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Legal Nature of Third-Party Funding Agreements under Polish Law

Charakter prawny umów o finansowanie sporów przez osoby trzecie (third--party funding) w prawie polskim

Abstract

This article explores the legal nature of third-party funding agreements (LFAs) under Polish civil law, situating the discussion within broader EU regulatory developments and comparative legal analysis. The article analyses LFAs considering the principle of party autonomy and its limitations, including pactum de quota litis, assignment of claims, and disproportionate funder returns. By comparing LFAs to close contracts such as silent partnerships, insurance contracts, and loans, the article claims that LFAs shall be classified as sui generis contracts under Polish law. The analysis leads to the conclusion that while there is no immediate need for specific regulation of LFAs under Polish or EU law, targeted regulatory efforts at the EU level – particularly on funder capital adequacy and public policy safeguards – could enhance legal certainty and support the responsible growth of the litigation funding market.

KEYWORDS: third-party funding, litigation finance, litigation funding, LFA.

SŁOWA KLUCZOWE: finansowanie sporów przez osoby trzecie, finansowanie postępowań sądowych, umowa o finansowanie sporu, LFA.

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1 | Introduction

In recent years, third-party funding has gained some publicity in Poland thanks to the investment arbitration between GreenX (formerly Prairie Mining) and Poland, financed by Australian Litigation Capital Management (LCM)[1]. Nev-

1 Harry Morgan, „Litigation Capital Management Limited Positive Update on Fund I Investment" *Legal Funding Journal*, 8 October 2024, https://legalfundingjournal.com/litigation-capital-management-limited-positive-update-on-fund-i-investment/ [accessed: 7.09.2026].

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ertheless, third-party funding is still relatively uncommon in Poland, primarily due to relatively low litigation costs and the long duration of court proceedings[2], two factors that play essential roles for every third-party funder[3]. Nevertheless, anecdotal evidence proves that some third-party funders are interested in the Polish market as a major market in CEE[4].

In its standard form, third-party funding involves a third party (third-party funder) providing non-recourse financing of litigation costs in return for a secured interest in the proceeds of the funded case. Currently, TPF exists in various forms, beginning with funding of single cases (i.e., "single-case financing") and finishing with funding of portfolios of cases (i.e., "portfolio financing") and direct investments in law firms[5]. For this article, only "single case" LFA will be considered.

As of the time of writing, third-party funding remains unregulated worldwide. Some regulations have been introduced in jurisdictions that recognise maintenance and champerty doctrines (e.g. Hong Kong or Singapore), and the primary aim of introducing a legal framework was the abolition of those doctrines. Thus, those regulations are rather general and limited to significant matters such as minimum contents of the LFA or capital adequacy of the funders. Similarly, existing soft law regulations also tend to regulate matters widely discussed in the context of third-party funding, such as conflicts of

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2 European Commission, Study on Mapping Third Party Litigation Funding in the European Union (2025), https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/third-party-litigation-funding-tplf_en [accessed: 7.09.2026].

3 Cento Veljanovski, „Third Party Litigation Funding in Europe", *SSRN Electronic Journal* (2011): 406; Marco de Morpurgo, „A Comparative Legal and Economic Approach to Third-Party Litigation Funding" *Cardozo Journal of International and Comparative Law* 19 (2011): 399–400; Gian Marco Solas, *Third Party Funding: Law, Economics and Policy* (Cambridge: Cambridge University Press, 2019), 121–122; Jonas von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* (Alphen aan den Rijn: Kluwer Law International, 2016); Kaja Zaleska-Korziuk, „Finansowanie sporów o prawa majątkowe przez osobę trzecią (third-party funding). Zarys problematyki" *Prawo i Więź*, no. 3(33) (2020): 92–109, https://doi.org/10.36128/priw.vi32.189.

4 Kaja Zaleska-Korziuk, *Charakter prawny umowy o finansowanie postępowania arbitrażowego przez osobę trzecią (third party funding)* (Warszawa: C.H. Beck, 2021).

5 Zaleska-Korziuk, *Charakter prawny umowy*; von Goeler, *Third-Party Funding in International Arbitration*.

interest, minimum obligations of the funder or contents of the LFA, disclosure and ethical considerations.

The lack of complex regulation has also been raised on the EU level. On 25 July 2022, the Committee on Legal Affairs headed by Axel Voss adopted a report with recommendations to the Commission on responsible private funding of litigation (procedure: 2020/2130(INL)). Based on the report on 13 September 2022, the European Parliament adopted a resolution with recommendations to the Commission on responsible private funding of litigation[6]. In response to the resolution, the EU Commission conducted a mapping study on legislation, practice, and debate on third-party funding in the Member States and four non-EU countries (i.e., the US, the UK, Canada, and Switzerland)[7]. The national report covering Poland, prepared by Magdalena Tulibacka, presents an overview of the regulation of third-party funding and academic discussion.

This article presents additional considerations regarding the legal nature of third-party or litigation funding agreements (LFAs) under Polish law. It comments on the need for regulation of LFAs on the EU level. From a comparative law perspective, the article will focus on French and German law, historically important points of reference for Polish law that provide a developed analysis of third-party funding. Furthermore, this article will not discuss procedural (e.g. disclosure) or ethical issues (relations with the funded party's counsel).

2 | The LFA in the Light of the Limits of Parties' Autonomy

LFAs constitute innominate contracts under Polish law and are thus typically allowed under the parties' autonomy[8].

Similarly, as in other civil law legal systems, party autonomy under Polish law is not unlimited. The limits to parties' autonomy are illegality, the nature of legal relationships, and rules of social coexistence (Art. 353^1 of the Polish

6 European Parliament resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation (2020/2130(INL)).

7 European Commission, Study on Mapping Third Party Litigation Funding in the European Union.

8 Order of the District Court in Poznań, IX GCo 190/20, unreported; European Commission, Study on Mapping Third Party Litigation Funding in the European Union; Zaleska-Korziuk, *Charakter prawny umowy*.

Civil Code), and contracts exceeding those limits are deemed fully or partially void under Polish law (Art. 58 of the Polish Civil Code). Therefore, it appears necessary to analyse the mechanisms of LFA in light of the limits of parties' autonomy.

Polish law does not impose any obligation on parties to personally incur litigation or arbitration costs, nor does it prohibit qualified lawyers from receiving remuneration for their services from third parties rather than directly from clients (unlike, e.g., French law, where such a limitation exists)[9]. Unlike Greek or Portuguese laws[10], Polish law does not provide for the prohibition of *pactum de quota litis*. Therefore, under Polish law, no *prima facie* provisions would preclude parties from utilising litigation finance to fund litigation or arbitration.

2.1. No Pactum de Quota Litis Prohibition

As briefly noted, Polish law does not provide for generally applicable rules on *pactum de quota litis*, which would preclude success-based remuneration between private parties. On the contrary, success fees are recognised in Poland and are standard in the context of personal injury cases and cases linked with unfair terms in consumer contracts. Thus, the prohibition of *pactum de quota litis* remains an ethical issue applicable only to qualified lawyers; however, even in this context, it is losing its significance and tends to be disregarded in practice[11].

2.2. Circumvention of Rules on the Assignment of Claims

LFA shall not circumvent rules on the assignment of a claim either when the respective contract includes a "no-assignment clause" or when a funder is not interested in officially becoming a party to pending litigation. Bearing that in mind, LFA should not be structured in a way which would make it equivalent to the assignment of claims. This is more important in the context of the funder's control over the funded procedure, including but not limited to the conclusion of a settlement agreement or withdrawal of the claim. LFA may not render the funder a party-in-fact as it would be qualified as contrary to the nature of LFA and possibly constitute the assignment of claims to the funder. Thus, LFA's

9 Zaleska-Korziuk, *Charakter prawny umowy*; Solas, *Third Party Funding*, 121–122.

10 Solas, *Third Party Funding*, 121–122.

11 Jerzy Naumann, *Zbiór zasad etyki adwokackiej i godności zawodu. Komentarz* (Warszawa: C.H. Beck, 2020).

clauses dealing with the funder's control over the procedure shall be carefully drafted, and a passive approach to the control would be preferred (i.e., the funder assumes the passive role and assumes no control over the litigation)[12].

2.3. Return on Investment and Revenue

Accordingly, the funder's revenue shall be proportionate to the investment made. Unreasonably excessive return on investment may be assessed as equivalent to proceeds of the case and lead to the conclusion that the funder is party-in-fact to the dispute. Additionally, excessive revenues may violate the rules of social coexistence and thus invalidate LFA at least partially in terms of return on investment. It shall be noted that the standard revenue of the funder amounts to 20–40% of the proceeds of the case and/or up to 10 times the amount invested by the funder (whichever is higher)[13]. It follows from the Polish Supreme Court case law on success fees that revenues calculated as a pre-agreed fraction of proceeds of the case are admissible under the parties' autonomy, and a fee amounting to 30% of the proceeds of the case together with interest due and VAT does not violate the rules of social coexistence[14].

The Supreme Court also noted that a mechanism linking the fee due with the case proceeds has a valid economic justification and allows impecunious parties to pursue claims they could not finance themselves. However, this Supreme Court's conclusion, made in the context of personal injury claims, also applies to litigation funding[15].

3 | Close Contracts and the LFA

There is no single approach to the legal nature of LFA within civil law countries, and it was first characterised either as a contract *sui generis* in France or as an atypical silent partnership in Germany (*atypische stille Gesellschaft bürgerlichen*

12 de Morpurgo, „A Comparative Legal and Economic Approach", 399–400; Peter Callens, Guillaume Croisant, Françoise Lefèvre, „Legality of Third-Party Funding Mechanisms under Belgian Law" *b-Arbitra \| Belgian Review of Arbitration*, no. 1 (2017): 35–65.

13 Zaleska-Korziuk, *Charakter prawny umowy*; Zaleska-Korziuk, „Finansowanie sporów o prawa majątkowe"; von Goeler, *Third-Party Funding in International Arbitration*; de Morpurgo, „A Comparative Legal and Economic Approach", 399–400.

14 Zaleska-Korziuk, *Charakter prawny umowy*.

15 Zaleska-Korziuk, *Charakter prawny umowy*.

Rechts)[16]. Nevertheless, the distinction of the LFA from close contracts has not been widely discussed from the Polish perspective in English scholarly writing.

3.1. The LFA as a Silent Partnership under Polish Law

A silent partnership was regulated under Art. 682–695 of the Commercial Code, which has been replaced by the Commercial Companies Code. As in German law, a silent partnership is only contractual, and no partnership is established. There is no regulation on silent partnerships under Polish law, rendering a silent partnership an innominate contract.

LFA appears similar to a silent partnership, especially regarding the third-party funder and silent partner positions. Like a silent partner, a third-party funder invests in a funded party's assets (e.g. claims) in exchange for a fraction of the case's proceeds. Furthermore, in both cases, the investor (i.e. the third-party funder or silent partner) assumes the risk of the outcome as they are entitled to participate in the proceeds of the venture. Finally, both contracts are "silent" as the involvement of a silent partner or third-party funder does not have to be disclosed to third parties. Both investors are not liable to third parties for any debts related to the venture[17].

The LFA resembles a silent partnership because both contracts are based on investment in third-party assets. Apart from that element, the contracts do not show any other similarities.

The silent partnership is closely linked with the general partner's economic activity. Therefore, the silent partner's contribution provides financing for further business development without establishing any partnership. This is why the general partner may freely allocate the contributions of the silent partner, who remains passive and has no control over the general partner's activities.

Considering the professionalisation of the third-party funding industry, litigation funding is provided by sophisticated entities, who become "super-lawyers"[18] able to assess cases from legal and economic standpoints. Funded claims do not need to be linked with the economic activity of the funded party,

16 Solas, *Third Party Funding*, 121–122; Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms".

17 Solas, *Third Party Funding*, 121–122; Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms"; Zaleska-Korziuk, *Charakter prawny umowy*; von Goeler, *Third- Party Funding in International Arbitration*.

18 Catherine A. Rogers, *Ethics in International Arbitration* (Oxford: Oxford University Press, 2014), 186.

and the funder is interested in the quantum of a claim and its legal merits[19]. Thus, private cases are suitable for funding, provided they meet the minimum assessment criteria. Third-party funding may be used only for its intended purpose and pre-agreed case budget[20]. It is also possible that no funds will be transferred between parties, as the funder may pay the litigation costs directly.

Contrary to a silent partnership, a litigation funder provides case financing on a non-recourse basis and bears the losses alone. Thus, the risk the litigation funder assumes is higher than that assumed by a silent partner. In a negative venture outcome, the litigation funder's losses include prospective profits and contributions (i.e., litigation costs incurred).

Under French law, the LFA cannot be qualified as a silent partnership due to its lack of *affectio societatis* (i.e., intent to form a partnership). The German judiciary shares this approach and has criticised the LFA's qualification as an atypical silent partnership[21]. From a Polish perspective, the intent to form a partnership is related to a civil rather than a silent partnership. Art. 860 § 1 of the Polish Civil Code provides that by a contract of civil partnership the partners undertake to achieve a common economic objective in a defined manner, in particular by making contributions. Thus, under Polish law, the *affectio societatis* is a characteristic feature of partnerships, first emerging in a civil partnership (which, like a silent partnership, is merely a contract). The Polish doctrine highlights that *affectio societatis* is a cornerstone of a civil partnership as an organisation. The partners' common objective justifies joint ownership of assets by the partners as well as their joint and several liability for the debts arising out of activities of a civil partnership[22].

Therefore, the heart of the problem is a common economic objective of the funder and funded party. The German doctrine considers that both parties are

19 Zaleska-Korziuk, *Charakter prawny umowy*; von Goeler, *Third-Party Funding in International Arbitration*; de Morpurgo, „A Comparative Legal and Economic Approach", 399–400.

20 Zaleska-Korziuk, *Charakter prawny umowy*; von Goeler, *Third-Party Funding in International Arbitration*; Rogers, *Ethics in International Arbitration*, 186.

21 Solas, *Third Party Funding*, 121–122; Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms"; Zaleska-Korziuk, *Charakter prawny umowy*; von Goeler, *Third- Party Funding in International Arbitration*.

22 Zaleska-Korziuk, *Charakter prawny umowy*.

interested in the case outcome in favour of the funded party[23]. The funder is, however, interested in return on investment, which does not always align with the case's successful outcome. The successful result is, therefore, a trigger of the funder's return structure, defined under the LFA. Consequently, the funder is not interested in the case's outcome *per se* (in contrast to the funded party). Possible conflicts of interest between the funder and the funded party, discussed especially in the context of settlement, clearly show that the parties have no joint objective. The LFA does not oblige the funder to act in the best interest of the funded party; it acts in its own, purely financial, interest.

The LFA is neither a silent nor a civil partnership under Polish law.

3.2. The LFA as Insurance

The LFA is generally associated with legal protection insurance, which exists in two basic forms: before-the-event insurance ("BTE" insurance) and after-the-event insurance ("ATE" insurance)[24]. From an empirical point of view, ATE insurance may be linked with litigation funding, as the funded party may be obliged under the LFA to provide ATE insurance covering adverse costs orders[25]. Nevertheless, both under BTE and ATE insurance, the insured event is a future event. ATE insurers provide indemnity against the risk of an eventual adverse costs award[26].

Unlike legal protection insurance, the LFA is concluded after the dispute arises[27]. The assessment process conducted by the funder prior to the conclusion of the LFA links the litigation finance with the individual dispute and its merits. Therefore, the funder does not assume abstract risks as in the case of insurance, and the assumed risks are calculated before the LFA is concluded. Furthermore, no obligation of the funder is linked with the outcome of the funded case. As noted under French law, in the case of the LFA, the "alea" affects the funded party's obligation to share the case's proceeds with the funder, and

23 Solas, *Third Party Funding*, 121–122; Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms".

24 Zaleska-Korziuk, *Charakter prawny umowy*.

25 Zaleska-Korziuk, *Charakter prawny umowy*.

26 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 (2018), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf [accessed: 11.09.2026].

27 Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms"; Zaleska-Korziuk, *Charakter prawny umowy*.

no premium is paid in advance[28]. Thus, the "alea" element influences the repayment structure.

Insurance premiums have been recognised as an essential element of insurance throughout continental Europe (France, Italy, Germany, and Belgium) [29]. Thus, the LFA is generally denied qualification as a type of insurance. The same finds application under Polish law. According to Polish doctrine, the economic purpose of insurance is a transfer of risks and not insurance payout[30]. In contrast, the economic purpose of litigation finance is financing, and the funder's assumption of risk is secondary (i.e. it is not a primary obligation of the funder). The LFA cannot be qualified as insurance under Polish law.

3.3. The LFA as a Loan

The LFA's qualification as a loan has been widely disregarded (Germany, France, Belgium, Italy)[31]. Litigation financing is provided non-recourse, and repayment constitutes an essential loan element. As noted by the French doctrine, the aleatory element concerns the remuneration of the funder[32], which would usually cover both reimbursement of costs incurred by the funder and share in the case proceeds. Thus, the LFA's aleatory character precludes it from being regarded as a loan. This approach finds complete application under Polish law as well[33].

3.4. The LFA as a Sui Generis Contract

Differences between the LFA and discussed close concepts lead to the conclusion that the LFA is a *sui generis* contract. Such a qualification has been accepted under French and Belgian law[34]. According to the French and Belgian

28 Solas, *Third Party Funding*, 121–122; Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms".

29 Solas, *Third Party Funding*, 121–122; Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms".

30 Marcin Orlicki, „Umowa ubezpieczenia", [in:] *System Prawa Handlowego*, vol. 5, *Prawo umów handlowych*, ed. Mirosław Stec (Warszawa: C.H. Beck, 2020), 1702–1704.

31 Solas, *Third Party Funding*, 121–122.

32 Solas, *Third Party Funding*, 121–122; Le Club des Juristes, Rapport de la commission „Financement du procès par les tiers" (June 2014), https://think-tank.leclubdesjuristes.com/les-commissions/rapport-commission-financement-du-proces-les-tiers/ [accessed: 11.09.2026].

33 Zaleska-Korziuk, *Charakter prawny umowy*.

34 Solas, *Third Party Funding*, 121–122; Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms".

approach, the LFA combines elements of a partnership, a services agreement, and a loan agreement[35]. This seems acceptable under Polish law as well[36]. The Polish legal doctrine recognises a minimum of three types of contracts, i.e., contracts regulated under a statute, hybrid contracts that combine terms of regulated contracts and *sui generis* terms, and *sui generis* contracts[37]. The LFA falls within the last category as it is not regulated under Polish law, and its main elements remain unique[38].

In recent years, the main terms of the LFA have been discussed in the Code of Conduct for Litigation Funders in the Code of Conduct for Litigation Funders of the Association of Litigation Funders of England and Wales, the Hong Kong Code of Practice for Third Party Funding of Arbitration, Guidance Note 10.1.1 (Third-Party Funding) of the Law Society of Singapore, and the SIArb Guidelines for Third-Party Funders. In 2024, the European Law Institute published Principles Governing the Third Party Funding of Litigation, which provide for the minimum content of third-party funding agreements[39].

A comparison of the basic terms of the LFA stemming from both foreign legislation and soft law shows that the LFA is well-developed from an empirical point of view. The primary contractual terms of the LFA cover: 1) case budget; 2) the funder's return; 3) case monitoring, the funder's right to be informed and control rights of the funder; 4) liability for adverse costs orders and/or ATE insurance; 5) confidentiality; 6) limited early termination rights of the funder; 7) dispute resolution clause. The LFA should be concluded in writing, and the funded party shall obtain legal advice on the LFA prior to its conclusion. The funder shall maintain its financial liquidity to provide financing throughout the litigation[40].

Considering the above, analysing possible relations between the LFA and the services agreement is important. The Polish doctrine holds that service

35 Callens, Croisant, Lefèvre, „Legality of Third-Party Funding Mechanisms".

36 Zaleska-Korziuk, *Charakter prawny umowy*.

37 Zbigniew Radwański, *Teoria umów* (Warszawa: Państwowe Wydawnictwo Naukowe, 1977).

38 Zaleska-Korziuk, *Charakter prawny umowy*.

39 Susanne Augenhofer, „European Law Institute (ELI) Principles Governing the Third Party Funding of Litigation" *SSRN Electronic Journal* (2024), https://doi.org/10.2139/ssrn.5058246.

40 Zaleska-Korziuk, *Charakter prawny umowy*; von Goeler, *Third-Party Funding in International Arbitration*.

agreements are a broad group of agreements relating to factual acts. It is also widely accepted that the *sui generis* agreements may be qualified as a subtype of the services agreement. Therefore, the LFA may qualify as a services agreement related to financing, alongside the sponsorship agreement and the Lombard loan. Should the LFA be regarded as a services agreement, the provisions on the mandate agreement shall apply accordingly under Art. 750 of the Polish Civil Code. Without elaborating on the details of the Polish regulation of the mandate agreement, applying the provisions on the mandate agreement to the LFA would lead to the same results generally accepted under existing foreign legislation and soft law. This would include, *inter alia*, limited grounds for the funder's early termination of the LFA and special trust between the funder and the funded party linked with the funded party's obligation to keep the funder informed and avoid conflicts of interest[41].

4 | Conclusions: The Need for Regulation

The lack of regulation of the LFA under Polish law does not create significant challenges or uncertainty. Thus, there is no need for additional regulation of the LFA under Polish law.

It should be emphasised that this article is limited to the legal nature of the LFA and does not discuss issues linked with public policy or ethics, as those matters remain distinct from the LFA as a contract and, therefore, call for separate analysis.

As regards the need for legislation on the EU level, the Commission noted differing positions of the Member States: from those pointing to a certain degree of confusion and uncertainty, potentially leading to funders not operating in certain countries (France), to a clear rejection of the need for regulation (Austria)[42]. The primary matter to be addressed in the discussion over a need for EU regulation of third-party funding is the scope of such a regulation. Third-party funding raises a broad scope of issues that are not necessarily related to the LFA itself. The general tendency is, however, to discuss all of those matters jointly, which leads to controversy and discussion.

41 Zaleska-Korziuk, *Charakter prawny umowy*.

42 European Commission, Study on Mapping Third Party Litigation Funding in the European Union.

From a contractual point of view, there is no need for EU regulation of the LFA. As with every contract, the LFA should be assessed through the lens of the national civil law of each Member State. From a broader perspective, the growing self-regulation of the third-party funding industry indicates the likelihood of developing model framework contracts. Thus, legislative intervention is premature.

Nevertheless, issues linked to public policy, such as the capital adequacy of the funders, shall be further elaborated, harmonised, and regulated to provide the industry with a clear legal framework.

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