a direct personal financial interest in the result;
- c. The extent to which the non-party was the initiator, funder and/or controller of, and moving party behind, the litigation;
- d. Any factors which may touch on whether the proceedings were pursued reasonably and in a reasonable fashion; the required assessment of the conduct of the proceedings may of course lean either in favour of or against the making of the order sought;
- e. There is no requirement that there be a finding of bad faith, impropriety or fraud, though of course the same, if present, will support the ordering of costs against the non-party;
- f. Whether the non-party was on notice of the intention to apply for a non-party costs order; at what point in the litigation such notice was communicated will also be a relevant consideration, as will the extent of the notice so provided;
- g. Whether the successful party applied for security for costs in advance of the trial;
- h. The Court's discretion is a wide one, but it must be exercised judicially and, in all the circumstances, must give rise to a just result.

Applying these factors to the case at hand, it was clear that the company was hopelessly insolvent and, as principal shareholder, Mr Cunningham would be the person to benefit if the litigation succeeded. The case was wholly without merit and dismissed as disclosing not even a *prima facie* case. The way in which the proceedings were conducted was wholly unreasonable, having been amended on several occasions as each succeeding line of argument ran out of road.

Factor (f) above was of particular importance in the court's decision, so will be considered separately. To be in a position to give notice to a funder or supporter of the litigation that the defendant intends to seek a third-party costs order, the defendant would need to know the identity of that funder. In jurisdictions where professional third-party funding is permitted, there are procedures enabling the defendant to find this out. For example, in New Zealand, the supreme court decided in *Waterhouse v. Contractors Bonding Ltd*<sup>63</sup> that the identity of a litigation funder should be disclosed as a matter of course at the commencement of the litigation.<sup>64</sup> In Ireland, there is no professional third-party funding, so it is likely only to be in cases of 'pure' funders like Neil

Hamilton's backers in *Hamilton v. Al Fayed (No 2)*<sup>65</sup> where the identity of any funder would be any kind of mystery. In those cases, it is thought likely that Ireland would follow the English practice and not make a third-party costs order against the funder. It would most likely be in cases where a principal shareholder, senior director or other member of a corporate group was backing the claimant where this issue would arise. Here, the presence of likely candidates for litigation supporter would probably be fairly obvious or readily ascertainable, so the giving of notice is not likely to be a serious difficulty.

McKechnie J did not consider the giving of notice of intention to seek a third-party costs order to be a requirement but did state that whether or not notice was given would be a proper matter to take into account in deciding whether to grant the third-party costs order. When notice is given is also important. This should be as soon as the applicant was in a position to demonstrate reasonable grounds for making the application if called upon to do so. In *Moorview*, the letter giving formal notice of the defendant's intention to seek the order was delivered 2 months before the trial was due to begin. Most of the costs in the litigation had still to be incurred at this stage but a still significant sum would have been thrown away if the claimant's funder had withdrawn then. Despite this relatively late notice, the third-party costs order was still made, the court taking account of the fact that this was the first case recognising the power of the Irish courts to make orders of this kind.<sup>66</sup>

The issue of notice of intention to seek a third-party costs order returned to the supreme court in *WL Construction Ltd v. Chawke and Bohan*.<sup>67</sup> An important feature of this case was that the first instance and Court of Appeal decisions in this case predated the supreme court's decision in *Moorview Development Ltd v. First Active Plc*. The claimant company sued the defendants for payment for work done under a building contract. The company's claim was riddled with inconsistency and reliant upon perjured evidence given by its principal shareholder, Mr Loughnane. It was dismissed by the trial judge, Noonan J, as failing to demonstrate any *prima facie* case. The judge made a third-party costs order against Mr Loughnane in large measure because of his litigation misconduct and because he would benefit from a judgment in the company's favour without being liable for costs if the case was lost. The company was not so hopelessly insolvent as the claimant company in *Moorview* but a very similar kind of abuse of the corporate form would have occurred if Mr Loughnane had not been made to pay costs. The notice issue was that Mr Loughnane had not been given any notice of intention to seek a third-party costs order against him.

Noonan J regarded the lack of notice as immaterial. The defendants could not know the findings of the court until the evidence had been given and were not expected to

62 [2018] IESC 33, [125].

63 [2013] NZSC 89.

64 This issue is discussed more thoroughly in D. Capper, 'Three Aspects of Litigation Funding', 70(3) *Northern Ireland Legal Quarterly* 357, 368 (2019).

65 [2002] EWCA Civ 665, [2003] QB 1175 (CA).

66 [2018] IESC 33, [111-121].

67 [2019] IESC 74.



alert Mr Loughnane in advance of any suspicions they had about the veracity of the case he was making against them, being entitled to keep their powder dry for cross-examination.<sup>68</sup> The Court of Appeal allowed Mr Loughnane's appeal, Hogan J describing the failure to give him notice as a due process violation contrary to the fair procedures guaranteed by Article 40.3 of the Constitution.<sup>69</sup> In the supreme court, Mr Loughnane argued that he should have been given some notice of the intention to seek a third-party costs order before the hearing commenced, and that this could have been done without disclosing any information about likely lines of cross-examination. Notwithstanding this argument, the supreme court allowed the defendants' appeal and reinstated the third-party costs order. Although the supreme court's judgment in *Moorview* had not been delivered at the time of the high court and Court of Appeal decisions in this case the jurisdiction to make third-party costs orders had been recognised in three other first instance judgments by that time.<sup>70</sup> Furthermore, this was a truly exceptional case 'permeated by the dishonesty of Mr Loughnane' and his abuse of the corporate form.<sup>71</sup> Giving notice, like all other factors in the exercise of this judicial discretion, is a factor to be weighed in the balance and not a requirement.

A third-party costs order was made against an insolvent company's liquidator in *Eteams International v. Bank of Ireland*.<sup>72</sup> The liquidator caused the company to bring proceedings challenging a sale of the company's uncollected book debts to the bank as an unregistered charge. The litigation was unsuccessful although the Court of Appeal observed that it was far from frivolous or vexatious. The point in issue had not been determined in Ireland and involved extensive consideration of authority from 'the neighbouring jurisdiction' (England). The reason for making the third-party costs order against the liquidator stemmed from the company's lack of standing to bring the proceedings itself. Section 280(1) of the Companies Act 1963 allowed the liquidator, or any contributory or creditor, to apply to the court to determine any question arising in the winding up of the company, but not the company itself. This was confirmed by the decision of the Court of Appeal in *Tucon Process Installations Ltd v. Cooney*.<sup>73</sup> If the liquidator had brought these proceedings himself and costs had been awarded against him, he would have been entitled to an indemnity from the company that would have ranked as a first priority expense in the liquidation. No evidence was provided to the court as to why the liquidator caused the company to bring the proceedings, whether because he feared it was so insolvent it would be unable to indem-

nify him had he brought them himself or for any other reason.

In making the third-party costs order, the supreme court leaned particularly on factors (d) to (h) from McKechnie J's judgment in *Moorview*.<sup>74</sup> In light of the Court of Appeal's decision in *Tucon*, the decision to continue the proceedings in the company's name 'pushed the borders of reasonableness'<sup>75</sup> under factor (d). There was no bad faith or fraudulent intent within the meaning of factor (e) but there was 'impropriety'.<sup>76</sup> The bank had placed both the company and the liquidator squarely on notice of its intention to seek costs against the liquidator personally, although no application for security for costs was ever made.<sup>77</sup> The liquidator argued that he had not used the corporate entity in his own self-interest, seeking only to recover money for the benefit of creditors. MacMenamin J acknowledged this but pointed out that the liquidator had offered no explanation as to why he had proceeded in the way he did.<sup>78</sup>

Two judgments of the supreme court above (*Moorview* and *WL Construction Ltd*) show a refreshing willingness to make people responsible for bringing meritless cases into court pay for wasting the court's time, causing delays throughout the civil justice system, and exposing defendants to potentially heavy costs burdens in proving they were not responsible for the claimant's alleged losses. Yet there remains some tension between these decisions and the supreme court's decisions refusing to recognise commercial litigation funding and assignment. Mr Cunningham and Mr Loughnane would still have had to pay their own legal teams for presenting these cases in the event that the claims failed, unless the lawyers were acting on a speculative basis, unlikely given the probable costs involved. They were not permitted to seek financial assistance from a third-party funder. One cannot help but think that had their cases been subjected to rigorous scrutiny by a commercially minded litigation funder, they might possibly have seen the light and abandoned their claims. Two very expensive litigation debacles might have been avoided. *Eteams* was a very different kind of case, with less in the way of access to justice issues, as the defendant bank was not a party of limited means. However, the proper procedure should still be used and well-resourced defendants not avoidably exposed to irrecoverable costs orders.

## 5 Conclusion – Reform

Although the jurisprudence of the Irish courts about maintenance and champerty is full of references to how these principles are not to be extended and must be adapted to changing circumstances, the outcome of the decisions suggests that the courts are trapped in some

68 [2019] IESC 74, [19] (O'Malley J).

69 [2019] IESC 74, [22].

70 [2019] IESC 74, [61], citing *Thema International Fund Plc v. HSBC* [2011] 3 IR 654 (Clarke J); *Used Car Importers of Ireland v. Minister for Finance* [2014] IEHC 256 (Gilligan J); *McCann v. Trustees of Victory Christian Fellowship* [2014] IEHC 655 (Donnelly J).

71 [2019] IESC 74, [67].

72 [2020] IESC 23.

73 [2016] IECA 211.

74 [2018] IESC 33, [63], [125].

75 [2020] IESC 23, [34] (McMenamin J).

76 [2020] IESC 23, [34].

77 [2020] IESC 23, [34-35].

78 [2020] IESC 23, [37], [39].

kind of time warp. Financial support for litigation from a commercial funder is maintenance and champerty per se. A principle that was grounded in the need to protect the purity of justice continues to regard commercial funding of litigation as an evil to be avoided when courts in England, where these ancient principles originated, have recognised that what was true of medieval times is no longer true today.

Irish law on assignment of rights to sue has not moved on from the *Trendtex* decision in the early 1980s. Courts then looked to the legitimate interest of the assignee in justifying the assignment of a right to litigate because that was a more innocent age when the access to justice problem was nothing like so dire as it is today. The legitimate interest of the assignor needs to be afforded considerably more weight than it currently receives.

The need for proper regulation of the litigation funding industry is acknowledged and the preference for a statutory scheme recommended by the Law Reform Commission and approved by the legislature is understandable. But is there really any reason why Ireland could not follow the English practice of self-regulation through the Association of Litigation Funders' (ALF) Code of Practice? Concern has been expressed, as noted above, that a significant number of litigation finance providers are not members of the ALF. That concern should not be overemphasised. This is an extremely tough market in which to make profit. Funders must get their due diligence right. They must back winners. Funding losing cases will lead to insolvency. To be a successful operator will require a company to be very well run and staffed by highly competent personnel. Operators unable to adhere to high standards in the matters listed above will not live long as the experience of the claims' management companies of yesteryear surely demonstrates. The *Excalibur* debacle,<sup>79</sup> where the non-ALF funder was required to pay the successful defendant's costs on an indemnity basis, should surely serve as a powerful signal that membership of the ALF and adherence to its rules is the only way.

We conclude with a brief account of where the reform process in Ireland is going. In 2016, the Law Reform Commission published an issues paper on the subject of contempt of court and other torts and offences concerned with the administration of justice.<sup>80</sup> This contained a list of the following questions relating to maintenance and champerty:

- a. Should the crimes and torts of maintenance and champerty be retained or abolished: (a) as crimes; (b) as torts?
- b. If the answer to 6(a) is that they should be abolished, should evidence that an agreement is champertous render it void?
- c. Should third-party funding of litigation be permitted? If so, in what circumstances?

- d. If permitted, should third-party funding be regulated by legislation or should it be subject to self-regulation?

It should be noted that the list above was only a small part of a longer issues paper. It was part of the Law Reform Commission's fourth programme of law reform but has not been carried forward into the fifth programme that commenced in 2019. However, the author has been informed that the Commission is still considering litigation funding and intends to publish a report on it.

The issues discussed in the current paper were the subject of some consideration by the *Review of the Administration of Civil Justice* published in October 2020.<sup>81</sup> Chapter 9 of this report contains some recommendations of significance in the present context. To deal with the problem of high costs, a majority recommendation favoured a set of non-binding guidelines on costs levels, while a minority recommendation favoured maximum costs levels with safeguards for exceptional cases. As far as third-party litigation funding was concerned, the review acknowledged the improved access to justice this could deliver for poorly resourced claimants. But it was also conscious of what it described as the risk of 'commoditisation' of litigation, including the incentivising of dubious claims and the imposition of a 'litigation culture' on an already heavily burdened court system. It was considered that a more detailed examination of this topic by the Law Reform Commission should be awaited. Third-party litigation funding should be made available for insolvency office holders trying to pursue claims and recover assets for the benefit of creditors. The review was against the adoption of contingency fees as it feared this would encourage a litigation culture. No recommendation for reform of protective costs orders was made as it was felt that the common law could develop sufficiently in relation to that.

There does not appear to be much air of urgency in all this, which is disappointing in view of the serious issues raised in this paper. It could also prove to be something of a missed opportunity in another sense. Brexit has left Ireland as one of only two common law jurisdictions in the European Union, the other being Cyprus. A legal services hub, including dispute resolution services, could be developed for international litigation. Litigation funding would surely facilitate disputants to use this hub and lucrative invisible income could be generated. If this income stream were to flow, one imagines that the resources necessary to capture it, more courts, judges and arbitrators, would surely follow. The Civil Justice Review's concerns about over-burdening the court system would probably dissolve in that eventuality.

<sup>79</sup> *Excalibur Ventures LLC v. Texas Keystone Inc* [2016] EWCA Civ 1144, [2017] 1 WLR 2221 (CA).

<sup>80</sup> Law Reform Commission, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC-IP-10-2016).

<sup>81</sup> *Review of the Administration of Civil Justice* (Department of Justice and Equality, October 2020).

# The Rise and Regulation of Litigation Funding in Australian Class Actions

Michael Legg\*

## Abstract

Litigation funding has become synonymous with class action litigation in Australia with third-party funders being a key source of financing. This article addresses the rise and regulation of litigation funding in Australia through three pathways: judicial oversight of litigation funding, government regulation of litigation funding and competition from lawyers. Initially, litigation funding was subject to minimal regulation in an effort to promote access to justice. However, concerns about the size of profits made by funders which in turn impacted Australian businesses and reduced the compensation available for group members saw the adoption of a more detailed and restrictive regulatory approach. Further regulation has been proposed and criticised for hampering funding of class actions. This article concludes with a middle or compromise position that recommends a base level of regulation and empowers the courts to act as a check on excessive fees.

**Keywords:** Australia, litigation funding, class action, regulation.

## 1 Introduction

Litigation funding has become synonymous with class action litigation in Australia<sup>1</sup> with third-party funders being a major source of financing.<sup>2</sup> As of 2018, there were some twenty-five funders active in Australia.<sup>3</sup> In 2020, there were said to be thirty-three funders operating in Australia.<sup>4</sup> The interaction of litigation funding and class actions has been described as a story ‘of adoption, testing, evaluation and modification of a range of

innovative procedures’.<sup>5</sup> Litigation funders sought to adopt or adapt class action procedures to support their business model. Equally, courts sought to develop procedures to protect both the administration of justice and group members. The Australian government initially adopted a laissez-faire or ‘light touch’ approach to regulation of funders to promote access to justice. This was then replaced by a detailed regulatory regime as Australian government became concerned at the size of profits made by funders and the impact of class actions on business. Concerns were also raised as to funders’ fees reducing the compensation paid to group members who had suffered loss.

This article addresses the rise and regulation of litigation funding in Australia through three pathways: judicial oversight of litigation funding, government regulation of litigation funding and competition from lawyers. The article proceeds by providing an overview of the regimes governing class actions, litigation costs and lawyer’s fees in Australia as they created the need, or opportunity, for funding from third parties. The operation of litigation funding, its legitimisation in Australia and the advent of concerns around the operation of funding are explained. The article then sets out both the judicial and government response to litigation funding from a regulation perspective. The article draws on law reform and parliamentary reviews into class actions and litigation funding which explained the concerns and proffered various responses.<sup>6</sup> The article then comes full circle by looking at attempts to respond to concerns about litigation funding by altering the class action and lawyers’ fee regimes in one of Australia’s states, Victoria.

The regulation of litigation funding in Australia tends to attract strong opinions, which has led to extreme positions aimed at liberating or restraining litigation funding with the result that under- or over-regulation is promoted. This article concludes with a middle or compromise position that recommends a base level of regulation and empowers the courts to act as a check on excessive fees.

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1 Australia is a federal system with six states and two main territories: New South Wales, Queensland, Western Australia, South Australia, Victoria, Tasmania, the Australian Capital Territory and Northern Territory. There is a federal court system and each state and territory have their own court system. However, the peak court in Australia, the High Court of Australia, is the final court of appeal for the federal, state and territory systems.

2 Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No. 134 (December 2018) (ALRC 2018 Report), [2.66], [3.1].

3 *Ibid.*, [1.39].

4 Parliamentary Joint Committee on Corporations and Financial Services, *Litigation Funding and the Regulation of the Class Action Industry* (December 2020) (PJC Report), [4.25].

5 *BMW Australia Ltd v. Brewster* [2019] HCA 45; 269 CLR 574, [102] (Gageler J).

6 Productivity Commission, *Access to Justice Arrangements, Inquiry Report No 72* (2014) vol 2, 607 (‘Productivity Commission 2014 Report’), Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings Report* (2018) (‘VLRC 2018 Report’); ALRC 2018 Report; PJC Report.



## 2 Background – Class Actions, Litigation Costs and Lawyers' Fees

### 2.1 The Australian Class Action

A class action is 'a generic term for a procedure whereby the claims of many individuals against the same defendant can be brought or conducted by a single representative'.<sup>7</sup> Class actions are provided for by statute that specify the terms on which the claims of numerous persons or entities may be aggregated and a representative applicant or plaintiff is permitted to litigate those claims on behalf of the group. Several Australian jurisdictions have class action regimes, the focus in this article will mainly be on the Federal regime, Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) which commenced on 4 March 1992, although reference will also be made to Victoria due to its innovative reform to lawyer's fees.<sup>8</sup> All regimes are very similar as the FCA Act has been the model for the other jurisdictions.<sup>9</sup>

The Federal Court class action procedure requires that there be seven or more persons with claims against the same person<sup>10</sup> and those claims are 'in respect of, or arise out of, the same, similar or related circumstances'.<sup>11</sup> Each of the claims must 'give rise to a substantial common issue of law or fact'.<sup>12</sup> The representative applicant must be a person who has sufficient interest in the matter to support their own action against the respondent.<sup>13</sup>

Australia adopts an opt-out class actions model. A group member's consent to being a group member is not required,<sup>14</sup> but they must receive an opportunity to opt out of the proceedings.<sup>15</sup> If a group member falling within the defined class does not opt out, then they are bound by the outcome of the proceedings.<sup>16</sup> The opt-out model is however augmented through the judicial recognition of the 'closed class' – a representative party may commence a proceeding on behalf of some, but not all, of the potential members of the group.<sup>17</sup>

The regime also provides for court oversight, especially in relation to ordering discontinuance of proceedings as

a class action,<sup>18</sup> notices,<sup>19</sup> approval of settlement<sup>20</sup> and a general power to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'.<sup>21</sup>

### 2.2 The Australian Approach to Costs and Legal Fees

To understand the rise of litigation funding in class actions, it is first necessary to outline the law and practice surrounding the costs of litigation and the payment of lawyer's fees generally. All Australian jurisdictions operate within the confines of the traditional English method of 'cost-shifting', whereby 'the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party'.<sup>22</sup> This approach to costs is referred to as 'costs follow the event' or 'loser pays' for shorthand. Shifting the burden of legal costs from winner to loser is done to discourage the filing of cases without merit or that are merely speculative.<sup>23</sup>

The rule is modified in relation to class actions. The representative party, as well as subgroup representatives, is liable for the legal costs borne by a successful respondent, consistent with the usual 'loser pays' approach.<sup>24</sup> However, group members are not obliged to pay for the respondent's legal costs should the class action be unsuccessful, unless they take on a representative role or agitate individual claims.<sup>25</sup>

This approach to costs has been raised as a disincentive to the commencement of litigation as the plaintiff, or representative party in a class action, is liable for the costs of their opponent if they are unsuccessful.<sup>26</sup> Moreover, to protect against a plaintiff or representative party avoiding liability to pay costs in the event they are unsuccessful, courts may also require the plaintiff to provide security for their opponent's costs.<sup>27</sup> Security may also be required in a class action, and group members (although not liable for costs) may be required to contribute to the security.<sup>28</sup>

Lawyers and legal fees are primarily regulated at the state level. None of the Australian states permits lawyers to charge by reference to the amount of any award or settlement or the value of any property that may be recovered in any legal proceedings, that is, contingency

7 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [1].

8 *Supreme Court Act 1986* (Vic), Part 4A which commenced on 1 January 2000.

9 The other state-based regimes are *Civil Procedure Act 2005* (NSW), Part 10; *Civil Proceedings Act 2011* (Qld), Part 13A; *Supreme Court Civil Procedure Act 1932* (Tas) Pt VII.

10 *Federal Court of Australia Act 1976* (Cth) s 33C(1)(a).

11 *Ibid.*, s 33C(1) (b).

12 *Ibid.*, s 33C(1)(c); *Wong v. Silkfield Pty Ltd* (1999) 199 CLR 255, 267.

13 *Federal Court of Australia Act 1976* (Cth) s 33D.

14 *Ibid.*, s 33E(1) but with exceptions to the requirement, such as government bodies, set out in s 33E(2).

15 *Federal Court of Australia Act 1976* (Cth) s 33J.

16 *Ibid.*, s 33ZB; *Timbercorp Finance Pty Ltd (in liquidation) v. Collins* [2016] HCA 44.

17 *Multiplex Funds Management Ltd v. P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, [111].

18 *Federal Court of Australia Act 1976* (Cth) s 33N.

19 *Ibid.*, ss 33X, 33Y.

20 *Ibid.*, s 33V.

21 *Ibid.*, s 33ZF.

22 *Northern Territory v. Sangare* [2019] HCA 25; 265 CLR 164, [25]. See also *Oshlack v. Richmond River Council* (1998) 193 CLR 72, [67].

23 VLRC 2018 Report, 116.

24 *Federal Court of Australia Act 1976* (Cth) s 33Q.

25 *Ibid.*, ss 33R, 43(1A).

26 M. Legg and L. Travers, 'Necessity is the Mother of Invention: The Adoption of Third Party Litigation Funding and the Closed Class in Australian Class Actions', 38 *Common Law World Review* 252-253, at 245 (2009).

27 *Madgwick v. Kelly* [2013] FCAFC 61; 212 FCR 1, [6].

28 *Ibid.*, FCAFC 61; 212 FCR 1; *Capic v. Ford Motor Company (No 2)* [2016] FCA 1178.

fees are illegal.<sup>29</sup> However, lawyers may take cases on a conditional or ‘no win no fee’ basis and, if they are successful, charge their base rate multiplied by some factor or a specified additional amount.<sup>30</sup> This provides a mechanism to address the disincentive to commencing legal proceedings because a plaintiff cannot afford to pay their own legal costs. The availability of a conditional fee arrangement will depend on a lawyer’s assessment of the risk of the proceedings and ability to bear non-payment for the period of the litigation. It does not address the disincentive associated with an adverse costs order.<sup>31</sup>

The Productivity Commission, Victorian Law Reform Commission (VLRC) and Australian Law Reform Commission (ALRC) have recommended lifting the prohibition on lawyers charging contingency fees in class actions.<sup>32</sup> In Victoria, the legislature has acted on the recommendation through the adoption of a ‘group costs order’ in the class actions regime which is discussed below.

### 3 The Rise of Litigation Funding

Litigation funding became an important component of a class action as it overcame the disincentives created by the costs rules described above. The litigation funding agreement typically provides for the costs of the litigation, including the lawyer’s fees, to be paid by the funder and for the funder to indemnify the representative party and group members against the risk of paying the other party’s costs in the event that the claim fails. In return, if the claim is successful, the funder, who is not prohibited from charging a contingency fee, will receive a percentage of any funds recovered by the litigants either by way of settlement or judgment. The litigants will also assign the funder the benefit of any costs order they receive. The percentage paid to the funder is typically in the range of 20–30% (usually after reimbursement of costs).<sup>33</sup>

For the litigation funder to recover a fee from each group member in a class action, it needed to contract with each of those group members. This necessity gave rise to the concept of book-building which is a process that seeks to generate, capture and record interest in a specific class action. In this process, the representative party’s solicitor and the litigation funder undertake active efforts to persuade group members to enter into retainers with the law firm and funding agreements with the litigation funder.<sup>34</sup>

The litigation funders’ strategy for being paid developed over time, moving from book-building to, in addition, seeking to limit the class action’s membership to those who had contracted so as to avoid free-riding (the closed class as referred to above),<sup>35</sup> to then including all potential group members (an open class) and seeking orders from the Court that those group members who had not contracted with the funder, nonetheless, be required to contribute to the cost of litigation funding.<sup>36</sup> This latter development is discussed further below.

Litigation funding does not just make available the financing needed for identifying and prosecuting potential lawsuits. The funder in Australia will often take on a broader role as the entity to identify the potential lawsuit, undertake the due diligence to determine the feasibility of litigation, organise a representative party and group members and co-ordinate the resources needed to achieve a favourable settlement or judgment. The litigation funder performs this role in conjunction with the lawyers for the representative party.<sup>37</sup>

#### 3.1 Legitimising Litigation Funding

Historically, improperly encouraging litigation (referred to as ‘maintenance’) and funding another person’s litigation for profit (referred to as ‘champerty’) were torts and/or crimes in all Australian jurisdictions. The common law prohibition of litigation funding was justified in part by a doctrinal concern, namely, that the judicial system should not be the site of speculative business ventures. However, the primary aim was to prevent abuses of court process (vexatious or oppressive litigation, elevated damages, suppressed evidence, suborned witnesses) for personal gain. Today, the prohibitions have been removed through legislation expressly abolishing maintenance and champerty as a crime and as a

29 *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law 2015* (NSW) s 183; *Legal Profession Act* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3 s 27; *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law 2015* (Vic) s 183; *Legal Profession Act 2008* (WA) s 285.

30 Conditional fee agreements are dealt with by *Legal Profession Act 2006* (ACT) ss 283, 284; *Legal Profession Uniform Law 2015* (NSW) ss 181, 182; *Legal Profession Act* (NT) ss 318, 319; *Legal Profession Act 2007* (Qld) ss 323, 324; *Legal Practitioners Act 1981* (SA) sch 3 ss 25, 26; *Legal Profession Act 2007* (Tas) ss 307, 308; *Legal Profession Uniform Law 2015* (Vic) ss 181, 182; *Legal Profession Act 2008* (WA) ss 283, 284.

31 *Gladstone Ports Corporation Limited v. Murphy Operator Pty Ltd* [2020] QCA 250; 384 ALR 725, [91].

32 Productivity Commission 2014 Report, 601; ALRC 2018 Report, 9–12, 185–217; VLRC 2018 Report, 63–68. See also M. Legg, ‘Contingency Fees – Antidote or Poison’, 29 *Australian Bar Review* 244 (2015) (recommending a common fund for class action lawyers).

33 M. Legg, ‘Shareholder Class Actions in Australia – The Perfect Storm?’, 31(3) *UNSW Law Journal* 703, at 669 (2008); Productivity Commission

2014 Report, 607; The Association of Litigation Funders of Australia, Best Practice Guidelines (January 2019).

34 *BMW Australia Ltd v. Brewster* [2019] HCA 45; 269 CLR 574, [91] (Kiefel CJ, Bell and Keane JJ), [133] (Gordon J).

35 *Multiplex Funds Management Ltd v. P Dawson Nominees Pty Ltd* [2007] FCAFC 200; 164 FCR 275.

36 *Dorajay Pty Ltd v. Aristocrat Leisure Ltd* [2009] FCA 19; *P Dawson Nominees Pty Ltd v. Brookfield Multiplex Ltd* (No 4) [2010] FCA 1029; *Money Max Int Pty Ltd v. QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191. See also M. Legg, ‘Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal’ 91 *Australian Law Journal* 655 (2017).

37 M. Legg, ‘Shareholder Class Actions in Australia – The Perfect Storm?’, 31(3) *UNSW Law Journal* 707, at 669 (2008).

tort<sup>38</sup> and through court decisions<sup>39</sup> so that they no longer stand in the way of litigation funding. Rather, the court addresses the above concerns through its accepted power to control its own processes against abuse.

The key decision legitimising litigation funding in Australia was *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd*.<sup>40</sup> Australia's highest court considered the legality of litigation funding for the first time and held by majority that litigation funding was not an abuse of process or contrary to public policy. The plurality judgment of Gummow, Hayne and Crennan JJ indicated that existing doctrines of abuse of process and the courts' ability to protect their processes would be sufficient to deal with a funder conducting themselves in a manner 'inimical to the due administration of justice'.<sup>41</sup> The joint judgment endorsed Mason P's statement in the Court of Appeal below that '[t]he law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled'.<sup>42</sup> The plurality accepted that there are two kinds of consideration put forward as founding a rule of public policy against litigation funding – 'fears about adverse effects on the processes of litigation and fears about the "fairness" of the bargain struck between funder and intended litigant'.<sup>43</sup> However, the plurality reasoned that an overarching rule of public policy that would bar

the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement ... would take too broad an axe to the problems that may be seen to lie behind the fears.<sup>44</sup>

Litigation funding is not per se an abuse of process, but in a particular funding arrangement, there may be features that give rise to an abuse of process. Australian courts' willingness to guard against an abuse of process in class actions has been demonstrated through a series of judgments where a corporate entity, Melbourne City Investments Pty Ltd, was created to purchase small par-

cels of shares in numerous listed corporations to permit the entity to then be the representative party with a view to generating profits for the people behind the corporate entity rather than to vindicate group member's rights. The courts permanently stayed the class action proceedings.<sup>45</sup>

### 3.2 Concerns About Litigation Funding

In 2014, the Productivity Commission completed an inquiry into access to justice which included an examination of litigation funding. The Commission reported concerns about litigation funding encouraging unmeritorious claims; taking advantage of plaintiffs for their own gain, mainly through high fees; and that the market was not adequately regulated.<sup>46</sup>

The Commission stated that it had not received evidence that supported the concerns and that largely they appeared to emanate from corporate defendants who were facing litigation where previously they had not.<sup>47</sup> However, while the Commission gave support to litigation funding, it recognised that 'consumers need to be adequately protected'<sup>48</sup> and regulatory reforms such as licensing were recommended.<sup>49</sup>

On 16 December 2016, the Victorian Law Reform Commission (VLRC), and then on 11 December 2017, the Australian Law Reform Commission (ALRC) received references to review litigation funding and class actions in their respective jurisdictions.<sup>50</sup>

The VLRC in its 2018 report stated: 'The Commission has not been asked to investigate whether litigants are being treated unfairly or charged excessively; rather, the report focuses on how to prevent this happening'.<sup>51</sup>

The VLRC terms of reference and approach appear to stem from litigation funders having only been involved in ten out of eighty-five class actions so that major problems had not been experienced, but also that state regulation of litigation funding was not a viable option because a national response was required. Consequently, the VLRC focussed on court oversight of funders in a particular class action and guidelines for lawyers as to their duties and responsibilities in class actions, including the recognition, avoidance and management of conflicts of interest.<sup>52</sup>

The reference to the ALRC was a response to concerns that the social utility and legitimacy of the class action regime were being undermined because the interests of claimants, and society more generally, were taking a backseat to profit generation for lawyers and funders.<sup>53</sup>

The concern is illustrated by the ALRC's finding that the median return to group members in funded matters was

38 See eg *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) ss 3, 4; *Wrongs Act 1958* (Vic) s 32; *Crimes Act 1958* (Vic) s 322A.

39 See *Clyne v. NSW Bar Association* (1960) 104 CLR 186 at 203; *Brew v. Whitlock* [1967] VR 449 at 450; *Gladstone Ports Corporation Limited v. Murphy Operator Pty Ltd* [2020] QCA 250; 384 ALR 725, [76], [80]–[105].

40 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386. For more detailed discussions of the case, see M. Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory', 39(1) *UNSW Law Journal* 174–77, at 165 (2016).

41 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, [93]. See also *Jeffery & Katauskas Pty Limited v. SST Consulting Pty Ltd* (2009) 239 CLR 75, [26], [29]–[30].

42 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, [65] citing *Fostif Pty Ltd v. Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 227 [105].

43 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, [90].

44 *Ibid.*, 229 CLR 386, [91].

45 *Treasury Wine Estates Ltd v. Melbourne City Investments Pty Ltd* [2014] VSCA 351; *Melbourne City Investments Pty Ltd v. Myer Holdings Ltd* [2017] VSCA 187; *Walsh v. WorleyParsons Limited* (No. 4) [2017] VSC 292.

46 Productivity Commission 2014 Report, 617.

47 *Ibid.*, 617–24.

48 *Ibid.*, 601.

49 *Ibid.*, 633 Recommendation 18.2.

50 VLRC 2018 Report, viii; ALRC 2018 Report.

51 *Ibid.*, xiv.

52 *Ibid.*, xiii–xxiii.

53 ALRC 2018 Report, [1.7]–[1.13], [1.49].



51%, whereas in unfunded proceedings, the median return was 85% of the settlement award.<sup>54</sup> Furthermore, for all finalised shareholder class actions between 2013 and 2018, the median percentage of the settlement used to pay (a) legal fees was 26% and (b) litigation funding fees was 23%, with the result that the median percentage of settlement paid to group members was 51%.<sup>55</sup>

The ALRC accepted the important role that litigation funders play in providing access to justice for group members, but also pointed to a number of inherent risks associated with litigation funders. The ALRC noted the high level of control that litigation funders in Australian class actions have – ‘They fund litigation and can give directions to the plaintiff’s solicitors, but they are not the client.’<sup>56</sup> The ALRC also identified the need to ensure that litigation funders meet their obligations under funding agreements, properly address conflicts of interest, and do not act in a manner that is detrimental to group members.<sup>57</sup>

On 13 May 2020, the Commonwealth Attorney-General referred to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) an inquiry into litigation funding and the regulation of the class action industry. The PJC delivered its report on 21 December 2020.<sup>58</sup> The PJC’s view of litigation funding was set out in the executive summary to the report as follows:

Australia’s highly unique and favourably regulated litigation funding market has become a global hot-spot for international investors, including many based in tax havens and with dubious corporate histories, to generate investment returns unheard of in any other jurisdiction – in some cases of more than 500 per cent. This is directly the result of a regulatory regime described by the Australian Securities and Investments Commission (ASIC) as ‘light touch’ and under which no successful action by a regulator has ever been taken against a funder.

Participants in class actions are the biggest losers in this deal. When they finally get their day in court, it is the genuinely wronged class action members who are getting the raw deal of significantly diminished compensation for their loss, as bigger and bigger cuts are awarded to generously paid lawyers and funders.<sup>59</sup>

The PJC’s general view was that ‘the class action system needs to be reformed to reflect the underlying tenets of its original intent: that is, to deliver reasonable, proportionate and fair access to justice in the best interests of class members’.<sup>60</sup>

The Australian government issued a response to the ALRC 2018 Report and PJC Report which recognised the importance of class actions, when working as originally

intended, echoed concerns about litigation funder’s profits and the impact on group member’s compensation which it saw as creating the need for ‘systemic regulation’ of litigation funders, but it also added that it was important ‘to ensure that economically inefficient class action do not have a detrimental effect on business’.<sup>61</sup>

The above summary demonstrates a consistent concern for consumers of litigation funding services, namely group members. However, since the PJC inquiry, it has been argued that this concern has been used as ‘cover’ for attempts to stifle class actions and protect corporate interests.<sup>62</sup>

## 4 Judicial Oversight of Litigation Funding

The regulation of litigation funder-group member relations, especially in relation to protecting the representative party and group members from adverse costs and providing oversight of the fee charged by the funder, has fallen chiefly to the courts. Litigation funding fees were not initially subject to review or oversight.<sup>63</sup> They were seen as private arrangements taking place outside the actual litigation. However, over time, the idea of the court supervising funder’s fees grew as the funder sought payment beyond its contractual entitlements. However, the power of the court to alter a funder’s fee has been controversial.

### 4.1 Court Orders for Funder’s Fees

The litigation funders’ strategy for being paid was explained above, including seeking orders from the Court that those group members who had not contracted with the funder nonetheless be required to contribute to the cost of litigation funding.

One set of court orders that was sought were referred to as ‘funding equalisation orders’ (FEO). An FEO provides that unfunded group members have their recovery reduced by the amount the funded group members agreed to pay to a litigation funder. This amount is then redistributed across all group members.<sup>64</sup> The FEO ensures equality amongst group members but without a direct payment to the funder. However, the funder may have

54 *Ibid.*, [3.49].

55 *Ibid.*, [3.53].

56 *Ibid.*, [6.94]. See also [6.59].

57 *Ibid.*, [1.43], [1.49], [6.1].

58 PJC Report, 125.

59 *Ibid.*, xiii.

60 *Ibid.*, xvi.

61 Australian Government, Response to the Parliamentary Joint Committee on Corporations and Financial Services Report Litigation Funding and the Regulation of the Class Action Industry, and The Australian Law Reform Commission Report Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, 19 October 2021, 2-4.

62 See Parliamentary Joint Committee on Corporations and Financial Services, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (November 2021) 41 (dissenting report by Labor members).

63 *McKay Super Solutions Pty Ltd (Trustee) v. Bellamy’s Australia Ltd (No 3)* [2020] FCA 461, [28].

64 *Dorajay Pty Ltd v. Aristocrat Leisure Ltd* [2009] FCA 19, [14]; *P Dawson Nominees Pty Ltd v. Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [26]–[28]; *Modtech Engineering Pty Limited v. GPT Management Holdings Limited* [2013] FCA 626, [55]–[60].

relied on the funding agreement to obtain an indirect payment by taking a percentage of the amount redistributed to funded group members.<sup>65</sup>

Another form of order drew on the concept of the common fund. A common fund, in generic terms, is where one person (e.g., a litigant or a lawyer) who recovers a fund for the benefit of persons other than himself or his client is entitled to a reasonable fee from the fund.<sup>66</sup> This generic approach was adapted for litigation funding. A common fund order (CFO) in the context of litigation funders and Australian class actions requires that all group members, even those who have not entered into a funding agreement with the litigation funder, contribute to the funder's commission from the proceeds of a judgment or settlement. In return, the funder agrees to Court determination of the funder's fee.<sup>67</sup>

In *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited (Money Max)*, the Full Court saw the scrutiny of the funder's fee and the likely reduction in that fee from what was proposed under the funding agreement as supporting the making of the common fund orders.<sup>68</sup> The Full Court indicated that it was 'highly likely' that the funding commission of 32.5% or 35% contained in the funding agreement would be reduced.<sup>69</sup> This did indeed transpire with the Court approving a payment of 23.208% of the settlement sum of \$132.5 million (being \$30.75 million) to the funder.<sup>70</sup>

However, in *BMW Australia Ltd v. Brewster; Westpac Banking Corporation v. Lenthall (Brewster)*, a majority of the High Court found that s 33ZF of the FCA Act, and the New South Wales equivalent, did not provide power to make a CFO at the beginning of a class action.<sup>71</sup> Nonetheless, Brewster gave rise to other questions: could a CFO be made at the end of the proceeding? Could a CFO be made relying on other powers of the court? These questions were addressed by two intermediate appellate court decisions.<sup>72</sup> Both held that Brewster had not addressed the operation of other legislative provisions,

such as s 33V(2) (if the Court makes an order approving a settlement, 'it may make such orders as are just with respect to the distribution of any money paid under a settlement'), or the making of CFOs at settlement or after judgment. The courts have now made a number of CFOs relying on s 33V at settlement.<sup>73</sup>

Each of the VLRC, ALRC and PJC has recommended that the Court be given the power by statute to make a common fund order.<sup>74</sup> The VLRC and ALRC reported prior to the Brewster decision. The PJC reported after the Brewster decision and recommended that the Australian government legislate to address uncertainty in relation to CFOs, in accordance with the Brewster decision.<sup>75</sup> The recommendation puts forward a legislative solution, but the terms of that solution are not clear. It may mean allowing for CFO only at the completion of a class action, and not at commencement.<sup>76</sup>

#### 4.2 Power to Review Funder's Fees

A number of Federal Court judgments have addressed the issue of whether litigation funding fees can be altered by the court (without a CFO), with reliance being placed on s 33V(2) and s 33ZF of the FCA Act.<sup>77</sup> Moreover, the Full Court of the Federal Court observed that 'the Court has a supervisory or protective role ... in relation to litigation funding charges'.<sup>78</sup>

In *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No 3)*, Murphy J considered an application for settlement approval and expressed concern that the settlement terms proposed by class counsel and the litigation funder offered such little benefit to class members that the terms could be said to undermine both the access to justice underpinnings of Part IVA and the judicial process itself (the class in that case stood only to take 2% of the settlement proceeds).<sup>79</sup> His Honour approved the settlement but disallowed a substantial amount of the proposed litigation and funding costs (after making these deductions, the class received 33% of the settlement sum).<sup>80</sup>

However, in *Liverpool City Council v. McGraw-Hill Financial, Inc*, Lee J accepted that in an appropriate case, the Court may refuse to approve a settlement because a funding commission is excessive or disproportionate.<sup>81</sup> However, after reviewing the heads of power, his Honour doubted that power existed for the Court to interfere

65 *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [99] (Beach J noted that when courts had made this type of equalisation order, the judge may not have been made aware of this outcome); *McKay Super Solutions Pty Ltd (Trustee) v. Bel-lamy's Australia Ltd (No 3)* [2020] FCA 461, [21].

66 M. Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach', 30 *Civil Justice Quarterly* 63–4, at 52 (2011).

67 *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited* [2016] FCAFC 148; 245 FCR 191.

68 *Ibid.*, 148; 245 FCR 191, [167].

69 *Ibid.*, 148; 245 FCR 191, [85].

70 *Money Max Int Pty Limited (Trustee) v. QBE Insurance Group Limited* [2018] FCA 1030.

71 *BMW Australia Ltd v. Brewster; Westpac Banking Corporation v. Lenthall* [2019] HCA 45; 269 CLR 574. For a discussion and critique of the court's reasoning, see M. Legg, 'Litigation Funding of Australian Class Actions after the High Court Rejection of Common Fund Orders: *BMW Australia Ltd v. Brewster; Westpac Banking Corporation v. Lenthall* [2019] HCA 45', 39(4) *Civil Justice Quarterly* 305 (2020).

72 *Brewster v. BMW Australia Ltd* [2020] NSWCA 272, addressing the Civil Procedure Act 2005 (NSW), and *Davaria Pty Limited v. 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 addressing the FCA Act. An application for special leave to appeal to the High Court in *Davaria Pty Limited v. 7-Eleven Stores Pty Ltd* was denied: *7-Eleven Stores Pty Ltd v. Davaria Pty Limited & Ors* [2021] HCATrans 113 (25 June 2021).

73 See eg *Court v. Spotless Group Holdings Limited* [2020] FCA 1730; *Asiri-fi-Otchere v. Swann Insurance (Aust) Pty Ltd. (No 3)* [2020] FCA 1885.

74 VLRC 2018 Report, Recommendation 27; ALRC 2018 Report, Recommendation 3; PJC Report, Recommendation 7.

75 PJC Report, 125.

76 *Ibid.*, 125.

77 See *Earglow Pty Ltd v. Newcrest Mining Limited* [2016] FCA 1433; *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [101]; *Mitic v. OZ Minerals Limited (No 2)* [2017] FCA 409, [26]–[32].

78 *Melbourne City Investments Pty Ltd v. Treasury Wine Estates Ltd* [2017] FCAFC 98, [90].

79 *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No 3)* [2018] FCA 1842, [5].

80 *Ibid.*, [6]–[16].

81 *Liverpool City Council v. McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289, [22].

and vary funding agreements in the context of a settlement by altering the contractual promises of group members to pay commission.<sup>82</sup>

The ALRC's 2018 report was cognisant of the divergence in judicial opinion as to whether the court could unilaterally alter terms of a funding agreement, mainly the fee to be charged. The ALRC addressed this issue through two recommendations: first, that third-party litigation funding agreements for class actions only be enforceable with the approval of the Court; and second, that the Court be given an express statutory power to reject, vary or amend the terms of such third-party litigation funding agreements.<sup>83</sup> The VLRC Report's recommendation was to similar effect.<sup>84</sup>

The PJC opined that the 'Federal Court's supervisory and protective role in class actions is vital' but that its current implementation was 'weak and appears to be favouring the provision of windfall profits to litigation funders'.<sup>85</sup> The PJC echoed the ALRC recommendations above, namely a requirement for a litigation funding agreement to obtain approval of the Federal Court of Australia to be enforceable; and a power for the Federal Court of Australia to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require.<sup>86</sup>

If the relevant Parliament adopted these recommendations, then the quantum of litigation funding fees would clearly be subject to judicial oversight. However, if Parliament does not legislate, then the courts will need to interpret the scope of the key provisions, ss 33V and 33ZF, to determine whether the courts may rewrite contractual bargains to achieve justice.

### 4.3 Tools to Assess Funders' Fees

The Australian courts have inherent power to regulate costs agreements between a solicitor and a client.<sup>87</sup> In the class action context, lawyer's fees have been subject to review from an early stage. The courts adopted a number of mechanisms to assist them to evaluate the reasonableness of costs. This included courts appointing a referee to inquire as to the reasonableness of the legal fees and provide a report to the court.<sup>88</sup> In addition, courts have appointed a contradictor, or litigation guardian, to represent group members' interest.<sup>89</sup> The contradictor can be appointed with a broad or narrow remit, that is, they can be tasked with making submis-

sions on legal costs or they can be asked to address whether an entire settlement should be approved.<sup>90</sup>

The courts can employ the same procedures used to review legal costs, namely, referees and contradictors, in relation to the fee claimed by the litigation funder.<sup>91</sup> However, the focus is not simply costs incurred but also, and primarily, the risks the funder accepts in exchange for its fee.<sup>92</sup> The VLRC observed that if courts 'begin to use a risk/reward calculus when assessing funding fees and rely less on the fees charged in previous cases, the demand for funding costs experts is likely to grow'.<sup>93</sup> The PJC was of the view that it was 'critical that an independent litigation funding fees assessor with relevant expertise assist and inform the Federal Court's assessment of litigation funding agreements'.<sup>94</sup> The PJC also recommended that the assessor be a professional with market capital or finance expertise.<sup>95</sup>

However, for a referee or contradictor to be able to assess costs or risk, they need access to information. As Beach J identified in the Allco shareholder class action: 'Whether a Court should set a commission rate and the rate to be used is largely a forensic question depending upon the material available to the judge at the time the order is sought'.<sup>96</sup> In Allco, Beach J referred to market rates and the risks faced by litigation funders in investing in litigation generally.<sup>97</sup> However, it must fall to the funder in seeking to justify their fee to provide the necessary evidence.<sup>98</sup> This should include explaining what the return on investment, in the context of the particular risks of the litigation being funded, is and why it is reasonable, not simply a comparison with funding fees in the market generally. Otherwise, if the market in general, including in past cases where there was less competition in the market, is resulting in above normal returns, then this is perpetuated.<sup>99</sup>

<sup>82</sup> *Ibid.*, [47].

<sup>83</sup> ALRC 2018 Report, Recommendation 14.

<sup>84</sup> VLRC 2018 Report, Recommendation 24.

<sup>85</sup> PJC Report, [11.53].

<sup>86</sup> *Ibid.*, Recommendation 11.

<sup>87</sup> *Woolf v. Snipe* (1933) 48 CLR 677, 678. In the class action context, the courts have also relied on *Federal Court of Australia Act 1976* (Cth) s 33ZF: *Johnson Tiles Pty Ltd v. Esso Australia Ltd* (1999) 94 FCR 167, [35-37].

<sup>88</sup> See eg *Lifeplan Australia Friendly Society Limited v. S&P Global Inc* [2018] FCA 379, [41]; *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited* (No 3) [2018] FCA 1842, [91]; *Prygodicz v. Commonwealth of Australia* (No 2) [2021] FCA 634, [338].

<sup>89</sup> See eg *Bolitho v. Banksia Securities Ltd* (No 6) [2019] VSC 653, [86]-[123].

<sup>90</sup> VLRC 2018 Report, [4.178]. See eg *Kelly v. Willmott Forests Ltd (in liquidation)* (No 5) [2017] FCA 689; *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited* (No 3) [2018] FCA 1842, [124].

<sup>91</sup> PJC Report, [11.61].

<sup>92</sup> See *Pharm-a-Care Laboratories Pty Ltd v. Commonwealth of Australia* (No 6) [2011] FCA 277, [42]; *City of Swan v. McGraw-Hill Companies, Inc* [2016] FCA 343, [30]; *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed)* (In Liq) (No 3) [2017] FCA 330, [122].

<sup>93</sup> VLRC 2018 Report, [5.52].

<sup>94</sup> PJC Report, [11.81], Recommendation 13.

<sup>95</sup> *Ibid.*, Recommendation 14.

<sup>96</sup> *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (recs and mgrs apptd)* (in liq) (No 3) [2017] FCA 330, [122].

<sup>97</sup> *Ibid.* [122]. See also *Asirifi-Otchere v. Swann Insurance (Aust) Pty Ltd* (No 3) [2020] FCA 1885, [25] ('expert material has been adduced showing that the amount of remuneration sought by [the funder] (25% of the gross settlement sum) is towards the middle of the range of rates offered or accepted by funders for class actions in Australia').

<sup>98</sup> See eg *Clarke v. Sandhurst Trustees Limited* (No 2) [2018] FCA 511.

<sup>99</sup> M. Legg, 'A Critical Assessment of Shareholder Class Action Settlements – The Allco Class Action', 46 *Australian Business Law Review* 64, at 54 (2018).



## 5 Regulation of Litigation Funding

After the High Court of Australia decision in *Campbells Cash & Carry Pty Ltd v. Fostif Pty Ltd* that legitimised third-party funding agreements in class actions, the focus turned to regulation.

### 5.1 'Light Touch' Regulation

The Australian government initially allowed litigation funding to mature in a relatively unregulated market so that there would not be barriers to entry which would hinder the advancement of access to justice.<sup>100</sup> Indeed, litigation funders were left to determine for themselves what laws and regulations they should comply with. Australia's first stock exchange listed funder, IMF Bentham Limited, obtained an Australian Financial Services Licence (AFSL) on its own initiative.<sup>101</sup>

The first significant instance of mandated regulation occurred in 2009, when the Full Court of the Federal Court of Australia found that funding arrangements met the definition of a 'managed investment scheme' or MIS for the purposes of the *Corporations Act 2001* (Cth), which in turn required funders to register funding arrangements with corporate regulators.<sup>102</sup>

However, the impact of the Full Court's decision was immediately undone through ASIC granting transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions commenced before 4 November 2009.<sup>103</sup> This was followed by a series of interim class orders granting relief from regulation for all funded class actions.<sup>104</sup>

Subsequent court decisions found that litigation funding should be regulated under existing legislation dealing with financial products and a credit facility.<sup>105</sup> ASIC's relief was then formalised and extended through regulations made pursuant to the *Corporations Act 2001* (Cth).<sup>106</sup> The regulations provided that litigation funders were not required to comply with the above regulatory

requirements, including to hold an AFSL, provided they had adequate practices in place to manage conflicts of interest. Failure to have such practices in place and follow certain procedures for managing conflicts was an offence.<sup>107</sup>

In 2014, the Productivity Commission concluded that the potential barriers to entry created through licensing requirements were justified in order to ensure that only 'reputable and capable funders enter the market'.<sup>108</sup> It recommended that:

The Australian Government should establish a license for third party litigation funding companies designed to ensure they hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest.<sup>109</sup>

However, a role for the courts in regulating the conduct of litigation funders was also thought necessary.<sup>110</sup>

In April 2018, the Association of Litigation Funders of Australia was established with six founding members. It effectively sought to promote a self-regulatory model similar to that accepted in the United Kingdom through the Association of Litigation Funders.<sup>111</sup>

The VLRC in its 2018 report discussed the arguments for and against further regulation before recommending that the Victorian Government should advocate for stronger national regulation and supervision of the litigation funding industry.<sup>112</sup>

The ALRC discussion paper issued prior to its 2018 report initially addressed concerns over litigation funding through recommending that funders must obtain a licence which would include conditions such as character, capital adequacy and managing conflicts of interest.<sup>113</sup> The ALRC final report in 2018 abandoned this approach in favour of giving greater powers and responsibility for the supervision of litigation funding to the Federal Court. As a result the regulatory regime described above, there is no need to hold an AFSL provided adequate practices were in place to manage conflicts of interest, remained. Concerns over capital adequacy and insolvent funders initiating litigation but then being unable to honour indemnities to the representative party (and group members) were to be dealt with through recom-

100 See The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, 'Government Acts to Ensure Access to Justice for Class Action Member' (speech delivered at IMF (Australia) Ltd. Shareholder Class Action Conference, Quay Grand Suites, Sydney, 4 May 2010).

101 IMF Bentham Limited, Submission to ALRC Inquiry into Class Action Proceedings and Third-Party Litigation Funders, 6 August 2018, 12 (IMF Bentham applied for and held an AFSL in the period July 2005 to April 2013. IMF Bentham gave up its AFSL after the introduction of ASIC Regulatory Guide 248.).

102 *Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147; 180 FCR 11.

103 ASIC, 'ASIC grants transitional relief from regulation for funded class actions', Media Release 09-218MR, 4 November 2009.

104 ASIC Class Order [CO 10/333] Funded representative proceedings and funded proof of debt arrangements commenced on 5 May 2010 and was extended seven times.

105 *International Litigation Partners Pte Ltd v. Chameleon Mining NL* (2011) 276 ALR 138; *International Litigation Partners Pte Ltd v. Chameleon Mining NL (rec and mgr apptd)* (2012) 246 CLR 455. For a more detailed discussion see M. Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory', 39(1) *UNSW Law Journal* 177-81, at 165 (2016).

106 Corporations Amendment Regulation 2012 (No 6) (Cth).

107 Corporations Regulations 2001 (Cth) reg 5C.11.01, 7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB. See also Australian Securities and Investments Commission, *Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013).

108 Productivity Commission 2014 Report, 632.

109 *Ibid.*, 633; Recommendation 18.2.

110 *Ibid.*, 633 ('Regulation of the ethical conduct of litigation funders should remain a function of the courts').

111 ALRC 2018 Report, [2.61]–[2.62]. See also The Association of Litigation Funders of Australia, *Best Practice Guidelines* (January 2019). The UK position is summarised in *Paccar Inc v. Road Haulage Association Ltd* [2021] EWCA Civ 299, [5].

112 VLRC 2018 Report, 18-20, Recommendation 2.

113 Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, (Discussion Paper No 85, June 2018), Proposals 3-1, 3-2.

mending a statutory presumption that third-party litigation funders provide security for costs.<sup>114</sup>

## 5.2 Regulation Redux

On 22 May 2020, the Federal Treasurer announced that litigation funders would be required to hold an AFSL from 22 August 2020, which would mean they were regulated by ASIC.<sup>115</sup> Litigation funders were also required to comply with the requirements of the MIS regime.<sup>116</sup> AFSL holders are obliged to:

- act honestly, efficiently and fairly in providing financial services;
- ensure the applicant is a fit and proper person (which allows for regard to be had to criminal convictions and insolvency);
- maintain an appropriate level of competence to provide financial services;
- have adequate financial, technical and human resources to provide the financial services covered by the licence;
- have appropriate arrangements for managing conflicts of interests;
- comply with licence conditions and financial service laws;
- ensure representatives are adequately trained and competent;
- have adequate risk management systems;
- be a member of the Australian Financial Complaints Authority;
- maintain an internal dispute resolution procedure;
- hold adequate coverage of professional indemnity insurance; and
- notify ASIC of licensee breaches.<sup>117</sup>

MISs traditionally provided a mechanism for investors to pool their funds or use them in a common enterprise to create an investment scheme from which they acquire rights to benefits.<sup>118</sup> Examples include raising funds for primary production (such as forestry, food and flower plantations and animal breeding), film production and collective investment in land, company securities and other securities.<sup>119</sup> The MIS regime seeks to protect investors by requiring that there be a responsible entity that is a public company and holds an AFSL.<sup>120</sup> The responsible entity also has particular obligations, such as a duties to act honestly, with care and diligence and to act in the best interests of the scheme's members. Furthermore, if there is a conflict between the members' interests and the responsible entity's interests, the

members' interests take priority.<sup>121</sup> MISs must be registered if they have more than twenty members or are promoted by a person in the business of promoting MISs.<sup>122</sup> A registered MIS has a constitution which must make adequate provision for:

- the consideration to be paid to acquire an interest in the scheme;
- the powers of the responsible entity to make investments of, or otherwise dealing with, scheme property, including powers to borrow or raise money for the scheme;
- the method for dealing with member complaints;
- any rights of members to withdraw from the scheme;
- rights of the responsible entity to any fees, remuneration, expenses or indemnity; and
- winding up of the scheme.<sup>123</sup>

There are also requirements for a compliance plan, compliance committee, auditing of the compliance plan and rights of withdrawal for members.<sup>124</sup> An interest in an MIS is also a financial product which must be accompanied by a Product Disclosure Statement (PDS).<sup>125</sup>

While the need for licensing of a litigation funder has been accepted, the application of the MIS regime has attracted criticism as the requirements were not designed for a class action or litigation more generally.<sup>126</sup> Consequently, ASIC granted relief from some obligations, such as the need to give a PDS to some members, some content requirements of a PDS; modification of the withdrawal procedures for scheme members; and obligations for the valuation of scheme property.<sup>127</sup>

The PJC reviewed the change to litigation funding regulation discussed above and noted the various concerns about whether the MIS regime was fit for purpose. The PJC recommended that the Australian government legislate a fit-for-purpose MIS regime tailored for litigation funders.<sup>128</sup>

The Federal Government put forward the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* to amend the *Corporations Act 2001* (Cth) to make clear that 'a class action litigation funding scheme' is an MIS so that reliance on the 2009 Full Court of the Federal Court of Australia decision<sup>129</sup> is

114 ALRC 2018 Report, Recommendation 12; [6.48]–[6.53].

115 The Hon Josh Frydenberg, Treasurer, 'Litigation funders to be regulated under the Corporations Act' (Media Release, 22 May 2020); *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth).

116 *Corporations Act 2001* (Cth), Ch 5C.

117 *Ibid.*, ss 912A, 912D, 913B, 913BA, 913BB.

118 *Ibid.*, s 9.

119 Robert Austin and Ian Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Online 2018) [22.470.3].

120 *Corporations Act 2001* (Cth), s 601FA.

121 *Ibid.*, s 601FC. The obligations also apply to officers of a responsible entity: s 601FD.

122 *Ibid.*, s 601ED.

123 *Ibid.*, s 601GA.

124 *Ibid.*, ss 601HA, 601HG, 601JA, 601KA.

125 *Ibid.*, s 1012B; *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA.

126 Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry hearing*, Hansard, 13 July 2020, 34 (Michael Legg), 50 (Andrew Saker, Omni Bridge-way Limited); R. Mizen, 'New Rules Could See Funded Class Actions Grind to Halt', *The Australian Financial Review* (29 July 2020).

127 ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020; Australian Securities and Investments Commission Corporations (Litigation Funding Schemes) Instrument 2020/787, *Explanatory Statement*, 21 August 2020.

128 PJC Report, 312, Recommendation 28.

129 *Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147; 180 FCR 11.

no longer needed.<sup>130</sup> The Bill also adds requirements for a class action litigation funding scheme's constitution, which includes the following:

- Each funding agreement for the scheme must include the same method (a claim proceeds distribution method<sup>131</sup>) for determining the amount of any claim proceeds for the scheme that is to be paid or distributed to any entity that is not a member of the scheme.
- Non-members of the scheme who are to receive a payment from claim proceeds must be party to a funding agreement under the scheme.
- Claims proceeds for the scheme must not be distributed until the claim proceeds distribution method has been approved by a court as fair and reasonable.
- The funding agreement is subject to Australian law and can only be enforced in an Australian court.
- The funder must pay for any court-appointed referee who examines the reasonableness of the funders fee and/or any contradictor as to whether to make any order to approve or vary the agreement's claim proceeds distribution method.<sup>132</sup>

The Bill's proposed s 601LF(1) and (2) provide that funding agreements that are part of a class action litigation funding scheme are not enforceable and have no effect in relation to the scheme's claim proceeds distribution method unless:

- a. the Court is a federal court;<sup>133</sup> and
- b. in the proceedings, the Court approves or varies the scheme's claim proceeds distribution method; and
- c. in, or in relation to, the proceedings, the Court does not make an order (a common fund order) for the purposes of: (i) fixing the remuneration (however described) of the funder for the scheme; and (ii) requiring one or more persons who are group members, but who are not members of the scheme, to contribute to the funder's remuneration.<sup>134</sup>

130 *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* Sch 1, cl 2 amending *Corporations Act 2001* (Cth) s 9; Explanatory Memorandum, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* [1.16], [1.30]–[1.31].

131 Explanatory Memorandum, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* [1.47]–[1.48] explains that the claim proceeds distribution method is intended to determine what amount of the claim proceeds should be paid to the entities that are not members of the scheme and are party to the funding agreement, to reimburse them for their costs and determine any fee or commission.

132 *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* Sch 1 cl 6 amending *Corporations Act 2001* (Cth) s 601GA; Explanatory Memorandum, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* [1.42].

133 Similar provisions exist in relation to state or territory courts that are or are not exercising federal jurisdiction. However, there may be a lack of power in relation to non-federal jurisdiction being exercised by state courts due to the doctrine of intergovernmental immunities: federal legislative power does not permit legislation that significantly impairs, curtails or weakens the capacity of states or state courts to exercise their constitutional powers or functions. See *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31; *Spence v. Queensland* [2019] HCA 15, [100].

134 *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* Sch 1 cl 7 inserting *Corporations Act 2001* (Cth) s 601LF.

In relation to (b), the court may approve or vary the claim proceeds distribution method provided, or to ensure, that the method is fair and reasonable in relation to the interests of the scheme's general members as a whole. The Bill sets out a range of factors that the court 'must only have regard to':

- a. in relation to the proceedings, the following:
  - i. the amount, or expected amount, of claim proceeds for the scheme;
  - ii. whether the proceedings have been managed in the best interests of the members to minimise the costs for the proceedings incurred by, or on behalf of, the members;
  - iii. the complexity and duration of the proceedings;
  - iv. the legal costs for the proceedings incurred by, or on behalf of, the members, and the extent to which those legal costs are reasonable;
  - v. the costs (other than legal costs) for the proceedings incurred by the funder for the scheme, and the extent to which those costs are reasonable;
  - vi. the costs (other than legal costs) for the proceedings incurred by the parties to each of the funding agreements (other than the funder for the scheme), and the extent to which those costs are reasonable;
  - vii. the extent of the commercial return to the funder for the scheme in comparison to the reasonable costs for the proceedings incurred by the funder;
- b. the costs for the scheme incurred by the responsible entity of the scheme, and the extent to which those costs are reasonable;
- c. the risks accepted by the parties to each of the funding agreements for the scheme by becoming parties to the funding agreement;
- d. any other compensation or remedies obtained by any of the members in relation to the transactions or circumstances referred to paragraph 9AAA(1)(a);
- e. any amounts that the members have contributed towards paying the costs for the scheme incurred by the parties to any of the funding agreements for the scheme;
- f. any other factors prescribed by regulations made for the purposes of this paragraph.<sup>135</sup>

The court must also receive and consider the reports of the referee and contradictor referred to above 'unless it is not in the interests of justice to do so'. The draft legislation would also establish a rebuttable presumption that the scheme's claim proceeds distribution method is not fair and reasonable if more than 30% of the claim proceeds for the scheme is to be paid or distributed to

135 Parliamentary Joint Committee on Corporations and Financial Services, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (November 2021) [2.155] recommended the removal of the word 'only' from s 601LG(3).



entities who are not members of the scheme, considering those entities as a whole.<sup>136</sup>

The 30% rebuttable presumption has been of great concern to litigation funders. According to a report by PwC, commissioned by Australia's largest litigation funder Omni Bridgeway, a 30% cap on gross recoveries would have resulted in 36% fewer class actions being brought historically as the cap would not have covered litigation costs, let alone provided a return for the funder.<sup>137</sup> If the funder was able to reduce those costs, such as legal fees, to a lower amount, then some of those class actions would have been able to proceed. Equally, the funder could reduce their own profit requirements. Nonetheless, the returns for litigation funders would be significantly impacted. However, as the presumption is rebuttable, a litigation funder that proceeds in an efficient manner could seek to convince a court that a higher recovery is warranted through addressing the above factors that the court must consider.<sup>138</sup>

In relation to CFOs, the ramifications of the Bill are less certain. The Bill is clear that for a funding agreement to be enforceable, the Court must not make a CFO for fixing the funder's remuneration. The scheme's claim proceeds distribution method cannot be enforced against claimants who have not signed up to be members of the scheme. The Bill may therefore incentivise book-building so that the funder can recover a fee. It may also mean that class actions with litigation funding would be brought using a closed class definition to incentivise claimants to be part of the scheme. This would undermine the opt-out approach and reduce access to justice by potentially excluding those group members who cannot be identified at the outset or who are unable to affirmatively participate due to social or economic barriers.<sup>139</sup> It may also foster multiple class actions in relation to the same alleged misconduct. However, an open class action is still permissible and it may be possible to obtain orders for unfunded group members to contribute to the legal costs of bringing the class action, but not the funder's remuneration. Proposed s 601LF(6) states that in relation to the ban on CFOs under s 601LF(2)(c), the remuneration of the funder does not include reimbursement for the payment of legal costs for the proceedings.

The Bill addresses the uncertainty over courts being able to review and set litigation funding fees to ensure they are fair and reasonable, does not clearly address CFOs and persists with the use of the MIS regime for regulating litigation funding, albeit with some provisions more tailored to the class action context than pre-

viously existed. The Second Reading Speech focussed on the reforms reducing funding fees so that more of any recovery went to group members.<sup>140</sup> In response, one plaintiff's law firm stated that to present this reform as a consumer protection measure was 'Orwellian gaslighting'.<sup>141</sup> The concern being that the 30% rebuttable presumption and greater costs imposed on litigation funder's operations would reduce consumer's access to justice as less class actions would be funded.

The calling of a federal election had the result that the Bill lapsed and did not become law. The election resulted in a change of government which will likely see a different direction taken in relation to litigation funding regulation. Nonetheless, the Bill demonstrates a range of mechanisms for regulating litigation funding if desired. Moreover, the 2009 Full Court of the Federal Court of Australia's decision that was the anchor for regulation through the MIS scheme, and which the Bill sought to replicate through legislation, was overturned by the same court in June 2022.<sup>142</sup> The Full Court found that its earlier decision was plainly wrong, primarily due to the approach taken to statutory construction. As one judge put it: 'The characterisation of litigation funding arrangements as managed investment schemes is a case of placing a square peg into a round hole'.<sup>143</sup>

## 6 Competition from Lawyers

The Productivity Commission, VLRC and ALRC all recommended lifting the prohibition on contingency fees in relation to class actions subject to effective consumer protections.<sup>144</sup> A key reason for supporting the introduction of some form of contingency fee that could be charged by lawyers was to create competition for litigation funders, with a view to decreasing the fees paid by group members.<sup>145</sup>

On 30 June 2020, the *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) commenced. This introduced a new section 33ZDA to the class actions regime in the State of Victoria which provided for 'group costs orders' (GCO). Section 33ZDA permits a plaintiff in a class action to apply to the court to make an order that:

- a. the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding; and
- b. liability for payment of the legal costs must be shared among the plaintiff and all group members.

136 *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* cl 7 adding *Corporations Act 2001* (Cth), s 601LG.

137 PricewaterhouseCoopers, *Models for the Regulation of Returns Litigation Funders*, 16 March 2021, 16. The report also states that a 30% cap would have had implications for 91% of class action settlements as the gross returns approved by the courts were above 30%.

138 See eg *Kuterba v. Sirtex Medical Limited* (No 3) [2019] FCA 1374, [18]-[19]; *Evans v. Davantage Group Pty Ltd* (No 3) [2021] FCA 70, [68]-[71] (discussing scenarios where group members should recover less than 70% of gross recoveries).

139 ALRC, *Grouped Proceedings in the Federal Court*, Report No. 46 (1988) [106].

140 Second Reading Speech, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (Senator Stoker, Assistant Minister to the Attorney-General), 25 November 2021.

141 A. Ferguson, 'Class Action Law Reform Rushed and Seen as Orwellian Gaslighting', *The Australian Financial Review*, (22 November 2021).

142 *LCM Funding Pty Ltd v. Stanwell Corporation Limited* [2022] FCAFC 103.

143 *Ibid.*, [7].

144 Productivity Commission 2014 Report, 601; ALRC 2018 Report, 9-12, 185-217; VLRC 2018 Report, 63-8.

145 Productivity Commission 2014 Report, 634-6.

The Court may make such an order if satisfied that 'it is appropriate or necessary to ensure that justice is done in the proceeding'. The Court may also amend a GCO, including, but not limited to, amendment of any percentage ordered, during the course of the proceeding. If a GCO is made, the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

The media has referred to GCOs as giving rise to the legalisation of contingency fees in Australia.<sup>146</sup> However, the amendment is much more similar to a common fund order.<sup>147</sup> Contingency fees are typically contractual – the client agrees that the lawyer can take a percentage of the recovery if the claim is successful. That is not the case here – the court makes an order that binds all group members regardless of any contract, including setting the amount of the percentage to be charged. Furthermore, the court can only make the order if it is satisfied that it is 'appropriate or necessary to ensure justice is done'. The GCO is therefore closer to the US common fund order for legal fees in American class actions which were adopted because the lawyers could not contract with all group members in an opt-out class action.<sup>148</sup> Furthermore, as a condition of a GCO, the plaintiff law firm must not only take on the risk of the plaintiff's costs of the class action if unsuccessful, but also accept liability for any costs payable to the defendant, and any security for costs order made in the defendant's favour if the claim fails.

The Supreme Court of Victoria in its first decision on s 33ZDA, *Fox v. Westpac Banking Corporation* appears to agree that the provision is akin to a common fund rather than a contingency fee due to the court being required to make an order that a particular percentage is to be paid by all group members.<sup>149</sup> However, the court was not persuaded to make a GCO at the proposed rate and adjourned the application to permit the plaintiffs to further consider their position, and specifically whether a reformulated application should be pressed at a later time.

The plaintiff argued that fixing a GCO at 25% of the recovered amount would cause the group to be 'better off' than under alternative funding arrangements. In particular, expert evidence was led that historically, third-party funding had delivered returns to group

members in the range of about 45-64%. The proposed GCO would, by comparison, guarantee to group members a 75% return of recovered funds.<sup>150</sup> The court found that if a 'better off' comparison was to be the measure for making a GCO, then the comparison was not with some hypothetical third-party funding arrangement but instead with the initial fee arrangement<sup>151</sup> entered into between the lawyer and the representative party. The initial fee arrangement was a conditional fee (no win no fee) with 25% uplift and with the lawyers providing an indemnity against an adverse costs order. The court accepted that there were realistic scenarios where the group would be worse off under a GCO and the evidence was too uncertain to discharge the requirement of appropriate or necessary to ensure that justice is done.<sup>152</sup> In the Supreme Court's second judgment on s 33ZDA, *Allen v. G8 Education Ltd*, the court made a GCO at a maximum of 27.5%, but potentially subject to adjustment downward in the event that a very positive outcome made the fee disproportionate to the law firm's risk or work performed.<sup>153</sup> The court pointed out that the lawyers would need to assist the Court in the future when the occasion arises for scrutinising the appropriateness of the rate.<sup>154</sup>

The plaintiff submitted that the initial retainer was structured so that the lawyers agreed to conduct the litigation on a 'no win no fee' (NWNF) basis but this was a fall-back arrangement subject to rights of termination, and contemplated by both the plaintiff and lawyer as a third alternative, ranked behind obtaining a GCO, which if it was refused, would be followed by seeking third-party litigation funding.<sup>155</sup> Emphasis was placed on the lawyers rights of seeking litigation funding if a GCO was not ordered and termination so as to characterise the agreement to act on a NWNF basis as an interim and uncertain funding arrangement, presumably to avoid the fate of the application in *Fox v. Westpac Banking Corporation* where the existing NWNF funding model was the relevant comparator and preferable to a GCO.<sup>156</sup>

The court identified the following key advantages from the proposed GCO:

- the certainty as to the maximum fee that would be charged, compared to a litigation funding arrangement where the maximum funder's fee may be certain but the funder would also seek reimbursement of the legal fees it had paid which were not certain;

146 J. Hewett, 'Legal Bid for Bigger Slice of Class Actions', *The Australian Financial Review* 2 (17 June 2020) (referring to the bill for 'the right to charge contingency fees in the booming and lucrative arena of class actions'); C. Merritt, 'Contingency Fee Shift Courts Conflict', *The Australian* 15 (20 June 2020).

147 M. Legg, 'Class Actions Fee Shakeup' *Law Institute Journal* 68 (January/February 2020).

148 M. Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach', 30 *Civil Justice Quarterly* 63-4, at 52 (2011).

149 *Fox v. Westpac Banking Corporation* [2021] VSC 573, [12] ('s 33ZDA facilitates the funding of group proceedings by introducing what might be described as a statutory common fund'), [17].

150 *Fox v. Westpac Banking Corporation* [2021] VSC 573, [8].

151 The structure of s 33ZDA is that a group costs order can only be applied for once a class action proceeding has been initiated. However, a class action cannot be commenced without a representative party who must have entered into a retainer and some form of fee agreement with the lawyer. Further, if a group costs order was not made, there needs to be a fall-back fee arrangement. Consequently, the legislation creates a scenario where there will be two fee arrangements: the non-GCO from commencement and the proposed GCO that the court is asked to endorse.

152 *Fox v. Westpac Banking Corporation* [2021] VSC 573, [115]. See also [117].

153 *Allen v. G8 Education Ltd* [2022] VSC 32.

154 *Allen v. G8 Education Ltd* [2022] VSC 32, [90]-[92].

155 *Allen v. G8 Education Ltd* [2022] VSC 32, [10].

156 *Allen v. G8 Education Ltd* [2022] VSC 32, [43] (summarising the terms of the retainer), [49], [58].

- the alignment of the lawyers and group member's interests by incentivising the efficient conduct of the litigation;
- its ease of comprehension, transparency and equitable sharing of costs between all group members; and
- in principle the proposed GCO would be likely to provide a better return to group members than third-party litigation funding, which invariably involves a funding commission to be paid on top of the law practice's professional fees. This view is supported by analysis of historical funding rates.<sup>157</sup>

The contradictor, consistent with *Fox v. Westpac Banking Corporation*, submitted that the GCO was not appropriate or necessary because there were plausible outcomes in which the NWNF model provided a greater return to group members. Evaluating the evidence as a whole, the court found that it was more likely that should the GCO be refused, the lawyers would seek, and likely obtain, third-party funding. However, third-party funding would be more expensive to the group than the GCO.<sup>158</sup> Of concern here is the impact of GCOs on the future of litigation funding. As explained above, litigation funding was a response to lawyers being unable to charge a fee by reference to a percentage of the recovery achieved, but also the Australian costs rule that the loser pays the winner's costs. Section 33ZDA allows lawyers to charge by reference to a percentage of the recovery and its requirements include that the lawyer bear the risk of the case failing, and provide any security for costs. As such, this would seem to make funding unnecessary or uncompetitive.

However, the end of third-party litigation funding may not occur for at least three reasons: (1) the complexity and uncertainty around proving that a GCO 'is appropriate or necessary to ensure that justice is done in the proceeding'; (2) the lawyers cannot meet the requirements for a GCO; and (3) a continuing role for litigation funders as financiers for the lawyers, but not the group members.

A key reason behind a GCO being denied in *Fox v. Westpac Banking Corporation* was the uncertainty inherent in modelling outcomes for the proceeding.<sup>159</sup> The plaintiffs adduced confidential evidence of predictive modelling that sought to explain the outcomes that the group may receive depending on a number of assumptions, including group members' prospective damages entitlements and prospects of success. The court explained that '[i]t will be immediately apparent that an assessment of that kind will commonly (and does in this case) entail significant uncertainty if made at an early stage in the proceedings'.<sup>160</sup> The existence of uncertainty was again acknowledged in *Allen v. G8 Education Ltd*.<sup>161</sup> However, the court also observed that comparative outcomes model-

ling must not be permitted to subsume the place of the evaluative inquiry required by s 33ZDA. Fee comparisons, while relevant, were not determinative.<sup>162</sup> This suggests that uncertainty may be less of a constraint on a GCO being ordered than first indicated. Nonetheless, litigation funding has the advantage that it does not require a court order to be put in place for it to operate. As a result, the above uncertainties, and the costs associated in preparing evidence to address those uncertainties, are avoided or at least deferred. Issues about the size of the fee and the factors impacting the size of the fee, such as risk and outcome, may still arise if a funder seeks a CFO or if the fee is subject to approval by the court as part of settlement approval.

The application for a GCO is not compulsory. Litigation funding arrangements are still permitted. For some cases, lawyers may not be able to bear the risk of having to pay the defendant's costs or they may have insufficient capital or cash flow to utilise a GCO where they are only paid at the conclusion of proceedings, or they may prefer to be paid an hourly rate.<sup>163</sup> Litigation funding will be the solution.

An alternative role for the funder where a GCO is made is that they finance the lawyers rather than the group members. The lawyer needs to be able to continue their operations while awaiting the outcome of the litigation and may need some form of insurance to be able to meet the adverse costs order requirements. The legislation does not specify or proscribe the role funders may play here. In *Fox v. Westpac Banking Corporation*, the lawyers seeking the GCO had entered into a costs sharing agreement with Vannin Capital Operations Ltd which provided:

- they would share equally project and investigation costs (these terms are not defined in the judgment but project costs appear to include legal fees);
- the lawyers would pay to Vannin half of the amount of any GCO awarded to the lawyers;
- to the extent that the lawyers must provide security for costs, Vannin would provide half of the total amount of security ordered;
- Vannin would pay to the lawyers half of the amount of any adverse costs that the lawyers were required to pay;
- if a costs order was made in favour of the representative party, those funds will be distributed between Vannin and the lawyers.<sup>164</sup>

The Court noted that there was force in the submission made by the court-appointed contradictor that a side agreement between a lawyer and a litigation funder for the sharing of the costs awarded pursuant to a GCO did not depend on an order of the Court and did not prevent the making of a GCO.<sup>165</sup> However, the Court further observed that the existence and terms of such a side agree-

<sup>157</sup> *Ibid.*, VSC 32, [93].

<sup>158</sup> *Ibid.*, VSC 32, [84].

<sup>159</sup> *Fox v. Westpac Banking Corporation* [2021] VSC 573, [113].

<sup>160</sup> *Ibid.*, VSC 573, [100].

<sup>161</sup> *Allen v. G8 Education Ltd* [2022] VSC 32, [83], [93].

<sup>162</sup> *Ibid.*, VSC 32, [24], [93].

<sup>163</sup> See ALRC 2018 Report, [7.102].

<sup>164</sup> *Fox v. Westpac Banking Corporation* [2021] VSC 573, [75].

<sup>165</sup> *Fox v. Westpac Banking Corporation* [2021] VSC 573, [81].



ment might inform the exercise of the discretion whether to make a GCO and what percentage to fix, but ‘where the law practice is acting as a “mere front” for a third party funder’ that may be a reason for declining to make a GCO.<sup>166</sup>

The GCO will undoubtedly impact the operation of litigation funding in Australian class actions. The traditional litigation funding model of a funder’s fee plus reimbursement for legal fees paid for the funder appears to be uncompetitive. However, litigation funders can develop different funding approaches. The funder financing the lawyers is one such model. Others may include significant lower funding fees, which have been seen in competing class actions,<sup>167</sup> or a single fee being charged by the funder with no additional charge for legal fees (provided this can be done without giving rise to an abuse of process or creating conflicts of interest). Although the GCO is currently only available in Victoria, Australian jurisdictions have a history of learning and borrowing from each other – class actions being a clear example – suggesting that similar common fund mechanisms for lawyer’s fees may be enacted elsewhere. Even if that does not come to pass, it is to be expected that the courts in other Australian jurisdictions will cast a more critical eye on the funding fees sought in the class actions before them through an awareness of the fees charged in Victoria.

## 7 Conclusion

In 2021, it was 15 years since the High Court of Australia legitimised litigation funding and set the stage for a new industry.<sup>168</sup> Litigation funders have since become major players in the Australian legal market, especially in relation to class actions where they have facilitated major compensation payments to group members but also significant returns on investment for themselves.

The success of litigation funding in generating both litigation and profits saw it be regulated through three pathways: judicial oversight of litigation funding, government regulation of litigation funding and the promotion of competition from lawyers.

However, continued attempts at further government regulation raises for discussion whether the correct balance between protecting group members while enabling sufficient financing to permit class actions to be brought will be achieved. The over-regulation of litigation funding runs the risk that class actions suits will be unviable investments for funders which in turn may prevent group members from seeking compensation for alleged

harms. Discouraging litigation funders may hinder access to justice, unless another source of financing for both legal costs and the risk of an adverse costs order can be found. The GCO regime, although somewhat inelegant in its operation due to only being available after a class action is on foot, offers such an alternative.

A middle ground is needed. Litigation funders must be licenced to be able to operate in Australia. Moreover, the licence conditions must include a requirement that the entity providing the funding for a class action has sufficient assets, or unconditional access to such assets, to be able to meet the costs of the litigation, in particular, the payment of the legal fees incurred in running the class action and any costs owed to the respondent if the class action is unsuccessful. The litigation funding agreement and the litigation funder must be subject to the laws of Australia and the jurisdiction of Australian courts. As persons who facilitate litigation purely for commercial profit, litigation funders should not avoid responsibility for costs if the litigation fails. To achieve a return through creating litigation, they must bear the associated risk. The application of the MIS regime to litigation-funded class actions should be abandoned as both unnecessary and ill-fitting.<sup>169</sup>

The fees charged by litigation funders and the returns generated should be subject to oversight but in a manner that takes account of the risks and costs associated with the specific class action. The court with jurisdiction over the class action is best placed to perform this role, but with the assistance of court-appointed referees and contradictors so as to preserve the adversarial context even when a settlement is achieved, but also to provide the necessary expertise. Legislative reform should make clear that a court may vary or set the fee payable to a litigation funder. Further that the court may order who is liable for that fee, including group members who have not previously agreed to pay such a fee, so that a CFO is permitted. The amount of any fee and the persons liable to pay the fee must be based on a finding of what is fair, reasonable and proportionate. If judicial oversight fails to ensure a fair division of class action recoveries between group members, lawyers and litigation funders, then further steps may be needed.

<sup>166</sup> *Fox v. Westpac Banking Corporation* [2021] VSC 573, [83].

<sup>167</sup> See eg I. Gottlieb and M. Legg, ‘The AMP Competing Class Actions: From Five to One’, 93 *Australian Law Journal* 817 (2019) discussing *Wigmans v. AMP Ltd* [2019] NSWSC 603 where funding fees of 8% and 10% were put forward but with additional charges and greater complexity in their operation.

<sup>168</sup> *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386.

<sup>169</sup> The unsuitability of the MIS regime for regulating litigation funding in class actions has been recognised in *LCM Funding Pty Ltd v. Stanwell Corporation Limited* [2022] FCAFC 103 and *Stanwell Corporation Limited v. LCM Funding Pty Ltd* [2021] FCA 1430.

# Cyprus: Affordability and Accessibility of the Civil Justice System

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## Abstract

In determining the accessibility and affordability of the civil justice system, this article will evaluate the costs regime and litigation funding available in Cyprus in light of the recent proposed reforms to the civil procedure rules. At the time of writing, civil cases in Cyprus are ranked according to their value and governed by fixed costs rules depending on the scale of the claim. Litigation funding, such as legal aid, is available only if the civil case involves the infringement of human rights and is granted under specific circumstances. Furthermore, third-party funding and contingency fees are practically unheard of, as they remain unregulated by the Cypriot legislation. Third-party litigation funding has only recently been examined by the national courts albeit in the context of an application for the setting aside of an order enforcing a foreign judgment. Is the Cypriot civil justice system affordable and thus accessible? Does limited access to legal aid and third-party funding result in violation of the right to access to justice? Will the civil justice reform improve accessibility for litigants? A holistic answer will be achieved by drawing comparisons with costs and litigation funding practices in England and Wales, as well as in Germany, both of which are leading jurisdictions in Europe and especially influential owing to their geopolitical history with the island, representing the common law and civil law systems, respectively.

**Keywords:** Cyprus, accessibility, affordability, costs, legal aid, civil procedure.

## 1 Introduction

The civil justice system is fundamental to any democratic society as it impacts a wide spectrum of daily interactions, from contractual agreements and commercial arrangements to family relationships and their breakdown. It is no secret that civil justice comes at a cost, but the question remains whether this cost acts as a deterrent to exercising the fundamental right of accessing justice.

Considering that the average length of a first instance civil trial in Cyprus is ranging from 600 to almost 1,200

days,<sup>1</sup> time is money and money is justice for litigants on the island, as the cost of litigation lies at the heart of effective access to justice. At the time of writing, civil cases in Cyprus are ranked according to their value and governed by fixed costs regimes depending on the scale of the claim.<sup>2</sup> Litigation funding, such as legal aid, is available only under specific circumstances and for specific types of claims,<sup>3</sup> whereas third-party funding is practically unheard of.<sup>4</sup> In determining the accessibility and affordability of the Cypriot civil justice system, this article will evaluate the costs regime of Cyprus in light of the recently proposed reforms to the civil procedure rules,<sup>5</sup> as well as the right to legal aid and availability of third-party funding, by drawing parallels with two jurisdictions in Europe that are highly influential owing to their geopolitical history with the island, England and Wales and Germany.

The connection between the justice systems of Cyprus and England and Wales is undeniable, considering that the former has stemmed from the latter; however, since it became a member state of the European Union, Cyprus' justice system has been considerably influenced by European Law, which under Article 1A of the Cypriot Constitution is now superior to national law. Considering Brexit and Cyprus' continual commitment to the European Union, a comparison with Germany's civil justice system is also appropriate given Germany's central role in the European Union.<sup>6</sup> A comparison between these two leading jurisdictions in Europe, representing the common law and civil law systems, respectively, is also appropriate given that the justice system in Cyprus is considered by some as a hybrid, with private law based on common law principles codified in statutes and public law deriving from the island's continental tradition.<sup>7</sup>

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1 EU Commission, 'The 2020 EU Justice Scoreboard' COM (2020) 306; EU Commission, 'The 2021 EU Justice Scoreboard' COM (2021) 17.

2 Appendix B, Cyprus Civil Procedure Rules.

3 Cyprus Legal Aid Legislation (N. 165(I)/2002).

4 S. Pavlou, C. Nicolaou, K. Philippidou, A. Antoniou & A. Patsalidou, 'Litigation and Enforcement in Cyprus: Overview', *Practical Law Country Q&A* 7-502-0202 (2021).

5 Supreme Court of Cyprus, Civil Procedure Rules (Proposed) (26 November 2020), [www.supremecourt.gov.cy/Judicial/SC.nsf/All/6305B22D4879980CC22586F8002A979A/\\$file/FULL%20VERSION%20CPR.pdf](http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/6305B22D4879980CC22586F8002A979A/$file/FULL%20VERSION%20CPR.pdf) (last visited 19 March 2022).

6 N. Kyriakides, 'Civil Procedure Reform in Cyprus: Looking to England and Beyond', *Oxford University Commonwealth Law Journal* 16(2) (2016); Procedural Regulation (No 1) of 2003 on Legal Aid.

7 The main difference between a common and a civil legal system is the importance of legal precedent in the common law system, whereas in a civil law system codified statutes predominate. Although Cyprus has per-

## 2 Costs

The civil procedure rules were first introduced in Cyprus during the British rule and follow the English White Book of 1954.<sup>8</sup> More than 65 years since, the civil procedure rules remain mostly intact, with partial amendments and reforms in 2016, predominantly in relation to Order 25, which provides for the amendment of court pleadings at different stages of the claim, and Order 30, which outlines the framework for a summons for directions.<sup>9</sup> The Republic of Cyprus is currently in the process of reorganising and improving the Cypriot judicial system as part of the Economic Adjustment Programme (EAP) following the economic crisis of 2012. The Supreme Court of the Republic of Cyprus, with the support of the Structural Reform Support Service (SRSS) of the European Commission, undertook the 'ambitious' project of reviewing and reforming the civil procedure rules in their totality, with the help of the Institute of Public Administration (IPA), Dublin.<sup>10</sup> The proposed draft of the new rules was approved by the Supreme Court of Cyprus in May 2021 and is due to come into effect by 1 September 2023.<sup>11</sup>

### 2.1 Costs in Civil Legal Proceedings: 1954-2022

At the time of writing, for *inter alia* costs purposes, civil cases in Cyprus are classified in different scales depending on the value of the claim as pleaded or determined by the court.<sup>12</sup> Currently, there are eight scales under which a claim may fall, the first being for claims valued at up to € 500 and the last for claims over € 2 million.<sup>13</sup> The general rule is that 'costs follow the event', meaning that the unsuccessful party will be responsible for covering the successful party's costs; however, the final decision as to the costs order remains with the court under Order 59 and Article 43 of Law 14/1960 on the Courts of Justice. Once the Court decides which party will pay, the

court registrar is responsible for assessing the costs based on a bill submitted by the successful litigant and using the fixed costs listed in Appendix B of the civil procedure rules. This assessment exercise by the registrar has been viewed by the Court as being of a judicial nature.<sup>14</sup> The registrar certifies the amount of costs, which is then approved by the Court and can be executed as a court order.

The amount of recoverable costs for all judicial activities is listed under the specific scale in which the claim falls. For each specific action that was undertaken during the litigation process, namely preparation of writs, filing of pleadings or interim applications, appearances before the Court, there is a corresponding set amount that cannot be disputed. When assessing the costs bill, the registrar will consider whether all actions taken were necessary and proper for the purposes of litigation, and in the interest of justice, or whether the party has unnecessarily complicated matters during case preparation.<sup>15</sup> Notably, private fee agreements made between the parties and their lawyers are not calculated in the final costs order, meaning that the recoverable costs do not reflect what the parties pay for in reality.<sup>16</sup>

In terms of transparency, while the fixed costs system operating in Cyprus has been seen as sufficient, criticism has been directed against the lack of widely and easily accessible information on costs and the difficulty this creates for parties that are not legally represented when assessing whether to initiate a civil action. This lack of easily accessible information, which despite the efforts of the Cyprus Bar Association and the introduction of online legal information platforms persists to an extent, increases the reliance on lawyers and can in turn be seen to increase costs from the outset.<sup>17</sup> It should be highlighted that according to the Advocate's Law (Cap. 2) and the Advocates' Code of Conduct (which every legal professional in the island has to abide by), when there is no written agreement between the lawyer and the client as to the fees, the lawyers *must* 'inform their client of the approximate requested fees, the amount of which must be fair, justified and reasonable under the circumstances'.<sup>18</sup>

The consequence of front-loading of costs was also discussed by the Expert Group appointed to review the CPR Rules, in relation to Order 30, which compels parties to take certain procedural steps at the outset of a case even though the said case might settle before trial. Although Order 30 was amended in 2016 in an attempt to improve case management and accelerate the litigation process, it is now seen as creating 'more problems than it solves'.<sup>19</sup> Order 30 introduced the procedure for sum-

haps the most elaborate codified Constitution, case law has precedential authority, and it is therefore important to use both a common law jurisdiction and a civil law jurisdiction for comparison. N.E. Hatzimihail, 'Cyprus as a Mixed Legal System', 6 *Journal of Civil Law Studies* (2013). <https://digitalcommons.law.lsu.edu/jcls/vol6/iss1/3> (last visited 19 March 2020).

8 C. Clerides, 'Civil Procedure' (European University Cyprus, 25 November 2009). [www.clerideslegal.com/article/civil-procedure-lecture-7](http://www.clerideslegal.com/article/civil-procedure-lecture-7) (last visited 26 September 2021).

9 For more see Kyriakides, above n. 6.

10 IPA, 'Progress Report on the Review of the Rules of Civil Procedure of Cyprus', June 2018.

11 It is important to note that initially the proposed rules would be introduced by September 2022; however, this deadline was pushed back. Supreme Court of the Republic of Cyprus, News and Announcements, 18 June 2021. [www.supremecourt.gov.cy/Judicial/SC.nsf/All/3C14E6251DEC1DEFC22586F80027A8AA?OpenDocument](http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/3C14E6251DEC1DEFC22586F80027A8AA?OpenDocument) (last visited 26 September 2021) (in Greek); IPA, 'Courts Reform in Cyprus: Final Report on Key Performance Indicator Matrix', 14 January 2022. [www.supremecourt.gov.cy/Judicial/sc.nsf/All/OCBD9EB9C96BC1C22587D50030C44F/\\$file/Final%20Report%20on%20KPI%20Matrix%20Cyprus%20Courts%20Change%20Management%2020%20January%202022.pdf](http://www.supremecourt.gov.cy/Judicial/sc.nsf/All/OCBD9EB9C96BC1C22587D50030C44F/$file/Final%20Report%20on%20KPI%20Matrix%20Cyprus%20Courts%20Change%20Management%2020%20January%202022.pdf) (last visited 19 March 2022).

12 Kyriakides, above n. 6, at 26; Cyprus Civil Procedure Rules.

13 Cyprus Bar Association, News and Announcements, 'Scales Lawyer's Costs from 24/10/2017'. [www.cyprusbarassociation.org/index.php/el/news/817-24-10-2017](http://www.cyprusbarassociation.org/index.php/el/news/817-24-10-2017) (last visited 26 September 2021) (in Greek).

14 *Georgiades v. The Council of Ministers* (1999) 3 CLR 35; J. Albert, *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union – Country Report Cyprus* (European Commission Directorate-General for Justice, Freedom and Security, 2007), 14.

15 *Ibid.*, at 27.

16 Pavlou et al., above n. 4.

17 Albert, above n. 14, at 17-18.

18 Advocates' Code of Conduct, Rule 26(2).

19 IPA, above n. 10, at 11.



mons for directions as well as a two-tier system on the basis of the value of a claim (below and above € 3.000) and has vested the court with increased case management powers. In terms of costs, Order 30 introduced the requirement that for actions that have been dismissed for failure of issuing a summons for directions to be reinstated, costs must firstly be paid. In practice, this provision allows defendants to hold claims hostage; if defendants refuse to submit a bill of costs to the registrar, costs cannot be assessed, and the action cannot be reinstated.<sup>20</sup> Order 30.9, which can be seen as an attempt to mirror the ‘overriding objective’ principle of England and Wales, preserves the Court’s discretion in making case management orders to save time and costs and to ensure that the parties are on an equal footing. However, in practice Order 30.9 has not been utilised by the Courts and is significantly narrower in scope than the ‘overriding objective’, a principle that is now extensively included in the proposed civil procedure rules.

## 2.2 Other Jurisdictions

### 2.2.1 England and Wales

With regard to the case of England and Wales, two major reports that were produced in 1996 and 2009 by Woolf and Jackson, respectively,<sup>21</sup> identified that the cost of litigation is merely a symptom of wider issues in civil procedure.<sup>22</sup> The Civil Procedure Rules were therefore drastically reformed, introducing the notion of the overriding objective in dealing with cases justly and at *proportionate* cost and giving the court greater case management powers.<sup>23</sup> The proportionality assessment in terms of costs is twofold; first, there is a global assessment of costs driven by the conduct of parties, preparation time, knowledge and skill needed, etc. Secondly, there is an individual assessment for each amount of costs sought on the standard basis.<sup>24</sup> The Court has the power to sanction parties for unreasonable conduct by undertaking the individual assessment of costs on the indemnity basis considering whether an amount is reasonable.<sup>25</sup>

In a further attempt to curb the length of litigation or even reduce the number of cases in need of litigation, parties are required to engage in pre-action disclosure and negotiation through the Pre-action Protocols designed.<sup>26</sup> The Court also has a duty to encourage parties to engage in alternative dispute resolution (ADR), even after the commencement of an action.<sup>27</sup>

Unlike Cyprus, England and Wales operates a fixed costs regime only for claims on the small claims track<sup>28</sup> or claims on the fast track that are governed by the Pre-Action Protocols in relation to road traffic accidents, low-value personal injury arising from road traffic accidents and employer’s liability.<sup>29</sup> In multitrack claims the Court, together with the parties, undertake a cost-budgeting exercise before trial so as to constrain spending by capping recoverable costs.<sup>30</sup> Moreover, to increase access to justice, for proceedings that include a claim for damages for personal injuries or arising from a fatal accident, qualified one-way costs shifting (QOCS) was introduced with the reforms of 2013 so as to protect an unsuccessful claimant from costs consequences.<sup>31</sup> Conditional fee arrangements (CFAs) as well as no fee damages-based agreements (DBAs) were also introduced so as to give litigants funding options in initiating their claims. In contrast, such fee agreements are prohibited in Cyprus, as they are ‘contrary to the principle of *cham-perty*’.<sup>32</sup>

Parties also have the opportunity to use Part 36 of the Civil Procedure Rules and make an offer to settle before or after the commencement of proceedings.<sup>33</sup> The said offer needs to be a genuine offer to settle, to be made ‘without prejudice except as to costs’, and to comply with the strict requirements of the rules contained within Part 36.<sup>34</sup> The tactical advantage in making a Part 36 offer is that a party that refuses a reasonable offer and chooses to carry on with litigation, failing to obtain a more favourable judgment, faces costs consequences.<sup>35</sup> Overall, the use of costs as a sanction creates a balance between the parties’ incentives in bringing claims to Court; it encourages settlement and deters unreasonable conduct.

### 2.2.2 Germany

Even though Germany, like Cyprus, operates on a system of fixed costs, it is perceived as one of the most cost-efficient jurisdictions in Europe.<sup>36</sup> The costs regime in Germany was reformed in 2004 and is now extensively codified in German legislation, making it highly transparent and easily accessible to prospective litigants.<sup>37</sup> In fact, there are three cardinal pieces of legislation that seek to regulate the costs of litigation in Germany; a) the German Code of Civil Procedure (*Zivilprozessordnung*) (ZPO), b) the Court Fees Act (*Gerichtskostengesetz*) (GKG) in combination with its annexes, and c) the Costs Act (*Kostenordnung*) (KostO).<sup>38</sup> Title 5 of the ZPO

20 *Ibid.*

21 Lord Woolf, *Access to Justice: Final Report* (Her Majesty’s Stationery Office 1996); R. Jackson, *Review of Civil Litigation Costs: Final Report* (2009).

22 E. Booth, ‘The Cost of Civil Justice: Time for Review or Revolution?’ 161 *New Law Journal* 6 (2011).

23 White Book 2021, Volume I, Section A: Civil Procedure Rules 1998, Parts 1 and 3.

24 *Ibid.*, Part 44.

25 *Ibid.*, Part 44.4.

26 White Book 2021, Volume I, Section C: Pre-Action Conduct and Protocols.

27 White Book 2021, Volume I, Section A: Civil Procedure Rules 1998, Part 26.

28 *Ibid.*, Part 27.14.

29 *Ibid.*, Part 45.

30 *Ibid.*, Part 29.

31 *Ibid.*, Part 44.13-16.

32 Pavlou et al., above n. 4.

33 White Book 2021, Volume I, Section A: Civil Procedure Rules 1998, Part 36.

34 *Ibid.*, Part 36.5.

35 *Ibid.*, Part 36.17.

36 Kyriakides, above n. 6, at 27.

37 B. Hess and R. Huebner, ‘Cost and Fee Allocation in Civil Procedure: National Report for Germany’ (International Academy of Comparative Law, 18th World Congress Washington DC, July 2010) 9.

38 Albert, above n. 14, at 19.

provides the general costs principles that govern civil litigation,<sup>39</sup> whereas the GKG is used for the calculation of costs in terms of court fees based on the value of the claim.<sup>40</sup> The type of claim or the stage of the proceedings also affects the fee payable to the Court, which is then multiplied to reflect the specific type/stage of the claim; for example, the Court fee for maintenance-related conflicts within the sphere of family law is three times the corresponding rate set out in Annex 2.<sup>41</sup>

Lawyers' fees operate on a similar basis and are regulated by the German Lawyers' Remuneration Act (*Rechtsanwaltsvergütungsgesetz*) (RVG). The RVG stipulates that the fees are calculated according to the value and type of claim before the Court, but higher fees can be agreed with the client.<sup>42</sup> Notably, contingency fees in Germany are used only in an attempt to increase access to justice when a party would have no other way of bringing their claim to Court.<sup>43</sup>

There is a stark difference between the calculation of costs and fees in Germany and that of Cyprus, as the activities undertaken as part of the action are not charged separately. Both the trial costs and the advocate's fees are calculated for the action, or trial, as a whole.<sup>44</sup> This in turn prevents lawyers from overcomplicating proceedings in an attempt to ramp up costs, thereby ensuring the efficiency of litigation. Another major difference between the two jurisdictions is that the German costs system has been structured in a way that encourages settlement; not only are court charges lower if litigation is not pursued, but lawyers also receive an additional fee in the event of settlement.<sup>45</sup>

The rules of evidence in Germany also assist in the efficiency of litigation, thus exhibiting that the legal system in its entirety is driven by cost and time saving. The fact that claimants ought to identify and/or provide the evidence on which they base their claim from the outset makes it easier for the Court, which plays an inquisitorial role, and even the parties themselves, to identify whether or not a claim is valid and ought to continue down the path of litigation.<sup>46</sup> This leading role of the Court in light of the absence of 'pretrial disclosure' means that evidence gathering and fact finding is only done once, and only if the Judge deems it necessary to explore the issue in question.<sup>47</sup> In fact, it is common

practice for the Court to intervene in order to motivate the parties to settle, more specifically through the so-called conciliation hearing.<sup>48</sup> It is not unheard of for judges in Germany to give early indications of the case outcome in an attempt to demotivate parties from pursuing their action, thereby avoiding the risk of unnecessary and prolonged court proceedings.<sup>49</sup>

### 2.3 Reform – What Does the Future Hold for Cyprus in Terms of Costs?

As already noted, there has been a movement in recent years stemming from the EU as well as legal professionals, pushing for a wide range of reforms in the justice system extending beyond the civil procedure rules. One example of this is the introduction of electronic justice through 'i-Justice', an online court filing platform that also enables electronic communications between the parties and the Court. While this is undeniably a step towards establishing a modern, 21st century-appropriate justice system, it is questionable whether in the short run there will be any positive effect on the access to justice. On the contrary, even though one would expect that electronic filing and communication would carry lower operating costs, which would then be reflected on the fees payable to Court, there has been no change to the said fees. Furthermore, lack of training and information campaigns means that litigants, especially the ones without legal representation, might not be able to use the i-Justice platform, either for want of resources or for want of technological knowledge and familiarity, resulting in an additional hurdle in accessing the Court and in turn justice.

Turning to the civil procedure rules, the proposed new rules drafted with the help of Experts led by The Rt. Hon. Lord John Dyson, have been approved by the Supreme Court of Cyprus with a view of coming into effect by 1 September 2023. It comes as no surprise that these new rules are heavily based on, or even mirror, the Civil Procedure Rules of England and Wales.

First and foremost, the overriding objective will now also be the guiding light for the civil courts in Cyprus, who will not only have to ensure that cases are dealt with justly and at proportionate cost, but will also have a duty to encourage parties to engage in ADR.<sup>50</sup> While some may argue that litigation proceedings were already or at least ought to have been carried out in the spirit of proportionality, the codification of the overriding objective is undoubtedly a novel concept, with which all legal professionals on the island will have to become accustomed.

Three Pre-Action Protocols will also come into effect guiding the parties' conduct before the commencement of proceedings, specifically in claims where a specified sum of money is being sought, in claims relating to road

39 The Code of Civil Procedure of Germany. [www.gesetze-im-internet.de/zpo/](http://www.gesetze-im-internet.de/zpo/) (last visited 26 September 2021) (in English).

40 Court Fees Act (GKG), Art. 3. Annex 2 of the GKG, contains a table that provides the fee payable to the court to initiate a civil claim according to the value pleaded. Court Fees Act (GKG), Annex 2. [www.gesetze-im-internet.de/gkg\\_2004/anlage\\_2.html](http://www.gesetze-im-internet.de/gkg_2004/anlage_2.html) (last visited 26 September 2021).

41 European Justice, 'Costs: Germany' (last update 4 November 2020). [https://e-justice.europa.eu/content\\_costs\\_of\\_proceedings-37-de-maximizeMS-en.do?member=1](https://e-justice.europa.eu/content_costs_of_proceedings-37-de-maximizeMS-en.do?member=1) (last visited 26 September 2021).

42 Albert, above n. 14, at 26-29.

43 RVG, Art. 4A.

44 Kyriakides, above n. 6, at 28.

45 B. Hess and R. Huebner, 'National Report for Germany', in M. Reimann (ed.), *Cost and Fee Allocation in Civil Procedure* (2010) 7.

46 J. Langbein, 'The German Advantage in Civil Procedure', 52(4) *University of Chicago Law Review* 823, at 827(1985). <https://chicagounbound.uchicago.edu/uclrev/vol52/iss4/1/> (last visited 29 September 2021).

47 *Ibid.*, at 831.

48 A. Reeg and M. Weiß, 'Litigation and Enforcement in Germany: Overview' (2021). [https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited 29 September 2021).

49 ZPO Art. 139; Langbein, above n. 46, at 832.

50 Proposed Civil Procedure Rules, above n. 5, Part 1, at 16-17.

traffic accident as well as personal injury.<sup>51</sup> As discussed previously in the context of England and Wales, the introduction of the Pre-Action Protocols can be seen as an attempt to limit the number of litigated claims and reduce costs by encouraging settlement. The Court will have the power to impose costs sanctions on parties that fail to comply with the Pre-Action Protocols.<sup>52</sup> However, it should be noted that when these protocols were introduced in England and Wales they were criticised by scholars as having the effect of over-complicating proceedings and front-loading costs.<sup>53</sup> It, of course, remains to be seen how and to what extent these Pre-Action Protocols will be used by prospective litigants in Cyprus and the effect this will have on the number of litigated claims.

Notably, the new rules will also place the Court under a duty to restrict expert evidence to prevent parties from incurring unnecessary costs.<sup>54</sup> This is of particular importance considering that, so far, litigants in civil claims have retained absolute discretion as to the number of experts used during trial, something that undeniably affects costs considerably. In addition, Part 35 of the new rules introduces the concept of ‘offers to settle’,<sup>55</sup> which, as discussed previously, act as an incentive for litigants to accept reasonable offers to avoid costs sanctions in the event of an unfavourable judgment.

The main difference between the new civil procedure rules of Cyprus and those of England and Wales is the creation of only two tracks under which a claim may fall – a small claims track for claims under € 10,000 and the ‘customary claims’ track for claims over € 10,000. In terms of costs, the fixed costs regime will continue to operate in Cyprus for all claims, irrespective of their value. The codification of costs procedure in Part 39 of the new rules and the inclusion of the table of costs as an Annex will provide the long-awaited transparency and will in turn improve access to justice for litigants, who will now be able to make informed assessments on the cost of litigation before deciding whether to issue a claim. The new rules will also include a provision on wasted costs, which is expected to address any concerns related to the over-complication of proceedings by lawyers.<sup>56</sup>

Ultimately, a quick glance through the almost 700-page long text of the proposed rules is enough to give hope to the optimists among us, that a more efficient and affordable civil legal system is in sight, yet also to raise doubts as to how they will be utilised by judges and lawyers combined to ensure their effectiveness.

51 *Ibid.*, Part 3, Annex I, at 33-43.

52 *Ibid.*, Part 3.10, at 29.

53 A.A.S. Zuckerman, ‘Lord Woolf’s Access to Justice: Plus ça Change...’, 59(6) *The Modern Law Review* 779 (1996).

54 *Ibid.*, Part 34, at 204.

55 *Ibid.*, Part 35, at 211. This part essentially mirrors Part 36 of the Civil Procedure Rules of England and Wales discussed previously.

56 *Ibid.*, Part 39.10, at 229. Zuckerman, above n. 53, at 773.

## 3 Legal Aid

### 3.1 Normative Underpinnings

For justice to be delivered, proceedings need to be initiated. Legal aid is a precondition for people who lack financial resources to have access to justice, as in the absence of such right, judicial remedies would be available only to individuals in possession of the financial resources needed for the initiation and/or continuation of the legal procedure.<sup>57</sup>

The right to fair trial, enshrined in Article 6 of the European Convention on Human Rights (ECHR), constitutes a *sine qua non* for a person’s access to justice.<sup>58</sup> However, the affordability of the procedures before the Court, including legal advice, and the relevant submissions of pleadings, as well as lawyers’ fees, can be a substantive financial burden, which might result in a person’s inability to access legal advice, assistance and representation.<sup>59</sup>

The significance of a right to legal aid lies in the fact that, once granted, it enables the individual to gain access to justice and provides financial support throughout the court procedure. In *Airey v. Ireland* (1979), the European Court of Human Rights (ECtHR) recognised that Article 6 of the ECHR includes a right to legal aid for civil cases.<sup>60</sup> Specifically, it noted that despite the absence of an explicit clause for civil litigation in Article 6, the state may be sometimes compelled to provide the assistance of a lawyer, when such assistance proves indispensable for an effective access to court, either because legal representation is rendered compulsory or because of the complexity of the procedure of the case.<sup>61</sup> Furthermore, whether or not Article 6 of the ECHR requires the provision of legal representation is a matter of facts,<sup>62</sup> and the test applied is whether the lack of legal aid deprives the individual’s right to fair trial, and particularly of their opportunity to present their case effectively before the court.<sup>63</sup> Nevertheless, the Court clarified that Article 6(1) of the ECHR does not imply that the state must provide free legal aid for every dispute arising out of a civil right.<sup>64</sup> Additionally, according to *Del Sol v. France* (2002),<sup>65</sup> the ECtHR noted that states have the discretion to decide the procedure for granting

57 F. Francioni, ‘The Rights of Access to Justice under Customary International Law’, in F. Francioni (ed.), *Access to Justice as a Human Right* (2007) 2.

58 See, B. Rainey, E. Wicks, C. Ovey (eds), *The European Convention on Human Rights*, 8th ed. (2020) 277-308; S. Treschel, ‘Why Must Trials Be Fair’, 31(1-3) *Israel Law Review* 94-119 (1997).

59 See, C. Paraskeva, *Cypriot Constitutional Law: Fundamental Rights and Freedoms* (2015) 500; S. Rice, ‘Reasoning a Human Right to Legal Aid’, *Legal Studies Research Paper No. 17/72 Sydney Law School* 3 (2017).

60 See, Francioni, above n. 57, at 1-56.

61 ECtHR, *Airey v. Ireland* (1979), App. No. 6289/73.

62 ECtHR, *McVicar v. the United Kingdom*, App. No. 46311/99, 7 May 2002, para. 48; ECtHR, *Steel and Morris v. the United Kingdom*, App. No. 68416/01, 15 February 2005, para. 61.

63 ECtHR, *Steel and Morris v. the United Kingdom*, App. No. 68416/01, 15 February 2005, para. 72.

64 ECtHR, *Airey v. Ireland*, App. No. 6289/73, 1979, para. 26.

65 ECtHR, *Del Sol v. France*, App. No. 46800/99, 26/02/2002.



such right, given that this procedure is always proportional and respects the party's right to access the court.

### 3.2 Overview of Legal Aid in Cyprus

The right to a fair trial in Cyprus is enshrined in Article 30 of the Cypriot Constitution,<sup>66</sup> which states that 'every person is entitled to a fair and public hearing'.<sup>67</sup> This Article corresponds to Article 6 of the ECHR, and the interpretation of the latter is applied to the former, by virtue of the Law on Ratifying the European Convention on Human Rights and the Additional Protocol, L. 39/1962. In *Fatsita v. Fatsita* (1988),<sup>68</sup> the Supreme Court of Cyprus accepted that the right to fair trial can be regulated in legislation. Specifically, it noted that '[t]he guarantee of the right of access to the Courts does not debar the legislature from providing for some sort of regulation of this right, provided that the regulatory provision is not arbitrary or unreasonable and does not labour as an infringement of the right of access to a Court'.<sup>69</sup>

Under Article 30(3)(d) of the Cypriot Constitution, it is provided that everyone has a right to have a lawyer of their own choice, as well as free legal aid when the interest of justice so requires, and the provision of such legal aid is recognised in law.<sup>70</sup> Importantly, Article 30 of the Constitution does not automatically grant a right to legal aid, as there is a requirement for the adoption of a specific law on legal aid that legalises this right and that can be enforced on the basis of such legislation.

The right to legal aid in civil proceedings in Cyprus is recognised in the Legal Aid Law of 2002 (Law 165(I)/2002) and specifically under Article 5. Although this Law regulates when and how legal aid is provided in civil cases, it recognises that legal aid may also be granted in criminal cases,<sup>71</sup> in family law cases,<sup>72</sup> in cross-border disputes,<sup>73</sup> and in cases related to the process of selling a mortgaged property.<sup>74</sup> Furthermore, the receivers of legal aid may be asylum seekers and refugees;<sup>75</sup> undocumented third-country nationals;<sup>76</sup> victims of trafficking, sexual harassment, child pornography, sexual exploitation and sexual abuse;<sup>77</sup> EU nationals and their family members;<sup>78</sup> as well as any individual whose human rights have been violated,<sup>79</sup> provided that certain conditions set out in the relevant Law are met.

Legal aid in Cyprus includes funding for advice, assistance and representation before a civil Court.<sup>80</sup> Notably, according to the Advocates' Code of Conduct, lawyers

have a duty to inform their clients if they could potentially be eligible to receive a legal aid grant.<sup>81</sup> However, according to Article 5(1)(a), a legal aid application can be granted only for '[c]ivil proceedings before the Court at any stage, brought against the Republic of Cyprus for damages sought by a person as a result of certain human rights violations'.<sup>82</sup> In other words, the right may be granted only if there has been a decision establishing the existence of human rights violations.<sup>83</sup> Importantly, the Supreme Court, in the case *Yiallourous v. Nicolaou* (2001),<sup>84</sup> established that a breach of a fundamental right or liberty of the individual, enshrined under human rights law, confers a right of action against the state, or an individual.<sup>85</sup> In this case, the Court made reference to Article 35 of the Constitution, which provides that the state must ensure the effective implementation of human rights and accepted that this provision calls for the detection of human rights violations, as well as the granting of relevant remedies that cure such violations. Remedies that may be granted in a civil procedure include compensation, reparation for damages caused, injunctions and other similar remedies that aim to restore justice.<sup>86</sup>

Even though Article 5 of the Legal Aid Law provides that legal aid may be granted for all civil cases that deal with a human rights violation, there have been contrary decisions related to specific procedures. For instance, the answer to the question of whether a Habeas Corpus procedure falls within the ambit of Article 5 of the Legal Aid Law has been ambiguous. The importance of the writ lies in its function, as it initiates judicial proceedings for the purposes of examining the legality of the applicant's incarceration.<sup>87</sup>

In *Mansour Ahmad* (2011),<sup>88</sup> where the legal aid applicant intended to use the funding to initiate a Habeas Corpus procedure, the Supreme Court accepted that the allegedly unlawful deprivation of the applicant's liberty was an alleged violation of the applicant's human rights, and since Habeas Corpus constitutes a civil procedure it approved the legal aid application. In stark contrast, in *Paliei v. the Republic* (2018),<sup>89</sup> where the applicant intended to use the legal aid funding for the purpose of submitting an appeal against a decision on Habeas Corpus, the Supreme Court of Cyprus decided that although Habeas Corpus falls under the category of civil procedure, it does not concern a procedure against human

66 See, Art. 30 of the Cypriot Constitution.

67 Art. 30(1) of the Cypriot Constitution.

68 *FATSITA v. FATSITA & ANOTHER* (1988) 1 CLR 210.

69 *Ibid.*

70 Art. 30(3)(d) of the Cypriot Constitution.

71 Arts. 3, 4 of the Legal Aid Law of 2002 (Law 165(I)/2002).

72 Art. 6 of the Legal Aid Law of 2002 (Law 165(I)/2002).

73 Art. 6A of the Legal Aid Law of 2002 (Law 165(I)/2002).

74 Art. 6E of the Legal Aid Law of 2002 (Law 165(I)/2002).

75 Art. 6B of the Legal Aid Law of 2002 (Law 165(I)/2002); *Application for Legal Aid by Azam Mohammad*, App. No. 13/2011, 27 May 2011.

76 Art. 6C of the Legal Aid Law of 2002 (Law 165(I)/2002).

77 Art. 6D of the Legal Aid Law of 2002 (Law 165(I)/2002).

78 Art. 6F of the Legal Aid Law of 2002 (Law 165(I)/2002).

79 Art. 5 of the Legal Aid Law of 2002 (Law 165(I)/2002).

80 Art. 5(3)(a) of the Legal Aid Law of 2002 (Law 165(I)/2002).

81 Advocate's Code of Conduct, Rule 29(2).

82 Art. 5(1)(a) of the Legal Aid Law of 2002 (Law 165(I)/2002).

83 Art. 5(1) of the Legal Aid Law of 2002 (Law 165(I)/2002); N. Kyriakides, 'Civil Procedure Reform in Cyprus: Looking to England and Beyond', *Oxford University Commonwealth Law Journal* 16(2) (2016).

84 *Yiallourous v. Nicolaou* (2001) 1 CLR 558.

85 *Ibid.*

86 *Ibid.*

87 E.M. Freedman, 'Habeas Corpus in Three Dimensions: Dimension I: Habeas Corpus as a Common Law Writ', 46(2) *Harvard Civil Rights Civil Liberties Law Review* 593 (2011).

88 *Mansour Ahmad* (2011) 1 CLR 2040.

89 *Regarding the Application by Paliei*, Application No. 317/2018, 6 December 2018.

rights violations<sup>90</sup> and that thus legal aid could not be provided in this case.<sup>91</sup> Likewise, in the *Application by Singh (2021)*<sup>92</sup> and *Application by Islam (2021)*<sup>93</sup> the Supreme Court of Cyprus rejected the applications for legal aid and explained that a decision affirming the existence of human rights violations is required for the right to fall under the provision of Article 5 of the Legal Aid Law and for legal aid to be granted to initiate civil proceedings.<sup>94</sup>

In a similar vein, the case *Regarding the Application of Svetlana Shalaeva (2005)*<sup>95</sup> concerned a legal aid application for the purposes of the applicant's recourse for the annulment of detention and deportation orders. However, the Supreme Court of Cyprus clarified that proceedings arising from the facts of the applicant's case were not included in the Legal Aid Law of 2002.<sup>96</sup> The Court then proceeded to examine whether the applicant could be benefitted from the right to legal aid based solely on the provisions of Article 30 of the Cypriot Constitution. However, owing to the wording of Article 30, which requires the existence of law that regulates the right to legal aid,<sup>97</sup> the Court decided that this provision could not function as the basis for an automatic right to legal aid and thus dismissed the application.

It is important to note that the eligibility threshold set by the relevant case law for a legal aid grant is relatively high, as the requirement for a decision that declares that a person's human rights have been violated presupposes that this individual was able to initiate court proceedings through which such decision would be made. In other words, the requirement that a human rights violation ruling exists as a precondition for the recognition of a right to legal aid indicates that the applicant has had access to court proceedings prior to that legal aid application. Thus, for instance, if a dispute concerns matters regulated by administrative law but neither does the individual who wishes to initiate legal proceedings have the financial means to do so nor is legal aid provided for such a case, then, by definition, it is impossible to meet the criteria set out in the case law and be granted a right to legal aid under Article 5 of the Legal Aid Law to initiate civil law proceedings to seek remedies for human rights violations.

To put the above observation in context, the following example can be proven useful. There are undeniably numerous legal aid applicants who are asylum seekers or undocumented third-country nationals and who usually seek to challenge decisions that reject their asylum applications or a detention order before the International Protection Administrative Court or the Administrative Court, respectively. If, for any reason, their application for legal aid to initiate these procedures – based either on Article 6B or on 6C of the Legal Aid Law – is rejected, then these persons would likely not be able to initiate legal proceedings for want of financial resources and might even have to act as litigants in person, constituting an inherently difficult endeavour, considering that most asylum seekers and migrants have little or no knowledge of the Greek language (the working language of the Court) or Cypriot law. This obstacle implies not only that they will not be able to fully engage with the proceedings but that they will also have access issues to the necessary resources to substantiate the pleadings, as most resources can only be found in Greek. This may lead to a situation where the individual will have no access at all to the court and to a fair trial and consequently to the decision that would declare a human rights violation in the first place.

Furthermore, as can be observed from the foregoing cases, the Supreme Court maintains that although Habeas Corpus is a civil procedure, it does not fall into the category recognised in Article 5 of the Legal Aid Law, because of the lack of a prior decision that establishes a human rights violation. However, the following paradox arises. Asylum seekers, refugees and undocumented third-country nationals can have access to legal aid only in first instance trials.<sup>98</sup> If their case is rejected and they cannot afford to challenge this decision on appeal by funding themselves, then they are, by definition, struck out of the legal system, and the possibilities to prove in the Court of Appeal that their human rights have been violated are eliminated, as well as any possibility of being eligible for legal aid under Article 5 of the Legal Aid Law.

Hence, it is plausible to conclude that there is an inherent barrier within the Legal Aid Law that excludes many applicants in the aforementioned category. This barrier hinders the right to meaningful access to justice. However, the right to legal aid is not absolute, and it is permissible for the state and the courts to impose several conditions on the right relating to the applicant's financial situation as well as the prospects of success in the proceedings.<sup>99</sup> However, the fact that the Supreme Court rejects almost all legal aid applications for Habeas Corpus proceedings and generally demands that a prior judgment of human rights violations exists indicates

90 Ibid.

91 Also, see, *Afran Siddique*, Legal Aid Application No. 18/2013, 21 June 2013; *Abrar Gujjar*, Legal Aid Procedure No. 21/16, 12 April 2016; *Sayed Taghi Hosseini Bayati*, Legal Aid Application No. 6/2017, 09 March 2017; *Aboutaleb Latfipour*, Legal Aid Application No. 15/2016, 06 April 2016; *Ahmad Hashemi*, Legal Aid Application No. 45/17, 10 October 2017; *Mohsen Gharahasanloo*, Legal Aid Application No. 13/2013, 14 March 2013; *Zakir Ullah*, Legal Aid Application No. 36/2016, 30 May 2016.

92 *Application by Singh*, Legal Aid Application No. 56/21, 12 July 2021.

93 *Application by Islam*, Legal Aid Application No. 54/2021, 28 June 2021.

94 Also, see, *Application by Piyas*, Legal Aid Application No. 24/2021, 17 March 2021; *Application by Rahmati (Rahmatinia)*, Legal Aid Application No. 45/21, 12 July 2021.

95 *Regarding the Application of Svetlana Shalaeva*, App. No. 4/2005, 21 October 2005.

96 Law 165(I)/2002; *Andreas Konstantinou v. Republic of Cyprus*, No. 1/03, 19 December 2003; *Stavros Maragkos*, No. 2/04, 4 October 2004.

97 Also, see, *Yiallourous v. Nicolaou* (2001) 1 CLR 558.

98 Art. 6B (2) (aa) and Art. 6C (2) (aa) of the Legal Aid Law, Law 165(I)/2002.

99 ECtHR, *Steel and Morris v. the United Kingdom*, App. No. 68416/01, 15 February 2005, paras. 59, 60, 62.

the adoption of a formal view of justice, rather than a substantive one.<sup>100</sup>

Importantly, the Committee Against Torture in its Concluding Observations on Cyprus in 2019 found that the application procedure for legal aid is restrictive and noted that Cyprus should ‘ensure that the right to immediate legal aid is fully implemented in practice at all stages of the legal process’ and that the state should ‘eliminat[e] overly restrictive procedural and judicial criteria’.<sup>101</sup> This issue has remained unresolved, and the fact that the Committee had made similar recommendations in its concluding observations in 2014 indicates that no progress has been made throughout the years.<sup>102</sup>

Therefore, access to civil proceedings through a legal aid right is extremely restricted, and this may result in limited or no access to justice. Undeniably, the right enshrined in Article 5 of the Legal Aid Law constitutes a privilege that is granted only to individuals who have had the opportunity to access the court prior to the legal aid application in question. Furthermore, although a right to legal aid is not absolute, the limitations applied to Article 5 of the Legal Aid Law may result in the deprivation of the right to access to justice in many cases.

### 3.3 Other Jurisdictions

#### 3.3.1 England and Wales

In England and Wales, there have been significant changes in the legal aid programmes throughout the years. Importantly, the Courts have not equated the right to legal aid to the right to access to justice.<sup>103</sup> However, to make access to justice meaningful, the right to legal aid is necessary in certain cases. In recognition of this, the UK government drafted a provision into the Legal Aid, Sentencing and Punishment of Offenders Act 2012, providing that legal aid is available only in exceptional circumstances.<sup>104</sup> More specifically, and as outlined in Schedule 1, Part 1 of the aforementioned Act, civil legal aid services are provided in cases of ‘care, supervision and protection of children’,<sup>105</sup> ‘special educational needs’,<sup>106</sup> ‘abuse of child or vulnerable adult’,<sup>107</sup> ‘working with children and vulnerable adults’,<sup>108</sup> ‘mental health and mental capacity’,<sup>109</sup> ‘community care’,<sup>110</sup> ‘fa-

cilities for disabled persons’<sup>111</sup> and ‘appeals relating to welfare benefits’.<sup>112</sup>

However, this has not always been the case for England and Wales. Zuckerman (1996)<sup>113</sup> suggested that the availability of an almost ‘unlimited legal aid’<sup>114</sup> right in the 1990s fuelled a rise in the cost of litigation. Specifically, he claimed that infusing more money into a system already liable to upward pressure on costs accelerated the rise in the unit price of legal services.<sup>115</sup> From the mid- to the late 2000s, the legal aid fund was subjected to increasing cuts under the austerity programme introduced by the government.<sup>116</sup> The narrative presented by the government was that legal aid was something of a private need.<sup>117</sup> Thus, the UK government imposed cuts on the scheme, and most of the savings were made by cutting out certain areas of law that were included in the legal aid programme, such as private family matters, employment, welfare benefits, housing, debt, clinical negligence and non-asylum immigration law matters.<sup>118</sup> The provision according to which legal aid is now available for only exceptional circumstances has clearly been inserted to ensure that the UK abides with its obligation under Article 6 of the ECHR. However, this safety net has not been performing a meaningful role for the provision of legal aid to those most in need of it but has functioned more as a shielding of the UK from possible convictions by the ECtHR.<sup>119</sup>

#### 3.3.2 Germany

The procedure of obtaining legal aid in Germany is considered both an efficient and a fair process.<sup>120</sup> The key piece of legislation that regulates legal aid in Germany is the Code of Civil Procedure (or the *Zivilprozessordnung*, also called ZPO),<sup>121</sup> and the Act on Advisory Assistance. According to the Act on Advisory Assistance, a party may be eligible for advisory assistance in civil law cases related to sales law, landlord and tenant cases, claims for damages, road accidents, neighbourly disputes, divorce and maintenance cases, other family matters, inheritance disputes and insurance claims, to name

100 For more information on the concepts of equality, see Fredman, *Discrimination Law*, 2nd ed. (2011).

101 Committee Against Torture, Concluding observations on the fifth periodic report of Cyprus, 23 December 2019, CAT/C/CYP/CO/5, para. 15.

102 Committee Against Torture, Concluding observations on the fourth report of Cyprus, 16 June 2014, CAT/C/CYP/CO/4, para. 7.

103 See Lord Neuberger of Abbotsbury, ‘Justice in an Age of Austerity’, (2013) JUSTICE, <https://files.justice.org.uk/wp-content/uploads/2015/02/06172428/Justice-in-an-age-of-austerity-Lord-Neuberger.pdf> (last visited 30 September 2021).

104 Legal Aid Sentencing and Punishment of Offenders Act 2012, s.10.

105 Legal Aid Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 1, s. 1.

106 *Ibid.*, s. 2.

107 *Ibid.*, s. 3.

108 *Ibid.*, s. 4.

109 *Ibid.*, s. 5.

110 *Ibid.*, s. 6.

111 *Ibid.*, s. 7.

112 *Ibid.*, s. 8.

113 See, Zuckerman, above n. 53, at 773-96.

114 *Ibid.*, at 775.

115 *Ibid.*, at 778.

116 See, Lord Neuberger, above n. 103.

117 A. Flynn and J. Hodgson, ‘Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes’, in A. Flynn and J. Hodgson (eds.), *Access to Justice and Legal Aid* (2017) 1.

118 J. Organ and J. Sigafos, ‘The Impact of LASPO on Routes to Justice – Equality and Human Rights Commission, Research Report’ (2018).

119 See, for instance, the Interim Report produced by The Bach Commission on Access to Justice, ‘The crisis in the justice system in England and Wales’ (November 2016).

120 See Federal Ministry of Justice and Consumer Protection, ‘Financial aid for legal advice and court costs: Information on the Act on Advisory Assistance e (Beratungshilfegesetz) and the provisions on legal aid in the Code of Civil Procedure (Zivilprozessordnung)’, 2. [www.hilfe-info.de/WebS/hilfeinfo/SharedDocs/Publikationen/EN/Information\\_court\\_costs.pdf?\\_\\_blob=publicationFile&v=3](http://www.hilfe-info.de/WebS/hilfeinfo/SharedDocs/Publikationen/EN/Information_court_costs.pdf?__blob=publicationFile&v=3) (last visited 19 March 2022).

121 The Code of Civil Procedure of Germany. [www.gesetze-im-internet.de/zpo/](http://www.gesetze-im-internet.de/zpo/) (last visited 19 March 2022).



a few.<sup>122</sup> Moreover, anyone who cannot afford to pay the court costs can be eligible for legal aid.<sup>123</sup> However, the funding of legal aid does not include the costs that the party needs to pay to the opposing party, including the opposing party's lawyer's fees. Hence, the losing party must cover all costs incurred by the opposing party, regardless of whether the former has been granted legal aid or not.<sup>124</sup>

Most relevant are Sections 114 to 127 under Title 7 of the ZPO, which regulate the procedure of acquiring legal aid, as well as the prerequisites needed. Specifically, under s. 114, it is noted that anyone lacking the financial capacity to afford litigation procedures is able to receive legal aid or advisory assistance on submission of the relevant application.<sup>125</sup> The applicant should not be able to cover the total cost of the legal proceedings or should only be able to cover them partially or in instalments.<sup>126</sup> However, the intended legal action should afford a reasonable chance of success.<sup>127</sup>

In determining the amount of legal aid that should be granted for the successful applicant, the party's gross income is taken into consideration and calculated on the basis of a formula stipulated in the legislation. More precisely, the party's gross income includes any financial support from their spouse,<sup>128</sup> and living expenses as well as any child maintenance are deducted from the total amount. Furthermore, the success of the legal aid application is dependent on whether the applicant is eligible for state benefits and social grants, whether there is a likelihood that the applicant wins the dispute,<sup>129</sup> and whether it is financially justifiable to initiate legal proceedings, meaning that the costs of such proceedings should not be higher than the value of the claim that the applicant seeks to be afforded to him or her.<sup>130</sup>

## 4 Third-Party Litigation Funding

Third-party litigation funding is a commercial practice that enables a party, which would otherwise have been unable to, to initiate or participate in legal proceedings.<sup>131</sup> Specifically, a third party – that is, a party that

does not take part in the legal proceedings before the court – provides funding to the party that cannot afford to pursue a claim in court, and if that party is successful, then the former will be entitled to a percentage of any damages received from the opponent. Admittedly, the recourse of third-party litigation funding has remained limited within the European Union. However, it has been accepted that third-party litigation funding represents a tool to support citizens and businesses in accessing justice.<sup>132</sup> Importantly, Directive (EU) 2020/1828 on Representative Actions for the Protection of the Collective Interests of Consumers<sup>133</sup> regulates some aspects of third-party funding regarding conflict of interest between the third-party provider and the entity bringing the representative action, which poses the risk of abusive litigation in cases when the third party has an economic interest in the bringing of the claim for redress measures or its outcome.<sup>134</sup>

### 4.1 Cyprus

In Cyprus, third-party funding is practically non-existent and has yet to be regulated.<sup>135</sup> Litigants in Cyprus are funded by themselves,<sup>136</sup> unless they are granted legal aid. Hence, although this practice would aid individuals who do not qualify for legal aid and cannot otherwise afford litigation costs to gain access to justice, the non-existence of this practice in Cyprus renders it impossible to gain access to justice through alternative means. It is important to note that the proposed civil procedure rules do not address third-party litigation funding, there are no pending legislation proposals before the Parliament in relation to third-party litigation funding and the EU Directive 2020/1828 has yet to be codified in Cypriot law. However, even when the EU Directive 2020/1828 is transposed into national law by Cyprus – which will need to be done by December 2022 – it is questionable whether and how it will be utilised in relation to third-party litigation funding, as there is no established market in Cyprus, yet.

It is important to note that, for the first time, on 31 January 2022, third-party litigation funding was the subject of a judgment issued by the District Court of Larnaca, in the case of *Kazakhstan Kagazy PLC a.o. v. Arip a.o.* (Application no. 1/2020).<sup>137</sup> In the context of an application for the setting aside of a Cypriot declaration of enforceability of an English money judgment and an order of the High Court of Justice of England & Wales, the Dis-

122 Federal Ministry of Justice and Consumer Protection, above n. 120, at 10.

123 *Ibid.*, at 17.

124 *Ibid.*

125 *Ibid.*, at 15-17, for more information regarding the interpretation of the term "available income".

126 "Costs: Germany", E-Justice Portal. <https://e-justice.europa.eu/37/EN/costs?GERMANY&member=1> (last visited 30 September 2021).

127 Federal Ministry of Justice and Consumer Protection, above n. 120, at 15.

128 R. Zöller and P. Philipp, *German Code of Civil Procedure: Commentary* (2009), para. 3.

129 *Ibid.*

130 *Ibid.*

131 European Parliament, Draft Report with recommendations to the Commission on Responsible private funding of litigation, 2020/2130 (INL). [www.europarl.europa.eu/doceo/document/JURI-PR-680934\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf) (last visited 19 March 2022).

132 European Parliament, 'Responsible private funding of litigation' (March 2021). [www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS\\_STU\(2021\)662612\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf) (last visited 19 March 2022).

133 DIRECTIVE (EU) 2020/1828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

134 *Ibid.*, recital 52.

135 S. Pavlou, C. Nicolaou, K. Philippidou, A. Antoniou & A. Patsalidou, 'Litigation and Enforcement in Cyprus: Overview', *Practical Law Country Q&A* 7-502-0202 (2021). Pavlou et al., above n. 4.

136 *Ibid.*

137 Judgment available at [www.cylaw.org/cgi-bin/open.pl?file=/apofaseised/pol/2022/3120220007.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseised/pol/2022/3120220007.htm) (last visited 2 May 2022).

strict Court of Larnaca decided that the recognition and enforceability of an English judgment obtained in proceedings funded under a third-party litigation funding agreement is not contrary to Cypriot public policy. The court noted that in the absence of national legislation or case law on third-party litigation funding, the relevant common law principles enshrined in the case law of England & Wales, as well as that of other common law jurisdictions, should be applied by virtue of Article 29 of the Courts of Justice Law 14/1960.<sup>138</sup> Given that the judgment has been appealed, it remains to be seen whether the Supreme Court of Cyprus will uphold the judgment, adopt the modern common law principles on third-party litigation funding and therefore improve access to justice.<sup>139</sup>

## 4.2 Other Jurisdictions

### 4.2.1 England and Wales

In contrast, third-party litigation funding is common practice in England and Wales. The third-party litigation funding industry in the United Kingdom has grown significantly over the years, in terms of both market participants and available capital.<sup>140</sup> In 2011, the Association of Litigation Funders was formed and constitutes an independent body appointed by the Ministry of Justice, which delivers self-regulation of litigation funding in the United Kingdom.<sup>141</sup> It aims to ensure litigation funders' ethical behaviour and best practice and to shape the law and regulation of third-party funding.<sup>142</sup> Importantly, a Code of Conduct for Litigation Funders contains standards of practice and behaviour that underlie third party litigation funding in the United Kingdom.<sup>143</sup> Furthermore, although the Code of Conduct has been described as a 'voluntary code',<sup>144</sup> the courts have accepted that the Code constitutes a legitimate basis for the regulation of third-party litigation funding, and the membership of companies in the Association of Litigation Funders is seen as good practice.<sup>145</sup>

### 4.2.2 Germany

In Germany, third-party litigation funding is well developed.<sup>146</sup> According to Evensberg, the practice has not been legally challenged, as it is widely accepted and used.<sup>147</sup> Interestingly, no legislative or other regulatory provisions apply to the practice, as third-party funders are not considered as banks or insurers.<sup>148</sup> Furthermore, and unlike in England and Wales, no ethical rules apply regarding third-party litigation funding, and no public bodies oversee the practice.<sup>149</sup>

## 5 Conclusion

There is no doubt that the Cypriot civil justice system is working, albeit at a very slow pace and at a relatively high cost. This is also evident following a comparison of the Cypriot justice system with that of England and Wales or Germany. Undoubtedly, these delays and increased costs deter litigants from accessing the courts and causes the public to lose faith in the system. Cyprus is in the midst of a wave of reforms to its justice system, from the introduction of i-Justice to the adoption of a new set of civil procedure rules, and it remains to be seen whether these reforms will increase access to justice and reduce litigation costs.

As for the costs of civil proceedings, it is expected that the coherence of the reformed civil procedure rules will provide transparency and clarity to parties involved in civil litigation. The commitment to a fixed costs regime to control costs together with the introduction of the court's increased case and costs management powers is expected to assist in the swift delivery of justice at a more affordable rate. The reform of the civil procedure rules will be a step towards effective justice, but it will most certainly carry with it issues that have also been identified in England and Wales and that will need to be addressed; that is, there will be a continual review of the rules and their application. Perhaps the more holistic assessment of costs followed by Germany, rather than viewing and assessing costs based on separate actions taken in the context of a claim, would be more appropriate for Cyprus, deterring delays in court proceedings. Ultimately, the proposed civil procedure rules are aimed at changing the culture surrounding litigation in Cyprus, and it remains to be seen whether the system is in fact open to change – after all 'the success of these reforms rests almost entirely on the extent judges will utilise the management tools granted to them'.<sup>150</sup>

138 Art. 29 of the Courts of Justice Law 14/1960 maintains the applicability of the common law and the principles of equity in the Cypriot legal system, unless it is specifically stated in the Cypriot Constitution or any of the laws and provided they are not contrary to the Cypriot Constitution.

139 Polyvios Panayides and Stacey Armeftis, 'Cypriot Court holds that a third party litigation funding agreement is not contrary to the public policy of Cyprus' (13 April 2022) published by Chrysos Demetriades & Co LLC, available at [www.demetriades.com/wp-content/plugins/pdf-poster/pdfjs/web/viewer.html?file=https://www.demetriades.com/wp-content/uploads/2022/04/Litigation-Funding-Article.pdf&download=true&print=ver-a&openfile=false](https://www.demetriades.com/wp-content/plugins/pdf-poster/pdfjs/web/viewer.html?file=https://www.demetriades.com/wp-content/uploads/2022/04/Litigation-Funding-Article.pdf&download=true&print=ver-a&openfile=false) (last visited 2 May 2022).

140 Woodsford, 'At a Glance: Regulation of Litigation Funding in United Kingdom (England & Wales)', [www.lexology.com/library/detail.aspx?g=5e1b610e-ef1b-46f7-9a1e-3261741a7465](https://www.lexology.com/library/detail.aspx?g=5e1b610e-ef1b-46f7-9a1e-3261741a7465) (last visited 17 March 2022).

141 S. Latham and G. Rees, 'The Third Party Litigation Funding Law Review: United Kingdom – England & Wales' (2021) Augusta Ventures. <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/united-kingdom-england--wales> (last visited 19 March 2022).

142 *Ibid.*

143 Law Review: United Kingdom, above n. 138.

144 *UK Trucks Claim Limite v. Fiat Chrysler Automobiles NV and Others and Road Haulage Association Limited v. Man SE and Others*, Case No. 1282/8/7/18, 1289/7/7/18, 28 October 2019.

145 See, *Akhmedova v. Akhmedov* [2020] EWHC 1526 (Fam).

146 D. Sharma, 'Germany', in *Third Party Litigation Funding Law Review*, 2nd ed. (2018), 59. <https://cdn.roschier.com/app/uploads/2019/12/16122450/third-party-litigation-funding-ed-2-book.pdf> (last visited 19 March 2022).

147 F. Steven and B. Jonathan (eds.), 'Litigation Funding 2021' (2020), 45. [https://woodsfordlitigationfunding.com/us/wp-content/uploads/sites/3/2021/02/2021\\_Litigation-Funding\\_Germany.pdf](https://woodsfordlitigationfunding.com/us/wp-content/uploads/sites/3/2021/02/2021_Litigation-Funding_Germany.pdf) (last visited 19 March 2022).

148 *Ibid.*

149 *Ibid.*

150 Kyriakides, above n. 6, at 25.

In terms of legal aid, the tendency of the UK government to restrict legal aid to only specific cases, thereby limiting access to courts for individuals who lack the financial resources, contrasts with the way Germany retains a more accessible legal aid system, with no limitations as to the civil matters eligible for legal aid grants. However, Cyprus can be characterised as the most restrictive jurisdiction in this regard, as the precondition for the existence of a prior judicial decision that has detected human rights violations for legal aid to be granted, is an often insurmountable barrier to justice. The regulation of legal aid in Germany may very well constitute a guide for the reform of legal aid practice in Cyprus, although there is no indication that the Law on Legal Aid will be the subject of review in the near future. Unfortunately, legal precedent shows that the bench is also not prepared to approach the right to legal aid with a new lens or provide the much-needed clarity on eligibility, meaning that access to justice for individuals of low means will continue to be hindered. The lack of a third-party litigation funding market and of alternative means for litigants to fund their claims constitutes an added barrier to justice. It remains to be seen whether the courts will pave the way for the establishment of an alternative litigation funding practice in Cyprus.



# Shifting Costs in American Discovery

## A Critical Appraisal

Jay Tidmarsh\*

### Abstract

This article examines proposals to reduce the cost of American discovery. It focuses on recent proposals and rules amendments to shift the entire cost of discovery to the party requesting discovery and then examines the idea of mandatorily shifting discovery costs in all cases. The article identifies a number of potential flaws with mandatory cost shifting. It then evaluates several proposals that might achieve the same end with fewer side effects, finding that two of them deserve consideration and, ideally, real-world experimentation.

**Keywords:** discovery in litigation, access to justice, costs budget, civil procedure, American rule on fees and costs, costs shifting.

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## 1 Introduction

The American Rule on costs in civil litigation – which holds that each party is responsible for paying its own costs and attorney’s fees<sup>1</sup> – is somewhat less prevalent in the United States than its name suggests. One American state has adopted the English (or ‘loser pays’) Rule.<sup>2</sup> In both federal and state courts, prevailing parties are entitled to collect some of the costs of litigation.<sup>3</sup> In addition, more than 200 federal statutes provide for fee-shifting in favour of the prevailing party.<sup>4</sup> A mixture of statutes,<sup>5</sup> rules<sup>6</sup> and common-law doctrines<sup>7</sup> also per-

mits fee-shifting in cases of frivolous claims or litigation.

Nonetheless, the American Rule prevails in most civil litigation most of the time. Among other things, the American Rule expects both parties to bear their own costs during the disclosure-and-discovery process.<sup>8</sup> The party requesting information bears the fees and cost of making discovery requests and reviewing any material that is produced; and if the responding party objects to a request, the requesting party usually bears the fees and costs of seeking a court order compelling production of the discovery.<sup>9</sup> Conversely, the responding party bears the cost of locating potentially discoverable information, reviewing it to ensure that it is subject to discovery<sup>10</sup> and supplying it to the requesting party; and if the responding party believes that the information should not be provided, it usually bears its own fees and costs in replying to any motion to compel that the requesting party files.<sup>11</sup>

The allocation of fees and costs during discovery matters because discovery is a major feature of American civil litigation<sup>12</sup> and is likely its largest cost compo-

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1 *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975) (‘In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.’).

2 Although large, not a populous state: Alaska. See Alaska Stat. §09.60.010 (2012). Texas, a large and populous state, permits fee shifting in a range of civil matters. See Tex. Civ. Prac. & Rem. Code Ann. §38.001 (West 2005). Cf. S. Burbank et al., ‘Private Enforcement’, 17 *Lewis & Clark Law Review* 650651, at 637 (2013) (discussing the general use of the American Rule in state courts).

3 See 28 U.S.C. §1920.

4 For a comprehensive list of federal fee-shifting provisions, see H. Cohen, *Awards of Attorneys’ Fees by Federal Courts and Federal Agencies* (2008).

5 See, e.g., 28 U.S.C. §1927.

6 See, e.g., Fed. R. Civ. P. 11(c), 16(f), 26(g), 37(a)(5), 37(b)(2)(C).

7 See, e.g., *Chambers v. NASCO*, 501 U.S. 32 (1991) (upholding sanction against a party under the court’s inherent power).

8 In the American system, ‘disclosure’ and ‘discovery’ are related but distinct processes for obtaining potential evidence. Each party must disclose, without a request from another party, certain basic information. See Fed. R. Civ. P. 26(a). Discovery, on the other hand, is party initiated. See Fed. R. Civ. P. 26(b). For the sake of simplicity, I refer to both disclosure and discovery as ‘discovery’, unless in a particular context the distinction matters.

9 In limited circumstances, a requesting party who successfully obtains an order to compel discovery may obtain its costs and fees from the responding party. See Fed. R. Civ. P. 37(a)(5)(A).

10 In order for information to be subject to discovery, it must be relevant, proportional to the needs of the case, not privileged and not work product. See Fed. R. Civ. P. 26(b)(1), -(b)(3). In addition, a party can often prevent the disclosure or discovery of a trade secret or at least limit the scope of the disclosure. See Fed. R. Civ. P. 26(c)(1)(G).

11 In limited circumstances, a responding party who successfully resists a requesting party’s motion to compel discovery may obtain from the requesting party its costs and fees. See Fed. R. Civ. P. 37(a)(5)(B). Rather than waiting for a requesting party to file a motion to compel, a responding party can file a motion for a protective order, see Fed. R. Civ. P. 26(c), but here too, with limited exceptions, it bears its own costs and fees in making the motion, see Fed. R. Civ. P. 26(c)(3).

12 See P. Carrington, ‘Politics and Civil Procedure Rulemaking: Reflections on Experience’, 60 *Duke Law Journal* 597, 609 (2010) (stating that ‘the discovery process ... was the central, distinguishing feature of civil procedure’ in federal court); M. Rosenberg, ‘Federal Rules of Civil Procedure in Action: Assessing Their Impact’, 137 *University of Pennsylvania Law Review* 2203, at 2197 (1989) (‘In the run of significant lawsuits, federal discovery has helped shift the center of gravity from the trial to the pretrial stages.’).

ment.<sup>13</sup> For this reason, a 2015 amendment to the Federal Rules of Civil Procedure (which govern civil cases in federal court and often influence the procedural rules used in state courts) attracted considerable attention. This amendment to Rule 26 – which is the principal Rule that sets out the parameters of American discovery – made explicit a power that federal trial judges already enjoyed implicitly: the power to shift the responding party’s discovery costs to the requesting party.<sup>14</sup> The amendment added the following italicised text to Rule 26(c)(1)(B), allowing the court to ‘specify[] terms, including time and place *or the allocation of expenses*, for the disclosure or discovery’. In a 2006 amendment, a similar explicit power had been given to judges to shift discovery costs for electronically stored information;<sup>15</sup> and before 2015, courts had interpreted the then-extant language of Rule 26(c)(1)(B) to authorise cost shifting even without the phrase ‘or the allocation of expenses’.<sup>16</sup> The point of the 2015 amendment, therefore, was principally to affirm that the power existed: ‘[e]xplicit recognition will forestall the temptation some parties may feel to contest this authority’.<sup>17</sup> At the same time, it was not contemplated that this power would, or should, be used broadly: ‘Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding’.<sup>18</sup>

The 2015 amendment was not the first explicit grant of cost-shifting authority in the Federal Rules of Civil Pro-

cedure. In 2006, the Supreme Court promulgated a specific rule for electronically stored information (ESI), the last sentence of which provides: ‘The court may specify conditions for the discovery.’<sup>19</sup> The ‘conditions’ were understood to ‘include payment by the requesting party of part or all of the reasonable costs of obtaining information that are not reasonably accessible’.<sup>20</sup>

## 2 Arguments for and against Shifting Discovery Costs

American discovery is unique, for parties generally gather information with no judicial review of discovery requests or oversight of the discovery process itself.<sup>21</sup> The court typically involves itself at the outset, working with the parties on a discovery plan and establishing deadlines for discovery to be completed.<sup>22</sup> It may, or may not, periodically check with the parties on the progress of discovery.<sup>23</sup> Otherwise, a court avoids intervention until a discovery dispute arises.<sup>24</sup> The system is also unique because the use of juries in some (though not all) civil cases means that the trial or other final adjudicatory hearing usually occurs only after the completion of all discovery.<sup>25</sup>

13 See T.E. Willging et al., ‘An Empirical Study of Discovery and Disclosure Practices under the 1993 Federal Rule Amendments’, 39 *Boston College Law Review* 531, at 525 (1998) (describing sample results in which, of the \$13,000 spent on litigation expenses in the median case, ‘about half’ went to discovery). See also J.S. Kakalik et al., ‘Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data’, 39 *Boston College Law Review* 637, at 613 (1998) (estimating that an average of 36% of attorney time spent on a lawsuit was devoted to discovery and discovery motions; further noting that the median time was 25%).

14 A proposed 1998 amendment to the Federal Rules of Civil Procedure would have created a similar explicit authority for judges to shift costs for document production; see Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181 F.R.D. 18, 88-89 (1998), but the amendment was ultimately rejected, see Rick Marcus, ‘Introduction to Proposals for Cost-Shifting Provisions in the Rules’ (dated 6 September 2013), Tab 5D in Agenda, *Advisory Comm. on Civil Rules* 216-219 (7-8 November 2013).

15 See Fed. R. Civ. P. 26(b)(2)(B) (‘The court may specify conditions for the discovery.’) Rule 26(b)(2)(B) states a unique rule only for electronically stored information. Although the language (‘specify conditions’) does not specifically address cost shifting, it was well understood that cost shifting was the point of this language. See Fed. R. Civ. P. 26(b)(2) advisory committee’s note to 2006 amendment (‘The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.’).

16 See Fed. R. Civ. P. 26(c)(1)(B) advisory committee’s note to 2015 amendment (noting that ‘courts already exercise this authority’ to allocate expenses of disclosure and discovery); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (noting in dicta ‘the district court’s discretion under Rule 26(c) to grant ... orders conditioning discovery on the requesting party’s payment of the costs of discovery’); *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (ordering partial cost shifting for producing electronically stored information).

17 Fed. R. Civ. P. 26(c)(1)(B) advisory committee’s note to 2015 amendment.

18 Ibid.

19 Fed. R. Civ. P. 26(b)(2)(B).

20 Fed. R. Civ. P. 26(b)(2)(B) advisory committee’s note to 2006 amendment. A prior provision in Rule 26(b)(2)(B) had made ESI that was not reasonably accessible, non-disclosable and non-discoverable unless the requesting party demonstrated good cause. Rule 26(b)(2)(B) did not provide a definition of ‘reasonably accessible’. For the 2004 case that influenced the structure of Rule 26(b)(2)(B) and developed the concept of ‘reasonable accessibility’, see *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317-20 (S.D.N.Y. 2004) (developing the concept of ‘reasonable accessibility’); see also *ibid.*, at 322 (describing the seven factors that bear on whether to permit cost shifting of ESI discovery).

21 When initially promulgated in 1938, the Federal Rules of Civil Procedure required judicial approval of many forms of discovery. Virtually all restrictions were removed by amendments in 1946 and 1970. See Fed. R. Civ. P. 33 advisory committee’s note to 1946 amendment; Fed. R. Civ. P. 33 advisory committee’s note to 1970 amendment; Fed. R. Civ. P. 34 advisory committee’s note to 1970 amendment. Today, the only form of discovery requiring judicial approval is a request for a physical or mental examination; see Fed. R. Civ. P. 35(a)(1), although parties must also seek judicial approval for depositions, interrogatories and, in some districts, requests for admission that exceed the maximum permitted under the Rules; see Fed. R. Civ. P. 26(b)(2)(A) (authorising local rules that limit requests for production), 30(a)(2)(A)(i) (limiting depositions to ten per side), 33(a)(1) (limiting interrogatories to twenty-five per party).

22 See Fed. R. Civ. P. 26(f) (describing the discovery-planning obligations of the parties), 16(b) (requiring the court to establish deadlines for discovery).

23 See Fed. R. Civ. P. 16(a), -(c)(2)(F) (giving federal courts the authority to call pretrial conferences at which measures to control and schedule discovery).

24 See Fed. R. Civ. P. 26(c) (protective orders), 37 (motion to compel discovery).

25 See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (suggesting that summary judgment may be granted only ‘after an adequate time for discovery’). As a rule, federal courts establish the deadline for filing case-dispositive motions after the deadline for completing discovery. Cf. Fed. R. Civ. P. 16(b)(3)(A) (requiring that deadlines be set to ‘complete discovery’ and ‘file motions’); *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 866 (7th Cir. 2019) (reversing summary judgment granted to the defendant before the

In light of these dynamics, there are excellent arguments why cost shifting of discovery expenses should be the norm in American civil litigation. Among them is the economic intuition that people tend to use a resource more wisely when they must pay for it rather than when it is free. A party that does not bear the full cost of discovery is therefore more likely to ask for too much information.<sup>26</sup> That possibility is particularly likely in cases of ‘asymmetric information’: situations in which one party possesses most of the relevant information and the other has little of value to discover. When the information in the parties’ possession is more or less in equipoise, neither party typically has an incentive to impose excessive costs on an opponent, owing to the fear that the opponent will respond in kind.<sup>27</sup> But the logic of ‘mutual assured destruction’ does not hold when information is asymmetrically held and one side can impose significant discovery costs without consequence.<sup>28</sup> A party that can inflict such costs can also often pressure (or perhaps even ‘extort’) an opponent to settle the case for an amount that does not reflect the true social value of the claim.

A second reason for shifting discovery costs to the requesting party is to keep litigation expenses within proportionate bounds. From a social viewpoint, the cost of litigation should not exceed the expected recovery.<sup>29</sup> Under the American rule, it might appear that parties will make such economically rational choices regarding litigation expenditures: after all (leaving the issue of asymmetrical information aside), they bear the costs of their litigation choices, and rational economic actors

will spend no more on litigation than they can expect the litigation to yield. But that intuition is wrong in numerous scenarios. For instance, the parties might act irrationally, might be risk takers or might miscalculate either the likelihood of recovery or the value of the lawsuit. Moreover, using real-options analysis, it can be shown that, in some scenarios, a rational economic actor will spend an amount on discovery that exceeds the expected return; stated more broadly, a party may have an incentive to continue spending on discovery even though, from a social viewpoint, the next dollar spent on discovery does not return at least a dollar in expected litigation value.<sup>30</sup> Third, in some instances, a repeat player in litigation might overspend on discovery because it values the litigation differently from the opponent. For example, a manufacturer facing one thousand lawsuits concerning a defective product has an incentive to spend a great deal more in the first lawsuit than the case is worth, because winning that lawsuit will discourage future litigants.<sup>31</sup> Or a wealthy litigant may calculate that a poorly financed opponent cannot afford even economically rational litigation expenditures and may therefore engage in litigation and discovery practices that drive the opponent to abandon the case or accept a lopsided settlement.<sup>32</sup>

For these and other reasons – including constitutional concerns about forcing a party to pay for disclosing information detrimental to its financial well-being – some scholars have proposed the mandatory shifting of discovery costs to the requesting party.<sup>33</sup> The law of Amer-

discovery deadline when additional discovery might have aided the plaintiff to obtain relevant evidence).

- 26 See R.G. Bone, *Civil Procedure: The Economics of Civil Procedure* 230 (2003) (‘[A] cost-shifting rule deters excessive discovery by forcing a requesting party to internalize discovery costs.’).
- 27 Of course, this logic does not pertain to information held in the possession of non-parties, but as a general matter, third parties hold less information, and discovery from them draws few complaints.
- 28 See R. Cooter and D. Rubinfeld, ‘An Economic Model of Legal Discovery’, 23 *Journal of Legal Studies* 453, at 435 (arguing for a modified version of a ‘requester-pays’ rule and noting that ‘a cost-shifting rule completely eliminates impositions’). See also J. Setear, ‘The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse’, 69 *Boston University Law Review* 616, at 569 (1989) (using game theory and the idea of nuclear deterrence to analyse ‘the effect that asymmetries in the availability of resources and opportunities for discovery have on the potential for discovery abuse’).
- 29 Cf. Bone, above n. 26, at 217. (‘In economic terms, an additional investment in discovery is “excessive” whenever the social costs of the investment exceed the social benefits.’) In his 2009 report on discovery costs in the United Kingdom, Lord Justice Jackson advocated for the same principle, arguing that even costs necessary to prosecute or defend a claim can be disproportional in light of the value of the claim and other factors; he proposed that such necessary but disproportional discovery be disallowed. See *Review of Civil Litigation Costs: Final Report* 37 (2009) (‘If the level of costs incurred is out of proportion to the circumstances of the case, they cannot become proportionate simply because they were “necessary” in order to bring or defend the claim.’) This principle was implemented in the Civil Procedure Rules. See CPR 44.3(2)(a) (allowing only those costs assessed on the standard basis ‘which are proportionate to the matters in issue’); *id.* (stating that ‘[c]osts which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred’). Cf. CPR 44.3(5) (listing factors bearing on proportionality that mostly mirror those recommended in Lord Jackson’s report).

- 30 See J. Grundfest and P. Huang, ‘The Unexpected Value of Litigation: A Real Options Perspective’, 58 *Stanford Law Review* 1293-1298, at 1267 (2006) (adapting real-option theory, which is often used in deciding whether to invest in research and development, to the decision whether to invest in litigation). For applications of the concept to American civil procedure and to discovery specifically, see J. Tidmarsh, ‘The Litigation Budget’, 68 *Vanderbilt Law Review* 862-64, at 855 (2015); J. Tidmarsh, ‘Opting Out of Discovery’, 71 *Vanderbilt Law Review* 1801, 1827 n.115, 1836 (2018).
- 31 At a practical level, this reality has led some products-liability defendants to engage in ‘scorched earth’ discovery tactics that impose such great costs on the opponent that the litigation becomes too expensive to maintain. The classic example of the use of these tactics to suppress plaintiffs’ claims is the tobacco litigation. For a short history of this litigation, see R. Rabin, ‘A Sociolegal History of the Tobacco Tort Litigation’, 44 *Stanford Law Review* 867, at 853 (1992) (describing how the tobacco defendants were ‘able to wear down the tobacco litigants through a seemingly inexhaustible expenditure of resources’). Asymmetrical incentives to litigate have sometimes been used as an argument to justify class actions, which aggregate the parties on both sides to create a level set of incentives. See D. Rosenberg, ‘Mandatory Litigation Class Actions: The Only Option for Mass Tort Cases’, 115 *Harvard Law Review* 848-53, at 831 (2002).
- 32 See *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 718 (N.D. Ill. 2014) (‘Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent. ... But even where a case is not conducted with an ulterior purpose, the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms.’).
- 33 See, e.g., Cooter and Rubinfeld, above n. 28; M. Redish and C. McNamara, ‘Back to the Future: Discovery Cost Allocation and Modern Procedural Theory’, 79 *George Washington Law Review* 773, 822 (2011) (‘An evaluation of fundamental moral, economic, democratic, and constitutional principles reveals that our current method of discovery cost allocation rests on a theoretical foundation that is at best shaky, and at worst completely illusory.’); M. Redish, ‘Discovery Cost Allocation, Due Process, and the Constitution’s Role in Civil Litigation’, 71 *Vanderbilt Law Review* 1847 (2018).



ican discovery has not yet gone so far, but the 2015 amendment demonstrates that the idea has traction. Shifting discovery expenses to the requesting party also has drawbacks. One concern is the experience of countries that routinely shift costs: in such a system, there is often limited incentive to control costs.<sup>34</sup> In the American context, a second principal concern is access to justice. In cases in which information is held symmetrically, cost shifting is usually unnecessary because costs for both sides will wash out: all that cost shifting does is to introduce a cumbersome accounting obligation.<sup>35</sup> On the other hand, cases involving asymmetrical information often involve ‘little guys’ with little information suing large enterprises with much information. Shifting discovery costs may therefore impose an expense on a less well-financed ‘little guy’, deterring them from turning to courts to challenge the behaviour of wealthy and powerful entities.

The Federal Rules’ approach to shifting discovery costs raises a second concern: it is ad hoc and discretionary. After conducting searches of the Westlaw federal-court database using two different sets of search terms, I collected and reviewed approximately 150 federal cases – all decided after the 2015 amendment to Rule 26(c)(1) (B) became effective – that discussed shifting costs in discovery. Many discussed the principle of cost shifting only in the abstract; other cases considered cost-shifting either as a sanction or as a form of redress for the tardy introduction of new claims. Only thirty-four cases considered the shifting of discovery expenses as a general matter. Of that number, twelve shifted discovery costs,<sup>36</sup> while twenty-two declined to do so.<sup>37</sup> Even when cost shifting occurred, the court often ordered only par-

tial sharing of expenses or else sharing of expenses only for certain components of discovery.<sup>38</sup>

My review was not exhaustive, and reliance on reported decisions may not accurately capture patterns in American courts.<sup>39</sup> Nonetheless, this review confirmed my impression, formed in prior research,<sup>40</sup> that federal courts typically decline to use their cost-shifting powers even after the 2015 amendment’s encouragement to do so; moreover, courts that decline to shift costs frequently invoke the American rule as one reason for their decision.<sup>41</sup> Such an ad hoc system can add to cost and delay, as parties litigate the satellite issue of cost-sharing, and can lead to injustice, as similarly situated parties receive different treatment in different courtrooms.<sup>42</sup>

A third difficulty with cost shifting in the American context is that it is far from clear how significant a problem the issue of ‘impositional’ or otherwise excessive discovery is in practice.<sup>43</sup> The prospect (some would say

(arguing that shifting discovery costs may be mandated by due process). See generally E. Elliott, ‘How We Got Here: A Brief History of Requester-Pays and Other Incentive Systems to Supplement Judicial Management of Discovery’, 71 *Vanderbilt Law Review* 1785 (2018) (reviewing prior proposals to require cost shifting).

34 For a telling analysis of lawyers’ economic incentives to complicate and protract litigation, see A.A.S. Zuckerman, ‘Lord Woolf’s Access to Justice: Plus ça change ...’, 59 *Modern Law Review* 775–778, at 773 (1996). This incentive is exacerbated in a loser-pays regime, because ‘a litigant who believes that an increase in the amount spent on litigation will increase his chances of success has good reason for progressively raising his stakes’. *Ibid.*, at 779. Of course, shifting only discovery costs limits this incentive; but given how large a component of overall litigation expenditures discovery costs are, see above n. 13, the basic point holds.

35 To avoid this obligation, it seems not unlikely that parties in symmetrical-information cases would agree to waive discovery-cost reimbursement. Cf. *Abernathy v. E. Ill. R.R.*, 940 F.3d 982, 994 (7th Cir. 2019) (noting that each party bore the expense of its own expert in providing pretrial testimony to the opposing party, even though the parties could have sought reimbursement under Rule 26(b)(4)(E)).

36 See, e.g., *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 3288058 (D. Kan. 18 June 2020); *CFPB v. Ocwen Fin. Corp.*, Case No. 9:17-CV-80495-Marra/Matthewman, 2018 WL 6843629 (S.D. Fla. 21 December 2018).

37 See, e.g., *Brogan v. Fred Beans Motors of Doylestown, Inc.*, Civil Action No. 17-5628, 2020 WL 5017500 (E.D. Pa. 25 August 2020), *Travelers Prop. Cas. Co. of Am. v. Mountaineer Gas Co.*, Civil Action No. 2:15-cv-07959, 2018 WL 899078 (S.D. W. Va. 15 February 2018); *Oxbow Carbon & Minerals LLC v. Union Pac. R.R.*, 322 F.R.D. 1 (D.D.C. 2017).

38 See, e.g., *McClurg v. Mallinckrodt, Inc.*, Case No. 4:12-CV-00361-AGF, 2016 WL 7178745 (E.D. Mo. 9 December 2016) (shifting 18% of defendants’ document-collection expenses to plaintiffs).

39 See D. Engstrom, ‘The *Twiqbal* Puzzle and Empirical Study of Civil Procedure’, 65 *Stanford Law Review* 1214, at 1203 (2013) (discussing the ‘serious concerns’, especially sampling bias, with using only Westlaw and Lexis databases to conduct empirical research on district-court behaviour); E. McCuskey, ‘Submerged Precedent’, 16 *Nevada Law Journal* 522, at 515 (2016) (‘It is well-documented that district-court opinions selected for the print reporter volumes (the Federal Supplement and Federal Rules Decisions) may not be representative of decision-making, and that therefore reliance solely on reported decisions to study judicial behavior risks biased results.’).

40 I conducted the research principally in 2016 and in 2019, while reviewing hundreds of recent decisions to update discovery chapters in a co-authored casebook.

41 See, e.g., *Oxbow*, 322 F.R.D. at 11 (‘Oxbow has failed to rebut the presumption imposed by the Federal Rules of Civil Procedure that it should bear the cost of complying with Defendants’ proposed discovery’).

42 There are 677 federal district-court judges in the United States, as well as another 588 federal magistrate judges who are often tasked by district-court judges to resolve discovery matters. See ‘Judicial Business 2020, U.S. District Courts’ tbl.5 (Admin. Office of U.S. Courts) [www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020](http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020) (last visited 21 June 2022); ‘Judicial Business 2019, Status of Magistrate Judge Positions and Appointments’ tbl.13 (Admin. Office of U.S. Courts), <https://www.uscourts.gov/statistics-reports/status-magistrate-judge-positions-and-appointments-judicial-business-2021> (last visited 21 June 2022). Should a magistrate judge’s decision on a discovery matter be appealed to the district judge, the judge reviews the decision on a deferential basis. See 28 U.S.C. §636(b)(1)(A) (permitting reconsideration of a magistrate judge’s order only when the order ‘is clearly erroneous or contrary to law’). Likewise, great deference is given to the discovery decisions of district-court judges on appeal. See *Khoury v. Miami-Dade Cty. Sch. Bd.*, 4 F.4th 1118, 1125 (11th Cir. 2021) (‘We review the District Court’s ruling on discovery matters only for abuse of discretion.’). With such a diffusion of authority, it is a near certainty that different judges will make different decisions on similar facts.

43 In a third or more of federal cases, no discovery occurs, and discovery in most other cases is not burdensome. See Kakalik et al., above n. 13, 636, at 613 (1998) (reporting that no discovery occurred in 38% of cases in a sample and that ‘[d]iscovery is not a pervasive litigation cost problem for the majority of cases’); Willging et al., above n. 13, at 530–31 (reporting that, in a sample of cases likely to involve discovery, only 85% of attorneys reported that discovery occurred and that the median cost of discovery was \$13,000 per client, or about 3% of the stakes in the case). Data from state courts show that discovery costs constitute only a small fraction of the total recovery from litigation. E. Helland et al., ‘Contingent Fee Litigation in New York City’, 70 *Vanderbilt Law Review* 1771, 1988 (2017) (describing a random sample of New York tort cases in which the median for all expenses, other than attorney’s fees, was 3% of recoveries and the av-

myth) of parties inflicting needless discovery costs on opponents to gain tactical advantage has driven much of the procedural reform in the United States in the past forty years – from expanded case management to limits on the scope of discovery to more stringent requirements for pleading.<sup>44</sup> The 2015 amendment that permits the shifting of discovery expenses sits at the end of a long line of unsuccessful (or at best partially successful) efforts to contain litigation costs. But the available data – as opposed to lawyers’ anecdotes – has never clearly supported the need to do anything at all about discovery costs.

That concern leads to a final difficulty with cost shifting: its tunnel vision. Cost shifting is often proposed as a stand-alone solution to the problem of expensive discovery. But other responses are possible. For instance, effective case management might make cost shifting unnecessary, and American procedure has been strongly committed to case management since 1983.<sup>45</sup> If we adopt cost shifting, should case management be relaxed or even abandoned? Discovery is just one part – albeit a critical part – of the machinery of civil justice; and as with any complex system, tinkering with one feature (cost allocation) of this one part will have repercussions elsewhere. Adopting an incentives-based approach to controlling discovery, such as cost shifting, may make more direct controls over the discovery process, such as case management, superfluous or even overkill; it may skew outcomes too much in favour of those who possess information and too much against those who do not. I am not trying to resolve the age-old debate about incentives versus command-and-control rules,<sup>46</sup> but instead to highlight that an incentives-based approach like shifting discovery costs does not exist in a vacuum.

It is important to put arguments for cost shifting in discovery in proper context. In countries that employ loser-pays fee shifting, the concern over shifting discovery costs plays out differently: some or all of the expenses of both sides’ discovery may be borne by the losing party in any event. In the American-rule context, however, shift-

ing discovery costs may benefit the losing party as readily as the winning party because the shifting of costs is not tied to prevailing in the litigation. We can debate the merits of the American rule that each side bears its own costs, but as long as the rule prevails, there must be a compelling justification to depart from it just for one aspect of litigation (discovery) where cost shifting is not even keyed to winning or losing.

In view of the American rule, a general, mandatory shifting of discovery costs to the requesting party faces a steep climb in American litigation. *If* stand-alone mandatory cost shifting can, in fact, deliver on its promise to hold down the costs of discovery to a reasonable level, *if* the savings from stand-alone mandatory cost shifting exceed the detrimental side effects (such as less access to justice), and *if* stand-alone mandatory cost shifting does so in a more effective way than alternatives, the necessary justification to require cost shifting would exist. But these are three big ‘ifs’. Let me tackle them briefly.

### 3 The Hidden Economic Costs of Cost Shifting

The first and second assumptions are related: together they assume that the savings from mandatory cost shifting will outweigh the costs. Because these assumptions are essentially economic in nature, I approach the question from that perspective. From an economic point of view, litigation generates two costs: the direct cost of litigation (attorneys’ fees, expert witnesses, discovery, judicial time, and so on) and error costs.<sup>47</sup> Error costs are often neglected, but they are real: if a court fails to resolve disputes accurately, the negative social effects could be substantial. For instance, we can devise a very cheap process for resolving disputes – such as flipping a coin – but the errors that would result would be socially disastrous: why would anyone engage in productive activity that amasses wealth if I can take that wealth away with a ginned-up claim and a lucky flip of the coin?

As a general matter, the two costs of litigation are inversely related (at least if our procedural rules are rationally designed to ferret out the truth): the more that we spend directly on litigating a dispute, the fewer the errors; while the less we spend, the more the errors. Procedural rules should minimise the sum of direct litigation costs and error costs.<sup>48</sup> Cost shifting in discovery is designed to give the parties an incentive to lower one direct litigation cost: the cost of discovery. It assumes that, in a cost-shifting regime, parties will limit their discovery expenditures to a cost-justified level, where

erage was 5%). In the main, lawyers are satisfied with the discovery process, believing that it reveals the right amount of information at a fair price. See Kakalik et al., above n. 13, at 636 (‘Subjective information from our interviews with lawyers also suggests that the median or typical case is not “the problem.”’); E.G. Lee III and T.E. Willging, *National, Case-Based Civil Rules Survey* 27, 34 tbl.4, 37 tbl.5, 43 tbl.10 (2009) (reporting survey results in which a clear majority of both plaintiffs’ and defence lawyers believed that discovery revealed ‘just the right amount’ of information, the median costs for discovery by plaintiffs’ lawyers was \$15,000 and by defence lawyers \$20,000, and the costs of discovery in relation to the stakes of the litigation were 1.6% for plaintiffs and 3.3% for defendants). *Contra*, *Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* 3-5 (2008) (describing survey results that ‘confirm[] that there are serious problems in many parts of the civil justice system, especially the rules governing discovery’).

44 For a fuller review of these reforms, see Tidmarsh (2018), above n. 30, at 1813-1814.

45 See Fed. R. Civ. P. 16.

46 Cf. E. Elliott, ‘Managerial Judging and the Evolution of Procedure’, 53 *University of Chicago Law Review* 326-34, at 306 (1986) (arguing that incentives-based approaches are more efficient than command-and-control procedural rules).

47 See R.A. Posner, *Economic Analysis of Law* §21.1 (7th ed. 2007).

48 This statement is not precisely accurate, and I will refine it shortly. See below n. 53 and accompanying text. As an initial matter, however, procedural scholars usually proceed from the assumption that keeping the sum of direct litigation costs and error costs to their minimum is the best way to keep overall social costs at their minimum.

another dollar spent on discovery will not yield at least another dollar in expected economic benefit from the settlement or judgment.

Like many incentives-based approaches, the concept of cost shifting also assumes that the parties have full information with which to make the requisite marginal-cost calculation. In the real world, however, parties do not know the value of the information that they might obtain in discovery, so they cannot know whether another dollar spent on discovery is worthwhile until it has been spent. In such a world, whether mandatory cost shifting will hold discovery costs to a cost-justified level – especially in instances of asymmetrical information that form the central case for cost shifting – is unclear. Uncertain of the value of the unknown, parties may engage in too little discovery, and cases will be settled or adjudicated inaccurately owing to insufficient information – a result that constitutes an error cost. Such inaccuracy is an error cost that may offset, or at least cut into, the savings in direct litigation costs that cost shifting promises. Or perhaps parties will engage in too much discovery – a result that constitutes an excessive direct litigation cost.

Although proponents of cost shifting might want you to believe otherwise, the question is not as simplistic as whether cost shifting reduces direct litigation costs. Without knowing the value of the information that discovery might yield, it is impossible for the parties in a cost-shifting world to know whether the amount of discovery for which they must now pay has landed near the marginal-cost sweet spot. Over time lawyers may develop sufficient experience or algorithms that dictate whether asking for some types of discovery is (or is not) ‘worth it’, but that result remains speculative at present.<sup>49</sup>

Of course, it is not even clear how much mandatory cost shifting will reduce discovery expenses. More likely, shifting discovery costs will accelerate a trend that has emerged in other countries but that has been slower to develop in the United States: third-party funding. In asymmetrical-information cases, which often pit Davids against Goliaths, the ‘little guy’ may be unable to afford the full burden of paying for the discovery requested. The party’s lawyer may be able to front the costs, or the lawyer may need to find someone else willing to do so. Third-party funders are the likeliest source. But third-party funding is not viewed as an unadulterated good in the United States. Although often marketed as a way to expand access to justice by providing the resources necessary to conduct litigation effectively, third-party funding has raised concerns about how it skews resources to high-dollar-value claims. It may also generate conflicts of interest between funders and plaintiffs. In particular, the fear is that funders, desirous

of achieving a higher rate of return, may pressure plaintiffs to settle claims quickly and for an inadequate amount. This result generates a type of error cost.<sup>50</sup>

To the extent that third-party funding, with its attendant concerns, is unavailable, shifting discovery costs seems likely to suppress litigation in David-versus-Goliath scenarios. ‘Access to justice’ is an abstract notion, and it often seems to be an ‘apples to oranges’ response to the economic intuitions that underlie cost shifting. But ‘access to justice’ can be translated into economic terms as a type of error cost. Typically, when we think about error costs, we think about the errors in the case being adjudicated: the reason that a coin flip is problematic is that the likelihood of getting the wrong result in the specific case is high. But error also exists when cases with merit are not filed at all. Granted, the errors are hidden from view in a way that errors in litigated cases are not. But from a social perspective, the failure to bring a meritorious case is as much a cost as the failure accurately to resolve a litigated case.

Furthermore, leaving the economic analysis to the side, the ‘day in court’ ideal is a treasured foundation for American justice. As Mauro Cappelletti and Bryant Garth have recognised, ‘access to justice’ is ‘not easily defined’, but it embodies

two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just.<sup>51</sup>

In the United States, the openness of courts to hear disputes from all citizens without distinction or favour, and thus to level the playing field between the powerful and the ordinary, is a pillar of the American sense of equality

49 Of course, the same criticism can be levelled against a system of discovery in which costs are not shifted. But, as I have described, there is very little data suggesting that the cost of discovery in the present non-cost-shifting world is problematic. See above n. 43-44 and accompanying text. The burden of proof for making a substantial change lies with the proponents of cost shifting.

50 For an overview of third-party litigation funding in the United States and some of its concerns, see M. Shapiro, ‘Distributing Civil Justice’, 109 *Georgetown Law Journal* 1509-1512, at 1473 (2021). It is fair to say that judges and legislatures have so far treated the arrival of third-party funding with a fair amount of scepticism. *Ibid.*, at 1510. For a more optimistic appraisal of third-party litigation financing, see S. Bedi and W. Marra, ‘The Shadows of Litigation Finance’, 74 *Vanderbilt Law Review* 563 (2021) (arguing that the prospect of litigation funding positively affects parties’ pre-litigation behaviour, especially in contractual settings, and also has positive post-litigation effects).

Concerns over third-party funding have led both lawmakers and rule-makers to consider changes that would require disclosure of the identity of third-party funders and any funding agreements. See, e.g., *Litigation Funding Transparency Act of 2021*, S. 840, 117th Cong. (2021) (requiring disclosure of funding sources in class action and multidistrict litigation); *Agenda, Advisory Committee on Civil Rules* 371-86 (5 October 2021) (describing history of efforts to regulate third-party funding by rule or legislation and recommending against immediate action on the issue). No proposals to regulate third-party funding have yet been enacted at the federal level; and in any event, disclosure obligations would likely have little effect on the issues described in the text.

51 M. Cappelletti and B. Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’, 27 *Buffalo Law Review* 181, 182 (1978); see also *ibid.*, at 185 (‘Effective access to justice can thus be seen as the most basic requirement – the most basic “human right” – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all.’).



before law. Indeed, the principal argument that undergirds the American rule on costs is that the rule promotes access to American courts.<sup>52</sup> The damage to that ideal could also be seen as a cost.

Another potential cost of cost shifting is its effect on litigants' primary behaviour (i.e. how they act before the claim arises). From a social-welfare viewpoint, the goal of a legal system is simply not to minimise the sum of direct litigation costs and error costs. Rather, the law should minimise the sum of three costs: the cost of harm, the cost of preventing harm and transaction costs, which include direct litigation costs and error costs.<sup>53</sup> This overarching cost-minimisation goal does not require that the sum of direct litigation and error costs be kept to their minimum. Indeed, the fear of incurring large discovery costs may induce actors to spend more to prevent harm, and the resulting reduction in the cost of harm may exceed the cost of discovery or errors.<sup>54</sup> The party has less incentive to reduce harm, however, if it knows that other parties bear its discovery costs.

I am not suggesting that mandatory shifting of discovery costs raises costs without corresponding benefits. The potential of cost shifting to limit impositional discovery and to avoid skewing settlements in favour of requesting parties in asymmetrical-discovery litigation is perhaps its strongest feature. My point is to identify potentially negative consequences of cost shifting that may offset or substantially reduce its cost-saving potential – concerns that proponents of cost shifting sometimes ignore or minimise. Of course, my critiques, as well as arguments favouring cost shifting, must ultimately rise or fall on the basis of the evidence. So far, no empirical studies of the effects of cost shifting on the

proportional disclosure of information have been conducted in the United States.<sup>55</sup> The experience of countries that generally shift costs to the winning party can be examined for relevant clues, although differences in the extent of discovery and the pesky American rule would make it difficult to draw firm conclusions.

## 4 Alternatives to Mandatory Cost Shifting

Before it can be adopted, mandatory cost shifting as a stand-alone remedy for excessive discovery must also prove itself better than other alternatives that address the same problem. Other options exist. Let me highlight two: one is a command-and-control approach and the other an incentive-based approach. As I discuss, both ideas have difficulties but both strike me as more promising than mandatory cost shifting.

Recent developments in English procedure suggest the command-and-control alternative. Courts could require parties to set, and then live within, a budget for the litigation. The budget includes an allotment for discovery expenses, which must not be exceeded. English courts adopted the concept of costs budgets, which applies principally to 'multi-track' cases,<sup>56</sup> in 2013. Insofar as limiting discovery expenses is concerned, a functionally equivalent idea would be a judicially imposed cap on discovery expenditures.<sup>57</sup> England has also adopted a

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52 See E. Labaton, 'Courts on Trial Symposium Closing Remarks', 40 *Arizona Law Review* 1113, at 1111 (1998) ('Access to American courts is available for two reasons: the contingent fee and the American rule.'). See also A. Goodhart, 'Costs', 38 *Yale Law Journal* 874, at 849 (1929) ('Apart from purely historical reasons, the American rules as to costs may also be due in part to a vague feeling that they favor the poor man, and are therefore democratic, while the English system helps the wealthy litigant.'). Cf. *ibid.*, at 877 (noting that allowing a judge 'wide discretion [to tax costs] as is inherent in the English system would be contrary to the general American conception of a judiciary bound by fixed rules').

53 See G. Calabresi, *The Cost of Accidents* (1970), at 26-31.

54 For example, assume that, with precautions costing \$400, the defendant's conduct causes \$800 in harm to eight plaintiffs (or \$100 apiece); and the defendant's discovery costs in ensuing litigation with the plaintiffs are \$240 (or \$30 apiece). The defendant could spend \$510 in safety precautions, and only seven plaintiffs would suffer harm (for a total of \$700). Discovery costs would be reduced to \$210. From a social viewpoint, it would be better if the defendant took the extra \$110 in safety precautions, since the total cost is \$1,420, compared with total costs for the lower-precaution alternative of \$1,440. If the defendant bears the cost of discovery, it will take the extra precaution, because an expenditure of \$110 saves the defendant \$130 in liability and litigation costs. But if the defendant does not bear the cost of discovery, the defendant will not take the extra precaution, for it would be spending an additional \$110 and receiving a benefit of only \$100. Obviously, this example is stylised, and its result does not pertain across all permutations. There are more realistic examples, which factor into the likelihood of suit, that better prove the point, but they would take more time to unpack than is justified for present purposes. The point of the given example is only to illustrate that there are circumstances in which the potential exposure to litigation costs can induce a party to undertake a socially appropriate level of care that it might not undertake if it did not bear its own discovery costs.

55 Congress or the federal judiciary has sometimes developed pilot programmes in some federal district courts to generate data on the efficacy of proposed procedural reforms. See 28 U.S.C. §651(b) (requiring each federal district court to authorise the use of one or more alternative dispute resolution processes); J. Sutton and D. Webb, 'Bold and Persistent Reform: The 2015 Amendments to the Federal Rules of Civil Procedure and the 2017 Pilot Projects', 101 *Judicature* 12 (Autumn 2017) (touting the benefits of pilot projects on discovery reform). Piloting programmes and gathering data on their successes and failures seem appropriate before undertaking major reformation of a procedure as foundational to the American system as discovery.

56 See CPR 3.12-3.18. There are exceptions; multi-track cases exceeding £10 million are exempt from costs budgeting, see CPR 3.12(1)(a)-(b), as are cases involving minors, see CPR 3.12(1)(d), and those that are subject to 'fixed costs or scale costs', see CPR 3.12(1)(d). The court can also exempt a multi-track case from costs budgeting by order. CPR 3.12(1)(e). Conversely, costs budgeting may also apply in other cases when the court so orders. See CPR 3.12(1A).

The Civil Procedure Rules divide cases into three tracks: 'multi-track cases', 'small claims cases', and 'fast track cases'. 'Multi-track cases' are defined as cases that are neither 'small claims cases' nor 'fast-track cases'. See CPR 26.6(6) ('The multi-track is the normal track for any claim for which the small claims track or the fast track is not the normal track.'). In general, 'small claims' cases are those personal-injury cases whose value does not exceed £10,000 (with some additional exceptions), certain landlord-tenant disputes with a value less than £1,000, and other cases whose value does not exceed £10,000. CPR 26.6(1)-(3). In general, 'fast-track' cases are those cases whose value does not exceed £25,000, the trial will likely last no more than one day and expert witnesses are limited. See CPR 26.6(4)-(5). Other factors, such as the number of likely parties, the complexity of the issues, and the importance of the case to non-parties, can influence the court's decision in assigning a case to a given track. See CPR 26.8.

57 A costs budget is a broader concept because it would also impose caps on other pretrial and trial expenditures.

form of this ‘costs capping’. A party can apply for an order that limits costs from the date of the order.<sup>58</sup> In theory available in all multi-track and other cases,<sup>59</sup> a costs-capping order is in practice entered ‘only in exceptional circumstances’.<sup>60</sup> Leaving aside the details of when and how English courts control costs, the basic intuition is spot on: if the concern is the disproportionality of discovery costs, the best way to control those costs is to limit the ability of the parties to spend money on discovery.

There are, however, practical problems with costs budgets and costs capping as a means to limit discovery costs. The first is the court’s ability to know where to set the cap: the court might have a reasonable sense of the cost of discovery, but then the ever-present bogie man of all efforts to limit discovery to proportional levels rears its head: the judge, like the parties, is unlikely to have accurate information on either the value of the case or the extent to which discoverable information will affect that value. These are critical variables in trying to limit expenditures to a proportional amount.<sup>61</sup> As a result, courts may fall back on possibly erroneous assumptions about the merits (or demerits) of broad discovery and the social value (or lack of value) of particular cases. At a minimum, the case-specific nature of the inquiry is likely to result in discretionary judgments that will result in like cases being treated unlike in different courtrooms across the United States.

The second problem is establishing a mechanism to ensure that parties remain within their budgets. In England, where the loser-pays rule allows the winning party to collect its costs from the losing party, the incentive to remain within the budget or cap is created by limiting the winning party’s award of costs to those contained in the budget or cap; in other words, the winning party may bear any costs spent in excess of the budget or cap.<sup>62</sup> That incentive is far from perfect: winning parties can spend in excess of the budget or cap, and they have an economic reason to do so when they can increase their expected recovery by more than the amount of the excessive expenditure.<sup>63</sup> But even this limited incentive

to keep costs within bounds does not work in the United States, where each side bears its own costs. Courts possess no award-of-costs incentive to control the parties’ expenditures. Other incentives are possible. Judges can require lawyers to advise their clients that they need not pay their lawyer more than the budgeted fee; but, equivalent to the problem in England, this advice will not constrain a party who believes that spending another dollar on discovery will favourably change the expected recovery by more than a dollar. Perhaps a better control would be incentives based: require a party who exceeds the budgeted amount to indemnify other parties who must respond to excessive discovery.<sup>64</sup> This incentive is, of course, a form of cost shifting, but it is targeted to control behaviour that is, by definition, impositional (because the party’s behaviour imposes costs in excess of the judicial cap).

In short, capping costs through an order or a budget is an excellent alternative in theory. The practical difficulties of setting the budget and enforcing the obligation to stay on budget, however, make the direct control of costs more problematic.<sup>65</sup> But these problems are akin to and not significantly worse than the problems of mandatory cost shifting.

Barring the ready ability to control costs directly, a second alternative is to construct a procedural system that reduces reliance on the discovery process. The most radical approach would ban discovery entirely, thus reverting to common-law procedure of two centuries ago.<sup>66</sup> As disputes have become more complex and accuracy more critical to their resolution, return to a system that even nineteenth-century lawyers recognised as too draconian is likely to lead to disaster as information necessary to decide cases collapses and errors in judgment rise: there is a reason that the common law abandoned its ban on discovery.<sup>67</sup> Less radically, judges could be placed in charge of the discovery process, as they are in numerous other countries;<sup>68</sup> but a lack of judicial resources<sup>69</sup>

58 Originally set out in Rule 44 in 2009, costs capping was moved to CPR 3.19-21 in 2013, at the time that costs budgeting was installed in the Civil Procedure Rules.

59 Costs capping is unlikely to arise in small-claims-track or fast-track litigation; in small-claims cases, each party bears most of its own costs, see CPR 27.14, while in fast-track cases, fixed costs are the norm, see CPR 45.37-40. Thus, the main terrain for costs capping is the multi-track case, including those multi-track cases ordinarily exempt from costs budgeting. See above n. 56.

60 Practice Direction 3F ¶1.1.

61 See, e.g., *Crystal Lakes v. Bath & Body Works, LLC*, No. 2:16-CV-2989-MCE-GGH, 2018 WL 533915, at \*2 n.1 (E.D. Cal. 23 January 2018) (noting that, without further clarification about the scope of the plaintiff’s claims, ‘it is difficult to determine the proportionality issue on his discovery demands’). See also 8 C.A. Wright et al., *Federal Practice and Procedure* §2008.1 (2010) (stating that ‘the proportionality concept ... seemed to require great familiarity with the case’, thus somewhat frustrating its implementation).

62 CPR 3.18(b) (noting that a court, when assessing costs on the standard basis, will ‘not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so’).

63 See J. Tidmarsh, ‘Realising the Promise of Costs Budgets: An Economic Analysis’, 35 *Civil Justice* Q 219 (2016).

64 See Tidmarsh (2018), above n. 30, at 888-89.

65 Other practical, legal and constitutional issues would also need to be addressed before a realistic costs-capping measure could be implemented. See *ibid.*, at 901-17.

66 I know of no scholar whose proposals go quite so far, but a few American writers have advocated the abolition of nearly all discovery. See G. Shepard, ‘Failed Experiment: *Twombly*, *Iqbal*, and Why Broad Discovery Should be Further Eliminated’, 49 *Indiana Law Review* 466, at 465 (2016) (‘Broad discovery should be eliminated. It is a seventy-year experiment that has failed. The rest of the world recognizes this ...’).

67 See Common Law Procedure Act 1854, 17 & 18 Vict. c. 125 (Eng.) (authorizing common-law courts to conduct discovery); K. Funk, ‘Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846-1876’, 36 *Journal of Legal History* 152, 174-79 (2015) (describing the breadth of discovery in New York before and after the adoption of the Field Code in 1848); E. Sunderland, ‘Scope and Method of Discovery Before Trial’, 42 *Yale Law Journal* 869-70, at 863 (1933) (describing the scope of discovery in American and Canadian jurisdictions prior to the Federal Rules of Civil Procedure).

68 See, e.g., J. Langbein, ‘The German Advantage in Civil Procedure’, 52 *University of Chicago Law Review* 827-29, at 823 (1985) (discussing the German approach to fact-gathering by the judge).

69 As mentioned, there are 677 authorised federal trial-level judges; and at any given time, a number of those positions remain unfilled. See above note 43. As of September, 2020, the number of cases pending in federal court was 511,666. See ‘Federal Judicial Caseload Statistics 2020’ (Ad-

and an American legal culture wedded to a more adversarial process make this approach unimaginable in practice. Nor does expanding existing requirements to disclose information to parties on a mandatory basis<sup>70</sup> solve the problem: no system of rules can fully encompass the parties' disclosure obligations, and, in any event, disputes over the parties' right to information and other parties' obligation to provide it would simply shift from discovery to disclosure.<sup>71</sup>

A third approach is to build a system of incentives to induce parties to reduce their reliance on discovery. Of course, mandatory cost shifting as a stand-alone measure is one example of a system of incentives. But other systems may be better, and I have proposed a different set of incentives: carrots for parties who waive discovery rights and sticks for those who do not.<sup>72</sup>

The principal carrot is to exempt parties who choose not to engage in discovery from two pretrial motions – the motion to dismiss and the motion for summary judgment that figure prominently in American procedure. The motion to dismiss accepts the plaintiff's factual allegations in the complaint (the document that commences an American lawsuit) and asks for dismissal when the plaintiff has no plausible claim to relief.<sup>73</sup> The motion for summary judgment seeks judgment when the material obtained in discovery and other admissible evidence shows that no genuine dispute exists regarding the material facts so that judgment is appropriate.<sup>74</sup> The effect of removing these motions from the picture is to bring a case to trial immediately, a result that some parties may value more highly than the right to conduct discovery.<sup>75</sup>

The principal stick in my proposal is to shift discovery costs (with some exceptions) to a party that opts to engage in discovery when the opposing party opts out of discovery. In particular, courts should retain some discretion

not to shift costs when doing so would seriously disadvantage the 'little guy' pursuing litigation against a major institution.<sup>76</sup> Of course, there are evident objections to such discretion, including, as always, the potential for disparate treatment of litigants and satellite litigation over the need to shift costs. Given that discretionary cost shifting is currently the norm and that enough law about cost shifting has emerged to keep discretion within reasonable boundaries,<sup>77</sup> the cost of operating a system of discretionary cost shifting in the 'little guy' situation is not much greater than under present law. Indeed, if the primary goal of the proposal is met, some parties will opt out of discovery, reducing the number of instances in which cost shifting might arise and thus also reducing the number of cases in which disparate treatment might arise.

An opt-out proposal aligns courts much more with arbitration processes that have eroded the important role of public adjudication in the resolution of social disputes.<sup>78</sup> One of arbitration's most cited advantages is that the parties do not incur discovery expenses.<sup>79</sup> By offering an arbitration-like alternative, an opt-out system could reclaim for the courts a more central role in resolving disputes.

It also bears emphasis that the point of this system is to eliminate discovery in some cases entirely. Assume that ten cases would each have \$12,000 in discovery costs and that mandatory cost shifting would reduce the per-case spending on discovery by \$1,000. Under a system that allows parties to opt out of discovery, further assume that the parties do so in one case. From a social-welfare viewpoint, even if the judge does not shift discovery costs in any of the other nine cases, the system is money ahead: mandatory cost shifting would result in a \$10,000 reduction (\$120,000 in total down to \$110,000) in discovery costs, while opting out of discovery would result in a \$12,000 reduction.<sup>80</sup> The broad

min. Office of U.S. Courts), [www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020](http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020) (last visited 1 October 2021). That number works out to more than 755 cases per authorised judgeship.

70 See Fed. R. Civ. P. 26(a) (requiring the mandatory disclosure of information supporting a party's claims or defences, expert witnesses and witnesses and documents to be used at trial).

71 For a well-crafted plan to expand the parties' mandatory-disclosure obligations, while still permitting some modest follow-on discovery, see D. Rosenberg et al., 'A Plan for Reforming Federal Pleading, Discovery, and Pretrial Merits Review', 71 *Vanderbilt Law Review* 2059 (2018).

72 See Tidmarsh (2018), above n. 30.

73 See Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007) (imposing a plausibility pleading standard); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (clarifying the scope of the plausibility standard).

74 See Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (discussing the summary-judgment standard); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (same).

75 A second carrot, when both parties waive discovery, is to waive jury trial in cases that would be triable to a jury when both parties opt to conduct discovery. Admittedly, some parties may regard the waiver of jury-trial rights as a stick rather than a carrot to forgo discovery, but nothing turns on whether it is characterised as a carrot or a stick. Eliminating jury trial would allow a court to adopt certain case-management tools that could make an American trial run more along the lines of civil-law trials and thus avoid needless discovery on issues that the court never reaches. See Langbein, above n. 68, at 830 (describing how '[t]he implications for procedural economy are large' under the episodic nature of German trial),

76 The types of factors that might inform a court's discretion not to shift costs would be essentially those given in Lord Jackson's 2009 report and presently found in Rule 44.3(5) of the Civil Procedure Rules (including the amount in controversy, the value of non-monetary relief, the complexity of the case, and broader considerations about the case's public importance), as well as the essentially overlapping factors identified as relevant to the proportionality inquiry under Federal Rules of Civil Procedure 26(b) (1) (including the amount in controversy, the importance of the issues at stake in the case, the parties' resources and their relative access to information).

77 See above n. 39-42 and accompanying text.

78 For the classic opposition to the wide-scale resolution of disputes through private ordering systems, see O. Fiss, 'Against Settlement', 93 *Yale Law Journal* 1073 (1984).

79 See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ('Although [discovery] procedures might not be as extensive [in arbitration] as in the federal courts, by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' (internal quotation marks omitted)); *Dodson Int'l Parts, Inc. v. Williams Int'l Co.*, 12 F.4th 1212, 1230 (10th Cir. 2021) ('[O]ne cannot expect full discovery in arbitration proceedings, as extensive discovery could undermine much of the advantage of arbitration.').

80 In this hypothetical case, if cost shifting occurred in just a third of the cases that did not opt out of discovery, the savings would be even larger: the reduction in discovery costs would now rise to \$15,000 (\$12,000 in the case that opted out of discovery plus \$1,000 apiece in the cases in which discovery costs shifted).



point is that it can be more socially beneficial to adopt structural changes that eliminate discovery in some cases rather than introduce changes that seek to reduce discovery in each case.

## 5 Conclusion

My suggestion that cost shifting could be adopted as part of an opt-out proposal might raise your eyebrows, given the rather sceptical attitude that I previously evinced about cost shifting. Thus, two final points are in order. First, in an opt-out system, shifting costs is not a stand-alone proposal. In this short article I cannot pursue the proof of this point down all the rabbit holes of American procedure, but the incentives such as those that I develop integrate discovery into larger themes in the American civil-justice system, such as disappearing trials, the expansion of case management, the rise of settlement and alternative forms of dispute resolution, and growing pretrial motion practice. Shifting discovery costs works better in connection with a broader set of proposals that considers the issue of discovery and its costs in light of the entire civil-justice system and its needs.

Second, such incentives-based proposals should be understood as a second-best solution. Cost budgeting (or cost capping) strikes me as a preferable option if solutions to the difficulties of its practical application can be found. Moreover, the ultimate proof of any alternative – whether mandatory shifting of discovery costs, cost budgeting or a proposal to reduce reliance on discovery – lies on the ground. There is a need to experiment with multiple ideas, to gather the data from each experiment and then to chart a course forward. The relentless nature of procedural reform demands no less.

# Counting the Cost of Enlarging the Role of ADR in Civil Justice

Dorcas Quek Anderson\*

## Abstract

Singapore, a common law jurisdiction, recently implemented radical changes to its civil procedure regime in order to ensure affordability of the civil justice process. The reforms include the imposition of a duty on parties to consider alternative dispute resolution (ADR) before commencing and during legal proceedings and the empowerment of courts to order the parties to use ADR. This paper discusses the implications of increasing the justice system's emphasis on the use of ADR with reference to Singapore's civil justice reforms and comparable reforms in the United Kingdom. It demonstrates how the historical inclusion of ADR in the justice system has shaped the concept of access to justice, resulting in an emphasis not only on cost-effective justice but also on tailoring the characteristics of each case to the appropriate dispute resolution process. An excessive association of ADR with cost savings will thus neglect other significant dimensions of access to justice. The paper argues that the question of whether ADR is an appropriate process for each dispute assumes greater complexity as both the parties and the court have to engage in detailed cost-benefit analyses to determine whether any refusal to attempt ADR or order to use ADR is justified. Cost concerns also have to be delicately balanced with other factors relevant to determining the appropriate dispute resolution process. The author proposes adopting a more nuanced approach that does not deem mediation as automatically decreasing the overall cost of justice and recognises the importance of encouraging appropriate dispute resolution.

**Keywords:** access to justice, alternative dispute resolution, mandatory ADR, cost sanctions, proportionality.

## 1 Introduction

Access to civil justice in many countries has been plagued by the common challenges of the high cost of litigation, inequality in parties' financial resources, differing risk appetites and limited judicial resources. Singapore, a common law jurisdiction, recently implemented radical changes to its civil justice regime with effect from 1 April 2022 in order to ensure affordability and

timeliness of the civil justice process.<sup>1</sup> As in the United Kingdom, these civil justice reforms are premised on the proportionality principle: they seek to achieve procedure that is proportionate to the claim value and the means of the parties, without unduly compromising justice.<sup>2</sup> The recommended reforms include the imposition of a duty on parties to a dispute to consider amicable or alternative dispute resolution (ADR) before commencing and during legal proceedings. Apart from continuing the use of cost sanctions against unreasonable refusals to attempt ADR, the court may also be empowered to order the parties to use ADR.<sup>3</sup>

This paper discusses the implications of increasing the civil justice system's emphasis on the use of ADR with reference to Singapore's recent civil justice reforms and comparable reforms in the United Kingdom. Section II examines how the inclusion of ADR in the Singapore and UK justice systems has shaped the concept of access to justice, resulting in an emphasis not only on cost-effective justice but also on tailoring the characteristics of each case to the appropriate dispute resolution process. An excessive association of ADR with cost savings will thus neglect other significant dimensions of access to justice. Section III reviews the efforts in the United Kingdom and Singapore to enlarge ADR's role in the civil justice system through the reliance on adverse cost orders and the recent focus on mandating the use of ADR. Section IV discusses the likely cost implications of expanding the use of ADR. The threshold question of whether ADR is an appropriate process for each dispute assumes greater complexity as both the parties and the courts have to engage in detailed cost-benefit analyses to determine whether any refusal to attempt ADR or order to use ADR is justified. In this regard, the cost-effectiveness of using ADR instead of litigation may not be readily evident in Singapore because of the drastically modified litigation process that front-loads discovery

- 1 Rules of Court 2021 <https://sso.agc.gov.sg/SL-Supp/S914-2021/Published/20211201?DocDate=20211201>; Supreme Court of Singapore, 'New Rules of Court 2021' [www.judiciary.gov.sg/new-rules-of-court-2021](http://www.judiciary.gov.sg/new-rules-of-court-2021) (last visited 13 January 2022).
- 2 Report of the Civil Justice Review Committee (2018), at 6. [www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system](http://www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system) (last visited 6 October 2021).
- 3 Courts (Civil and Criminal Justice) Reform Bill s 71; Rules of Court 2021 (S 914/2021), Order 5 rule 3; Ministry of Law, 'Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission' (26 October 2018), at 9. [www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system](http://www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system) (last visited 6 October 2021).

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and other legal work. Section V further highlights that cost concerns have to be delicately balanced with other factors relevant to access to justice, including the need to tailor the appropriate dispute resolution process to the parties' needs. The paper proposes the adoption of a more nuanced approach that does not automatically deem mediation as decreasing the overall cost of justice and recognises the importance of other dimensions of access to justice. This will be made possible only with clear guidelines on when ADR may or may not be suitable and the judicious use of mandatory ADR orders. Above all, the cost of civil justice must be evaluated not only in financial terms but also other aspects of justice relating to the quality of dispute resolution.

## 2 ADR's Role in Access to Civil Justice

### 2.1 Re-conceptualising Justice as Entailing Proportionality of Costs

The question of funding of ADR is inextricably linked to the larger issue of ADR's relationship with access to civil justice. In many jurisdictions, ADR has grown in prominence as a counterpoint to the traditional litigation process. As noted by Cappelletti and Garth, the access-to-justice movement in the late 1970s focused on addressing the procedural obstacles associated with traditional litigation, resulting in a search for alternative ways of resolving disputes, including the mediation process.<sup>4</sup> The growth of court-connected mediation in the United States thus coincided with growing dissatisfaction over the administration of justice in the courts, while the early discussion of ADR in the United Kingdom was precipitated by criticism of the costly and lengthy litigation process.<sup>5</sup> The multidimensional nature of civil justice has emerged amidst recognition of the practical obstacles to accessing the civil courts. While the primary duty of the courts used to be the pursuit of accurate judgments, the costs and time of obtaining justice have been gradually perceived as critical components of the definition of justice, thus transforming the very concept of justice.<sup>6</sup> Describing the changes brought about by the Woolf Reforms, a UK commentator noted that the commitment to the principle of accuracy has been replaced by a more balanced commitment to

other principles.<sup>7</sup> Others have similarly noted that cost and time considerations are integral to the definition of procedural justice, and not separate from it.<sup>8</sup> There 'is never a need to choose between justice and proportionate cost' as '[j]ustice requires proportionality'.<sup>9</sup> Commenting on the international changes to civil justice systems, another commentator emphasised the growing desire to distribute the means of the national justice systems proportionally, on the basis of the importance and social value of the matters at stake.<sup>10</sup>

The concern with cost and time considerations has been embodied in procedural rules and civil justice reforms. The UK's Civil Procedure Rules have underscored the need to deal with cases 'justly and at proportionate costs'. Proportionality between parties entails costs being proportionate to the value and nature of the claim.<sup>11</sup> In addition, proportionality involves spending the appropriate amount of judicial resources on each case so as to ensure availability of resources for other litigants.<sup>12</sup> ADR has played an integral role in furthering the goal of proportionate justice since the Woolf Reforms. Lord Woolf, when advocating an obligation to deal with cases justly, noted that the principles of equality, economy, proportionality and expedition were fundamental to an effective contemporary justice system. The new civil justice landscape should, therefore, avoid litigation wherever possible, through the courts' encouragement of the use of ADR at case management conferences, provision of legal aid funding for pre-litigation ADR and the introduction of pre-action protocols facilitating the early exchange of information and exploration of settlement.<sup>13</sup> Lord Justice Jackson's subsequently proposed reforms reiterated that ADR 'has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases' but was currently underused.<sup>14</sup> In a similar vein, Lord Justice Briggs called for the courts to manage cases such that 'a trial is statistically unlikely to be its conclusion'.<sup>15</sup> Hence, ADR in the UK civil justice

4 M. Cappelletti and B. Garth, 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective', 27 *Buffalo Law Review* 181 (1978); M. Cappelletti, 'Alternative Dispute Resolution Processes Within the Framework of the Worldwide Access-to-Justice Movement', 56 *Modern Law Review* 282 (1993).  
5 D. Quek Anderson, 'The Evolving Concept of Access to Justice in Singapore's Mediation Movement', 16 *International Journal of Law in Context* 128, at 129 (2020), referring to the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in the US in 1976 and to The Rt Hon Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).  
6 R. Assy, 'The Overriding Principles of Affordable and Expeditious Adjudication', in A. Higgins (ed.), *The Civil Procedure Rules at 20* (2021) 280, at 282.

7 J. Sorabji, 'Prospects for Proportionality: Jackson Implementation', 32(2) *Civil Justice Quarterly* 213 (2013), at 221; J. Sorabji, 'Late Amendment and Jackson's commitment to Woolf: Another Attempt to Implement a New Approach to Civil Justice', 31(4) *Civil Justice Quarterly* 393 (2012).  
8 R. Assy, 'Brigg's Online Court and the Need for a Paradigm Shift', 36 *Civil Justice Quarterly* 70, at 84 (2017); A. Higgins, 'Keep Calm and Keep Litigating', in A. Higgins (ed.), *The Civil Procedure Rules at 20* (2021) 44, at 52-3.  
9 Higgins, above n. 8, at 54.  
10 A. Uzelac and C.H. Van Rhee, 'The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms – Unity and Diversity', in A. Uzelac and C.H. Van Rhee (eds.), *Transformation of Civil Justice* (2018) 3, at 13.  
11 Civil Procedure Rules 1.1(2)(c).  
12 Civil Procedure Rules 1.1(2)(e) referring to the objective of "allotting ... an appropriate share of the court's resources, while taking into account the need to allot resources to other cases"; *Arrow Nominees Inc & Another v. Blackledge & Others* (2020) CP Rep 591; (2001) BCC 591 at para. 69.  
13 The Rt Hon Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), at para. 9.  
14 Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (14 January 2010), at 361-62.  
15 Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (December 2013), at 67-8; see also M. Ahmed, 'Bridging the Gap Between Alternative Dispute Resolution and Robust Adverse Costs Orders' 66(1) *North-ern Ireland Legal Quarterly* 71, at 73 (2015).



regime has been deemed instrumental to cost reduction and has, consequently, been encouraged as a cost-effective alternative to the conventional court process. This has resulted in a re-conceptualisation of justice as entailing proportionality of costs.

## 2.2 Contributing to a Wider Conceptualisation of Justice

Apart from being a cost-reduction tool for the courts, ADR also has the potential to transform the nature of civil justice. In this respect, Master of Rolls Sir Geoffrey Vos highlighted that mediated interventions should be part and parcel of resolving disputes in society. He suggested that the 'alternative' aspect should, therefore, be taken out of ADR, so that dispute resolution is holistically conceived as 'an integrated process in which parties feel that there is a continuing drive to help them find the best way to reach a satisfactory solution'.<sup>16</sup> From this perspective, ADR is not merely instrumental to reducing the obstacles to access to justice but is instead integral to a wider conceptualisation of justice that includes a variety of dispute resolution methods. However, this broader understanding of access to justice has not been uniformly embraced. By way of illustration, Lord Justice Briggs depicted the civil courts as existing primarily to 'provide a justice service rather than merely a dispute resolution service', which entails recourse to an 'expert, experienced and impartial court for the obtaining of a just and enforceable remedy'. Access to civil courts has been deemed 'an essential guarantor of the rule of law' because the civil courts develop, declare, and strictly uphold the law, while ADR systems may use different criteria.<sup>17</sup> Lord Neuberger has similarly associated the delivery of justice with access to courts, in comparison with the delivery of a service such as mediation. As such, 'mediation must not be invoked and promoted as if it was always an improved substitute for litigation'.<sup>18</sup>

By contrast, Australia has conceived the justice system as including a broad range of dispute resolution services within and outside the courts, before and after the commencement of litigation.<sup>19</sup> This perspective perceives ADR as complementing court adjudication. Both facilitative and adjudicatory processes are co-equal within the broader justice system.<sup>20</sup> In a similar vein, ADR processes are increasingly seen as supplementing litigation. While a resolution may not be arrived at after at-

tempting ADR, ADR could narrow down the number of disputed issues to the essential ones that parties realise cannot be amicably resolved and require the court's determination.<sup>21</sup> As hybrid processes are increasingly explored in many jurisdictions,<sup>22</sup> it is likely that ADR will no longer be seen as antithetical to adjudication but as contributing to the justice system's efforts to resolve a dispute in the most appropriate manner.

In sum, ADR in some jurisdictions is associated with the broader civil justice system, placing consensual and adjudicatory processes on an equal footing, with either method to be appropriately relied on by parties to resolve disputes satisfactorily. Under this vision, ADR assumes more than an instrumental role in advancing access to justice: it is also central to widening the scope and nature of civil justice beyond legal forums and remedies.

## 2.3 ADR's Instrumental and Intrinsic Value in Advancing Access to Justice in Singapore

ADR's value, both instrumental and intrinsic, in advancing access to justice has been evident within its development in Singapore. The development of mediation in Singapore was primarily driven by the judiciary, the government and the commercial sector. Within the courts, former Chief Justice Yong Pung How was an early advocate of mediation. Under his leadership, a court-connected mediation programme for civil disputes was created in 1994 and, subsequently, extended to other disputes, including minor criminal complaints and matrimonial matters. Notably, the introduction of the mediation process into the landscape was connected to the intrinsic value of conciliatory resolution of disputes. Chief Justice Yong emphasised then that Singapore was developing mediation not as a means to reduce case backlog – a problem the courts had already resolved in the early 1990s – but as a non-confrontational way of resolving disputes to preserve relationships. He elaborated that the preservation of relationships was an important value in an Asian society like Singapore.<sup>23</sup> Echoing these sentiments, the Attorney General in 1996 called for mediation to be institutionalised through the

16 The Rt Hon Sir Geoffrey Vos, *The Relationship between Formal and Informal Justice* (26 March 2021), at 7-8. [www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf](http://www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf) (last visited 6 October 2021).

17 Lord Justice Briggs, *Civil Courts Structure Review Interim Report* (December 2015), at 28-9.

18 Lord Neuberger, *Keynote Address: A View From On High* (Civil Mediation Conference, 12 May 2015), at para. 9. [www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf](http://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf) (last visited 6 October 2021).

19 T. Sourdin and N. Burstyn, *Australia's Civil Justice System: Developing a Multi-Option Response*. In *National Centre for State Courts, Trends in State Courts* (2013). <https://ssrn.com/abstract=2723670> or <http://dx.doi.org/10.2139/ssrn.2723670> (last visited 22 June 2022).

20 J.F. Roberge and D. Quek Anderson, 'Judicial Mediation: From Debates to Renewal', 19 *Cardozo Journal of Conflict Resolution* (2018) 613.

21 Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009) at 318, referring to a survey by King's College showing that 10% of respondents found mediation beneficial to the litigation by helping to narrow issues in dispute, and 25% found mediation helpful in gaining a greater understanding of issues in dispute.

22 See for example Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' [https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf) (last visited 12 January 2022), at 5 showing that 59% of respondents preferred international arbitration together with ADR in resolving cross-border disputes; and Singapore International Dispute Resolution Academy, 'SIDRA International Dispute Resolution Survey: 2020 Final Report' <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html> (last visited 12 January 2022), at 14 indicating 27% preference for hybrid dispute resolution.

23 Former Chief Justice Yong Pung How, 'Speech at the Opening of the Legal Year 1996', in Hoo Sheau Peng (ed.), *Speeches and Judgments of Chief Justice Yong Pung How* (1996); Former Chief Justice Yong Pung How, 'Speech at the Official Opening of the Singapore Mediation Centre on 16 August 1997', in Hoo Sheau Peng (ed.), *Speeches and Judgments of Chief Justice Yong Pung How* (1996). See also Anderson, above n. 5, at 131-32.

setting up of a commercial mediation centre. Having observed that litigation had affected harmonious relationships, he urged Singaporeans to resolve their disputes amicably. This call eventually resulted in the setting up of a commercial mediation centre in 1997. Hence, in its nascent stage of development in Singapore, ADR was conceived as changing the complexion of civil justice to adopt a less contentious approach to resolving disputes consonant with Asian culture. This development coheres with Cappelletti's observation that many non-Western societies have embraced mediation because of its focus on achieving consensus rather than determining fault. ADR in these jurisdictions plays a role in the qualitative transformation of justice – from rights based to consensus driven and for preserving relationships rather than adopting a confrontational approach.<sup>24</sup>

At the same time, the cost-effectiveness of ADR has also been part and parcel of the mediation movement narrative. Some Singapore commentators have opined that 'the initial impetus to the development of ADR originate[d] from the recognition of a need to improve the productivity and efficiency of the courts'.<sup>25</sup> More recently, it was observed that the massive backlog in the 1990s was a catalyst for the mediation movement in Singapore.<sup>26</sup> Hence, although the judiciary stressed that there was no acute crisis in the administration of justice, efficiency concerns have still been perceived as forming the backdrop for the introduction of ADR.

In the past two decades, ADR – notably mediation – has also been connected with a user-centric conceptualisation of access to justice. The current chief justice, Sundaresh Menon, proposed a broader vision of the Rule of Law that includes access to justice as an essential ingredient. The disputant's needs, rights and interests should be at the centre of this consideration, resulting in the adoption of a user-centric approach to define the ideals of the legal system. He contended that the Rule of Law should not be rooted exclusively in an adjudicative setting because mediation has proven valuable in addressing access to justice concerns such as affordability, efficiency, accessibility, flexibility and effectiveness. Developing a diversified suite of dispute resolution options within the legal system would enhance its ability to deliver justice that is 'customised to the particularities of each case' and most appropriate for the parties' needs.<sup>27</sup> In order to have appropriate dispute resolution, the justice system requires 'a broader philosophical shift... which moves beyond from the rather narrow view of resolution as necessarily entailing an adjudicated outcome...towards a more holistic view that conceives of resolution as an open-ended process which embraces non-adjudicated outcomes such as settlement'.<sup>28</sup> There has, therefore, been unequivocal judicial endorsement of a broader justice system comprising consensual and adjudicative processes, and the need for the individual disputant to be referred to the most appropriate dispute resolution mode.

The different aspects of ADR's relationship with access to justice – cost-effectiveness, the qualitative transformation of justice from rights based to consensus driven, contribution to a broader justice system with a diverse suite of dispute resolution options and finding the appropriate process to suit the parties' needs – have recently been synthesised as collective goals. Referring to the aforementioned attributes of a user-centric approach to access to justice, Chief Justice Menon added two more overarching values to this approach: proportionality and peacebuilding. The inclusion of the proportionality principle clarifies that cost-effectiveness has to be considered not only from the disputants' perspective but also that of the overall justice system and future court users. Alluding to similar concerns articulated by the UK judiciary, Chief Justice Menon stated that 'proportionate justice...is about fairly, equitably and responsibly distributing scarce judicial resources, so as to promote the interests of all who require justice'.<sup>29</sup> The second principle, peacebuilding, underscores the importance of the preservation of relationships and the furthering of peace. Mediation contributes to peacebuilding by 'transform[ing] society's notion of justice from an adversarial, hierarchical...process geared towards zero-sum outcomes, to one that is more consensual, flexible, and interest-based, and thus more open to outcomes that focus on the parties moving forward constructively'.<sup>30</sup> ADR is, thus, intimately connected with the judiciary's goal of achieving lasting peace by repairing relationships and transforming the qualitative nature of justice into a more consensus-based one.<sup>31</sup> Chief Justice Menon further elaborated that a justice system with the aforementioned values would recognise that adjudication is part of a wider universe of dispute resolution.

24 Anderson, above n. 5, at 130.

25 N.T. Tan et al., 'ADR – Current and Future Prospects', in N.T. Tan and J.E. Lee-Partridge (eds.), *Alternative Dispute Resolution in Business, Family and Community: Multidisciplinary Perspectives* (2000), at 134.

26 E. Chua and G. Lim, 'Development of Mediation in Singapore' in D. McFadden and G. Lim (eds.), *Mediation in Singapore: A Practical Guide* (2017) 3.

27 Chief Justice Sundaresh Menon, 'Mediation and the Rule of Law' (10 March 2017), at 18 [www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20\(Final%20Edition%20after%20delivery%20-%20090317\).pdf](http://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20(Final%20Edition%20after%20delivery%20-%20090317).pdf); Chief Justice Sundaresh Menon, 'Mass Call Address: The Legal Profession Amidst the Pandemic: Change and Continuity' (23 August 2021), at 9 [www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/cj's-speech-mass-call-2021.pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/cj's-speech-mass-call-2021.pdf) (last visited 6 October 2021).

28 Chief Justice Sundaresh Menon, 'International Commercial Courts in the Post-Pandemic Era' (10 March 2021), at 8 [www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-symposium-2021---cj's-opening-address-\(final\)-\(2\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-symposium-2021---cj's-opening-address-(final)-(2).pdf) (last visited 6 October 2021).

29 Chief Justice Sundaresh Menon, 'Technology and the Changing Face of Justice' (14 November 2019), at 38 <https://beta.judiciary.gov.sg/docs/default-source/news-docs/ncmg---keynote-lecture.pdf> (last visited 6 October 2021).

30 Chief Justice Sundaresh Menon, 'Setting the Stage for Mediation's Golden Age' (17 July 2021), at 15 [www.supremecourt.gov.sg/docs/default-source/default-document-library/india-singapore-mediation-summit---setting-the-stage-for-mediation's-golden-age-\(final2\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/india-singapore-mediation-summit---setting-the-stage-for-mediation's-golden-age-(final2).pdf) (last visited 6 October 2021).

31 Chief Justice Sundaresh Menon, 'Response by Chief Justice, Opening of the Legal Year 2020' (6 January 2020), at 19-20 [www.supremecourt.gov.sg/docs/default-source/module-document/speech/oly-2020---speech-by-cj-\(checked-against-delivery\).pdf](http://www.supremecourt.gov.sg/docs/default-source/module-document/speech/oly-2020---speech-by-cj-(checked-against-delivery).pdf) (last visited 6 October 2021).

lution methods<sup>32</sup>; ADR, therefore, contributes to a wider scope of the justice system that ‘depart[s] from a traditionally reactive approach to proactively resolving disputes in the most appropriate manner’(emphasis added).<sup>33</sup>

In summary, the early ascendance of ADR in many legal systems stemmed principally from time and cost obstacles in the achievement of access to justice. ADR emerged as a counterpoint and alternative to litigation, which has remained the primary means of delivering justice in some jurisdictions. The role played by ADR in advancing access to justice is more multifaceted in Singapore. ADR has been promoted not merely because of its instrumental value in alleviating prohibitive costs and time but also for its inherent value in creating a justice system with diverse dispute resolution options, bringing a consensual dimension to the quality of justice and helping disputants find the most suitable forum for their needs. As such, counting the cost of providing ADR in the justice system is necessarily a complex task. It has to take into account the multiple dimensions of ADR’s relationship with access to justice, of which cost-effectiveness is but one aspect.

### 3 Enlarging ADR’s Role Through Procedural Reforms

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Given the multiple ways in which ADR has been perceived to enhance access to justice, many jurisdictions have made concerted efforts to embed mediation within the civil justice regime. The reforms in the United Kingdom include the introduction of pre-action protocols to oblige parties to consider and engage in ADR processes and the empowerment of the courts to make adverse cost orders against a party deemed to have unreasonably refused to engage in ADR.<sup>34</sup> The adverse costs orders could take two forms: cost deprivation orders and paying orders. The former entails restricting the party that is successful in its claim or defence from recovering all of its costs from the unsuccessful party. The latter obliges the successful party to reimburse some of the unsuccessful party’s costs arising from the failure to attempt ADR.<sup>35</sup> Beginning with *Halsey v. Milton Keynes General NHS Trust*, the courts have developed and refined guidelines to determine whether a refusal to attempt ADR will be perceived as unreasonable.<sup>36</sup> However, *Halsey* has been criticised as failing to provide guidance on the range of adverse costs orders at the court’s disposal, resulting in the judiciary’s reluctance to impose paying orders on successful parties. Such a cautious approach

to impose robust costs sanctions seems to run counter to the judicial endorsement of ADR.<sup>37</sup>

One common way of institutionalising mediation within the justice system is to mandate mediation. This question has ignited considerable controversy within and beyond the UK judiciary. Lord Dyson maintained in *Halsey* that the courts’ compulsion of ADR would pose ‘an unacceptable constraint on the right of access to the court’ and, consequently, violated Article 6 of the European Charter of Human Rights.<sup>38</sup> Dissenting views were later expressed by other members of the judiciary. Lord Phillips suggested that a court order mandating ADR might infringe Article 6 only if it prevented a party from continuing with its case,<sup>39</sup> while Lord Clarke Master of Rolls called for a review of *Halsey*’s position in light of the introduction of compulsory ADR schemes in European states and the United States.<sup>40</sup> In response, Lord Dyson subsequently conceded that mandatory mediation per se did not breach Article 6, but also argued that compulsion orders could be objectionable if accompanied by a denial of access to the court or high costs of mediation.<sup>41</sup> Having comprehensively reviewed these arguments in 2021, the Civil Justice Council opined that the parties could be lawfully compelled to participate in ADR provided that there was no obligation to settle and a return to the normal adjudicative process was available. It further recommended the imposition of sanctions for breaches of mandatory mediation orders, including the striking out of a claim or defence.<sup>42</sup> The council’s recommendations have decisively addressed the 17-year-old controversy since *Halsey* and paved the way for the future use of compulsory ADR orders. There have, however, been deeper concerns over the desirability of mandating mediation. There is the fear of undermining the role of adjudication in the justice system. Professor Genn underscored the importance of having civil adjudication to provide the ‘credible threat of judicial determination’, without which mediation would be ‘the sound of one hand clapping’.<sup>43</sup> She argues that the courts should not indiscriminately attempt to drive litigants away or compel them to unwillingly participate in mediation in light of the social and economic value of the civil courts.<sup>44</sup>

Having a common law system, Singapore’s civil justice regime has drawn inspiration from many UK reforms. ADR for civil disputes has been institutionalised through a reliance on adverse costs orders and a limited number of mandatory ADR programmes. Several mechanisms

32 *Ibid.*, at 21.

33 *Ibid.*

34 Civil Procedure Rules 44.2(2)(a).

35 Ahmed, above n. 15, at 72.

36 [2004] 1 WLR 3002.

37 Ahmed, above n. 15, at 83-4, 86.

38 [2004] 1 WLR 3002 at [9].

39 Lord Phillips, ‘Alternative Dispute Resolution: An English Viewpoint’ (29 March 2008), at 13-15.

40 Sir Anthony Clarke Master of Rolls, ‘The Future of Civil Mediation’, 74(4) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Resolution*, at 421 (2008).

41 Lord Dyson, ‘A Word on *Halsey v. Milton Keynes*’, 77(3) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Resolution* 338-39, at 337 (2011).

42 Civil Justice Council, *Compulsory ADR* (June 2021), at 30-1.

43 Hazel Genn, *Judging Civil Justice* (2010), at 125.

44 *Ibid.*, at 123.



have been introduced to facilitate the courts' evaluation of the parties' decision whether to attempt ADR. Parties in the Supreme Court may file an ADR Offer, indicating their willingness to participate in ADR. The recipient of the ADR Offer is given 14 days to file a Response to the ADR Offer, stating whether they agree to the proposal and providing detailed reasons for any refusal. Failure by a party to file a Response to an ADR Offer within the stipulated time is taken to mean that the party is unwilling to participate in ADR without providing any reasons.<sup>45</sup> A similar system has been instituted in the State Courts for civil claims below S\$250,000. A 'presumption of ADR' applies to all civil disputes, resulting in disputes being routinely referred to a mode of ADR unless any party chooses to opt out.<sup>46</sup> All parties must file an ADR Form at the pre-trial stage.<sup>47</sup> This form provides information on the different ADR options and requires parties and their lawyers to indicate whether they wish to use any form of ADR. Similar to the Supreme Court procedure, the parties have to provide reasons for any refusal to use ADR.<sup>48</sup> The spectre of adverse cost sanctions due to an unreasonable refusal to use ADR is highlighted in both courts' forms. Furthermore, the registrars in both courts routinely encourage parties to consider ADR during pre-trial conferences and rely on the parties' responses in the forms to determine whether any refusal of ADR is unreasonable.

Unlike the reluctance within the United Kingdom to compel the use of mediation, Singapore's civil justice regime has relied heavily on mandatory mediation. The reliance on costs sanctions to encourage the use of ADR has been complemented by mandating the use of mediation at an early stage for certain civil claims below S\$250,000, including personal injury, motor accidents, medical negligence and defamation.<sup>49</sup> The parties in such disputes are automatically referred for ADR in the State Courts' Centre for Dispute Resolution. In 2014, the scope of mandatory ADR programmes was expanded through the introduction of a simplified regime to deal with civil claims below S\$60,000. In such cases, the court is empowered to order the use of ADR if it is 'of the view that doing so would facilitate the resolution of the dispute between the parties'.<sup>50</sup> This change was followed by radical recommendations made in 2018 by two civil procedure reform committees to reform the civil justice system. Their proposals included the introduction of a duty for parties to consider ADR prior to and during legal proceedings and the empowerment of the courts to order the use of ADR.<sup>51</sup> After extensive consultation, the collective recommendations were accepted with minor

modifications by the Ministry of Law.<sup>52</sup> Legislative amendments were recently approved to grant the courts the power to order parties to attempt ADR, and took effect on 1 April 2022.<sup>53</sup>

The parallel developments in the UK and Singapore civil justice systems seemed to have converged through their current endorsement of mandatory ADR court orders. This major development is likely to result in an unprecedented expansion of ADR's role in the future within both jurisdictions. What are the potential cost implications of ADR's enlarged function within the civil justice regime? The next section considers this pertinent question.

## 4 Counting the Costs of Enlarging ADR's Role

### 4.1 A More Complex Analysis of Cost-Effectiveness

Section II highlighted how ADR has been heavily promoted by the courts because of its instrumental value in alleviating the prohibitive costs and time involved in litigation. The critical question arising from ADR's enlarged role is whether the reliance on mandatory ADR orders will indeed reduce the costs of civil justice, resulting in the delivery of justice at proportionate costs. Cost-effectiveness may be evaluated from several perspectives – the individual party, the judiciary or the broader society – and with varying conclusions. Because the concept of access to justice is essentially a user-centric one, it is critical that the mandatory ADR order is cost effective for the disputants. Nevertheless, the determination of this question is a complex exercise. Some relevant factors the courts have considered to determine the reasonableness of refusals to attempt ADR include the costs of ADR and the time involved in completing ADR. In this regard, Lord Justice Dyson stressed in *Halsey* that the costs of mediation must not be disproportionately high and any delay caused by attempting ADR should not be prejudicial to the parties.<sup>54</sup> Reiterating these concerns, the Civil Justice Council in its 2021 report suggested that the form of ADR should not impose a disproportionate burden on the parties' time and resources. It further stated that mandatory ADR options that are free or low cost or available in shorter format are less likely to be controversial, while privately provided mediation service may cause more difficulty because the fees involved may represent a disproportionate cost in low-value claims.<sup>55</sup>

45 Supreme Court Practice Directions (2010 Revised Edition), Singapore, para. 35C and Forms 28-9.

46 State Courts Practice Directions, Singapore, para. 35(9).

47 *Ibid.*, para. 36(4) and Form 7.

48 *Ibid.*, Form 7.

49 *Ibid.*, paras 36(2). 37, 38, 39A.

50 Rules of Court (Cap 322, R 5, 2014 Ed), Order 108 rule 3(3).

51 Ministry of Law, above n 3.

52 Ministry of Law, Response to Public Feedback on the Civil Justice Reforms (11 June 2021) [www.mlaw.gov.sg/news/press-releases/2021-06-11-response-to-public-feedback-on-the-civil-justice-reforms](http://www.mlaw.gov.sg/news/press-releases/2021-06-11-response-to-public-feedback-on-the-civil-justice-reforms) (last visited 6 October 2021).

53 Courts (Civil and Criminal Justice) Reform Bill s 71; Rules of Court 2021 (S 914/2021), Order 5 rule 3.

54 *Halsey*, above n 41.

55 Civil Justice Council, above n 42, at 41, 46. These observations were influenced by the European Court of Justice decisions in *Rosalba Alasini*

**Table 1** *Litigation Interest and Risk Assessment Framework*

|                                                                            |
|----------------------------------------------------------------------------|
| <b>Stage 1: Determine the Expected Value of Court Outcome</b>              |
| (1) Estimate risks or probability regarding liability at trial             |
| (2) Estimate damages                                                       |
| (3) Multiple (1) by (2) to obtain expected value of court outcome          |
| <b>Stage 2: Calculate the Net Expected Value of Court Outcome</b>          |
| (4) Estimate value of tangible and intangible costs of proceeding to trial |
| (5) Deduct (4) from (3) to obtain net expected value of court outcome      |

Apart from the costs and time involved in ADR, the courts have considered other factors, including the merits of the case, the nature of the dispute, the extent to which other settlement methods have been attempted and whether the ADR process has a reasonable prospect of success.<sup>56</sup> Collectively, these *Halsey* guidelines have been applied in contrasting ways. As noted by Ahmed, the merits of the case factor has been applied both generously and strictly. Certain decisions, such as *Northrop and Leicester Circuits Ltd v. Coates Brothers Plc*, have not placed great weight on parties' reasonable belief in success at litigation. Justice Ramsey in *Northrop* reasoned that a reasonable belief in a strong case would provide limited justification for a refusal to mediate because mediation would have a positive effect even if the claim had no merit.<sup>57</sup> By contrast, decisions such as *Swain Mason Mills v. Reeves (A Firm)* and *Reed Executive Plc v. Reed Business Information Ltd* have readily deemed a party's reasonable belief in a watertight case as sufficient justification for a refusal to mediate.<sup>58</sup> The diversity of the UK courts' weighing of the *Halsey* factors attests to the complexity of determining the overall cost-effectiveness of attempting ADR. The inherent complexity of this task is likely to be also present in the courts' decision to mandate ADR or not.

It is paramount that the court's discretion on mandatory ADR orders be exercised accurately in order to effectively enhance access to justice through proportionate costs. To illustrate the nuanced nature of the comparison of litigation and ADR, it is beneficial to refer to decision analysis, a common tool used by lawyers to identify a range of possible litigation outcomes on the basis of key factors and estimated probabilities.<sup>59</sup> Drawing from this method, Keet et al. formulated a litigation interest and risk assessment framework to guide lawyers

in making a systematic analysis of the risk of litigation. It comprises the following two stages (see Table 1).<sup>60</sup>

The same framework can be readily applied to assess the interest in and risk of attempting ADR. As illustrated in Table 2, the net expected values of ADR and litigation may be juxtaposed to ascertain which is the more cost-effective dispute resolution option from the disputant's perspective.

The aforementioned decision analysis framework underscores several salient principles underlying the analysis of ADR and litigation's relative cost-effectiveness. First, each factor cannot be considered in isolation in relation to ADR without giving regard to the equivalent factor in litigation. It would, for instance, be erroneous to give substantial weight to the cost of ADR alone without considering how these costs compare with the likely litigation costs. Such an approach fails to appraise ADR using litigation as a reference point. Second, the multiple factors interact with one another such that it is rare for one factor to be determinative. As such, when estimating the cost-effectiveness of litigation, the court cannot ascribe undue weight to probability of success at trial alone without also considering the legal costs and intangible costs (such as monetary value of lost time). In the same vein, it is not holistic to focus on the cost of ADR without also considering the likelihood of a successful outcome with ADR. Third, the accuracy of the overall analysis hinges on the parties' and the court's accurate estimation of each factor. It has been shown that many lawyers and parties make decision errors in estimating the likelihood of success at trial.<sup>61</sup> The error rates in some studies were as high as 65% for plaintiffs and 29% for defendants. These errors stem from common cognitive biases that plague the parties, including optimism bias, self-serving bias, confirmation bias and

56 *Halsey*, above n. 41.

57 [2014] EWHC 3148 (TCC); [2015] 3 All ER 782, at [72].

58 *Swain Mason Mills v. Reeves (A Firm)* [2012] EWCA Civ 498 [2012] STC 1760; *Reed Executive Plc v. Reed Business Information Ltd* [2004] EWCA Civ 887; [2004] 1 WLR 3026.

59 J. Lande, *Lawyering with Planned Early Negotiation* (2015), at 28.

60 M. Keet, H. Heavin and J. Lande, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions* (2020), at 1531-1800.

61 R.L. Kiser, M.A. Asher and B.B. McShane, 'Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations', 5(3) *Journal of Empirical Legal Studies* 551, 556 (2008); Keet et al., above n. 60, at 431.

Table 2 Litigation Interest and Risk Assessment Framework Applied to Assess Benefit of Attempting ADR

| ADR                                                                                              | Litigation                                                                 |
|--------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------|
| <b>Stage 1: Determine the Expected Value of ADR Outcome</b>                                      | <b>Stage 1: Determine the Expected Value of Court Outcome</b>              |
| (1) Estimate probability of obtaining desired settlement sum with ADR                            | (1) Estimate risks or probability regarding liability with trial           |
| (2) Estimate settlement sum                                                                      | (2) Estimate damages                                                       |
| (3) Multiple (1) by (2) to obtain expected value of ADR outcome                                  | (3) Multiple (1) by (2) to obtain expected value of court outcome          |
| <b>Stage 2: Calculate the Net Expected Value of ADR Outcome</b>                                  | <b>Stage 2: Calculate the Net Expected Value of Court Outcome</b>          |
| (4) Estimate value of tangible and intangible costs of proceeding to ADR                         | (4) Estimate value of tangible and intangible costs of proceeding to trial |
| (5) Deduct (4) from (3) to obtain net expected value of ADR outcome                              | (5) Deduct (4) from (3) to obtain net expected value of court outcome      |
| <b>Compare net expected values to determine whether ADR or litigation is more cost effective</b> |                                                                            |

focus on sunk costs. The chances of arriving at flawed analyses of the cost-effectiveness of ADR vis-à-vis litigation are, thus, very high.

#### 4.2 Potential Pitfalls in Comparing the Use of ADR and Litigation

It is evident that the *Halsey* factors are readily mapped to the variables in the aforementioned framework. Drawing from the aforementioned three principles, there are multiple ways in which the courts may weigh the *Halsey* factors inaccurately when deciding whether to order the use of ADR. One such error could occur in the consideration of the costs and time of ADR, which the courts have noted should not be disproportionate or prejudicial to the parties. The Civil Justice Council suggested that the form of ADR ordered should preferably be free or offered at a low cost. However, if the costs and time of ADR are compared with the resources to be spent at litigation, ADR need not necessarily be free in order to justify a mandatory ADR order; ADR costs merely need to be lower than the costs and time occasioned by a trial. Alluding to this argument, the UK Civil Mediation Council pointed out that the suggestion that compulsory mediation ought to be free or low cost could prove to be a false economy as it failed to take into account the consequent savings in time and costs to the individual.<sup>62</sup> As such, when ADR costs are being evaluated in terms of proportionality, the absolute value of ADR costs is not as significant as the value relative to litigation costs. Admittedly, the absolute costs of ADR should not be disproportionately higher than the value of the disputed claim. However, that is a distinct issue from the proportionality of ADR costs with reference to litigation, which is the primary remit of the court's analysis when deciding whether to mandate ADR.

Furthermore, the court may also neglect the interaction of multiple factors and, consequently, give undue weight to a few factors in its analysis. Notably, there may be excessive significance placed on a party's reasonable be-

lief in the merits of the case. Lord Justice Dyson's view that a reasonable belief in a watertight case may constitute sufficient justification to refuse mediation seemed to excessively elevate this factor over others.<sup>63</sup> Subsequent decisions have relied heavily on Lord Justice Dyson's statement, resulting in the diminution of other equally important factors. Lord Justice Davis in *Swain Mason*, quoting Lord Justice Dyson, found that the principle had obvious resonance where the defendant's assessment of the strength of its case was largely vindicated by the trial outcome. At the same time, Lord Justice Davis disagreed with the trial judge's consideration of other factors: the likelihood of settlement at mediation, the benefit of mediation in understanding the weaknesses of the case and the collateral reputational damage to the defendant that could be avoided through a settlement. It is most plausible that these factors were diminished by the merits factor because the latter was assumed to be most determinative.<sup>64</sup>

A more holistic assessment of the interaction of multiple factors has been done in recent UK High Court decisions. In *DSN v. Blackpool Football Club Ltd*, the claimant was successful in the sexual assault claim and sought an indemnity costs order on the basis of the defendant's refusal to engage in ADR. Addressing the defendant's belief in its strong defence, Justice Griffith stated that no defence, however strong, justified a failure to engage in ADR. Justice Griffith considered other factors, including the significant financial costs and expenditure of time at a trial, in comparison with the possibility of reaching flexible, timely and ingenious solutions through mediation that satisfied all parties.<sup>65</sup> The High Court in *Richard Wales v. CBRE Managed Services Ltd* adopted a similar approach. The unsuccessful claimant argued that he should not pay the first defendant's costs because it had rejected his invitations to attempt mediation before and during the legal proceedings. When assessing the merits

62 Civil Justice Council, above n. 42, at 7.

63 *Halsey*, above n. 41.

64 *Swain Mason*, above n. 58.

65 [2020] EWHC 670 (QB), at [28]-[30].



factor, Justice Halliwell noted that *Halsey's* emphasis on this factor was motivated by the danger of public bodies being vulnerable to pressure from claimants with weak cases and sought to use mediation as a tactical ploy. Having found no such tactical ploy in the circumstances, Justice Halliwell considered the opportunity provided by mediation to address wider considerations not justiciable by the courts, the reasonable prospect of success of mediation given the historic relationship between the parties and the nature of the issues in the litigation and the costs of mediation not being disproportionately high in relation to the sums at stake in the litigation.<sup>66</sup> The court, therefore, disallowed 20% of the first defendant's costs. These recent cases are a more positive reflection of a cost-benefit analysis that considers the interaction of multiple factors.

Finally, the threshold question of whether ADR is cost effective assumes greater complexity because the courts have to make this assessment *before* instead of after the trial. When deciding whether a party has unreasonably refused to attempt ADR, the court is able to consider the eventual litigation outcome to determine whether the party had a reasonable belief in the merits of its claim or defence. However, in deciding whether to make a mandatory ADR order, the court has to prospectively appraise the party's assessment of the merits. As suggested earlier, the influence of multiple cognitive biases readily results in inaccurate appraisal of the prospects of success by litigants and lawyers. It is, therefore, likely that the court would have to carefully review the parties' views on the merits to determine whether they are reasonable. Nevertheless, the court's preliminary assessment of the merits at an early stage of the proceedings cannot realistically be a precise evaluation. Because of the inherent uncertainty in making a prospective assessment of the success at trial, the merits factor could arguably play a less influential role in the court's decision to mandate ADR.

In summary, ADR's role has expanded considerably through the UK and Singapore courts' power to make compulsory ADR orders, supplementing their existing practice of imposing adverse costs orders to take into account unreasonable refusals to attempt ADR. This has brought greater complexity to courts' assessment of the cost-effectiveness of ADR. Both the parties and the courts have to engage in detailed risk analyses to determine whether any refusal to attempt ADR or order to use ADR is justified. The expanded role of ADR in the civil justice system will have a positive impact on access to justice only when the court engages in a holistic and accurate assessment of the relevant factors with an accurate comparison of the respective implications of ADR and litigation. As evident from the potential pitfalls discussed, it is exceedingly challenging to attain such accuracy.

### 4.3 Civil Justice Reforms in Singapore: The Complexity of Comparing the Cost-Effectiveness of ADR and Litigation

Singapore implemented extensive changes to its civil justice regime that took effect on 1 April 2022. The Civil Justice Commission was tasked by the Chief Justice in 2015 to consider ways to transform the litigation process by enhancing the efficiency and speed of adjudication, maintaining costs at reasonable levels, simplifying rules, eliminating cost-wasting procedural steps and allowing greater judicial control of the litigation process.<sup>67</sup> Another committee was concurrently set up by the Ministry of Law to also make recommendations on enhancing judicial control over litigation.<sup>68</sup> Collectively, both groups have proposed the streamlining of the litigation process by empowering the court to limit the number of interlocutory applications and order the filing of a single application as far as possible. They also recommended narrowing the scope of the default discovery process to oblige the parties to produce documents that support their respective cases and known adverse documents in their possession or control. Furthermore, the court may order the filing and exchange of affidavits of evidence-in-chief before or simultaneously with discovery, in order to shift the focus of witness evidence to the earlier case put forward in the pleadings. As briefly explained, ADR's role has also been expanded through the imposition of a duty to consider amicable resolution of the dispute, the more robust use of cost sanctions to take into account unreasonable refusals to consider ADR and the empowerment of the courts to order parties to participate in ADR.<sup>69</sup> These proposals were effected in legislation taking effect from 1 April 2022.<sup>70</sup> Will the use of ADR be readily deemed as cost effective in this future civil justice system? Paradoxically, ADR will not evidently be the least costly choice in this radically transformed justice process. In a conventional litigation process, the costs and time involved in mediation are usually lower than the costs and time occasioned by litigation; ADR has, thus, emerged as a natural alternative to court adjudication in many countries. However, a streamlined litigation process with a shorter discovery process, limited interlocutory applications and greater judicial control is likely to substantially reduce the time for court adjudication. Once the litigation process is more efficient, there is less incentive to reap time savings by attempting ADR. Moreover the cost-effectiveness of using ADR instead of litigation may also not be evident because the modified litigation process could front-load discovery and other legal work. As such, several members of the Singapore Bar pointed out that the front loading of legal costs, caused by the exchange of witnesses' AEICS before discovery, would have an adverse impact on the likelihood of parties reaching an

66 [2020] EWHC 1050 (Comm), at 27-32.

67 Civil Justice Commission Report (29 December 2017).

68 Report of the Civil Justice Review Committee (2017). [https://www.mlaw.gov.sg/files/Annex\\_B\\_CJRC\\_Report.pdf](https://www.mlaw.gov.sg/files/Annex_B_CJRC_Report.pdf)

69 Ministry of Law, above n. 3, at 5-6.

70 Courts (Civil and Criminal Justice) Reform Bill s 71; Rules of Court 2021 (S 914/2021), Order 5 rule 3.

amicable settlement.<sup>71</sup> Indeed, the potential for mediation to save substantial costs is great where a large proportion of legal costs has yet to be spent in preparation for a trial. Conversely, the incentive to attempt ADR in order to save legal costs is considerably reduced where most of the trial preparation work has been done at an early stage of the proceedings. Hence, ADR becomes less of a desirable alternative to litigation when the litigation process is substantially shortened and the legal work brought forward to the early stage of proceedings. Where the time and cost differences across mediation and litigation are minimal, the court may then have to ascribe greater weight to other *Halsey* factors to decide whether mediation is the most cost-effective option. For instance, the likelihood of resolution at ADR may assume greater importance because a low settlement probability will result in additional costs and time spent without the parties' reaping future savings. In this regard, compulsion to attempt mediation potentially impacts the probability of a successful settlement. The concept of mandatory mediation has attracted criticism from mediation practitioners, who have highlighted the danger of the court's coercion into mediation being translated into coercion within mediation.<sup>72</sup> Litigants may be advised by their lawyers to go through the motion of mediation in order to avoid the possibility of adverse costs orders and to move on to litigation. The coercive nature of an order to mediate could, thus, diminish the highly consensual nature of the mediation process within the parties' perception, leading to their reluctant and suboptimal participation in the mediation.<sup>73</sup> Admittedly, there have been mixed views and studies on whether the lack of voluntary participation in mediation affects the likelihood of resolution, for instance, the Civil Justice Council noted that a surprisingly large number of litigants are drawn into the mediation and become engaged in it.<sup>74</sup> Nevertheless, it is prudent for the courts to take into consideration any particularly strong objections any party has against mediation.

Alternatively, where there are negligible cost differences between mediation and litigation, the intangible benefits and costs of ADR and litigation will have to be carefully weighed to discern whether ADR could offer valuable benefits such as creative solutions. In short, mandatory ADR orders have to be made with circumspection when the litigation process is simplified with reduced costs. The greater use of ADR will not necessarily result in greater access to justice for the litigant. Singapore's civil justice reforms, thus, aptly illustrate the

complexity of undertaking sound risk analyses of ADR and litigation, taking into account all the circumstances.

#### 4.4 Proportionality of Costs for the Overall Justice System

The preceding sections have discussed the proportionality of costs from the individual litigant's perspective. However, the overarching question of proportionality is much wider than the party's resources, with both the UK and Singapore courts acknowledging the need to ensure scarce public resources are allocated appropriately to ensure availability of resources for other litigants.<sup>75</sup>

When public resources, apart from individual resources, are considered in counting the cost of mandatory ADR, the overall cost-benefit calculus is rendered more ambivalent. The use of ADR may save costs and time for the parties, but may not be cost efficient for the courts or the state. Proportionality of costs for the individual does not invariably result in overall proportionality of costs, and a choice has to be made in the event of a conflict. Consider, for instance, the management of low-value civil claims. The Singapore State Courts, which have jurisdiction over claims below S\$250,000, provide ADR services through their centre for dispute resolution staffed by full-time district judges and staff. Parties with civil suits are able to participate in mediation or early neutral evaluation at no cost or a nominal fee. These ADR sessions are scheduled as half-day sessions.<sup>76</sup> In the event that parties are ordered to attempt ADR, they clearly reap substantial cost savings from the potentially shorter resolution time at ADR than a trial, lower legal costs due to the shortened duration of legal work and not having to pay court fees for a trial. From the court's standpoint, the short-term savings may be of a lower extent as the cost of ADR through judge mediators is funded by the judiciary; the savings are reaped primarily from the shorter time spent by the courts to resolve the matter. However, long-term benefits may be reaped through the appropriate referral of resource-intensive claims to ADR, thus freeing judicial resources to adjudicate other claims.<sup>77</sup> Proportionality of costs from the courts' standpoint may, therefore, vary from proportionality from the party's perspective.

When the court assesses the relevant factors concerning a mandatory ADR order, there could conceivably be a tension between the parties' cost concerns and the cost concerns of the overall justice system. A disputant could form a reasonable view that their desired outcome, such as a public decision, may be achieved through a trial instead of ADR. While legal costs may ostensibly be saved through attempting ADR, this disputant will rate the overall cost-effectiveness of ADR poorly because of its

71 Ministry of Law, above n. 52, at 22.

72 See for instance T. Hedeem, 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some are More Voluntary than Others', 26 *Justice Systems Journal* 273, 278 (2005); F.E. A. Sander, H. William Allen & D. Hensler, 'Judicial (Mis)use of ADR? A Debate', 27 *University of Toledo Law Review* 885, 886 (1996); D. Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' 11 *Cardozo Journal of Conflict Resolution* 485-86, at 479 (2010).

73 Quek, above n. 72, at 508.

74 Civil Justice Council, above n. 42, at 37.

75 Section II.

76 Thian Yee Sze and Low Lih Jeng, 'An Overview of the Court Dispute Resolution Process and Judicial Mediation in the State Courts', in D. McFadden and G. Lim (eds.), *Mediation in Singapore: A Practical Guide* 2021) 219, 229-34; State Courts, *An Overview of Mediation* <https://www.judiciary.gov.sg/alternatives-to-trial/mediation/going-for-mediation-state-courts> (last visited 22 June 2022).

77 Section II.

constraint in achieving their desired outcome. By contrast, it will seem proportionate from the judiciary's perspective for the claim to be referred to ADR, particularly if the trial will take substantial time and involve complex issues. This will be an even more compelling factor where there are acute constraints in judicial resources.<sup>78</sup> A third perspective may be added – that of the society. The UK Civil Justice Council reasoned in this regard that ADR 'should reduce the ultimate burden in terms of cost and time imposed by disputes on individuals, businesses and the community'.<sup>79</sup> The society's viewpoint would be aligned with the courts' perspective, as it is desirable for costs to be saved for the broader community. As such, it matters whose perspective – that of the community and the court or that of the individual party – is adopted when considering the proportionality of costs for the purpose of determining whether to mandate the use of ADR. The pertinent question arising from such circumstances is whether the court's perspective of proportionate costs should generally prevail. If so, it would effectively imply that the judiciary is ascribing greater significance to its resource constraints than the party's primary concerns underlying the pursuit or defending of their claim. This stance would not be objectionable if cost-effectiveness of the overall justice system is the overarching factor in deciding whether ADR should be attempted. However, should proportionality of costs always be the overriding consideration? The next section discusses other factors that are also vital to the concept of access to justice.

## 5 Counting the Costs in More Intangible Ways

Section II earlier argued that ADR has been promoted in many legal systems not merely because of its instrumental value in alleviating prohibitive costs and time but also for its inherent value in many other aspects. The extent of intangible benefits derived from ADR is substantially influenced by the system's legal tradition and culture. The role played by ADR in advancing access to justice is particularly multifaceted within the Singapore civil justice regime. Apart from cost-effectiveness, the judiciary has promoted ADR because of its value in creating a broader justice system with diverse modes of dispute resolution, adding a consensual dimension to the quality of justice and tailoring the appropriate process to suit the parties' needs.<sup>80</sup> It will be argued next that the court's future decisions on mandating ADR must also take these aspects into account, in addition to efficiency factors. A neglect of these factors will risk a failure of the civil justice regime to properly use ADR to further the multiple dimensions of access to justice.

## 5.1 The Other Dimensions of Access to Justice: Appropriate Dispute Resolution and Transforming the Quality of Justice

Despite ADR's multidimensional relationship with access to civil justice within Singapore, the recently recommended reforms for ADR have not referred to its multiple purposes. This is largely due to the overarching focus of the two reform committees on cost-effectiveness. For instance, the Singapore Civil Justice Commission was tasked to recommend reforms that enhance efficiency and maintain costs at reasonable levels.<sup>81</sup> Notably, four out of five ideals in the draft procedural rules – fair access to justice, cost-effective and proportionate work, expeditious proceedings and efficient use of resources – cumulatively stress efficiency concerns.<sup>82</sup> Nevertheless, a close reading of the proposals and related speeches reveals brief references to other goals of civil justice. The ideals in the amended procedural rules include achieving 'fair and practical results suited to the needs of the parties'.<sup>83</sup> This goal alludes to the concept of appropriate dispute resolution. One reform committee also identified appropriate dispute resolution as a reason for the proposed empowerment of the courts to order the use of ADR.<sup>84</sup> Elaborating on this aim, a member of the Civil Justice Commission stated that this provides assurance of the process addressing the litigant's needs and providing a fair result.<sup>85</sup>

Notwithstanding the great emphasis on proportionality and cost-effectiveness of the overall reforms, it is submitted that the court's future decision on mandating ADR should be applied consonant with the goal of appropriate dispute resolution. As underscored by Chief Justice Menon, access to justice should entail a user-centric focus on the disputant's needs, rights and interests. He also highlighted how the legal system was meant to deliver justice that was customised to the features of each case and most appropriate to the parties' needs.<sup>86</sup> To fulfil this goal of access to justice, the court is obliged to match perceived needs with the most appropriate dispute resolution process. Although ADR may generally be encouraged as a first resort due to the cost savings it brings, it should not be the automatic option ordered by the court, without giving regard to the contours of the dispute.

78 Civil Justice Council, above n. 42, at 38.

79 *Ibid.*, at 41.

80 See Section II.

81 Ministry of Law, n. 3, at 3.

82 Ministry of Law, n. 3, Annex D Draft Rules of Court, Ch 1 r 3 3(2).

83 *Ibid.*, Ch 1 r 3(2)(e).

84 Civil Justice Review Committee, above n. 68, at 27-8.

85 J. Pinsler, 'The Ideals in the Proposed Rules of Court', 31 *Singapore Academy of Law Journal* 987, 1001 (2019).

86 CJ Menon, above n. 27 and n. 28.



Significantly, the notion of appropriate dispute resolution is closely related to the vision of creating a broad justice system with a diverse suite of dispute resolution modes. These concepts were prominent in the ‘multi-door courthouse’ metaphor coined by Frank Sander in the 1990s that precipitated the early growth of court-connected ADR. As Sander put it, the forum has to be fitted to the fuss.<sup>87</sup> The availability of ADR in the courts is ultimately meant to serve the needs of the parties and the unique features of each dispute. The disputants’ needs may well include areas other than cost concerns. Cost concerns should, therefore, not be the sole consideration when deciding whether ADR should be ordered. Notably, the Ministry of Law has acknowledged that the duty to consider ADR does not ignore the fact that there may be reasonable grounds in some situations not to use ADR.<sup>88</sup> It has also explained that the courts would take into account all the facts, including why the parties did not use ADR earlier, before deciding whether to order the use of ADR. Hence, costs and efficiency concerns should be considered in tandem with other needs of the disputants, as part of the overarching goal of referring parties to the most appropriate dispute resolution option. As argued earlier, this approach may at times require the court to consider whether the justice system’s cost concerns or the parties’ needs in the particular dispute should take precedence in deciding whether to order the use of ADR. This likely tension has to be acknowledged, and a considered decision made on where the balance should lie.

Another significant aspect of ADR’s contribution to access to justice is its focus on consensual, instead of adversarial, resolution of disputes. This idea has been summed up in the term ‘peacebuilding’ and was also integral to the early introduction of mediation to the Singapore judiciary. The minister of law, when explaining the legislative amendment to empower the courts to mandate ADR, also highlighted that the long-standing assumption that dispute resolution must be adversarial should be replaced by the understanding that justice is about the maintenance of peace and the promotion of conciliation between parties. Significantly, the amendment has been explicitly connected with the goal of hastening a mindset shift of achieving justice ‘by focusing on the common interests of the litigants and reaching common ground through mutual agreement’.<sup>89</sup> The enlarged role of ADR is, therefore, inextricably connected with the goal of transforming the quality and nature of justice. It, thus, follows that the court should consider this implicit benefit of ADR when deciding whether to mandate the use of ADR. ADR will be most suitable in

situations where parties have not explored negotiation and where it is important to preserve the parties’ relationship.

## 5.2 Counting the Cost of ADR Using Important Dimensions of Access to Justice

There are profound implications of these ADR dimensions on the issue of counting the cost of expanding ADR in the justice system. First, an excessive association of ADR with cost savings alone potentially diminishes the significance of other dimensions of access to justice. The courts’ exercise of their power to make cost sanctions because of a refusal to attempt ADR or to order participation in ADR could be conceivably justified primarily in terms of efficiency reasons. Furthermore, the courts, when determining the suitability of ADR, have probably focused on cost-effectiveness because it is an objective factor that can be more accurately ascertained than intangible considerations. When assessing factors such as the appropriateness of the dispute for mediation, the courts have to consider the parties’ subjective views. The weight to be ascribed to these factors will also be highly uncertain. Notwithstanding the pragmatic utility of the cost-effectiveness factor, there needs to be a nexus between the factors considered and the dimensions of access to justice that ADR is intended to advance in the relevant jurisdiction. An overemphasis on efficiency and a resulting neglect of other attributes of ADR could severely undermine the overall value of ADR in advancing access to justice. It is for this reason that the concept of mandatory mediation has attracted criticism from mediation practitioners, who have highlighted the danger of mandatory mediation orders diminishing the consensual nature of the mediation process.<sup>90</sup> Put another way, the parties could misconstrue the court’s order as motivated principally by public needs rather than their individual needs. The average court user’s overall understanding of ADR could, thus, be associated more with compulsion and efficiency needs than with the potential of mediation to enhance party autonomy and meet deeper individual needs. ADR would predominantly be perceived as a court diversion tool. The intangible cost of enlarging ADR’s role primarily on the basis of efficiency concerns should, therefore, not be underestimated as it will severely diminish ADR’s peacebuilding aspect, particularly where the jurisdiction purports to promote ADR because of its financial and wider benefits.

Second, the successful expansion of ADR within the justice system must be complemented by measures to ensure the consistent and high quality of ADR. If ADR is promoted because of its consensual nature and its ability to meet individual needs, a court order to attempt ADR would have to direct parties to ADR services that would fulfil these qualities. It will be remiss for parties to be diverted from the adjudication process and to then receive no guidance on the choice of ADR or to be referred to an ADR process with no assurance of quality.

87 Frank E.A. Sander, *Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing* (7-9 April 1976), 70 F.R.D. 79, 111-16 (1976).

88 Ministry of Law, above n. 52, para. 31.

89 Second Minister for Law Mr Edwin Tong, *Second Reading Speech on the Courts (Civil and Criminal Justice) Reform Bill* (13 September 2021), at 29-32. [www.mlaw.gov.sg/news/parliamentary-speeches/2021-09-13-second-reading-speech-by-2m-edwin-tong-on-courts-civil-and-criminal-justice-reform-bill](http://www.mlaw.gov.sg/news/parliamentary-speeches/2021-09-13-second-reading-speech-by-2m-edwin-tong-on-courts-civil-and-criminal-justice-reform-bill) (last visited 6 October 2021).

90 See references above n. 72.

The UK Civil Justice Commission, therefore, highlighted the need for the courts and the parties to have sufficient confidence in the ADR provider. It noted that this could be implemented through court rosters of approved mediators or the provision of court-sponsored ADR neutrals. It further stressed the importance of systematic regulation of the mediation industry if mediation were to be made compulsory.<sup>91</sup> In sum, ADR's multifaceted role in enhancing access to justice is not fulfilled merely through procedural means such as cost sanctions but has to be supplemented by concurrent efforts to ensure consistent quality of ADR; otherwise, cost concerns may be met, but not the other essential aspects of ADR's connection with access to justice. The cost of civil justice must be counted not only in financial terms but also in other intangible ways, including the quality of dispute resolution.

## 6 Conclusion: Adopting a Holistic Approach in Counting the Cost of Enlarging ADR

ADR has grown in prominence as a counterpoint to the traditional litigation process due to procedural obstacles to access to justice, such as time and cost constraints. However, its role in enhancing access to justice has expanded from ameliorating procedural obstacles to creating a broader justice system, bringing in a consensual element to the quality of justice and being one of the options that could be appropriate for the disputants' needs. It has been argued that a court's analysis in deciding whether to order the use of ADR is a highly complex one. When considering cost-effectiveness alone, it has to consider an array of factors, including the chances of success at ADR and at litigation, and both tangible and intangible costs of each option. Moreover, it is critical to have clarity on whose perspective is primary in evaluating cost-effectiveness. There could conceivably be a tension between the parties' cost concerns and the cost concerns of the overall justice system that has to be resolved. A risk analysis framework is instructive in elucidating the proper interaction of multiple factors and the potential pitfalls in the court's analysis of the relevant variables. Some of these errors have arguably been made in *Halsey* deciding on disputants' reasonableness in rejecting the use of ADR. Furthermore, mistakes could be exacerbated by cognitive biases that readily affect litigants embroiled in disputes and potentially the courts. In addition, the more intangible aspects of ADR are susceptible to being neglected when cost and efficiency concerns are emphasised in the civil justice system. The courts' power to order the use of ADR could then be motivated principally by proportionality considerations, to

the detriment of the other significant aspects of ADR's contribution to access to justice, such as appropriate dispute resolution.

In light of the complexity in expanding the use of ADR in the courts, how could ADR be appropriately utilised in the future civil justice system? First and foremost, the exact role played by ADR within the civil justice system has to be clearly defined and even reconceptualised. As elaborated in Section II, ADR, within many jurisdictions, has evolved from being a mere alternative to litigation to playing a complementary role to adjudicatory processes. Both facilitative and adjudicatory processes could be characterised as co-equal options within civil justice. A continuing conceptualisation of ADR as an alternative process presumes that court litigation is the primary route to attain justice. Procedural rules to encourage the use of mediation will then be perceived by court users as efforts to divert cases to an external process that is inferior to adjudication. In such circumstances, mandatory ADR orders could reinforce the perception that the courts are, as Professor Genn put it, 'indiscriminately driving cases away' to preserve resources for more important cases that are to be adjudicated. ADR will then be relegated to playing an instrumental role in advancing civil justice through saving costs. However, as Master of Rolls Sir Geoffrey Vos aptly suggested, the 'alternative' aspect has to be taken out of ADR so that ADR is part and parcel of an integrated dispute resolution system helping parties achieve the best solution.<sup>92</sup> A civil justice system premised on the co-equal role of ADR is likely to manifest this vision in ways going beyond procedural mechanisms encouraging the use of ADR. ADR programmes will probably be integrated into the courts through court-supervised lists of mediators or ADR programmes administered by court staff. This conveys to litigants that ADR services play a critical role in advancing justice, instead of being a poor substitute to adjudication. Retired US magistrate Wayne Brazil rightly stated in this regard that 'the closer and more visible the connection between the court and its ADR programme, the clearer the court's signal that it identifies with that program – and endorses its value and quality'.<sup>93</sup> The court's commitment to administering and monitoring the quality of ADR will, thus, effectively attest to the benefits of ADR beyond saving of court and litigant resources. Mandatory ADR orders will also be less likely misconstrued as being motivated merely by efficiency concerns. In sum, counting the cost of expanding ADR has to start with articulating a clear vision of ADR's multidimensional role in advancing civil justice and introducing judicial policies that consistently evince a conviction in ADR's co-equal role with litigation.

While ADR's role has been greatly shaped by legal developments, the impact of culture in reconceptualising

<sup>91</sup> Civil Justice Council, above n. 42, at 42.

<sup>92</sup> The Rt Hon Sir Geoffrey Vos, above n. 16.

<sup>93</sup> W.D. Brazil, 'Comparing Structures for the Delivery of ADR Services: Critical Values and Concerns' 14 *Ohio State Journal on Dispute Resolution* 715, at 750 and 753 (1999).

ADR's place within the broader justice system and the wider society should not be ignored. As evident from the earlier discussion of ADR's development in the United Kingdom and Singapore, ADR's cultural aspects could influence its characterisation within the judiciary. In the early years of Singapore's mediation movement, the judiciary highlighted that mediation was being introduced to revive the Asian practice of resolving disputes in a conciliatory manner.<sup>94</sup> Notably, ADR's non-confrontational aspect was subsequently reiterated by the current chief justice by emphasising its role in peacebuilding. When introducing the most recent legislative amendments to empower the court to order the use of ADR, the minister of law concurred with the chief justice on the need to challenge the long-standing assumption that disputes are inherently confrontational and, hence, solutions must be adversarial in nature. He pointed out that justice 'must also be about the maintenance of peace and the promotion of compromise, conciliation, and closure between parties'.<sup>95</sup> Master of Rolls Sir Geoffrey Vos similarly alluded to ADR's wider societal functions when he spoke about integrating ADR into the overall dispute resolution system. Evidently, extralegal factors, including culture, permeate society's perception of ADR in advancing justice. Singapore's judiciary drew upon the Asian conciliatory approach towards managing conflicts to shape the ADR narrative within the justice system. Since the judicial system is situated within the wider society, the courts' desired vision of ADR could greatly benefit by drawing upon societal influences that are consonant with access to justice goals. Once there is clarity about ADR's role within civil justice, it is also necessary that the courts' decision analysis framework underlying mandatory ADR orders corresponds with the role envisaged for ADR. For instance, if ADR has been promoted because of user-centric benefits, such as helping to achieve the parties' desired goals, the court should properly evaluate whether ADR would indeed meet or detract from the parties' concerns. The court's decision could be informed by clear guidelines on the benefits and suitability of ADR in comparison with litigation. While this approach will be more nuanced than a consideration of cost-effectiveness alone, it will also ensure congruence between mandatory ADR orders and the justice system's goals in using ADR to advance justice. It will ensure that the courts do not indiscriminately order ADR as a matter of course, but holistically consider the needs of the disputants and the broader society. Such a stance will avoid an excessive association of ADR with cost savings, which may then diminish the other significant dimensions of access to justice. The judicious reliance on mandatory orders should also be complemented by measures to ensure the consistent and high quality of ADR. Cumulatively, these measures will contribute to the enlargement of ADR's role within the justice system, consonant with the multifaceted goals of access to justice.

94 See above Section II and n. 23.

95 Second Minister for Law Mr Edwin Tong, above n. 89, at para. 29-30.



# Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe

Adrian Cordina\*

## Abstract

Virtually all major jurisdictions worldwide, including those in Europe, have been facing constrained budgets in civil justice and increasing litigation volume, delays, complexity and costs in the last few decades. This makes it difficult, or impossible, for certain individuals and entities to pursue meritorious claims, be it individually or collectively, posing a significant challenge to access to justice. With third-party funding (TPF) of litigation frequently touted as a promising private funding solution to this problem, this article explores the question of how and why the proliferation of TPF has been viewed with a considerable degree of caution in Europe, and questions to what extent this caution is warranted. The scale of the civil justice crisis in Europe, the shift from public to private funding and the purported benefits of TPF are first briefly investigated. The article then proceeds to critically examine, including from a law-and-economics perspective, the main sources of concern leading to the scepticism shown towards TPF in Europe, which is still largely unregulated. These sources are the commodification of justice, conflicts of interest and funder capital inadequacy. Particular reference is made to the regulatory frameworks of the jurisdictions of England and Wales, the Netherlands and Germany in Europe, and at the European Union level, to the Representative Actions Directive. It concludes by restating the potential benefits and complexity of this industry and the importance of distinguishing and analysing the arguments most commonly raised against it in the literature, policy and jurisprudence.

**Keywords:** access to justice, third-party litigation fund, collective redress, Europe, conflicts of interest.

## 1 Introduction

Virtually all major jurisdictions worldwide, including those in Europe, have been facing cuts to public expenditure in civil justice and increasing litigation volume, delays, complexity and costs in the last few decades.<sup>1</sup> This makes it difficult, or impossible, for certain individ-

uals and entities to pursue meritorious and socially desirable claims, be it individually or collectively, posing a significant challenge to access to justice. Third-party funding (TPF) of litigation is frequently touted as a promising private funding solution to this problem.<sup>2</sup> TPF can be broadly defined as an arrangement whereby a third party, which has no other link to a dispute, provides the funding for some or all of a party's litigation costs in return for a share of the proceeds in case of success.<sup>3</sup> TPF is only one form of private or market-based funding of dispute resolution; other forms are contingency fees arrangements and legal expenses insurance.<sup>4</sup> TPF can be used for both individual claims and for collective redress, and the industry has been expanding at a rapid pace in the last few years in a number of jurisdictions around the world.<sup>5</sup> This is especially true in common law jurisdictions, including, for instance, Australia, the United States and England and Wales.<sup>6</sup> So far, the use of TPF has been limited in the European Union (EU). However, it is expected to be of growing importance in the provision of dispute resolution services in the coming years, with climate change and the recent COVID-19 pandemic potentially giving rise to a significant number of claims.<sup>7</sup>

X.E. Kramer and S. Kakiuchi, 'Austerity in Civil Procedure and the Role of Simplified Procedures', 8 *Erasmus Law Review* 139, at 139 (2015).

- 2 See, for example, for consumer collective redress, L.T. Visscher and M.G. Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions', 1 *Journal of Consumer Policy* 1–28, at 8 (2021). Collective redress refers generally to the obtaining of redress in cases of mass harm situations.
- 3 J. Saulnier, K. Müller & I. Koronhalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', *European Parliament Research Service* (March 2021), at 1.
- 4 *Ibid.*, at 45. Contingency fees refer to a payment agreement prior to the end of a judicial procedure, wherein the lawyer receives a share of the proceeds of the dispute if the client is successful and nothing if the client is unsuccessful. Legal expenses insurance, on the other hand, is insurance taken out in the form of the payment of a premium, either before a dispute starts to cover the insured's litigation costs (BTE) or, alternatively, after the dispute starts, to cover the insured's future litigation costs (ATE).
- 5 *Ibid.*, at 1.
- 6 England and Wales was the most popular European jurisdiction for collective redress actions in 2020, followed by the Netherlands. [www.litigationfutures.com/news/uk-leads-the-way-as-class-actions-surge-across-europe](http://www.litigationfutures.com/news/uk-leads-the-way-as-class-actions-surge-across-europe). England and Wales is also home to the largest TPF market, followed by the Netherlands and Germany. See Saulnier, Müller & Koronhalyova, above n. 3, at 8.
- 7 Saulnier, Müller & Koronhalyova, above n. 3.

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1 See generally amongst others; C. Hodges, S. Vogenauer & M. Tulibacka, *The Costs and Funding of Civil Litigation: A Comparative Perspective* (2010).

In practice, while private funding of litigation has been in place for a long time for a variety of reasons in specific circumstances, including, for instance, through donations, trade unions or consumer organisations, professional commercial TPF is today almost exclusively dedicated to high-value claims in Europe. These claims are where funders can higher returns from their investments. TPF is, therefore, commonly used in the collective redress frameworks by small and medium enterprises (SMEs) litigating against larger opposition and in international arbitration proceedings. Professional funders have nowadays started to diversify their investment portfolios to include smaller lawsuits,<sup>8</sup> and some have provided pro bono funding<sup>9</sup> while new funders are also crowdfunding litigation.<sup>10</sup> In Europe, unlike in the United States, consumer TPF, that is, funding to individual non-sophisticated litigants, most of whom have not engaged in litigation before, is not widespread.<sup>11</sup> Despite its potential to provide access to justice where otherwise not available, one can often discern a somewhat negative attitude towards TPF: that there is something ‘fishy, even distasteful’ about the practice.<sup>12</sup> It has indeed been heavily resisted in several jurisdictions throughout the years.<sup>13</sup> This article identifies the main objections that are commonly raised in relation to TPF in the literature, jurisprudence and policymaking, and generally analyses how they are currently dealt with in the European jurisdictions explored. TPF, especially in individual claims, is still largely unregulated if one excludes self-regulation, jurisprudence, the court’s discretion and professional ethical rules.<sup>14</sup> This article focuses on several European jurisdictions, but in particular on the ones where the TPF industry is most developed: England and Wales, the Netherlands and Germany. Out of these three, TPF seems to be most developed<sup>15</sup> and viewed most positively in England and Wales jurisdiction,<sup>16</sup> and while it is also well developed in the Netherlands and Germany, one can identify a sometimes suspi-

cious attitude towards it in Germany.<sup>17</sup> This attitude is also evident at the EU level<sup>18</sup> in the recent EU Representative Actions Directive for consumers (RAD),<sup>19</sup> where TPF is allowed, under strict conditions, in collective redress actions.<sup>20</sup> By severely restricting TPF, this attitude is implicit in the RAD.<sup>21</sup> It is also undisguised in the recent European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (Draft Report).<sup>22</sup>

Following the Introduction, Section 2 briefly reviews the growth and benefits of TPF. The subsequent sections then illustrate, categorise and critically examine the main objections to the industry, which are the commodification of justice (Section 3.1), conflicts of interests (Section 3.2) and funder capital inadequacy (Section 3.3). These concerns are the ones most often encountered in the existing literature, jurisprudence and policy. This article critically examines this non-exhaustive list of objections, including from a law-and-economics perspective, which provides useful insights. It also briefly sketches how these have been dealt with so far in the selected jurisdictions, while focusing on both individual and collective litigation in Europe. The article then concludes with a few thoughts on the future development of this industry in Europe. It highlights anew the complexity of this industry and the importance of understanding it by distinguishing and putting the main concerns most commonly raised against it under a critical lens.

- 8 I.N. Tzankova and X.E. Kramer, ‘From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands’ in A. Uzelac and S. Voet (eds.), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (2021) 97.
- 9 For instance, England and Wales funder Therium has set up a pro bono scheme to tackle legal aid gaps. [www.ft.com/content/72a099a2-41b1-11e9-9bee-efab61506f44](http://www.ft.com/content/72a099a2-41b1-11e9-9bee-efab61506f44).
- 10 Saulnier, Müller & Koronthalova, above n. 3, at 8.
- 11 R. Avraham and A. Sebok, ‘An Empirical Investigation of Third Party Consumer Litigant Funding’, 104 *Cornell Law Review* 1133, at 1135 (2019).
- 12 W.B. Wendel, ‘Alternative Litigation Finance and Anti-commodification Norms’, 63(2) *DePaul Law Review* 655, at 656 (2014).
- 13 W. Van Boom, ‘Litigation Costs and Third-party Funding’, in W. Van Boom (ed.), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (2017) 5.
- 14 C. Hodges, J. Peysner & A. Nurse, ‘Litigation Funding: Status and Issues’, 55 *Oxford Legal Studies Research Paper*, at 151 (2012).
- 15 B. Zhang, ‘Third Party Funding for Dispute Resolution: A Comparative Study of England, Hong Kong, Singapore, the Netherlands and Mainland China’ (Doctoral theses on file at University of Groningen) (2019). <https://doi.org/10.33612/diss.102275228>, at 2.
- 16 Sir Rupert Jackson’s comprehensive Review of Civil Litigation Costs: Final Report 2009 recommended that there should be as many funding methods as possible available to litigants, which would promote access to justice, provided that they are suitably regulated. Available at [www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf).

- 17 A. Stadler, ‘Third Party Funding of Mass Litigation in Germany: Entrepreneurial Parties – Curse or Blessing?’ in L. Cadet, B. Hess & M.R. Isidro (eds.), *Privatizing Dispute Resolution* (2019) 209, at 209-231. See also A. Bruns, ‘Third-party Financing in the Perspective of German Law: Useful Instrument for the Improvement of the Civil Justice System or Speculative Immoral Investment?’ 8(3) *Journal of Law, Economics and Policy* (2012), 525 and I. Tillema, *Entrepreneurial Mass Litigation: Balancing the Building Blocks* (2019), at 53. The German government in 2013, in response to a Commission Recommendation on collective redress, expressed that no incentives should exist to profit from litigation.
- 18 Visscher and Faure, above n. 2, at 20.
- 19 Directive 2020/1828/EU of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1.
- 20 A. Biard and X.E. Kramer, ‘The EU Directive on Representative Actions for Consumers: A Milestone or Another Missed Opportunity?’ 27 *Zeitschrift Für Europäisches Privatrecht* 249, at 251-2 (2019).
- 21 Visscher and Faure, above n. 2, at 20-1. The RAD rejects American-style class (group) actions with market-based solutions for funding. See also C.I. Nagy, *Collective actions in Europe. A Comparative, Economic and Trans-systemic Analysis* (2019), at 59-60. Contemporary developments in Australia are very interesting to compare with those in Europe given the presence of the loser-pays rule and general prohibition of contingency fees in both. Recent federal government reviews of TPF in class actions in Australia have also very recently proposed increasingly stringent and aggressive regulation of TPF. See J. Geisker and D. Luff, ‘Australia’, in L. Latham (ed.), *The Law Reviews - The Third Party Litigation Funding Law Review, Fifth Edition* (2021) available at <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/australia#>>
- 22 European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation. See also <https://conflictoflaws.net/2021/the-time-is-ripe-proposed-regulation-of-third-party-litigation-funding-in-the-european-union/>> and <https://www.theparliamentmagazine.eu/news/article/protecting-eu-consumers>>

## 2 The Rise and Benefits of TPF

### 2.1 The Rise of the TPF Industry in Europe

The growing TPF industry marks a trend in litigation funding in the decades following World War II. The focus of litigation funding was primarily on public legal aid, but in more recent decades it has been shifting to private means. Amongst the reasons for this shift are the increasing cost of legal aid schemes and cuts in public expenditure in civil justice, and the increasing number, complexity and duration of cases, including mass claims and cross-border cases.<sup>23</sup> In the 1990s, it was widely accepted that civil justice systems across Europe were in crisis, with one of the main reasons being the high cost of litigation.<sup>24</sup>

Given the cuts in public legal aid, private funding becomes essential for certain individuals, large corporations and SMEs who choose not to incur or cannot afford the risks and costs of litigation. Without private funding, they would either increasingly resort to go to court unrepresented or lack access to justice altogether.<sup>25</sup> It was in recent years, especially after the 2009 financial crisis, that private professional third-party funders came to the fore.<sup>26</sup> This happened first in Australia, where TPF has been available since 1995. Here litigation funders emerged after insolvency practitioners started to be able to contract for the funding of lawsuits, if these are deemed as company property,<sup>27</sup> and a combination of the loser-pays rule and prohibition of contingency fees led to a fertile ground for the industry to develop.<sup>28</sup> This was followed by the rest of the common law world and continental Europe.<sup>29</sup> The industry in Europe, which has been growing at a steady rate, is estimated at around one billion Euro and is projected to keep growing rapidly.<sup>30</sup> The largest funders operating in the European Union are Burford Capital, Omni Bridgeway and Therium Capital Management.<sup>31</sup>

### 2.2 The Need for and Benefits of TPF

The lack of access to justice that results from a lack of funding can be viewed from a law-and-economics perspective. This perspective can provide useful additional insights explaining the need for a funding solution to the access to justice problem.

Firstly, TPF<sup>32</sup> enables access to justice (or compensation) and has a deterrent function. In engaging in activities, parties can create negative externalities, that is, the uncompensated indirect impact on the well-being of individuals other than those involved in the harmful activity in question.<sup>33</sup> They spill over on bystanders without them being internalised by the actors engaging in the harmful activities. Externalities constitute a market failure. In other words, the harmful actors do not incur the social cost of their activity. Externalities can be private if they affect one individual or public if they affect multiple individuals.<sup>34</sup> Lack of internalisation causes social costs if there is 'a too high activity level and a too low investment in care'<sup>35</sup> and the market failure will persist. In order for internalisation to occur, legal rights may be enforced publicly, which is common for criminal and tax offences, or privately, as happens in tort, contract and property disputes.<sup>36</sup> Unless externalities are internalised through private bargaining, government intervention or public enforcement, the victims have the option of starting legal proceedings and pursuing their claims through private enforcement.

The law-and-economics perspective is primarily concerned with incentivising desirable behaviour. From this perspective, the primary goal of obtaining damages is not to compensate the victims but to incentivise potential wrongdoers to engage in socially desirable behaviour in the future.<sup>37</sup> This model of deterrence entails that the expected costs of wrongdoing need to exceed, or at least equal, the benefits. The expected costs include the size of the penalty and the chances of detection and enforcement. By increasing the penalties and/or the probability of enforcement, the appeal of wrongdoing can be reduced. Bigger penalties can counterbalance under-enforcement by increasing the expected cost of wrongdoing. Private enforcement depends on individuals' incentives to detect and litigate harms at their own expense. When claims are not pursued because the costs of enforcing them outweigh the expected recovery, the civil justice system fails 'either to deter socially wasteful activity or to compensate for violations of rights'.<sup>38</sup>

This can happen because individuals might simply lack the funds to initiate proceedings. If they have the funds,

23 See generally R.D. Kelemen, *Eurolegalism – The Transformation of Law and Regulation in the European Union* (2011), at 63-71; Van Boom, above n. 13.

24 A. Zuckerman, *Civil Justice in Crisis* (1999).

25 A. Higgins, 'The Costs of Civil Justice and Who Pays?' 37 *Oxford Journal of Legal Studies* 687, at 687-8 (2017).

26 G. Solas, *Third Party Funding: Law, Economics and Policy* (2019), at 28-37.

27 M. Legg, L. Travers, E. Park & N. Turner, 'Litigation Funding in Australia', *UNSW Law Research Paper No. 2010-12*.

28 This combination is also present in Europe, which could lead to similar results. I. Samuel, 'Litigation Funding and the Problem of Agency Cost in Representative Actions' 63(2) *Depaul Law Review* 561 (2014) at 567-570.

29 Solas, above n. 26, at 38-122. See also generally Zhang, above n. 15.

30 The European Parliament Research Service finds that it is growing at an average of 8.8% per year in the next 5 years, and that globally, it provides higher return rates than other financial investment markets. See Saulnier, Müller & Koronithyova, above n. 3, at 3-7.

31 *Ibid.*, at 8.

32 And other forms of litigation funding in which the costs and risks of litigation are not borne by the claimant. For the purposes of this article only the claimant will be considered, and not defendants. Claimants are much more common recipients of TPF. See Saulnier, Müller & Koronithyova, above n. 3.

33 L.T. Visscher, 'Tort Damages', in M. Faure (ed.), *Tort Law and Economics, Encyclopaedia of Law and Economics*, Second Edition (2009) 153, at 153.

34 R.D. Cooter and T.S. Ulen, *Law and Economics*, Sixth Edition (2012), at 39.

35 M. Faure and L.T. Visscher, 'Mass Damages in the Netherlands: To Collect or Not to Collect, that Is the Question', in M. Faure, W. Schreuders & L.T. Visscher (eds.), *Don't Take It Seriously. Essays in Law and Economics in Honour of Roger Van den Bergh* (2018) 389, at 390.

36 W.M. Landes and R.A. Posner, 'The Private Enforcement of Law', 4(1) *The Journal of Legal Studies* 1, at 1 (1975).

37 Visscher and Faure, above n. 3, at 2.

38 I. Ramsay, 'Framework for Regulation of the Consumer Marketplace', 8(4) *Journal of Consumer Policy: Consumer Issues in Law, Economics and Behavioural Sciences* 353, at 356 (1985).



they could rationally decide not to start legal action as litigation is costly and risky. Lawyer costs, court fees, information costs and the time and hassle dedicated to the case need to be taken into consideration. There is also the chance that a claim can be unsuccessful and that the costs of the opposing party would need to be paid. The expected benefits of pursuing a claim could therefore be less than the expected costs.<sup>39</sup>

This very often happens in public externalities or mass harm situations, such as pollution. In such collective redress scenarios, one has dispersed losses and individuals often rationally decide not to sue due to rational apathy because of the usually limited amount of compensation involved in proportion to the costs and risks of litigation.<sup>40</sup> In these cases of dispersed losses, victims would also wait and check if other individuals start a legal procedure in order to freeride from the benefits of the result if the procedure is actually started. This fear of freeriding by others could inhibit any of them from starting private enforcement in the first place. Information asymmetry could also curtail the initiation of legal procedures. The victim, or the judge in a private individual lawsuit, might not be able to meet the high thresholds of information and evidence required to successfully pursue the claim. There is also the chance that victims are not even aware of the fact that they were victims and that they can pursue a claim. Collective actions, which blur the distinction between private and public enforcement, are seen as a solution to the problem of individual litigation failing to be started. However, even more than in individual litigation, given the widespread social cost involved, the question of funding of the collective action is crucial.<sup>41</sup> With collective actions, the 'collective matter is dealt with in one proceeding and individuals are relieved of (most of) the litigation costs.'<sup>42</sup>

TPF is generally viewed positively in the law-and-economics literature, as it is a market-based solution that remedies the above-mentioned market failure and enables access to justice by shifting the litigation costs and risks away from the victims onto the funder, in return for a share of the damages.<sup>43</sup>

If more disputes are resolved or adjudicated upon due to TPF, this internalises the negative externalities and produces deterrence on the behaviour of potential defendants generally.<sup>44</sup> These potential defendants would con-

sider the expected cost of harmful activities they engage in as they would expect a higher probability of a claim being successfully pursued against them. In other words, TPF can affect parties' behaviour *even before* a claim arises<sup>45</sup>; it increases the chance that if a party is harmed it will successfully litigate against the wrongdoer. This makes the amount of damages that the wrongdoer would expect to pay more closely aligned with the losses that would actually be incurred by the victim. TPF allows litigation to better operate as a private enforcement mechanism and causes parties to more fully consider the costs of their activities, be they in breaching contracts, in taking care against possible accidents and so on.<sup>46</sup>

In other words, the possibility of resorting to TPF makes the human right of access to justice available to those individuals and entities with meritorious claims not entitled to public legal aid, by providing them with access when they would otherwise not litigate due to the costs and risks involved. TPF is seen in economic theory as private actors bargaining over property rights in litigation in response to a market failure in access to justice. This market failure arose from the increasing cost and risk aversion corporations faced due to the interplay of increasing litigation volume, delays, complexity and costs.<sup>47</sup>

Secondly, funders are usually in a significantly more advantaged position than claimants who only pursue claims on isolated occasions, that is, one-shotter parties. Funders are repeat players in litigation; they have extensive experience and expertise in the field. Having a large investment portfolio in legal claims also means that they can diversify risk better. The chance of having some unsuccessful claims is offset by many more successful claims. Furthermore, having substantial financial resources means that they are less liquidity constrained than one-shotter parties.<sup>48</sup> TPF therefore equalises the litigation playing field. By providing the claimant with a reduction of the risk constraint, higher quality legal assistance and financial resources, it strengthens the bargaining power of the claimant who would otherwise usually be in a weaker bargaining position relative to the defendant. This can occur both in settlement negotiations and in adjudication, with the claimant being both more likely to settle closer to,<sup>49</sup> and to secure judgements for, the full value of the claims.<sup>50</sup>

39 These can be referred to as 'negative-expected value claims.' See T. Ulen, 'An Introduction to the Law and Economics of Class Action Litigation', 32 *European Journal of Law & Economics* 185-203 (2011).

40 This is the rational apathy problem. See J.D. Mot, M. Faure & L.T. Visscher, 'TPF and Its Alternatives an Economic Appraisal', in W. Van Boom (ed.), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (2017) 31, at 32.

41 Visscher and Faure, above n. 2, at 4.

42 M.G. Faure and F. Weber, 'Dispersed Losses in Tort Law – An Economic Analysis', 6(2) *Journal of European Tort Law* 163, at 163 (2015).

43 Contingency fees are also viewed positively in the law-and-economics literature and serve similar goals to TPF. Both of these forms of funding are better able to tackle agency problems than hourly fees. Contingency fees are generally not allowed in continental Europe. See Visscher and Faure, above n. 2, at 8-9.

44 S. Shavell, 'The Social Versus the Private Incentive to Bring Suit in a Costly Legal System', 11 *Journal of Legal Studies* 333 (1982), see also W.B.

Rubenstein, 'Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action', 74 *UMKC Law Review* 709 (2006).

45 S. Bedi and W.C. Marra, 'The Shadows of Litigation Finance', 74 *Vanderbilt Law Review* 588-613, at 591-605 (2021).

46 *Ibid.*, at 591-605.

47 Solas, above n. 26, at 130-2. A market failure arises when goods and services are not efficiently allocated to their highest valued use, due to, inter alia, negative externalities and regulatory barriers. See also M. Steinitz, 'Whose Claim is This Anyway – Third-Party Litigation Funding', 95 *Minnesota Law Review* 1268, at 1311, 1338 (2011).

48 See generally M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', 9 *Law & Society Review* 95 (1974).

49 J.T. Molot, 'Litigation Finance: A Market Solution to a Procedural Problem', 99 *Georgetown Law Journal* 65 (2011).

50 Bedi and Marra, above n. 45, at 588-613.

Thirdly, by enabling access to justice, TPF can increase adjudication, court decisions, precedent and the resolution of disputes generally, which can be characterised as a public good.<sup>51</sup> Public goods are non-rivalrous and non-excludable, in the sense that the use by one person does not diminish the opportunities for use by others and no one can be excluded from their use, without contributing to the costs. Public goods are another source of market failure, as they are underprovided by the private market,<sup>52</sup> and TPF can serve to mitigate this. One can therefore argue, at least theoretically, that TPF has great potential in alleviating the civil justice crisis Europe has been facing and to increase social welfare from an economic perspective. However, despite all the mentioned benefits, the TPF phenomenon has been met with opposition throughout history. The article now turns to outline and scrutinise the concerns raised against it. The three objections to be examined are the commodification of justice, conflicts of interest and funder capital inadequacy.

### 3 The Concerns Surrounding TPF in Europe

#### 3.1 The 'Commodification of Justice'

The first objection to be examined has been coined the 'commodification of justice'<sup>53</sup> and cannot be analysed without first briefly describing the history of the legal restrictions against TPF, and secondly, exploring the merits of using economic analysis of law with respect to the TPF phenomenon.

##### 3.1.1 A Brief History of the Legal Restrictions Against TPF

The argument against unduly commodifying justice emanates from the historical prohibitions or limitations of property rights in litigation. At national levels, the common law doctrines of maintenance and champerty, the prohibition to enter into *pacta de quota litis* and *redemptio litis* in civil law<sup>54</sup> and more recent doctrines preventing frivolous and fraudulent claims<sup>55</sup> and strict confidentiality obligations<sup>56</sup> have been used to constrain TPF,

but their relevance has been decreasing significantly. These doctrines refer broadly to the general prohibition of interference in others' litigation claims, for profit or otherwise, originating in the Greek and Roman legal systems.<sup>57</sup> Christianity was a major influence in the continuation of these prohibitions as it viewed litigation itself and anything that promoted it as an 'evil', which was only to be pursued as a last resort.<sup>58</sup> With the advent of the independence of the judiciary and rule of law principles, these prohibitions started to be seen instead as a barrier to the fulfilment of the right of access to justice. The idea of enhancing access to justice by providing public funding for litigation was only realised with the rise of the welfare state and when legal aid became a fundamental component of Western democracies,<sup>59</sup> and the restrictions to private funding also started to be done away with.

##### 3.1.2 The Anti-Commodification Argument and Economic Analysis of TPF

The anti-commodification of justice argument relies on a non-consequentialist<sup>60</sup> argument where the 'commodification' and meddling in others' claims for profit by private actors is still in itself often seen as undesirable.<sup>61</sup> This moral objection is familiar because it has also been raised against US-style class actions, contingency fees and legal expenses insurance.<sup>62</sup> It entails opposition to the transformation of a non-market good, civil justice, into a tradable commodity, as its value is reduced to the amount of money it sells for. In order for this argument to be successful, one must, however, show that the civil justice system has higher *value* than other practices in human life, in order for it to escape the process of commodification. One must also show that investments by third parties in suits will degrade the civil justice system. A further problem for this line of argumentation is that legal systems already value personal relationships, harms and damages in monetary terms.<sup>63</sup>

To examine this objection to TPF, some differing conceptions of *value* itself need to be outlined. Some approaches to *value* rely on the reasons and justifications for actions. For instance, human dignity and the uniqueness of each individual are important reasons and justi-

51 W.M. Landes and R.A. Posner, 'Adjudication as a Private Good', 8 *The Journal of Legal Studies* 235, at 248 (1979). See also S. Harnay and A. Marciano, 'Collective Litigation versus Legislation: a Rent-seeking Approach to Class Actions' in J.G. Backhaus, A. Cassone, and G.B. Ramello (eds.), *The Law and Economics of Class Actions in Europe* (2012) 219, at 222.

52 Cooter and Ulen, above n. 34, at 40-1.

53 Wendel, above n. 12, at 657. Commodification is a common fear with regard to the broader market order and liberal individualism that drive 'out other and better ways of perceiving or evaluating objects and activities'. It has been also referred to as the 'domino theory'. See E. Mack, 'Dominoes and the Fear of Commodification', in J. Chapman and J. Pennock (eds.), *Markets and Justice: Nomos XXXI* (1989) 198, at 198-99.

54 The prohibitions for legal counsels to receive a share of the damages and of the transfer of claims by assignment or purchase. Solas, above n. 26, at 18-26.

55 V. Shannon, 'Harmonizing Third-Party Litigation Funding Regulation', 36(3) *Cardozo Law Review* 861, at 874 (2015).

56 A. Grec and O. Marquais, 'Investment Management and Corporate Structuring Considerations for Third-Party Litigation Funders in Luxembourg',

38 *ASA Bulletin* 296, at 296 (2020).

57 Shannon, above n. 55, at 874.

58 M. Radin, 'Maintenance by Champerty', 24 *California Law Review* 48, at 68 (1935). See generally also A.J. Sebok, 'The Inauthentic Claim', 64 *Vanderbilt Law Review* 61 (2011).

59 Solas, above n. 26, at 38-122.

60 In other words, a deontological argument. For a more comprehensive analysis of the anti-commodification argument see Wendel, above n. 12.

61 Wendel, above n. 12, at 656.

62 *Ibid.*, at 655. See also Tillema, above n. 17, at 53 and Bruns, above n. 17. The European Commission expressly provided that contingency fees should not be permitted out of fear of creating incentives for 'abusive litigation', a fear that is reflected in the RAD. See European Commission (2013) 'Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law', at para. 30. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396>.

63 *Ibid.*, at 667.

fications for acting in particular ways. These approaches adopt an internal perspective. One of these approaches, the expressive theory of value, focuses on the attitudes expressed. However, the emotions guiding attitudes can be said to not always be reliable. Life insurance, for example, which seemed suspicious at first as it involved speculation over the death of other people, is now an accepted practice.<sup>64</sup> The same reasoning could in a way be applied to TPF.

The economic approach to *value* avoids taking moral stances in contested issues and relies on externally observable behaviour. By default, in the absence of market failures, the government does not get involved, and the people have no obligation to engage in controversial practices – such as bargaining over lawsuits – if they find them objectionable. In expressivist terms, the anti-commodification argument against TPF is that the goal of profiting from a lawsuit is not a good or moral reason to participate in the civil litigation process. Nevertheless, it is widely agreed that litigation should be resolved as fairly, quickly and cheaply as possible. This is achieved in economic theory by private actors bargaining over lawsuits to reach optimal dispute resolution, absent transaction costs and market failures. It constitutes a belief in individualism and a mistrust towards government. Such a faith in individualism is already present in various areas of substantive law, including in property law, where ownership is given over property and individuals can decide on its use, and in contract law, which allows people to bargain and reach their own agreements.<sup>65</sup>

A problem with the economic approach to value where individuals maximise their own welfare or utility, that is, the net balance of total benefits over costs, is that this can result in the reduction of welfare of others, and winners only in principle compensate the losers.<sup>66</sup> On the one hand, another approach, the rights-based or corrective justice theory, is appealing; it emphasises the victim-wrongdoer relationship. On the other hand, welfare economists emphasise rules that apply to everyone, such as the minimisation of social costs. The corrective justice theorist would say that this is a characteristic of public law – not private law. The participation of strangers in the civil litigation process would somehow express an inappropriate attitude with respect to corrective justice. Justice should be perceived as ‘relational’. Claims can only be brought by harm sufferers against those responsible, in line with the direct relationship that arises.<sup>67</sup>

The corrective justice theory, however, is sometimes at odds with the principle of party autonomy – autonomous claimants do agree to sell part of the damages be-

forehand in TPF. Furthermore, when it comes to other practices in the legal system, such as the examples of insurance and settlement, the law already undermines the importance of safeguarding this corrective justice relationship. This raises the question of why it is so essential that justice should be relational. The law permits the transfer of the obligation to directly correct harm, in the case of the party causing the harm being insured. With settlements, there is no institutional expression that the defendant has committed a wrong. If damages paid by insurance is a partial commodification, then a settlement paid by insurance is nearly complete commodification of civil justice. Critics of TPF, therefore, should also condemn these practices, or show that there is some distinction between insurance, settlement and TPF.<sup>68</sup>

From a law-and-economics perspective, if TPF increases overall social welfare in the future, the objection of profiting from other people’s litigation being morally deplorable would be dismissed as mere ‘superstition’.<sup>69</sup> One could, however, successfully criticise TPF by distinguishing it from other forms of private funding of litigation like insurance – for instance, by showing a greater extent of conflicting interests. This can be done through touching on economic themes such as agency costs and externalities rather than through commodification arguments.<sup>70</sup> The next section will examine the agency problems or risks of conflicts of interest TPF brings about but will mostly refrain from attempting to compare TPF’s magnitude of conflicting interests with those of other forms of funding such as insurance, contingency fees and hourly fees. It will rather adopt a perspective internal to a TPF situation.

### 3.2 Conflicts of Interest

The second argument against TPF relates to the risk of conflicts of interest. Given the assumption of self-interest, TPF arrangements inevitably give rise to the possibility of conflicting interests between the funder, the claimant and the lawyer. The conflicts examined in this article are grouped into Pre-existing Relationships and the Economic Interest of the Funder (Section 3.2.1), Excessive Shares of the Damages (Section 3.2.2), Control on Procedural Decisions (Section 3.2.3) and Opportunistic Entrepreneurial Parties Stirring up Litigation (Section 3.2.4).

#### 3.2.1 Pre-existing Relationships and the Economic Interest of the Funder

There could be conflicts of interest that emerge due to pre-existing relationships *inter alia* between the funder and any of the lawyers in the dispute and/or when the defendant is a competitor of the funder of the case. The *Gawker Media* case in the United States is an illustrative controversial case of a possible conflict of interest, where it was discovered after the case that the funder

64 *Ibid.*, at 681-2.

65 *Ibid.*, at 682-8.

66 This is Kaldor Hicks efficiency. A legal system achieves Pareto efficiency when no one can be made better off without making at least one individual worse off. With Kaldor Hicks efficiency, changes that bring about an increase in utility for some individuals which exceeds the decrease in utility suffered by others are favoured.

67 Wendel, above n. 12, at 689-92.

68 *Ibid.*

69 *Ibid.*, at 693.

70 *Ibid.*, at 693-4.



funded the case out of personal revenge motives.<sup>71</sup> In TPF involvements, a frequent concern is the question of disclosure of funding to the court, which would uncover, amongst others, conflicts of interest and funder profile and motivations.<sup>72</sup> Furthermore, disclosure of funding could send a signal on the merits of the case to the opposing party.<sup>73</sup>

In the *Fortis* shareholder collective redress case in the Netherlands,<sup>74</sup> the Amsterdam Court of Appeal stated that in the future it may require transparency on the disclosure of the identity of the funders and of the contents of funding agreements. This was in order to establish funder capital adequacy, standing and business models of those funders and to determine the absence of conflicts of interest.<sup>75</sup>

In the EU collective redress scenario, the RAD requires that representative actions are not brought against a defendant who is a competitor of the funder or against a defendant on which the funder is dependent. It also requires disclosure on the source of funding to the court or administrative authority by the entity representing the class members.<sup>76</sup> However, as of the time of writing, there is no such requirement for disclosure in individual claims in Europe. The RAD also requires that the qualified entities, namely, consumer organisations or public bodies representing the consumers, be independent and have established procedures preventing conflicts of interest between it, its funders and the consumers.<sup>77</sup> Their decisions, including those on settlement, are not to be 'unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers'.<sup>78</sup>

The reason funders fund claims is the potential economic reward they only receive if the case is successful. Only claims with the prospects of high financial awards are funded. Actions for specific performance, injunctive relief or actions that offer a low-value return are not considered by funders as there is no or little financial outcome that can be shared with the claimants. This economic interest itself is sometimes cited as the reason for restricting TPF. In the RAD, it is provided for that this interest must be aligned with the consumer interests. In Germany, a court found that a collective profit disgorgement claim against a major telecommunica-

tions company was primarily in the financial interest of the funder, and the use of TPF was considered against the legislature's intention and an abuse of the consumer association's legal standing.<sup>79</sup> This exemplifies the bad reputation TPF has in Germany. Despite being aware of the financial difficulties consumer associations face, especially when it comes to risky litigation, it effectively prohibited the entity from making use of TPF, and made it very difficult for similar actions to be brought in the future.<sup>80</sup>

A few important considerations in this regard must at this point be listed. The first consideration is that litigation is risky, that is, there is never a 100% chance that even a good claim will succeed. In such a case the funder will be liable to an adverse cost order to compensate for litigation costs incurred by the defendant. This entitles the funder to a risk premium. Secondly, depending on the rules of the specific jurisdiction or the judicial discretion, the losing defendant might also have to pay parts of, or the full TPF fee on top of the litigation costs and the damages to the winning claimant, ensuring that the claimant ends up with bigger shares of the damages. Thirdly, without TPF, some claims would not be started in the first place and no damages or compensation are ever recovered. Finally, funders always have an economic interest in the outcome, which is usually well, but not perfectly, aligned with the claimant's interests or the consumer interests represented by the consumer organisation. Both parties are interested in obtaining good settlements or judicial decisions.<sup>81</sup>

### 3.2.2 Excessive Shares of the Damages

The second conflict arises when, during pre-agreement negotiations, the better-informed funder with a stronger bargaining position attempts to obtain excessive shares of the damages in case of success at the expense of claimants, thus undermining the effectiveness of access to justice. This is obviously relative to other forms of funding of litigation, including hourly fees and insurance. With hourly fees there is a two-player relationship instead of three, which reduces transaction costs.<sup>82</sup> If claimants win, they receive the full damages. However, if they lose, they might have to pay the litigation costs – so claimants might be willing to bear the TPF risk premium. With insurance, from an ex-post perspective, the insured might be paying the premiums for nothing if they never get into legal disputes. It may result in the situation that, in the aggregate, plaintiffs may be left better off with TPF than with the two other forms of private funding.

71 *Bollea v. Gawker Media, LLC*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at \*2 (M.D. Fla. 14 November 2012).

72 On the *Gawker Media* case and the question of disclosure generally see M. Steinitz, 'Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements', 53 *University of California Davis Law Review* 1073 (2019).

73 R. Avraham and A.L. Wickelgren, 'Third-party Litigation Funding with Informative Signals: Equilibrium Characterization and the Effects of Admissibility', 61 *The Journal of Law and Economics* 637 (2018).

74 On collective redress actions and their funding in the Netherlands, see more extensively Tzankova and Kramer, above n. 8 and also X.E. Kramer and I. Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context', 2 *Revista Ítalo-Española de Derecho Procesal* 165 (2021).

75 Amsterdam Court of Appeal 2018 ECLI: NL: GHAMS: 2018: 368.

76 RAD Art. 10.

77 *Ibid.* Art. 4(3)(e).

78 *Ibid.* Art. 10(2)(a).

79 BGH, 13.9.2018, I ZR 26/17, BeckRS 2018, 24788.

80 Stadler, above n. 17, at 221.

81 Visscher and Faure, above n. 2, at 20.

82 While TPF overcomes the budget constraint of the plaintiff ... [it] leads to another "profitability" constraint: claims have to be profitable enough to be financed so as to support the additional organizational costs. These costs include the cost of the additional contract, bargaining, risk assessment and conflicts of interest in decision making. See B. Deffains and C. Desrieux, 'To Litigate or Not to Litigate? The Impacts of Third-party Financing on Litigation', 43 *International Review of Law & Economics* 178, at 179-80 (2015).

In practice, litigation funders in Europe typically take twenty to fifty percent of the amount awarded in the case.<sup>83</sup> In England and Wales, the landmark *Arkin* case<sup>84</sup> provided strong judicial approval to TPF and established the well-known 'Arkin Cap'.<sup>85</sup> It was deemed that by virtue of the fact that a professional funder could be liable for the costs of the opposing party 'to the extent of the funding provided' if the case loses, 'the funding is provided on a contingency basis of recovery'.<sup>86</sup> The funder would therefore be entitled, as 'the price of the funding', to a portion of the proceeds if the claim succeeds.<sup>87</sup> The damages recovered by the successful claimant would be decreased. While the court called this 'unfortunate', it saw this as a 'cost that the impecunious claimant can reasonably be expected to bear'.<sup>88</sup> This was considered more just than situations where successful defendants cannot recover their litigation costs from funders, whose intervention is the reason why claims, which eventually prove to be evidently without merit, are maintained to an advanced stage.<sup>89</sup> Despite the cap being subsequently criticised by many,<sup>90</sup> the court here provided justification for the acquisition of shares of the damages by the funder when the funded case wins.

This, however, does not satisfactorily attenuate the concern that the shares recovered by the funder could be excessive or unfair. In the *Fortis* collective redress case in the Netherlands, it was decided that, given the considerable procedural risks and funding costs that the claimant organisations and their litigation funders undertook for lengthy periods of time, the compensation to be paid by Ageas was not unreasonable and had not been provided at the expense of the damages paid to the shareholders.<sup>91</sup> This suggests that in the case of commercial parties, the chance of excessive return rates for funders would be reduced by market forces, which would lead to the normalisation of rates.

In the US consumer TPF sector, concerns about predatory practices by funders have been raised. It has been considered as comparable to payday lending, which is another form of high-cost, short-term credit.<sup>92</sup> In the first comprehensive empirical study on the situation of

consumer TPF in the United States, it was found that consumer TPF agreements are unnecessarily 'complex and opaque', possibly leading the less sophisticated consumers to routinely underestimate the future costs of the agreement. The payment actually returned to the funders at the conclusion of the disputes was, however, lower than what was contractually agreed and what is sometimes speculated in the media. The authors suggest that renegotiations happen because consumers are surprised that they have to pay more than what they expected.<sup>93</sup>

Caps on the return rates have indeed been suggested to reign in the concern of excess return rates.<sup>94</sup> This concern seems, however, to be only relevant when it comes to less well-informed and well-resourced, and more risk-averse, consumers in retail TPF markets and does not concern more sophisticated commercial parties. The necessity for specific regulation for the protection of vulnerable claimants could arise in the occasion that TPF becomes more widely accessible to consumers in Europe.<sup>95</sup>

### 3.2.3 Control on Procedural Decisions

The funder's interests are never fully aligned with those of the claimant and a third conflict arises if it attempts to exert control on procedural decisions, such as during settlement negotiations. Though it has frequently been stated in the economic literature that TPF should bring about better settlements for claimants, it could also be the case that funders push for speedier and lower settlements than would be the case without TPF, due to short-termism ('early harvesting problem').<sup>96</sup> In the EU collective redress scenario, the RAD addresses this problem by expressly prohibiting any form of control on procedural decisions diverting away from the collective interest of the consumers.<sup>97</sup>

This strict prohibition may, however, reveal a certain kind of suspicion towards funders that might not be justified. Having undertaken the due diligence on the case and the litigation costs and risks, funders would be interested in having some form of influence on the direction of the dispute. The case has already been made that this should be allowed unless they push lawyers to violate ethical duties.<sup>98</sup>

In England and Wales, a recent judgement did not apply the *Arkin* Cap and made a third-party costs order against a funder who had 'massive' control over the case in question.<sup>99</sup> The Association of Litigation Funders Code of Conduct for Litigation Funders (ALF Code) in England and Wales<sup>100</sup> requires funders to ensure that the funded

83 Saulnier, Müller & Koronthalyova, above n. 3, at 22.

84 *Arkin v. Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 26 May 2005. [www.bailii.org/ew/cases/EWCA/Civ/2005/655.html](http://www.bailii.org/ew/cases/EWCA/Civ/2005/655.html).

85 The cap or limitation of a professional funder's liability for the costs of the opposing party if the case loses, to the amount of the funding provided for the litigation. To illustrate, if the funder funds £50,000, if the case loses, the funder will also pay a maximum of £50,000 to the winning party.

86 *Arkin*, above n. 84, para. 41.

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

90 Including by Sir Rupert Jackson in 'In my view, it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat. This is unjust not only to the opposing party (who may be left with unrecovered costs) but also to the client (who may be exposed to costs liabilities which it cannot meet)' Jackson, above n. 16, at 123, para. 4.6.

91 Amsterdam Court of Appeal 2018 ECLI: NL: GHAMS: 2018: 368.

92 P.M. Skiba and J. Xiao, 'Consumer Litigation Funding: Just Another Form of Payday Lending? (Consumer Credit in America: Past, Present, and Future)', 80 *Law and Contemporary Problems* 117, at 117 (2017).

93 Avraham and Sebok, above n. 11, at 1172-1176.

94 Saulnier, Müller & Koronthalyova, above n. 3, at 17.

95 Van Boom, above n. 13, at 26.

96 M. Steinitz and A.C. Field, 'A Model Litigation Finance Contract', 99 *Iowa Law Review* 711, at 738 (2014).

97 RAD, above n. 19, Art. 10(1).

98 Van Boom, above n. 13, at 24, see also Stadler, above n. 17, at 227.

99 *Laser Trust v. CFL Finance Ltd* [2021] EWHC 1404 (Ch) 21 May 2021. [www.bailii.org/ew/cases/EWHC/Ch/2021/1404.html](http://www.bailii.org/ew/cases/EWHC/Ch/2021/1404.html).

100 Association of Litigation Funders Code of Conduct for Litigation Funders Arts. 9, 11.

party receives independent advice prior to the funding agreement, allows some degree of input to the funded party's decisions on settlements and provides for the possibility of termination of the agreement if certain conditions are satisfied. In Germany, funding agreements are not considered to be contracts for legal advice and only lawyers can give legal advice. However, standard funding agreements also often stipulate termination rights.<sup>101</sup> In the Dutch collective redress scenario, as per the WAMCA<sup>102</sup> and the Dutch Claim Code 2019, the entity representing the parties must have a professional board whose members do not have a direct or indirect financial interest in the outcome of the lawsuit. The court can review the organisation's funding in order to protect the interests of the claimants.<sup>103</sup> This minimises funder control over the lawsuit.

The presence of a conflict of interest between the claimant and the funder puts the lawyer in a delicate position, as the lawyer is engaged by the claimant but getting paid by the funder.<sup>104</sup> Professional rules of ethics require lawyers to act in the client's best interests<sup>105</sup>; therefore, the lawyer should only allow the level of control by the funder, which is most beneficial for the claimant in the funding. However, if there is a mistrust in funders, it could also be argued from the above that there also seems to be a trust in lawyers that might not be justified. In the archetypal hourly fee type of funding of litigation, where the claimant pays the lawyer in accordance with the time spent on the case, there are also conflicting interests. As per rational choice theory, the claimants, who in reality are never fully informed, will not be able to monitor the lawyers on whether they are acting in their best interest, irrespective of the existence of lawyer codes of ethics.<sup>106</sup> Reputational sanctions could control the lawyer, but these apply more in the case of repeat players than with 'one-shotters'.<sup>107</sup> This information asymmetry might therefore lead the lawyer to spend more time on the case in order to bill more hours than would be necessary. Being less exposed to risk, lawyers therefore change their behaviour.<sup>108</sup> Furthermore, the claimants cannot properly distinguish between good- and bad-quality lawyers. With hourly fees, the lawyer does not consider whether the number of hours spent on the case produces more benefits than costs to the claimant.<sup>109</sup>

This goes to show that, in reality, lawyers do not always act in the best interest of the claimant, and that with the presence of some form of control and monitoring by the funders, who are usually interested in obtaining good outcomes for both themselves and the claimant, the lawyer's interests could also become more closely aligned with those of the claimant.

This principal-agent problem is further aggravated in mass claims. When the lawyer or other representative represents a whole group, the members of this group will, as a result, face even larger coordination and monitoring costs with regard to the agents, who further their own interests.<sup>110</sup> Pursuant to the RAD, representative actions are allowed, as opposed to group actions (class actions), which are common in the United States, where the group or class is directly represented by the lawyer, who funds the action and, if the action is successful, recovers a reasonable and judicially overseen fee out of the outcome.<sup>111</sup> With representative actions, there is a double agency relationship, one between the parties represented and the qualified entity and the other between the qualified entity and the lawyer. Being better informed and financially resourced, the qualified entity might be better suited to monitor the lawyer than the individual claimants. However, problems arise if the funded qualified entity, which proclaims to work for the consumers interests, is a self-interested monopoly, and prioritises 'reputation, an increase in membership, and more public attention' over consumer interests.<sup>112</sup> Nevertheless, with representative actions, the risk of collusive settlements mainly benefitting the attorneys are reduced.<sup>113</sup>

### 3.2.4 *Opportunistic Entrepreneurial Parties Stirring Up Litigation*

Another common concern is that, by looking to make a profit from lawsuits, opportunistic entrepreneurial parties may stir up litigation and fuel a compensation culture that may cause negative externalities on society in the form of unmeritorious litigation<sup>114</sup> and an overall increase in the volume of litigation,<sup>115</sup> thereby further overburdening the already overburdened civil justice systems. Claimants could also overstate the value of their lawsuits during its negotiations with funders. On further examination, it is not immediately straightforward that a bigger volume of litigation is necessarily a negative effect of TPF, as increased litigation itself can reduce litigation undersupply (the access to justice problem) and the deterrent benefits of increased litigation.

101 D. Sharma, 'Germany', in L. Perrin (ed.), *The Law Reviews – The Third Party Litigation Funding Law Review*, 3rd ed. (2019), at 63-80.

102 Wet Afwikkeling Massaschade in Collectieve Acties (Act on Collective Damages Claims) 2020.

103 Kramer and Tillema, above n. 74, at 179. In individual claims, general rules of contract apply subject to public policy principles. See R. Philips, 'Netherlands', in L. Perrin (ed.), *The Law Reviews – The Third Party Litigation Funding Law Review*, Third Edition (2019), at 114-120.

104 Saulnier, Müller & Koronthalyova, above n. 3, at 72.

105 CCBE Code of Conduct for European Lawyers Art. 2.7.

106 As per agency theory, the contract between principal (claimant) and agent (lawyer) may be designed to better align the interests of both parties. See Mot, Faure & Visscher, above n. 38, at 45.

107 M. G. Faure and F. Weber (2015), above n. 42, at 179.

108 This is the moral hazard phenomenon.

109 Mot, Faure & Visscher, above n. 40, at 45.

110 Visscher and Faure, above n. 2, at 7.

111 Tillema, above n. 17, at 49.

112 *Ibid.*

113 Faure and Weber, above n. 42, at 179-80.

114 Funded claimants have less risk in starting litigation and this could incentivise unmeritorious suits. This is primarily a problem of adverse selection.

115 On this objection with specific reference to collective redress in the Netherlands, see more extensively I. Tillema, 'Entrepreneurial Motives in Dutch Collective Redress: Adding fuel to a "compensation culture"?' in W. Van Boom (ed.), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (2017) 221.



tion could outweigh its costs.<sup>116</sup> In Australia, an empirical study did find some evidence that third-party funding corresponds to an increase in litigation and court caseloads.<sup>117</sup> With regard to unmeritorious litigation, for instance by competing businesses, the loser pays principle<sup>118</sup> in Europe makes this unlikely. Furthermore, it is in the interest of funders themselves who have the gatekeeper role and the legal expertise to conduct thorough due diligence on the claims' merits throughout the litigation process. Despite being able to fund risky high-value claims as the risk of loss is spread among many other less risky high-value claims, funders ultimately only receive their fee if they win and will have to pay the litigation costs if they lose. In the US empirical study on consumer TPF carried out by Avraham and Sebok, the funder refused to follow through with half of the 200,000 funding requests in the dataset.<sup>119</sup>

In the collective redress scenario, unmeritorious suits could also be brought with the intent of inducing early settlement by pressuring defendants to settle in order to avoid litigation costs and reputational losses. As per the RAD, there are information requirements on the qualified entities and on the cases they bring,<sup>120</sup> and the judge can dismiss 'manifestly unfounded' cases at the earliest possible stage of the proceedings,<sup>121</sup> thereby diminishing the risk that qualified entities would extract such blackmail settlements.<sup>122</sup> Following the introduction of entrepreneurial parties in Dutch collective redress, no increase in unmeritorious collective redress claims occurred.<sup>123</sup> The arguments of overburdening the civil justice system and increasing frivolous litigation seem to be the most easily dismissed ones with respect to TPF.<sup>124</sup>

### 3.3 Funder Capital Inadequacy

Lastly, funders with insufficient capital to fund in full their portfolio of investments in disputes may leave the claimant without funding, or may be unable to meet adverse cost orders. In England and Wales, pursuant to another landmark case, *Excalibur*,<sup>125</sup> funders who persist in funding 'hopeless cases'<sup>126</sup> are required to pay costs on an indemnity basis, that is, all the litigation costs incurred by the defendant, going beyond the Arkin Cap. This makes it important for funders to have adequate

financial reserves. In the ALF Code, minimum capital requirements of five million pounds with continuous disclosure obligations are prescribed for funders within the association.<sup>127</sup> However, this is a self-regulation instrument, and membership within the association is voluntary, which means that there are funders operating in the market who are not under the auspices of the ALF Code.<sup>128</sup>

In Germany, funder capital inadequacy at the time of the assignment of claims could prove to be a legal obstacle for litigation funding by special purpose vehicles. In the *cement cartel* case, Cartel Damage Claims (CDC) filed an action against the participants of the cement cartel, after purchasing the claims from direct purchasers. The case was dismissed ten years after the filing because, despite having adequate financial means at the time of the dismissal, at the time of the assignments CDC did not have enough to meet a possible adverse cost order. This was considered by the courts to be a violation of public policy and the standards of good faith and good dealing. Now, there is an obligation to provide security for costs.<sup>129</sup> In the Netherlands, the Claim Code 2019 stipulates that the entity representing the claimants must ascertain of sufficient financial resources to bring the claim and of the potential track record and reputation of the funder.<sup>130</sup>

While lack of funder capital adequacy is a legitimate concern giving rise to the need of minimum capital requirements, the above-mentioned German case illustrates how consideration should also be given to all the circumstances of the case, as meritorious claims can fail to be pursued despite adequate financial resources being available. Furthermore, capital requirements might create barriers to entry for newcomers into the market.

## 4 Conclusion

This article has highlighted the importance of understanding the TPF industry by distinguishing and critically examining the main objections most commonly raised against it. It provides the background of the emergence of the TPF industry as a partial solution to the access to justice problem in Europe. It focuses on analysing the main concerns TPF has raised, them being the commodification of justice, conflicts of interest and funder capital inadequacy, including from a law-and-economics perspective. It finds after examination that these concerns have been overemphasised and inflated and that TPF is not all that fishy. The future development and growth of the TPF industry in Europe seems to be guaranteed, and it could even be the case that it finds

116 Shavell, above n. 44.

117 D.S. Abrams and D.L. Chen, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding', 15(4) *Faculty Scholarship at Penn Law* 1075, at 1075 (2013). This however does not at all mean that 'the sky is falling' due to TPF's introduction as Deborah R. Hensler puts it. See D. R. Hensler, 'Third-party Financing of Class Action Litigation in the United States: Will the Sky Fall?' 63(2) *DePaul Law Review*, 499 (2014)

118 Hodges, Vogenauer & Tulibacka, above n. 1, at 28. In almost all jurisdictions the general rule is that the losing party pays the litigation costs. Some exceptions are possible.

119 Avraham and Sebok, above n. 11, at 1141.

120 RAD, Art. 13.

121 *Ibid.* Recital 39 and Art. 7.7.

122 Visscher and Faure, above n. 2, at 15.

123 Tillema, above n. 17, at 235.

124 A few studies did find that TPF may cause an increase in the number of frivolous claims. See, for example, Deffains and Desrieux, above n. 82.

125 *Excalibur Ventures LLC v. Texas Keystone Inc & Ors* [2016] EWCA Civ 1144 18 November 2016. [www.bailii.org/ew/cases/EWCA/Civ/2016/1144.html](http://www.bailii.org/ew/cases/EWCA/Civ/2016/1144.html).

126 *Ibid.*, para. 27.

127 ALF Code Art. 9.4.2.

128 R. Mulheron, 'England's Unique Approach to the Self-regulation of Third Party Funding: A Critical Analysis of Recent Developments', 73 *The Cambridge Law Journal* 570, at 577 (2014).

129 OLG Dusseldorf, 18 February 2015, IVU Kart 3/14, *Juristenzeitung* (JZ) 2015.

130 Tzankova and Kramer, above n. 9, at 114. See also Philips, above n. 101.

itself gradually entering individual consumer litigation rather than only commercial litigation. Some form of European-wide regulation could address the risks of TPF in a more holistic manner; however, the evolving nature and substantial complexity of this industry and its important benefits of access to justice and deterrence need to be taken into consideration. There is the further issue that this industry is empirically under-researched and that, if left on its own, TPF will fail to provide access to justice, where otherwise not available, to strong claims, which are of low value or are for specific performance or of an injunctive nature.

The Draft Report constitutes one such response to the concerns. It proposes very stringent additional regulation of TPF, including requirements on setting up a licensing system of funders in each Member State, disclosure of funding agreements (as opposed to the disclosure of only the 'source' of funding as required in the RAD), on funding agreements being worded transparently, on capping the return rate to funders at 40%, and on, subject to limited exceptions, preventing litigation funders from withdrawing funding halfway through proceedings. It is up to the European regulator to strike a balance between taking advantage of the benefits TPF provides while minimising its costs. TPF has the potential of deterring undesirable behaviour and facilitating access to justice, despite these not being self-interested funders' primary goals. The task of regulation is to minimise the social costs which could arise from TPF in a way that does not disincentivise funders from funding meritorious and socially desirable cases, which would otherwise not be pursued due to a lack of funding options available to claimants.

# In Data We Trust? Quantifying the Costs of Adjudication in the EU Justice Scoreboard

Adriani Dori\*

## Abstract

Affordable and timely judicial proceedings by independent courts are essential for an effective justice system. They are also a precondition for the protection of the rule of law in the EU and for an integrated internal market. Among the tools the European Commission adopts in this field, the EU Justice Scoreboard is key to understanding the empirical basis of the European judicial policies. Created in 2013, it provides annual data on efficiency, quality and independence of member states' courts. The Scoreboard considers costly judicial proceedings as an obstacle to access to justice. It accordingly benchmarks member states' performance with various indicators. In the Commission's view, different national legal traditions should not prevent comparative assessment of member state judicial systems. However, the idiosyncrasies of national systems and the heterogeneity of national judicial statistics inevitably affect this empirical monitoring exercise. A closer look at the Scoreboard data shows that adjudication costs cannot be evaluated through quantitative metrics without contextualisation. This article focuses on the Scoreboard data on judicial costs, from both the supply and the demand side of judicial services. It critically reviews the fact-finding process that supports the preparation of the Scoreboard as well as the data this document displays. In so doing, it tests whether the Scoreboard conveys reliable and comparable information. This analysis is all the more important as the Scoreboard often supports academic analyses on the performance of justice and policy proposals by regulators and lawmakers.

**Keywords:** access to justice, costs of justice, EU Justice Scoreboard, empirical legal research.

## 1 Introduction

That a well-functioning judicial system is a crucial element in the development of a society is a truism very few would disagree with. However, the implications of this statement may become less obvious if one zooms in a bit. When is a judicial system 'well functioning'? Is a system that is open to a large number of citizens but that reaches *res judicata* in a relatively long time considered to function better than a system that restricts access to justice but ensures quick dispute resolution? And

what is the social 'development' that justice leads to? Does this refer to economic development alone? Or does it involve the ability to protect general values such as fairness and equality?

According to the European Commission, efficiency and quality of an independent judiciary secure and promote the rule of law as a shared value within the EU.<sup>1</sup> At the same time, well-functioning justice systems restore economic growth and foster competitiveness.<sup>2</sup> Timely judicial proceedings, affordability, and user-friendly access to justice are some of the essential features of effective justice systems, which in their turn are a precondition for rule-of-law enforcement and a requirement for growth.<sup>3</sup> According to the Commission, these priorities are of such importance that they are expected to be delivered by any national judicial system, regardless of the legal tradition this belongs to. For this reason, they are expected to be supported by policies that, although still largely national, share a common set of values and purposes.

The EU Justice Scoreboard (hereafter Scoreboard) is the European Commission's policy instrument adopted to shed light on these overarching policies. Created in 2013 by the Directorate-General for Justice and Consumers (DG Justice) and issued on an annual basis, the Scoreboard provides data on the functioning of EU national judicial systems.<sup>4</sup> The official description defines the Scoreboard as a non-binding monitoring instrument to map the functioning of national courts, draw up an inventory of potential challenges and incentivise judicial reforms through peer pressure and benchmarking exercises.<sup>5</sup>

The Scoreboard contributes to these endeavours by offering quantitative and qualitative data on the performances of EU national courts articulated along three main lines: efficiency, quality and independence of justice. Overall, the Commission itself does not offer a theoretical framework on how efficiency, quality and independence are conceptualised on the Scoreboard. The indicators are primarily constructed on the standards

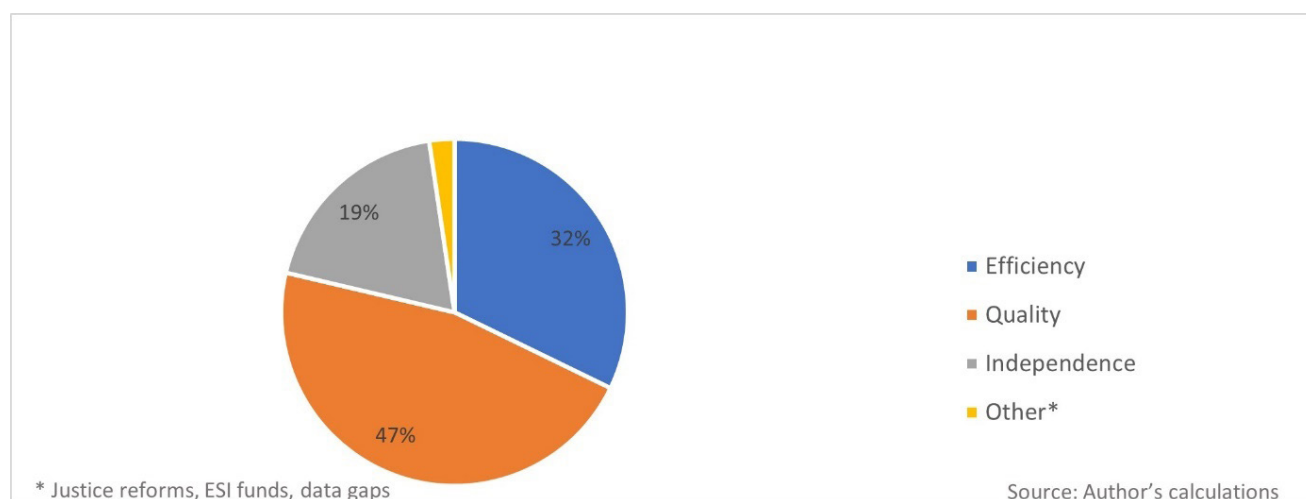
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- 1 European Commission, '2020 Rule of Law Report, COM(2020)580 final, 8.
- 2 European Commission, 'The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union', COM(2014)144 final.
- 3 EU Justice Scoreboard 2021, 1.
- 4 All editions are available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en) (last visited 30 September 2021).
- 5 EU Justice Scoreboard 2013, 3.



Figure 1 Justice Scoreboard indicators per category (aggregated 2013–2021)



set by other bodies. The Scoreboard adopts the working method of The European Commission for the Efficiency of Justice (CEPEJ) and understands efficiency exclusively by trial length.<sup>6</sup> In this light, efficiency on the Scoreboard is conceptualised primarily as court effectiveness and not as economic efficiency.<sup>7</sup> The model of quality combines a wide range of factors broadly accepted by the scientific community and policymakers as relevant. The indicators reflect the common standards set by the Council of Europe (CoE), either by CEPEJ or by the Consultative Council of European Judges (CCJE), the advisory body of the CoE.<sup>8</sup> They are developed around five measurement areas: (1) accessibility of justice; (2) financial and human resources; (4) assessment tools; (4) training and (5) standards on quality. For measuring judicial independence, the Scoreboard follows the classic distinction between perceived (*de facto*) and structural (*de jure*) independence. Perceived judicial independence covers subjective evaluations by different target groups (judges, business or the public). The normative basis of structural judicial independence is heavily influenced by the 2010 CoE Recommendation,<sup>9</sup> which differentiates between external (from the legislative and executive branches) and internal (of individual judges from undue pressure from within the judiciary) independence.

Figure 1 displays how many indicators refer to each area as a percentage of the total to reveal the relative importance of the three areas from a quantitative perspective.

Although the Scoreboard is gaining momentum and is used as a basis for academic studies and policymaking, targeted research on the specific information in that tool is limited.<sup>10</sup> This article focuses on one of the most significant parts of the Scoreboard data sets, the costs of the adjudication. In doing so, it considers the implications of those costs for both the supply (production costs in terms of resources and budget) and the demand sides of judicial services (court fees, lawyers' fees and legal aid). This analysis is particularly relevant, as the Scoreboard considers costly (and lengthy) judicial proceedings as the main impediment(s) to access to justice and offers a benchmarking analysis with various data to depict member states' performance in that regard.

The remainder of this article reviews the Scoreboard data collections on costs and assesses whether they can convey reliable and comparable information. To do so, Section 2 provides a brief history of the development of cost-relevant indicators throughout all the Scoreboard editions. Section 3 focuses on the selection of data providers who feed the Commission with information, both in general and with a specific focus on costs. Section 4 analyses methodological limitations that affect the

6 CEPEJ Guidelines on Judicial Statistics (GOJUST) adopted by the CEPEJ at its 12th plenary meeting (Strasbourg, 10–11 December 2008), CEPEJ(2008)11.

7 See also A. Dori, 'The Supply and Demand of Justice: What Policy Implications from the EU Justice Scoreboard?', III *Yearbook of Socio-Economic Constitutions* (2022) (forthcoming); A. Ontanu, M. Velicogna & F. Contini, 'How Many Cases: Assessing the Comparability of EU Judicial Datasets', 8 *Comparative Law Review* 1 (2017).

8 CEPEJ, Checklist for promoting the quality of justice and the courts adopted by the CEPEJ at its 11th plenary meeting (Strasbourg, 2–3 July 2008); see also Opinion No 6 (2004) Consultative Council of European Judges (CCJE) on fair trial within a reasonable time and a judge's role in trials taking into account alternative means of dispute settlement and Opinion No 11 (2008) on the quality of judicial decisions.

9 Council of Europe, Judges: independence, efficiency and responsibility of judges, Recommendation CM/Rec(2010)12 and explanatory memorandum.

10 For the problems with the Scoreboard data collections see: R. Mohr and F. Contini, 'Conflict and Commonalities in Judicial Evaluation', 4 *Oñati Socio-Legal Series* 843 (2014); Dori, above n. 7; Ontanu, Velicogna & Contini, above n. 7; M. Fabri, 'Methodological Issues in the Comparative Analysis of the Number of Judges, Administrative Personnel, and Court Performance Collected by The Commission for the Efficiency of Justice of the Council Of Europe', 7 *Oñati Socio-Legal Series* 616 (2017); *Ibid.*, 'Comparing the Number of Judges and Court Staff across European Countries', 26 *International Journal of the Legal Profession* 5 (2019); A. Nylund, 'Comparing the Efficiency and Quality of Civil Justice in Scandinavia: The Role of Structural Differences and Definitions of Quality', 38 *Civil Justice Quarterly* 427 (2019); A. Ontanu and M. Velicogna, 'The Challenge of Comparing EU Member States Judicial Data', 11 *Oñati Socio-Legal Series* 446 (2021). For more generic literature dedicated to the Scoreboard see: E. Van Rijckevorsel, 'The European Union and the "Indirect Promotion of Its Values": An Analysis of the Justice Scoreboard and the Roma Framework', 3 *Journal européen des droits de l'homme* 444 (2016); A. Strelkov, 'EU Justice Scoreboard: A New Policy Tool For "Deepening" European Integration?', 27 *Journal of Contemporary European Studies* 15 (2019); B. Cappellina, 'Legitimising EU Governance through Performance Assessment Instruments – European Indicators for a Judicial Administration Policy', 2 *International Review of Public Policy* 141 (2020).

completeness, comparability and quality of the Scoreboard data sets on costs. Section 5 analyses how the Scoreboard tackles the uneasy triangular relationship between costs, efficiency and the rule of law. The article concludes with a summary of the relevant findings.

## 2 The Development of Cost-Relevant Indicators

This section describes the development of the variables the Scoreboard adopted to report on the costs of adjudication. The purpose of the exercise is to set the basis for further reflections on the methodological issues surrounding judicial statistics, in general, and the Scoreboard, in particular.

For ease of exposition, the chronological analysis groups all Scoreboard editions (2013-2021) into three different periods. The first period gathers the two first editions when the Scoreboard was still, to some extent, an experiment in the making. The second period (2015-2019) collects the editions where the Scoreboard appeared to be a more mature tool, as made clear by the number and the complexity of the variables it included. The third period (2020 to the present day) is characterised by a further expansion of cost-relevant data to commercial (B2B) litigation. The following analysis addresses the Scoreboard data on costs, including public expenditure, legal aid and court fees. While those sources of funding are different in nature, they all provide coverage for the resources needed to run the judicial machine.

### 2.1 The First Period (2013-2014)

In its very first edition, the Scoreboard pinpointed the difficulties in presenting comparable information on the performances of EU national courts. The unavailability of data for nearly all member states also explained the gaps that afflicted the Scoreboard data sets.<sup>11</sup>

Given this difficulty, the 2013 Scoreboard included only one indicator related to the financial aspects of litigation. This was based on the understanding that adequate financial resources ensure efficiency, quality and independence of national justice systems and that investments in a well-organised justice system contribute to sustainable growth.<sup>12</sup> With this reasoning, the first edition presented the approved (while not necessarily executed)<sup>13</sup> annual total budget allocated to civil, commercial and criminal courts of member states, in absolute figures and per inhabitant.<sup>14</sup>

The 2014 Scoreboard continued on the same path. Emphasis was laid on the negative correlation between efficient enforcement of contracts and transaction costs

(particularly in the shape of opportunistic behaviour).<sup>15</sup> The analysis of budgetary resources for the judiciary was complemented with more refined Eurostat data<sup>16</sup> on the actual total expenditure (including probation system and legal aid), both per capita and as a percentage of the GDPs.<sup>17</sup>

### 2.2 The Second Period (2015-2019)

As anticipated in the previous edition,<sup>18</sup> the 2015 Scoreboard relied extensively on new sources and expanded the indicators compared with the past years. Consequently, it was also enriched with additional cost-related data and more precise key findings and time series of member states.

To begin with, the modernisation of public administration and assessment of the quality of public services became a priority for all member states. In this general context, the Commission has shown particular interest in fostering structural reforms,<sup>19</sup> including the policy area of justice,<sup>20</sup> which brought the focus of the Commission policy closer to economic efficiency – as opposed to rule-of-law protection as such.<sup>21</sup>

To provide a mapping of the efforts undertaken by the member states, the Scoreboard introduced a new indicator presenting the scope, scale and state of play of judicial reforms across the EU.<sup>22</sup> Domestic reforms were classified into different categories depending on their primary objectives. Next to operational measures (e.g. case management, promotion of alternative dispute resolution (ADR), use of information and communication technology (ICT)) and more structural initiatives (e.g. restructuring of the organisation of courts, simplification of procedural rules), legislative activities regarding court fees, legal aid and legal services regulation constituted separate categories. The combined reading of the number of countries undergoing reforms and the plurality of the addressed policy directions enabled readers to understand ‘who was doing what’ in the policy area of justice.

Regarding the allocation of financial and human resources for the judiciary, data from CEPEJ and Eurostat on consecutive years sought to highlight trends in the

11 EU Justice Scoreboard 2013, 20.

12 *Ibid.*, at 17.

13 CEPEJ differentiates between ‘budget approved’, which has been formally authorised by law (by the Parliament or another competent public authority), and ‘budget implemented’, which covers expenditure actually incurred in the reference year; see CEPEJ Glossary, CEPEJ(2020)Rev1.

14 EU Justice Scoreboard 2013, Fig. 20.

15 EU Justice Scoreboard 2014, 4.

16 *Ibid.*, at 7.

17 *Ibid.*, Fig. 25-26.

18 *Ibid.*, at 27.

19 European Commission, ‘Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth’, COM (2010) 2020 final; For the cryptic notion of ‘structural reforms’; see A. Crespy and P. Vanheuverzwijn, ‘What “Brussels” Means by Structural Reforms: Empty Signifier or Constructive Ambiguity?’, 17 *Comparative European Politics* 92 (2019).

20 EU Justice Scoreboard 2015, 4; European Commission, ‘Communication from the Commission, Annual Growth Survey 2015’, COM(2014)902 final; see also B. Hess and G. Dimitropoulos, ‘Judicial Reforms in Luxembourg and Europe: International and Comparative Perspectives’, in B. Hess (ed.), *Judicial Reforms in Luxembourg and Europe* (2014) 11, at 18.

21 In this respect scholars have pointed out in the broader EU economic governance the paradoxical challenge of ‘doing better with less’ or, in other words, providing high-quality services in times of budgetary austerity; see R. Peña-Casas, S. Sabato, V. Lisi & C. Agostini, ‘The European Semester and Modernisation of Public Administration’, *European Social Observatory* 5-6 (December 2015).

22 EU Justice Scoreboard 2015, Fig. 1.

management of budgetary constraints.<sup>23</sup> Cognisant of the methodological limitations that afflict cross-country comparisons of judicial data,<sup>24</sup> the Commission did not submit a single set of parameters to benchmark public budgets. Instead, it underlined the importance of better regulation toolboxes, which could improve the quality of policy impact assessments through tighter monitoring and evaluation of court activities.<sup>25</sup>

The 2015 edition drew a direct link between adequate financial resources and structural judicial independence for the first time.<sup>26</sup> A new indicator presented the criteria applied to the determination of the resources invested in law courts (e.g. historic or realised costs, number of incoming and resolved cases, anticipated costs or needs and requests by a court) and the specific branch of government (judiciary, legislature and executive) deciding on their allocation.<sup>27</sup>

Considering the requirement of access to justice under Article 47 CFR, legal aid guarantees effective judicial protection to citizens lacking sufficient financial means.<sup>28</sup> With this reasoning, the 2015 Scoreboard presented CEPEJ data on the annual public budget allocated to legal aid per capita and uncovered major discrepancies between the south and the north EU states.<sup>29</sup>

Finally, cost-related variables started to appear more often as components of new aggregated indicators. When mapping national practices in courts' communication policies, the Scoreboard also considered the availability of online information on litigation costs and legal aid for citizens<sup>30</sup> and revealed many deficiencies in the member states.<sup>31</sup> Availability of legal aid for ADR costs, refund of court fees in successful ADR outcomes, and non-mandatory participation of lawyers in ADR schemes were examined as incentives to promote ADR use.<sup>32</sup> Last but not least, free-of-charge access to judicial decisions was a variable for assessing the national practices in the publication of courts' decisions.<sup>33</sup>

The 2016 Scoreboard further explored the connection between structural independence and distribution of public resources with a new indicator. It focused on national Councils for the Judiciary and their managerial powers to allocate budget to courts.<sup>34</sup>

The most significant novelty in 2016 was the incorporation of data on legal aid domestic conditions. In particular, that exercise factored in, for the first time, the income level of individuals compared with their countries' average to provide a more calibrated view on access to

justice.<sup>35</sup> The new indicator was created with the help of the Council of Bars and Law Societies of Europe (CCBE).<sup>36</sup> It combined information on legal aid schemes and domestic economic conditions.<sup>37</sup> For most member states, personal income appeared to be the dominant factor in access to legal aid. The indicator was designed on the basis of a narrow scenario of a consumer dispute of an absolute value of 3,000 EUR for a single 35-year-old employed applicant with a regular income. The CCBE members replied to questionnaires and provided information on the eligibility criteria for legal aid. The indicator presented the differences (in %) between the income thresholds used by the member states to grant legal aid, on the one hand, and the Eurostat at-risk-of-poverty threshold, on the other. It also provided information on whether the legal aid coverage for the litigation costs was full or partial.

The 2017 edition moved beyond general budgetary questions<sup>38</sup> and explored the connections between court effectiveness and resources. Following the mapping of quality standards of the previous year,<sup>39</sup> it offered an overview<sup>40</sup> of the measures triggered when courts failed to comply with standards on time limits,<sup>41</sup> time frames<sup>42</sup> and backlogs.<sup>43</sup> In this regard, some member states reportedly considered the allocation of additional financial and human resources among the remedies to deploy when the judiciary fell short of delivering timely decisions. The Commission was not suggesting that footing the bill and increasing the total expenditure should be the governments' reaction to lengthy judicial proceedings. However, by benchmarking this option and presenting national trends in this field, it showed its intention to expand the surveillance beyond general budgetary questions and to include qualitative assessments of the allocation of public resources, especially for justice systems in critical conditions.

In the fields of legal aid and court fees, the 2017 edition introduced two novelties. Since the CEPEJ data on the annual public budgets allocated to legal aid (per inhabitant) had not been proven particularly effective for cross-country comparisons, they have been omitted. Instead, the Scoreboard made broader use of the CCBE indicator on legal aid thresholds.<sup>44</sup> The indicator maintained the main features of the previous edition but broadened its scope to include both a high- and a low-value consumer dispute. The high-value consumer

23 *Ibid.*, Fig. 38-41.

24 See Section 4.2.

25 EU Justice Scoreboard 2015, 36.

26 *Ibid.*, at 38.

27 *Ibid.*, Fig. 50.

28 *Ibid.*, at 32, 36.

29 *Ibid.*, at 32 and Fig. 39.

30 *Ibid.*, Fig. 26.

31 *Ibid.*, at 36.

32 *Ibid.*, Fig. 34.

33 *Ibid.*, Fig. 29.

34 EU Justice Scoreboard 2016, Fig. 50-51.

35 The incorporation of domestic living and economic conditions when assessing national legal aid schemes has also been highlighted by the German *Bundesrat*, BR-Drucksache 92/15, para.6.

36 More on the Scoreboard data providers in Section 3.

37 EU Justice Scoreboard 2016, Fig. 20.

38 EU Justice Scoreboard 2017, Fig. 32-34.

39 EU Justice Scoreboard 2016, Fig. 31-32.

40 EU Justice Scoreboard 2017, Fig. 47-49.

41 'Time limits' are understood as quantitative deadlines for courts; *ibid.*, at 32.

42 'Time frames' are understood as measurable targets and practices, e.g. specifying a predefined share of cases to be completed within a certain time; *idem.*

43 'Backlogs' are understood as the number of pending cases after a certain predefined amount of time; *idem.*

44 *Ibid.*, Fig. 21.



claim was set with an absolute amount (6,000 EUR). The low-value claim was defined in relative terms (60% of the national median income). In absolute numbers, the low-value claim ranged between 110 EUR in Romania and 1,716 EUR in Luxembourg.

The second major novelty on costs in 2017 was the incorporation of data on court fees for consumer disputes.<sup>45</sup> The new CCBE indicator used the same scenarios as with legal aid thresholds. It displayed the court fees paid for the initiation of proceedings (in % of the claim value) for high- and low-value consumer claims. Unfortunately, no further information was available on the criteria and the methods followed by the member states when setting the prices and calculating court fees. In 2018, no novelties were introduced regarding costs. The only visible change was related to ICT and legal aid. Drawn from the experiences of the past editions, the synthetic indicator on information for the public about the justice systems started to include as a separate variable the availability of interactive online simulation tools to assess eligibility for legal aid.<sup>46</sup>

The 2019 edition did not include significant changes, either. A new indicator with data from Eurostat classified the total public expenditure on law courts into four big groups: wages and salaries of judges and court staff, operating costs, fixed assets, and others.<sup>47</sup> Each of them was displayed as a percentage of the total courts' budget. Legal aid fell under operating costs for goods and services, along with building rentals and energy costs for courts (but without further distinction among the different components).

The CCBE indicator on the eligibility for legal aid started to aggregate the data from the two individual scenarios (high- and low-value consumer claims).<sup>48</sup> No explanation for this methodological change was given, although its drawbacks were immediately visible. The variables shown on the chart were reduced to the applicable income threshold (in % compared with the Eurostat poverty threshold) and the type of coverage costs through legal aid (full or partial). As a consequence, the findings became more reader-friendly, but some information was lost.

### 2.3 The Third Period (2020-2021)

The 2020 Scoreboard continued presenting data on public investments in the judicial systems as a proxy for financial resources allocated to the judiciary.<sup>49</sup> By contrast, the indicators examining the budget allocation and judicial independence and the follow-up measures for non-compliance with performance benchmarks and time standards were omitted. No explanation was given for this change.

When assessing the costs of proceedings for litigants, next to consumer disputes,<sup>50</sup> the 2020 edition turned to

commercial cases as well. Given the importance of contracts enforcement for economic development<sup>51</sup> and the cost-shifting principle<sup>52</sup> for deterring or encouraging low- or high-probability lawsuits, respectively, CCBE developed two new indicators on the financial aspects of litigation between companies (B2B). Both indicators used the same hypothetical scenario of a cross-border commercial dispute regarding the contract enforcement for a claim of 20,000 EUR. The first indicator displayed the court fees for the initiation of the proceedings in absolute values.<sup>53</sup> The second indicator showed the amounts of recoverable lawyers' fees.<sup>54</sup> In this hypothetical set-up, the legal services provided by lawyers during the litigious phase<sup>55</sup> (without clerical costs and VAT) amounted to 3,300 EUR, i.e. 1,650 EUR for each party. The indicator further divided the member states into three big categories depending on the system of recoverable lawyers' fees.

The latest publication of 2021 continued reporting the annual trends on public and private resources allocated to justice and legal services. Additionally, as announced by the Commission,<sup>56</sup> the Scoreboard has been substantially augmented with more data on the impact of the ongoing pandemic crisis on the digitalisation of judicial and legal proceedings.<sup>57</sup> The focus was placed on digital solutions that can tangibly facilitate access to justice and reduce costs for citizens, including the availability of online payments of court charges<sup>58</sup> and ADR fees<sup>59</sup> or electronic service of documents.<sup>60</sup>

## 3 The Information Providers for the Scoreboard Data

As in any fact-finding exercise, looking at the procedure for collecting information is key to understanding the contents and the quality of the outcome, as this is inevitably dependent on the input. This section focuses on the data providers, which annually feed the Commission with the requested data, and explains how such data are processed in the preparation of the Scoreboard. At the same time, it sheds light on the different approaches

45 *Ibid.*, Fig. 22.

46 EU Justice Scoreboard 2018, Fig. 25.

47 EU Justice Scoreboard 2019, Fig. 31.

48 *Ibid.*, Fig. 21.

49 EU Justice Scoreboard 2020, Fig. 32-34.

50 *Ibid.*, Fig. 23-24.

51 *Ibid.*, at 28.

52 In some states the recovery of court fees is decided on a case-by-case basis, e.g. Portugal and Romania; others do not foresee the full recovery of court fees, e.g. Greece and Hungary; *ibid.*, 24.

53 *Ibid.*, Fig. 25.

54 *Ibid.*, Fig. 26.

55 Revocability of legal costs occurred during the pre-litigious phase is not foreseen in all member states, and those costs were consequently not included; *ibid.*, at 29.

56 European Commission, 'Digitalisation of Justice in the European Union: A Toolbox of Opportunities' COM(2020)710 and accompanying SWD(2020)540.

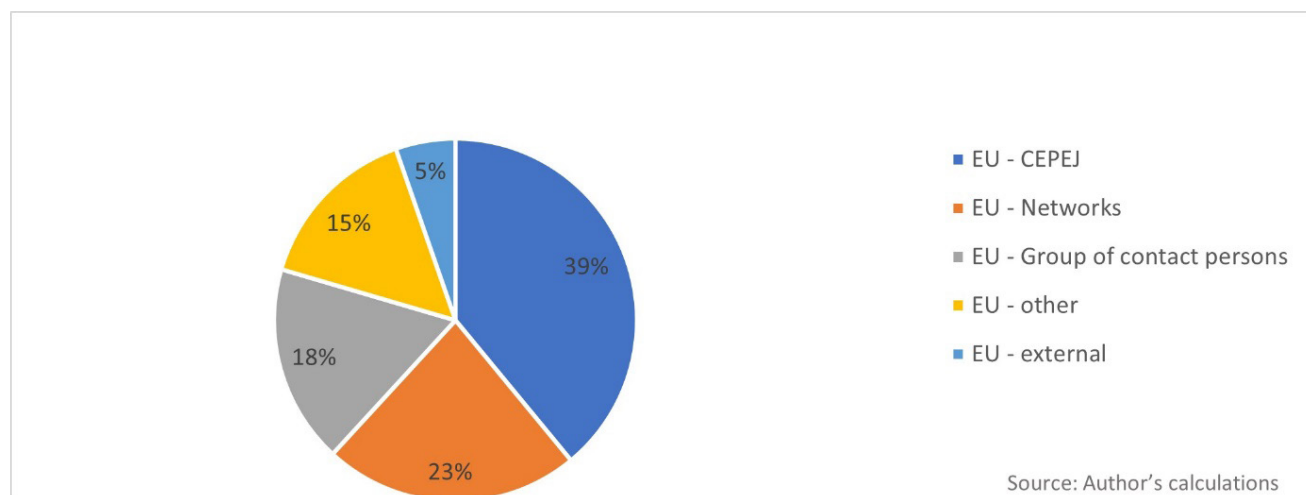
57 See EU Justice Scoreboard 2021, 5 and Fig. 39-47; See also A. Biard, J. Hoevenaars, X. Kramer & E. Themeli, 'Introduction: The Future of Access to Justice – Beyond Science Fiction', in X. Kramer, A. Biard, J. Hoevenaars & E. Themeli (eds.), *New Pathways to Civil Justice* (2021) 1, at 15-16.

58 EU Justice Scoreboard 2021, Fig. 44.

59 *Ibid.*, Fig. 27.

60 *Ibid.*, Fig. 44.

Figure 2 Justice Scoreboard indicators per provider (aggregated 2013-2021)



that the tool has been following regarding costs from the very origin of its process.

### 3.1 The Role of Information Providers in General

The Scoreboard relies primarily on various EU-internal channels or EU-based entities, which collect all requested data on behalf of the Commission. Aggregated calculations (see Figure 2) show that most of the Scoreboard data have been obtained from several EU-based providers. Only exceptionally does the Scoreboard reproduce information from EU-external sources.<sup>61</sup>

The CEPEJ of the CoE has been, since 2002, the leading actor in Europe in assessing the functioning of judicial systems through legal indicators.<sup>62</sup> In 2011, the Commission mandated CEPEJ to analyse the EU judicial systems annually.<sup>63</sup> In 2013<sup>64</sup> CEPEJ started to publish its yearly Studies and feed the Scoreboard with figures and findings. CEPEJ counts as the biggest data provider with a share equal to 39% of the consolidated amount of Scoreboard data throughout the years, with very active involvement in the production of indicators on efficiency.

Various types of European networks created under the aegis of the European Commission constitute the second-biggest provider, with a 23% total share of all data. In this category fall primarily EU associations of judicial professions.<sup>65</sup> The Commission enhanced the coopera-

tion with the European Network of Councils for the Judiciary (ENCJ), the Network of Presidents of the Supreme Courts of the European Union, and the European Judicial Training Network (EJTN). They have all contributed to the expansion of the Scoreboard data sets, especially in the fields of quality and independence of justice. Starting in 2016, the DG Justice also included the CCBE as a new actor among EU networks, from the demand side of judicial services. CCBE is an international non-profit association representing European bars and law societies from the EU, the European Economic Area (EEA) and wider Europe with more than 1 million EU lawyers as members.<sup>66</sup> CCBE has been the sole provider of all indicators on legal aid, court and lawyers' fees of the latest Scoreboard editions.<sup>67</sup>

The 'group of contact persons on national justice systems' is the third biggest data provider. It is an expert group established in 2013 by DG Justice to assist the Scoreboard development and promote the exchange of best practices on data collection.<sup>68</sup> Each member state designates one member from the judiciary and one from the Ministry of Justice. The group holds regular meetings<sup>69</sup> and since 2015 had contributed 18% of the total amount of the Scoreboard data.

The remaining data are obtained from a variety of other EU sources. Eurobarometer is the series of pan-European opinion polls on the attitude of EU citizens<sup>70</sup> and has offered, since 2016, the most quoted Scoreboard

61 World Bank's Doing Business Report (DBR) or the Global Competitiveness Report (GCR) of the World Economic Forum.

62 CEPEJ was established in 2002 to promote with various activities (e.g. reports, guidelines, recommendations) the exchange of best practices and the creation of a common legal culture among CoE member states; see Resolution Res(2002) 12 of the Committee of Ministers, Appendix 1, Statute of the European Commission for the Efficiency of Justice (CEPEJ), Arts. 1-3.

63 CEPEJ, 18th plenary meeting (7-8 December 2011), Abridged Report.

64 For the uneasy cooperation between CEPEJ and the DG Justice, see M. Velicogna, 'The EU Justice Scoreboard and the Challenge of Investigating the Functioning of EU Justice Systems and Their Impact on the Economy of the Member States', Paper prepared for the 'Società Italiana di Scienza Politica' (SISP) Conference (September 2013).

65 For the increasing role of EU judicial networks on EU justice policymaking, see S. Benvenuti, 'National Supreme Courts and the EU Legal Order: Building a European Judicial Community through Networking', 6 *Perspec-*

*tives on Federalism* 1 (2014); M. Claes and M. Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', 8 *Utrecht Law Review* 100 (2012); D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (2010), at 37-8.

66 More at [www.ccbe.eu/](http://www.ccbe.eu/) (last visited 30 September 2021).

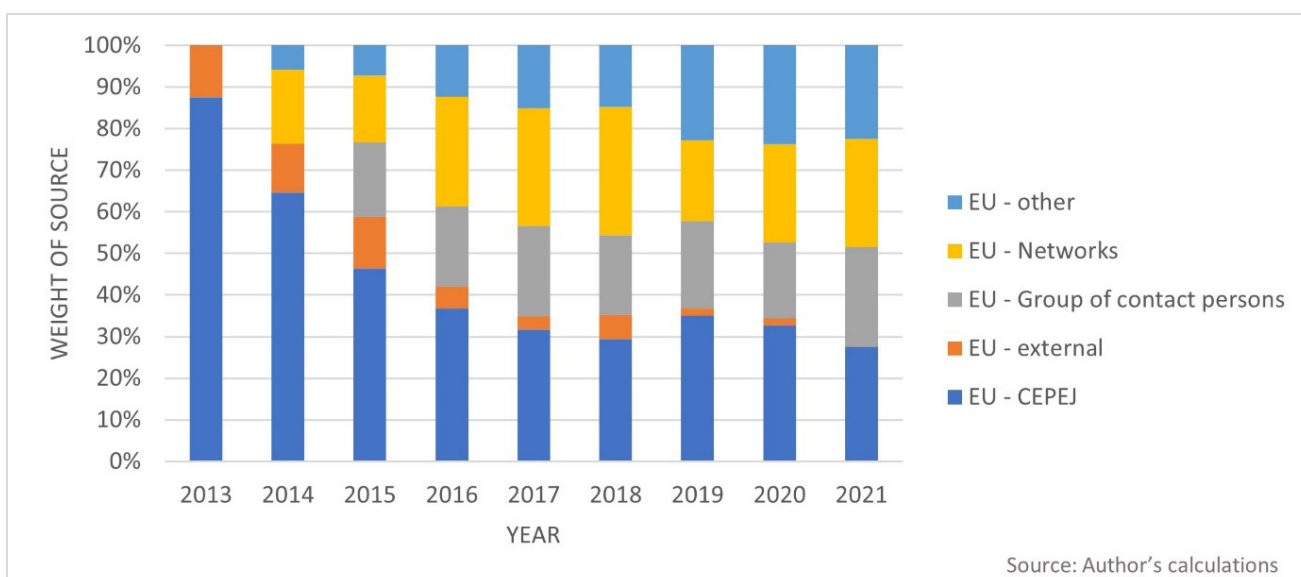
67 See also below Section 3.2.

68 EU Justice Scoreboard 2015, 4.

69 Information available at the Register of Commission's Expert Groups and Other Entities at <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3022> (last visited 30 September 2021).

70 Eurobarometer was created in 1974 to boost the European Union's political project; see S. Signorelli, 'The EU and Public Opinions: A Love-Hate Relationship?', 93 *Notre Europe Studies & Reports* (2012), at 12; S. Nissen, 'The Eurobarometer and the Process of European Integration', 48 *Quality & Quantity* 713 (2014).

Figure 3 The providers of all Scoreboard indicators (weight per year)



indicators by scholars and media, those on perceived judicial independence among EU citizens and businesses. Eurostat, the statistical office of the EU, provides figures on the public budgets allocated to the judiciaries. Data in EU law fields crucial for the internal market, such as money laundering or electronic communications, is obtained by institutions and organisations active in the specific respective fields.<sup>71</sup>

In its initial phase, the Scoreboard relied heavily on the methodology, intellectual support and knowledge transfer by CEPEJ. As noted previously, CEPEJ counts as the biggest contributor to the Scoreboard data sets. This static information says little, however, about the dynamics of such involvement. CEPEJ participation has decreased progressively over time also owing to the expansion of indicators in quality and independence and the inclusion of other providers in these two fields. This steady decline has brought CEPEJ from its initial leading role as a Scoreboard input, which translated into 87% of the total sources, to its much smaller current stake, down to 27% (Figure 3).

### 3.2 Information Providers and Data on Costs

Among the various data providers, only a few contribute cost-related data. CEPEJ and Eurostat offer data primarily on public budgets for the judiciaries. The 'group of contact persons' uses cost variables to assess aspects of the quality of justice systems. ENCJ explores the connections between resource allocation and its impact on judicial independence. Finally, CCBE is the sole provider of data on the effectiveness of legal aid and the amount of litigants' fees paid as court charges or lawyers' fees. The following chart (Figure 4) shows the participation of each provider in the area of costs per year of publication and reveals some interesting trends. The most blatant one is the decommissioning of CEPEJ. From being the sole provider of cost-relevant data of the first edition,

CEPEJ gradually lost significance and entirely disappeared after 2016. The same declining trend characterises the use of ENCJ data. By contrast, data from CCBE followed an increasing trend.

### 3.3 The Selection of Information Providers: A Neutral Exercise?

The weight of the providers per year of publication analysed at the end of the last subsection (Figure 4) also gives indications of the changing level of trust placed by the Commission on those providers. More importantly, it also highlights the lack of transparency in setting the Scoreboard's benchmarks, selecting the sources and collecting the data.

Overall, the creation and development of the Scoreboard do not appear entirely transparent. This lack of accountability by the Commission ranges from fundamental issues, such as the states' involvement in the Scoreboard blueprint, to questions on the indicators' design and data presentation. Besides very few generic statements on the indicators' objectives and methodology, the Commission is very reluctant to explain the reasons behind the selection of providers, all the more compared with the available alternatives.

Adjudication costs offer a good example. The CEPEJ annual Studies contain data also on legal aid and litigants' fees.<sup>72</sup> The reasons why such data have been disregarded can only be speculated. The first Scoreboard editions largely duplicated CEPEJ data on efficiency and quality. A presentation of (more) CEPEJ data in the area of costs might have provoked additional criticism by those member states, which have openly questioned the usefulness of the Commission's initiative from its very beginning.<sup>73</sup> However, it would have significantly enriched the Scoreboard's output when measuring adjudication costs.

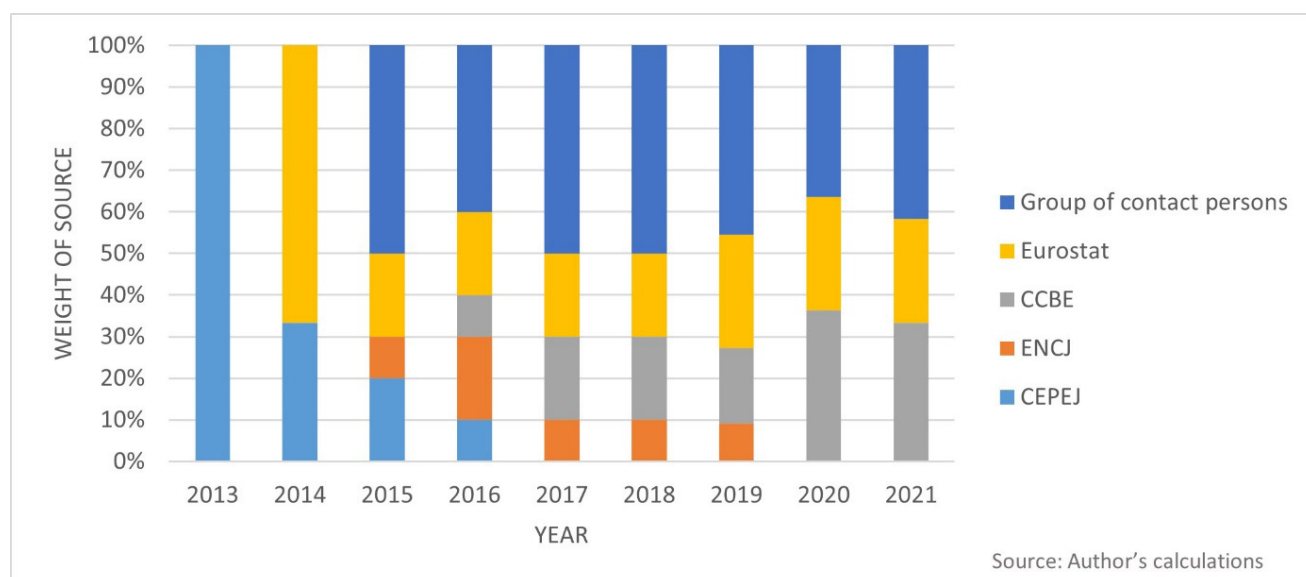
71 E.g., the 'Expert Group on Money Laundering and Terrorist Financing' or the 'Communications Committee' (COCOM).

72 CEPEJ, Study on the Functioning of Judicial Systems in the EU Member States – Facts and Figures from the CEPEJ Questionnaires 2010 to 2018, Part 1, CEPEJ(2019)17 rev4.

73 More on that in Section 4.1.1.



Figure 4 The providers of cost-relevant indicators (weight per year)



A possible explanation might, therefore, be the cautious CEPEJ approach when publishing its data. CEPEJ follows a very transparent methodology. Its complete data sets are fully accessible to the public with online interactive tools.<sup>74</sup> Additionally, CEPEJ publishes its annual Studies in full length compared with the Scoreboard and includes many caveats and extensive explanatory notes per member state.

Furthermore, the policy choice to rely solely on lawyer members of CCBE for assessing the effectiveness of legal aid schemes is not obvious, especially considering the existence of alternative official channels such as the relevant judicial authorities through the CEPEJ national correspondents or the 'group of contact persons' (with members from the judiciary and Justice ministries). Unfortunately, answers to these methodological concerns could not be found in CCBE documents either. The questionnaires, the methodology, the dataset or any draft analysis of the findings are not publicly accessible. The Scoreboard presents only a one-page-long description of the CCBE findings together with very few guidelines on how to read the indicator and some methodological caveats cramped in footnotes. The 'group of contact persons' follows a similar approach and does not publish its data. Therefore, when confronted with the Scoreboard data on costs, readers are left usually with figures and charts. These offer a preliminary orientation but do not always facilitate thorough research.

## 4 The Challenges of Measuring Costs: The Scoreboard Methodology

Since its first 2013 edition, the Scoreboard pinpointed the difficulties in presenting performance indicators related to judicial services in a comparative context. Addressing the data gaps became the main challenge for the Commission.<sup>75</sup> Despite the objective difficulties in gathering comparable, homogeneous and reliable data, the Commission moved forward with its more-is-better approach to further develop the Scoreboard. Relying on new synergies with several actors, from 2015 onwards it began incorporating additional indicators (Figure 5).

The same growth is also reflected in the field of adjudication costs. The 2015 edition was enriched with additional information on costs and more precise key findings, including legal aid budgets or criteria for determining courts' resources.<sup>76</sup> Overall, the total number of cost-related indicators tripled in 2015 and followed a slightly increasing trend later (Figure 6).

However, the increase in the available information also revealed various practical and methodological limitations in the Scoreboard data sets.<sup>77</sup> For the sake of exposition, such shortcomings may be grouped into two different categories: completeness and comparability. However, as this section will explain, the Scoreboard indicators on costs are not equally affected by both problems.

74 Available at [www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems](http://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems) (last visited 30 September 2021).

75 EU Justice Scoreboard 2013, 20.

76 See above Section 2.2.

77 For the problems of the Scoreboard data collections see the literature references above n. 10.

Figure 5 The progression of all Scoreboard indicators

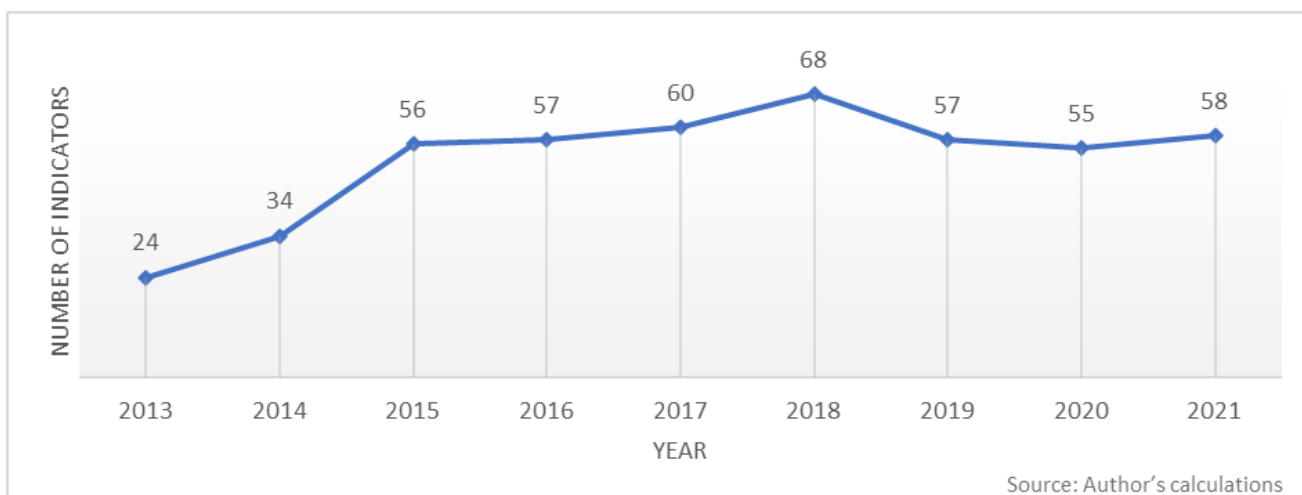
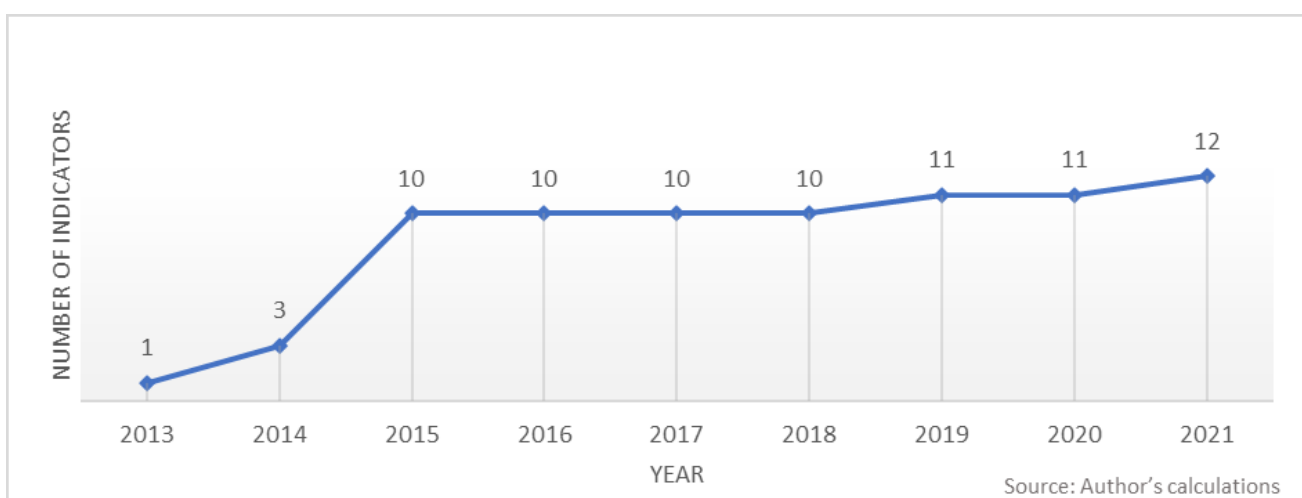


Figure 6 The progression of cost-relevant indicators



Section 4.1 deals with the issue of completeness and shows the reasons why the Scoreboard has not always been able to provide a complete picture of the quantities it planned to measure. Section 4.2 addresses the problem of comparability.

#### 4.1 The Completeness of Data on Costs

##### 4.1.1 Loopholes: Voluntary Participation of Member States

The first limitation that significantly affects the completeness of the Scoreboard data sets is related to the nature of this periodical monitoring exercise. The Scoreboard is a soft-law instrument based on the voluntary participation of all member states. National authorities are not obliged to comply with the Commission's requests for data. Therefore, the completeness of the Scoreboard annual data sets is always conditional on the overall attitude and free cooperation of each member state. In this light, data gaps may often occur owing to the lack of contribution from the member states.<sup>78</sup> Overall, the Commission tends to ascribe the occurrence of the data gaps primarily to the technical difficulties in collecting comparable data, the insufficient domestic

statistical capacity, and the heterogeneity of national statistics.<sup>79</sup> This is true, as also demonstrated in the Scoreboard footnotes. When complete data sets are publicly accessible, as is the case with the CEPEJ Studies, it is also often revealed that data gaps occurred, for instance, because the requested information was not available at the national level or because the authorities failed to provide on-time data meeting the specific quality requirements for inclusion.

Nevertheless, the fact remains that the member states' response rate to the Commission's annual requests for data varies. While some countries are more willing to collaborate, others refuse. Given the lack of compliance mechanisms, naming and shaming together with peer pressure appears to be the main incentives for the member states to participate in the Commission's annual monitoring exercise. And in this respect, not all member states respond equally.

The fear that the Scoreboard may lead to the promotion of a one-size-fits-all EU justice system<sup>80</sup> and the top-down Commission's approach when designing and set-

<sup>79</sup> *Idem*.

<sup>80</sup> N. Nielsen, 'EU Justice Scoreboard Upsets Some Member States', *EUobserver*, 14 March 2014.

<sup>78</sup> EU Justice Scoreboard 2013, 20; EU Justice Scoreboard 2021, 3.

ting the tool in motion<sup>81</sup> have upset some member states, which have pleaded for a more intense dialogue during the Scoreboard preparations.<sup>82</sup> Some member states repeatedly denied sending data to Brussels (e.g. Belgium) or boycotted the Scoreboard project in its entirety (e.g. the United Kingdom). Refusals were based on various grounds, from questioning the EU's competence (since the Scoreboard is not limited to data on the implementation of EU law or cross-border cases but encroaches on national statistics, and recently also on the whole organisation and management of prosecution services<sup>83</sup>) to arguments of national administrative incapacity, limited resources, political expediency, or even usefulness of the Commission's initiative, as the Scoreboard, at least in its first editions, had essentially duplicated CEPEJ figures.<sup>84</sup> To be sure, other member states (such as Germany) have been equally critical of the Commission's initiative, yet they decided to cooperate and engage in an annual dialogue with the Commission, suggesting improvements for the Scoreboard.<sup>85</sup>

The unavailability of data has also raised the attention of journalists attending the annual Scoreboard press conferences. Questions on data gaps were raised both in general terms<sup>86</sup> and for specific countries, as was the case with the Polish lack of cooperation during the controversial judicial reforms of 2017.<sup>87</sup> Similarly, the data gaps have also triggered Parliamentary Questions (PQs)<sup>88</sup> by members of the European Parliament on the Scoreboard and, particularly, the reasons behind the member states' refusal to cooperate.<sup>89</sup>

The Commission and the European Parliament encourage the member states to cooperate voluntarily and invest in better regulation systems, impact assessments and analytical and statistical capacity regarding the progress of judicial reforms and availability of court da-

ta.<sup>90</sup> On a similar note, the EU Justice Commissioners have often expressed their commitment to ensuring better cooperation and initiating discussions with national authorities for all matters related to the development of the tool, its findings and the occurring data gaps.<sup>91</sup>

#### 4.1.2 How Pervasive Are the Loopholes? The Case of Costs

As the previous subsection has explained, the voluntary participation of member states has significantly affected the completeness of the Scoreboard data collections. Member states do not always comply with the requests to provide judicial statistics with the same responsiveness.

But how pervasive are the data gaps for the Scoreboard in general and its statistics on costs in particular?

The problem of the missing data has been addressed in the 2015 edition with a specific indicator. It displayed the percentage of the information available per member state for each of the main fields measured on the Scoreboard, namely efficiency, quality and independence.<sup>92</sup> The findings showed that data gaps were primarily localised in the area of efficiency of justice. Unfortunately, the same indicator has not been repeated in the following editions. Therefore, it is not always easy to assess the completeness of the Scoreboard database, nor can one quickly tell whether the Commission and EU Parliament's persuasive powers in achieving cooperation have delivered in this regard.

Even more complex is to assess the effectiveness of the providers the Scoreboard uses in the field of costs. Whether those providers can match the expected results in terms of completeness of data is one of the main determinants of output quality. For instance, the non-availability of data from nearly all member states explained the lack of cost-relevant information of the first edition.<sup>93</sup> However, with the gradual creation of synergies,<sup>94</sup> the DG Justice has expanded the cost-relevant data sets and presented findings from EU jurisdictions.

The mandates given to the different providers to collect data are not available to the public. Therefore, Scoreboard readers cannot assess the effectiveness of those providers in producing the expected results, as these had been specified in the mandates. Nevertheless, what can be assessed with quantifiable metrics is the final results delivered by the providers in terms of data completeness, as appeared in the Scoreboard.

The following chart shows the size of the available and missing data in the field of costs (Figure 7). For each cost-relevant indicator, the amount of data is calculated per variable and member state. If data availability

81 B. Cappellina, *Quand la Gestion S'Empare de la Justice: De la Fabrique Européenne aux Tribunaux* (2018), at 241.

82 Council of the European Union, 3279th Council Meeting – Justice and Home Affairs, Brussels, 5-6 December 2013, Press Release 17342/13, 18.

83 E.g., EU Justice Scoreboard 2019, Fig. 55-57 (structural independence arrangements for prosecution services).

84 See, e.g., Parliament of the United Kingdom, House of Commons European Scrutiny Committee, 47th Report of Session 2013-2014, 15 May 2014, 25 MOJ (35888) (34822).

85 From the first Scoreboard edition the German *Bundesrat* (i.e. legislative body that represents the sixteen federated states of Germany) issued Opinions (*Stellungnahmen*) commenting on the Commission's initiative: see BR-Drucksache 244/13, 171/14, 92/15, 173/16, 279/17, 416/18, 294/19, 526/20.

86 E.g., EU Justice Scoreboard 2016 press conference, 11 April 2016; the video is available on the Commission's audiovisual services portal (Reference: I-119359).

87 EU Justice Scoreboard 2017 press conference, 10 April 2017; the video is available on the Commission's audiovisual services portal (Reference: I-136896).

88 The EP's rules of procedure offer an oversight mechanism to monitor the activities of the EU executive branch; see Rules of Procedure of the European Parliament, Rules 128 (Questions for oral answer with debate), 130 (Questions for written answer).

89 PQs: E-004328-15, 17 March 2015 (about the lack of efficiency data from Belgium); E-004440-15, 18 March 2015 (missing data from Spain); E-003070-17, 2 May 2017 (about data gaps in general).

90 EU Justice Scoreboard 2015, 36.

91 See above n. 87, at 16:28; see also Commission's replies to PQs: E-004328/2015, 5 June 2015 (referred to PQ E-004328-15); E-004440/2015, 19 June 2015 (referred to PQ E-004440-15); E-003070/2017, 18 July 2017 (referred to PQ E-003070-17).

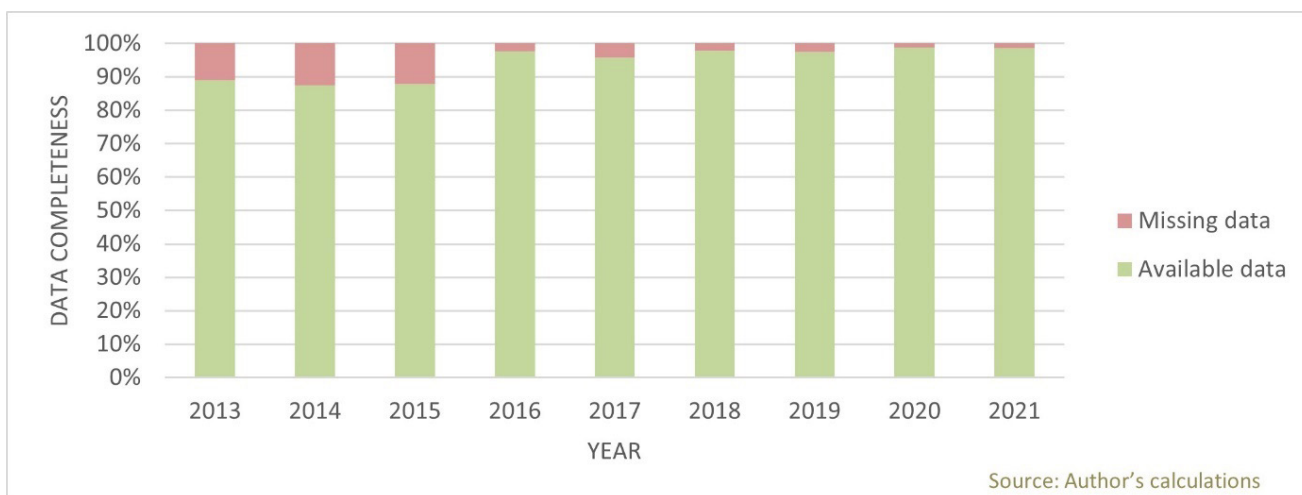
92 EU Justice Scoreboard 2015, Fig. 56.

93 EU Justice Scoreboard 2013, 20.

94 See above Section 3.2.



Figure 7 Data gaps in cost-relevant indicators (per year)



appears to be 100%, the providers have managed to deliver data from all member states in all variables included in the indicators. The amount of data is presented in an aggregated form for all cost-relevant indicators per year of publication.

Overall, the providers entrusted by the Commission have proven particularly effective from the very beginning in collecting data from all member states concerning all the information on costs that the Scoreboard considered. Therefore, data gaps, which significantly characterise the Scoreboard, in general, have not particularly affected the reporting on costs. Accumulated calculations from all Scoreboard editions show that the cost data sets are, on average, 96% complete.

## 4.2 The Comparability and Quality of Data on Costs

However, completeness of data does not guarantee the quality of the data. A database with all its cells duly filled in may still report inaccurate or non-comparable information. The quality of the Scoreboard exercise shall therefore also be measured on its ability to convey information that is able to support policy considerations. Crucial in this regard is that data classified under the same heading from different member states actually reports the same information (comparability). This goal may be hard to achieve, as the following subsections will demonstrate. Problems may arise from different sources. The most obvious one is that the fact involving different providers (including member states) in a fact-finding exercise (4.2.1) may lead to inconsistencies as long as there is no common understanding of what information is to be collected (4.2.2). Besides this, homogeneous data may still convey uneven information if figures are not compared with the context they refer to. For instance, one euro does not have the same purchase power across the entire Eurozone, so that missing this information out may skew the reader's perception of cross-country comparisons (4.2.3). Finally, even the most perfect statistical exercise may require some legal context to be able to deliver meaningful results because what functions courts actually perform may vary from

country to country, often depending on legal traditions (4.2.4).

### 4.2.1 Collection Procedure and Comparability: Institutional Concerns

The second drawback that significantly affects the quality of the Scoreboard, next to completeness – is comparability. This is inherently related to the nature of the data presented. Only exceptionally does the Scoreboard include 'primary data'. These are indicators that had been produced directly by the Commission with first-hand information, own surveys or interviews. Most of the Scoreboard indicators are based on 'secondary data' instead. These are information and judicial statistics kept by the national authorities and made available for the Commission. The data is communicated to DG Justice through various channels and intermediaries, such as CEPEJ, the 'group of contact persons' or European networks.

In this light, the availability and quality of the Scoreboard annual data largely depend on the collection methods at the domestic level. On the same note, national categories for which data is collected do not always correspond exactly to the ones used for the Scoreboard, and there are no common operational definitions across jurisdictions. Structural reforms, the re-organisation of the national judicial maps, and changes in the methodologies for collecting and categorising judicial statistics might also reduce the consistency of national data over time.

The Scoreboard indicators always have a backwards-looking nature, and findings refer to past evaluation cycles. Although the Commission tries to present timely and consistent data from the same period, the availability of such information depends on the logistics for its gathering. CEPEJ data usually refers to the second year before the year of each Scoreboard publication. When the Commission conducts its own surveys – for instance, through Eurobarometer – the answers are collected a few months before each publication and offer a more up-to-date picture. However, there are also cases where an indicator might display figures from different

periods for the different member states<sup>95</sup> or provisional numbers and estimations.<sup>96</sup>

Overall, despite the Commission's determination to present homogeneous information on the performances of national courts in litigious civil, commercial and administrative cases, data inconsistencies for each evaluation period are eventually inevitable and significantly affect the end-product delivered each year.

The European Parliament voiced some concerns about the Scoreboard's ability to provide an accurate picture of justice. It called the Commission to focus its attempts on gathering fewer but more reliable and comparable data.<sup>97</sup> Similar calls also came by individual member states.<sup>98</sup> Nonetheless, the Commission appeared determined to continue exploring the possibility of expansion of the indicators in the future by using more sources, such as judicial networks and new expert groups.<sup>99</sup>

The official answer to the EP's critical calls came with a concise and diplomatic text.<sup>100</sup> The Commission acknowledged that the gathering of objective, comparable and reliable data remained the most significant challenge. However, it threw the ball into the member states court, declaring that it was the sole responsibility of national authorities to make this cooperation possible by providing timely and good-quality data. Similar replies were also given to the individual member states.<sup>101</sup>

#### 4.2.2 Apples and Oranges? Structural Issues of Comparability

A closer look at the various Scoreboard editions can show how problems concerning the availability and the comparability of data have afflicted the DG Justice's exercise from the beginning and are still a limitation today. Even when comparing aspects of national judicial systems that *prima facie* appear easier to assess with statistically quantifiable parameters alone – such as the financial resources for courts – the difficulties of cross-country comparisons represented the biggest challenge for different reasons.

For instance, the figures on public expenditure sent by the national authorities in preparation for the Scoreboard 2013 edition were not always separating between the different budgetary components. While some member states included the budget of prosecution services or

legal aid,<sup>102</sup> others did not. The same methodological problems that afflicted the 2013 edition were visible again in 2014. Data was either missing or not always consistent, and the member states often reported provisional figures.<sup>103</sup>

These general concerns also involved some specific areas of justice costs and particularly those on legal aid. In the 2015 edition, for instance, the Commission made brief references to the caveats affecting the comparability of the data on that matter.<sup>104</sup> The most pressing one was the lack of information on how the total public investments in legal aid were distributed among beneficiaries and per case. Overall, one should always bear in mind that the number of legal aid beneficiaries and the granted amount of legal aid are not always in a linear relationship. Some states have stricter eligibility conditions for legal aid but grant a high amount per case; others follow the opposite policy by loosening the conditions for legal aid admissibility but limiting the amount granted per case.<sup>105</sup> Therefore, the distribution of legal aid among beneficiaries and per case is critical when conducting cross-country comparisons.

The CCBE indicator on the income threshold for legal aid created in 2016 took into account the living and economic conditions in the member states.<sup>106</sup> However, it left many questions unanswered in many editions, highlighting the transparency issues in the Commission's approach when setting the Scoreboard's benchmarks, selecting the data providers<sup>107</sup> and collecting data. Apart from some generic statements on the objectives and methodology used, no further information is available on the selection of the sources or the complete data sets. On top of this, the evolution of the Scoreboard variables on legal aid has sometimes been in the sense of aggregating data that were previously provided separately.<sup>108</sup> As a result of the data aggregation in the 2019 edition,<sup>109</sup> for instance, disparities between legal aid eligibility for high- or low-value claims disappeared. Similarly, the aggregated figures did not always help understand whether the sudden fluctuations observed in some member states (compared with the previous edition)<sup>110</sup> were rooted in the developments of the domestic living and economic conditions, or were the results of the Commission's changes in the methodology and presentation of the data, or, finally, were simply the result of inaccurate collection of data at the national level.

All in all, this makes the Scoreboard reader's work occasionally difficult, especially when it comes to under-

95 E.g. EU Justice Scoreboard 2018, Fig. 26 (income threshold for legal aid): Data referred to 2017, Malta contributed with data from 2016; EU Justice Scoreboard 2019, Fig. 33 (share of female professional judges at 1st and 2nd instance courts): Data referred to 2017, Greece contributed with data from 2016; EU Justice Scoreboard 2021, Fig. 31 (general government total expenditure on law courts by category): Data referred to 2019, some Member States (France, Slovakia) used accumulated figures from previous evaluation periods.

96 E.g., EU Justice Scoreboard 2020, Fig. 32-34; EU Justice Scoreboard 2021, Fig. 29-31.

97 EP Resolution of 4 February 2014, OJ 2017 C 93/32; EP Resolution of 29 May 2018, OJ 2020 C 76/36.

98 Bundesrat, BR-Drucksache 92/15, para. 3.

99 EU Justice Scoreboard 2015, 44.

100 European Commission, SP(2014)414-0, 15 April 2014.

101 E.g. European Commission, C(2015)5727 (reply to Bundesrat BR-Drucksache 92/15).

102 EU Justice Scoreboard 2013, Fig. 20.

103 E.g. EU Justice Scoreboard 2014, n. 40-41.

104 EU Justice Scoreboard 2015, 31-2.

105 See also CEPEJ, above n. 72, at 5. More limitations of the comparability of budgetary data on legal aid can be found by comparing the explanatory notes of each member state under Questions 12 and 12.1 of the CEPEJ Study.

106 EU Justice Scoreboard 2016, Fig. 20.

107 See also above 3.3.

108 See above n. 48.

109 EU Justice Scoreboard 2019, Fig. 21.

110 *Ibid.* (France, Latvia, and Slovenia); cf. EU Justice Scoreboard 2018, Fig. 26.

standing national rules on legal aid. This is like trying to draw the function line that represents the legal aid structure, while the Scoreboard only provides one point within that line.

A similar problem also characterises the CCBE indicators on court charges in consumer disputes. Take the 2017 edition as an example.<sup>111</sup> Court charges are displayed only as a share (in %) of the total value of the claim. Therefore, reverse engineering the Scoreboard findings to understand the underlying functions was not possible. This prevented tracking with sufficient confidence the original formula each member state adopted when defining court charges (flat tariffs, percentage tariffs, a combination of the two systems, tapering up to a certain amount, etc.). All in all, such shortcomings reduce the comparability of data. They prevent the reader from understanding, for instance, the extent to which similar results displayed for different states are showing an overlapping policy choice or are just a coincidental result, for the specific Scoreboard scenario, of rules that are otherwise different.

#### 4.2.3 Finding Uniform Measures for Non-uniform

##### *Countries: Size and Purchase Power*

Next to the lack of homogeneity of national statistics and the formulas for calculating the figures for each jurisdiction, additional concerns surround the Scoreboard ability to provide a basis for cross-country comparisons in the realm of justice and adjudication costs in particular. These do not come from cases – such as those described in the previous subsection – where data under the same label report information referring to different phenomena. Rather, perfectly aligned information may convey a distorted image if the way it is conveyed does not take into account that the same data may mean different things depending on the context it refers to.

A typical issue stems from the different sizes of member states. Dividing the annual budget allocated to the judicial system by the country's population can yield only a rough estimate of the sum invested in the operation of a domestic judicial system. Calculation methods per capita do not take into account economies of scale, which could also explain – at least to some extent – the results from the less-populated member states.<sup>112</sup> Moreover, raw data in absolute amounts per capita should always be compared with the average domestic wealth, including per capita GDP. Yet the Scoreboard did not include such additional layers of analysis, and its input remained simplistic.

For all these reasons, the indicators on courts' budgets can provide only a very rough overview of one isolated financial parameter related to the operation of domestic courts. Alone, it cannot support safer conclusions not only in a purely domestic setting but, even more, in a comparative cross-country context.

Once again, measuring legal aid shows problems that are similar to those concerning justice costs in general. The Commission first acknowledged these specific limitations in the 2016 edition of Scoreboard.<sup>113</sup> It pointed out that the previous reporting methods based on the annual budgets allocated to legal aid<sup>114</sup> did not always enable safe cross-country comparisons. Additional parameters were needed to reflect the relevant macroeconomic conditions of each country and, more particularly, to allow the assessment of national legal aid schemes not abstractly but in the context of domestic income conditions.

The incorporation of domestic macroeconomic and living conditions was a necessary addition to the 2016 edition for assessing the effectiveness of domestic legal aid schemes. It expanded the available Scoreboard sources by involving lawyers and presenting more voices outside of the supply side of judicial services. By the same token, the direct liaison to the most prominent association of lawyers in the European continent was also a positive step. It opened up the Scoreboard analysis to a part of the demand side dealing professionally with judicial services. It remains to be seen whether the Commission intends to incorporate additional voices from the demand side, that is, the actual final users of courts such as businesses and citizens. This would balance out possible biases that vested interests may have in the collection of data in its current form.

#### 4.2.4 Finding Uniform Measures for Non-uniform

##### *Countries: Legal Contexts and Traditions*

Finally, even the most perfect statistical exercise may require some legal context to deliver meaningful results. Institutions such as courts and legal tools such as court fees may work differently from country to country, often depending on legal traditions. The importance of legal context also explains the Commission's reluctance to extract more generic comparative conclusions from the Scoreboard figures. This cautious approach reflects the inherent constraints on the use of quantitative data in the field of empirically based justice policies.

The complex relationship between the operation of courts, allocation of resources and economic efficiency is impossible to capture in its entirety solely with limited numerical data. Besides some basic needs common across jurisdictions, such as the costs for fixed assets or rental of buildings or infrastructure, the adequate distribution of financial and human resources depends largely on the multifaceted characteristics of each legal system. A more thorough analysis requires considering additional qualitative variables, which are anchored in the legal traditions of each system and diverge significantly across countries. Therefore, comparisons between countries should always be made cautiously and cannot be conducted without keeping an eye on the social, historical and domestic economic context, the

111 EU Justice Scoreboard 2017, Fig. 22.

112 E.g., Luxembourg is typically the top spender in the Scoreboard ranking on general government total expenditure on law courts since the first edition of 2013.

113 EU Justice Scoreboard 2016, 19.

114 E.g., EU Justice Scoreboard 2015, Fig. 39 (CEPEJ data).



structural peculiarities of each system and the different constitutional and legal traditions.

How the idiosyncrasies of legal systems can affect the comparability of data, particularly on budgets, can be illustrated with some examples. The Commission notes that even the broad distinction between inquisitorial and adversarial legal systems could significantly influence the amounts of public investments for the operation of courts.<sup>115</sup> However, comparability questions arise even before considering the procedural principles defining the role and the function of a judge in a court. The Scoreboard does not always explain which adjudicative bodies are included in the displayed sums and which are not. Different forms of privatisation of dispute resolution have emerged in recent years in many EU countries.<sup>116</sup> However, Nordic countries had established a tradition for decades in transferring litigious or non-litigious disputes to quasi-judicial bodies or public authorities that are state-funded and that operate similarly to courts.<sup>117</sup> The scope of such bodies is broad and covers a variety of disputes related to consumers, personal injuries, family law and recourse against social benefits, to mention a few.<sup>118</sup> To what extent the Scoreboard figures on the expenditure and staff take such bodies into account is unclear. In any case, it affects cross-country comparisons on efficiency and resources.<sup>119</sup> Eurostat contains only a generic definition of law courts,<sup>120</sup> which does not go deeper into the peculiarities of each legal system. CEPEJ, on the other hand, addresses some of these characteristics in the explanatory notes of each legal system. So, for instance, rent and tenancy tribunals or sections that operate as administrative agencies (e.g. in Sweden)<sup>121</sup> or as a simplified electronic procedure for eviction cases (e.g. in Portugal)<sup>122</sup> are not always included in the CEPEJ data.

The Commission has consistently shown itself to be fully aware of these methodological limitations. As long as relevant variations existed at the national level regarding the costs of judicial services, additional reflections were needed on the collection, measurement and analy-

sis of data to reduce divergences and achieve more homogeneous and comparative results. However, except for a few generic references in its pages,<sup>123</sup> the Scoreboard did not delve into the problem with any specific methodological approach.

It is worth noting that the same concerns were also expressed by the European Parliament when it first assessed the Commission's initiative.<sup>124</sup> Although the EP was formulating its critique diplomatically, a clear message was sent to the Commission regarding the Scoreboard methodology and output. Statistical assessments of judicial systems should respect the legal and constitutional traditions of member states. They should be based on objective criteria, on reliable and comparable data. With these thoughts, the EP indirectly questioned the Commission's one-size-fits-all approach to setting the Scoreboard's benchmarks and collecting data. The concept of justice and its agents (courts) as a complex, multidimensional social and political phenomenon required a more sophisticated assessment. In this respect, the EP has directly called the Commission to enhance the Scoreboard methodology by taking into greater consideration the differences between national judicial systems in the future.<sup>125</sup>

The concerns of the EP about the tool's blueprint and the Commission's overall attitude were not tackled directly in the Scoreboard. The 2014 edition contained some generic references to the need to account for the different legal traditions and the broader need for improvements of the indicators. However, those statements lacked the emphasis one would have expected in light of the EP's auspices, nor did they include concrete suggestions.<sup>126</sup> The same shortcomings affect, to some extent, all the following editions. The EP's main criticism against the one-size-fits-all Scoreboard methodology had been answered only with a short reference to the equality of treatment between member states.<sup>127</sup>

The area where these contradictions emerge most clearly is undoubtedly that of judicial reforms, including the reforms involving the costs of access to justice. As mentioned before,<sup>128</sup> the 2015 Scoreboard introduced a new indicator on the scope, scale and state of play of judicial reforms across the EU.

Unfortunately, the indicator offered information only on the mere existence of domestic legislative initiatives, entirely neglecting the importance of contextualisation and bearing no explanations on the surrounding circumstances under which judicial reforms had taken place. By the same token, the Scoreboard explanatory comments did not include descriptions or qualitative analysis of the concrete measures discussed or adopted in each jurisdiction.<sup>129</sup> Readers interested in finding out more about the reforms' content and impact on citizens

115 EU Justice Scoreboard 2013, 17.

116 B. Hess, 'Privatizing Dispute Resolution and Its Limits', in L. Cadet, B. Hess & M. Requejo Isidro (eds.), *Privatizing Dispute Resolution: Trends and Limits* (2019) 15.

117 A. Nylund, 'Rethinking Nordic Courts: An Introduction', in L. Ervo, P. Letto-Vanamo & A. Nylund (eds.), *Rethinking Nordic Courts* (2021) 1, at 3.

118 A. Nylund, 'Institutional Aspects of the Nordic Justice Systems: Striving for Consolidation and Settlements', in L. Ervo, P. Letto-Vanamo & A. Nylund (eds.), *Rethinking Nordic Courts* (2021) 187, at 203-7.

119 Nylund, above n. 10.

120 According to Eurostat, the data includes 'expenditure on administration, operation or support of civil and criminal law courts and the judicial system, including enforcement of fines and legal settlements imposed by the courts and operation of parole and probation systems; legal representation and advice on behalf of government or on behalf of others provided by government in cash or in services. Law courts include administrative tribunals, ombudsmen and the like, and exclude prison administrations'; See Eurostat data code: SDG\_16\_30, available at [https://ec.europa.eu/eurostat/databrowser/view/sdg\\_16\\_30/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/sdg_16_30/default/table?lang=en) (last visited 30 September 2021).

121 CEPEJ, Study on the Functioning of Judicial Systems in the EU Member States – Facts and Figures from the CEPEJ Questionnaires 2010 to 2018 Part 2, CEPEJ(2019)17 rev4, at 686.

122 *Ibid.*, at 556.

123 E.g., EU Justice Scoreboard 2013, 17.

124 EP Resolution of 4 February 2014, OJ 2017 C 93/32.

125 *Ibid.*, para. 8.

126 EU Justice Scoreboard 2014, 3, 27.

127 See above n. 100.

128 See Section 2.2.

129 *Bundesrat*; BR-Drucksache 173/16, para. 3.

and society had to look for material outside the pages of the Scoreboard.

Thus, only by relying on other sources could readers gain a more precise understanding of the supply policies being followed in the area of justice in the aftermath of the sovereign-debt crisis. So, for instance, studies conducted in the same period by the Committee of the European Parliament for Civil Liberties, Justice and Home Affairs (LIBE) on the impact of the crisis on fundamental rights were revealing.<sup>130</sup> The comparative report gave eye-opening information on the consequences of austerity measures that had addressed the costs of judicial services directly or indirectly:<sup>131</sup> court fees have been instated for proceedings that used to be traditionally free;<sup>132</sup> court charges have skyrocketed, in some cases up to 750% (e.g. Greece);<sup>133</sup> legal aid budgets had shrunk,<sup>134</sup> new taxation regulations imposed VAT on lawyers' fees (e.g. in Belgium and Greece).<sup>135</sup> For the same reasons, several of the court fees reforms had been declared unconstitutional, constituting, according to national courts, a disproportionate obstacle to access to justice.<sup>136</sup> Again, the Justice Scoreboard failed to provide such additional and crucial data on the content and the impact of reforms. Instead, by keeping its quantity-over-quality approach, it could ultimately provide only an over-simplistic overview of domestic reforms initiatives in the policy area of justice.

Once again, legal aid can further illustrate the point. The indicator first developed in 2016 to measure access to legal aid,<sup>137</sup> despite its apparent simplicity, fell short of providing a sufficiently detailed indication as to the conditions to have access to that form of financial support. To understand those conditions properly, readers should always read the indicator together with the accompanying explanatory comments and footnotes, and even in this case the picture would only be partial. Despite the Commission's attempts to provide more comprehensive information, comparisons across jurisdictions should still be made with caution, given the complexity of domestic legal aid schemes.

As with all quantitative data on legal aid, those figures should be read carefully as they do not always include the entirety of the available eligibility criteria of each

system. Next to the income thresholds, other factual parameters may often lead to automatic granting of legal aid, such as the qualification of applicants (particularly for recipients of social benefits other than legal aid alone) or the merits of the case. The existence of requirements that identify *ipso jure* the beneficiaries of legal aid (e.g., unemployment, incapacity for work, or social benefits receivers), the variety of the eligibility criteria (including financial or non-financial capital thresholds), the different reference periods applied (e.g. monthly or annual income of the applicant), or even the merits of the case are all additional and important parameters that were difficult to capture and reflect in the numerical data of the indicator, as also recognised by the Commission itself.<sup>138</sup> Using a homogeneous definition of legal aid for all national systems excluded *de facto* public resources allocated, e.g. on advisory services for pre-proceedings, and raised protests by some member states, which questioned the accuracy of the data.<sup>139</sup> Perhaps mindful of these limitations, the Scoreboard – and, more generally, the Commission – refrained from recommending one-size-fits-all solutions to enhance the effectiveness of national courts based, for instance, on optimal allocation of financial and human resources. Each member state should ascertain the appropriate distribution of resources across jurisdictions after a holistic and in-depth assessment of the domestic conditions.

### 4.3 Cost Data in Context

Section 4.2 has shown that, on top of the limitation surrounding data availability analysed in Section 4.1, one should not forget that the completeness of data does not guarantee the quality of data. The problems of comparability and reliability remain and are not necessarily connected with the sources' commitment to fulfilling their mandates. They are instead related to the inherent constraints on comparative empirical legal research. The heterogeneity of national judicial statistics significantly affects the comparability of the Scoreboard data. Moreover, it is highly questionable whether the use of quantitative data alone can support safe conclusions without the additional consideration of the different legal traditions and the multifaceted characteristics of each legal system. The challenge of quantification becomes even greater when mapping legal aid or litigants' fees with numbers. The perplexity of national legal aid schemes, the function and calculation formulas of court charges across jurisdictions, and the diverse regulatory approaches in setting the market prices for legal services need to be taken into account when comparing data on costs.

Caveats and limitations in data collection are often listed in the Scoreboard explanatory notes and footnotes. However, more transparency in the data collection processes could have enabled a more thorough evaluation of the reliability and comparability of the data. Unfortu-

130 A.I. Tamamović, *The Impact of the Crisis on Fundamental Rights across Member States of the EU: Comparative Analysis*, European Parliament, PE 510.021 (2015); the selected states were Belgium, Cyprus, Greece, Ireland, Italy, Spain and Portugal.

131 *Ibid.*, at 95-109.

132 For England: J. Sorabji, 'Austerity's Effect on English Civil Justice', 8 *Erasmus Law Review* 159 (2015); Spain: L. Carballo Piñeiro and J. Nieva Fenoll, 'The Impact of the Economic Downturn in the Spanish Civil Justice System', 8 *Erasmus Law Review* 174, at 178 (2015).

133 Tamamović, above n. 130, at 101.

134 See also X. Kramer and S. Kakiuchi, 'Austerity in Civil Procedure and the Role of Simplified Procedures', 8 *Erasmus Law Review* 139, at 143 (2015).

135 Tamamović, above n. 130, at 101.

136 See e.g., the Spanish Constitutional Court decision 140/2016 of 21 July 2016 (published in the Spanish Official Bulletin on 1 August 2016 declaring the Law 10/2012 of 20 November 2012, regulating certain fees relating to the administration of justice, unconstitutional), Press Release of the Tribunal No 74/2016, 29 July 2016.

137 EU Justice Scoreboard 2016, Fig. 20.

138 *Idem.*

139 E.g. *Bundesrat*, BR-Drucksache 173/16, para. 2.

nately, neither the complete data sets nor the methodology used to construct indicators is always available to the public.

However, as Sections 4.1 and 4.2 have demonstrated, a better look at the Scoreboard's pages reveals frequent data inconsistencies, such as figures from different years, provisional numbers or even estimations by the member states.<sup>140</sup> On a similar note, data on legal aid or fees is equally dependent on the peculiarities of each legal system.<sup>141</sup> Considering these limitations, the Scoreboard data collections on costs may offer readers a first orientation. However, they should be used very cautiously when carrying out scholarly analysis or policy-making.

## 5 The Costs of Accessing Justice: A Double-Edged Sword

Among the policymaking areas that are most sensitive to the data-driven analysis of the Scoreboard are, without a doubt, court fees. The way data is presented and collected and the drawbacks this project displays are therefore important in order to understand what kind of impact the Scoreboard can have on such policy. In other words, data may be objective but hardly neutral, the difference being in the selection of the information to cover and on the way such information is conveyed. In this part, the article addresses these implications with specific regard to the Scoreboard approach to the impact of court fees on efficiency and rule-of-law protection.

Costs and their effect on access to justice may also be in a complex relationship with rule-of-law protection.<sup>142</sup> Unfortunately, the relationship between costs, on the one hand, and the rule of law or efficiency, on the other, is not linear. An increase in the costs of adjudication could reduce access to justice. However, it is also likely to facilitate case management and reduce caseload, which is translated into quicker decisions, which in turn are beneficial to the rule of law. Whether a judicial system is more efficient when it delivers fewer decisions in a relatively shorter time or when it can handle a larger caseload in a lengthier fashion depends, of course, on the preferences of citizens and policymakers, including on distributive concerns. Which policy choice prevails is, to a large extent, a matter of value judgment.

Here, an example is given of how the Scoreboard deals with this sensitive issue. A potential dissuasive effect of high costs of proceedings does not appear to raise concerns for the Commission, at least not as long as high costs lead to a drastic reduction of incoming or pending litigious cases. Spain offered a good example of such rel-

ativisation of the Scoreboard findings in the 2016 edition.

In that edition, the Scoreboard failed once again to offer an account of the surrounding economic and social context where national trends were occurring. A focus on the member states that showed remarkable improvements in their results<sup>143</sup> would quickly show a more complex reality than the Scoreboard would tell. As mentioned only in a footnote and in small letters, the drastic drop in the number of incoming cases in Spain was attributed (next to methodological changes in the collection of national data) also to 'the introduction of court fees for natural persons'.<sup>144</sup> Indeed, a strong correlation existed between the Scoreboard findings for Spain and the stipulation of court charges, as statistics showed a reduction in the number of incoming cases in almost all Spanish courts affected by Spain's new measures on court fees.<sup>145</sup> What the Commission had considered *in passim* and with an asterisk as a standardised policy lever to adjust the volume of filed and pending actions within a system constituted one of the most controversial justice reforms of the past decades in Spain. The measures met with considerable opposition within the Spanish society as a symptom of unequal access to justice. They were widely denounced by the legal community, consumer associations, the Spanish Ombudsman and lower courts' rulings owing to their lack of proportionality between the court charges and the average purchasing power of citizens.<sup>146</sup> Ultimately, they were declared unconstitutional in 2016.<sup>147</sup> Considering, however, the Commission's tendency to assess positively any decline in the figures of incoming cases,<sup>148</sup> the dissuasive effects on people to access justice caused by disproportional court charges was rather seen as a success story and a legitimate practice.

## 6 Conclusions

The EU Justice Scoreboard is the first attempt of the European Commission to venture into the field of evidence-based justice policies. It provides data on the functioning of national justice systems in the three main fields of efficiency, quality and independence and is based on the voluntary participation of EU member states.

The Commission's starting point is straightforward. The different national legal traditions and the peculiarities of each legal order should not affect the common objective of the European AFSJ. Affordable and timely judicial

140 E.g., EU Justice Scoreboard 2020, Fig. 32-34; EU Justice Scoreboard 2021, Fig. 29-31.

141 E.g., EU Justice Scoreboard 2021, Fig. 23-24 (explanatory notes).

142 Dori, above n. 7.

143 The 2016 Scoreboard emphasised the positive developments in many member states, which faced particular challenges and numerous incoming and pending cases in the past; see EU Justice Scoreboard 2016, 16.

144 *Ibid.*, notes under Fig. 3 for Spain.

145 J. Lladós Vila and T. Freixes, 'The Impact of the Crisis on Fundamental Rights across Member States of the EU – Country Report for Spain', European Parliament, PE 510.019, at 65 (2015).

146 *Ibid.*, at 62-8.

147 Spanish Constitutional Court, above n. 136.

148 EU Justice Scoreboard 2016, 16.



proceedings by independent courts are essential for the rule-of-law protection and strengthening of the internal market.

The article focused on one of the most significant parts of the Scoreboard, namely the one dedicated to costs for the supply and demand sides of judicial services. The Scoreboard considers costly (and lengthy) judicial proceedings as the main obstacle(s) to access to justice. By creating synergies with various data providers, the Scoreboard developed a data set progressively on the affordability of national justice systems.

Contrary to the Commission's starting point, however, the idiosyncrasies of the national systems and the heterogeneity of national judicial statistics do affect how individual characteristics should be measured and compared across jurisdictions. A closer look at the Scoreboard shows that even aspects of courts' functioning, which by definition appear easier to quantify, such as the costs of adjudication, cannot be easily assessed alone with quantifiable metrics and without contextualisation. And while it is true that the Scoreboard data sets on costs are complete and do not appear to be affected by data gaps, the Commission's one-size-fits-all approach in this regard often leads to questionable results. Scoring exercises often lead to this kind of consequence, if only because comparability requires to fit national rules and implementations within a common evaluation grid.<sup>149</sup> In this regard, different results displayed by member states may be misleading to the extent that such an evaluation grid does not adapt to all of them. Fitting different national systems into a single set of metrics does not lead to theoretical problems alone. Another more practical consequence is that data is sometimes inconsistent, often based on estimations and does not use common operational definitions. Crucial information on the peculiarities of each system, if revealed, is squeezed in asterisks and footnotes.

Additionally, the Scoreboard does not delve directly into the uneasy relationship between the rule of law, efficiency of courts and costs. On the sensitive issue of using litigation tariffs to adjust the volume of litigation, it only offers some sporadic hints. The Commission complements those member states, which faced particular challenges and improved their performances by decreasing incoming and pending cases. At the same time, however, it does not offer a contextualisation of the measures taken to achieve improvements. The example of Spain in the 2016 edition with the dissuasive effect of high costs of proceedings on the volume of litigation shows that the Commission seems to favour efficiency, although somewhat misguided.

On top of that, the Commission has not always been particularly transparent regarding the creation and development of the Scoreboard. This general feeling of unaccountability affects more than one step in the proce-

cedure. It starts with the selection of the data providers that feed the tool among the available alternatives, but it is also reflected in the concepts underpinning the features of the indicators used. On a similar note, not all data providers made their complete data sets available to the public. The indicators' objectives and methodology are addressed in the Scoreboard pages. General statements are repeated in identical text in all editions.

Consequently, readers are rarely offered the possibility of better understanding the indicators' selection and production process. In most cases, they are left with figures and charts alone. It is unclear to what extent the DG Justice follows the old saying attributed to *Otto von Bismarck* on lawmaking and treats the Scoreboard data sets as sausages.<sup>150</sup> However, as the Scoreboard is often used as a starting point of academic analyses on the performance of justice and policy proposals by regulators and lawmakers, closer ex post facto scrutiny seems necessary to make sure those analyses and those proposals are based on solid ground. Moreover, the use of sound, independent and scientific concepts developed in a dialogue with the academic community and policymakers could benefit the Scoreboard methodology and framing of indicators.

149 Unsurprisingly, similar problems affect another important exercise as the World Bank's Doing Business Report: see e.g. L. Enriques and M. Gargantini, 'Form and Function in Doing Business Rankings: Is Investor Protection in Italy Still So Bad?', 1 *University of Bologna Law Review* 1 (2016).

150 It was *Bismarck* who said that the man who wishes to keep his respect for sausages and laws should not see how either is made.

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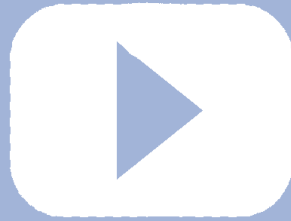
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