

## Justice and Profits: A Comparative Analysis of the Enforceability of Third-Party Litigation Funding Agreements Under Jordanian Law

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### Abstract

This article explores the enforceability of Third-Party Litigation Funding (TPLF) agreements used to finance litigation and arbitration under Jordanian law. It examines the legal, procedural, and policy issues these agreements raise. Although the laws of Jordan do not specifically address this form of funding, according to the article, the contracts may be regarded as unnamed contracts under Article 87 of the Civil Code, provided they satisfy the general conditions of validity and do not conflict with Article 165's public order constraints. The article adopts a descriptive and comparative analytical methodology, drawing on foundational principles of Arab civil law, comparative case studies, and Islamic jurisprudential concepts such as *gharar* (uncertainty) and *maisir* (gambling).

To illustrate these risks in the absence of statutory regulation, this article presents hypothetical models of permissible and impermissible TPLF structures. It demonstrates how excessive funder control or disproportionate profit-sharing may render such agreements unenforceable. Empirical data on access-to-justice barriers in Jordan reinforces the argument that TPLF addresses a systemic need, especially given the high costs and long duration of litigation.

This article offers the first doctrinal analysis of TPLF enforceability in Jordan, grounded in proportionality, mutual benefit, and judicial integrity. It recommends enforceability thresholds and limited disclosure duties that preserve claimant autonomy while aligning with Jordanian public policy. The findings also contribute to broader debates in civil law jurisdictions regarding the role of private finance in litigation and the evolving boundaries of public order.

**Keywords:** Third-party litigation funding (TPLF); International Commercial Arbitration; Atypical contracts; Enforcement of Arbitral Awards; New York Convention; Jordanian Law; Islamic Finance; Sharia; Gharar and Maisir; Access to justice; Public Policy (Arbitration).

## العدالة والربح: دراسة مقارنة في مدى قابلية تنفيذ اتفاقيات تمويل التقاضي

من الغير في ظل القانون الأردني

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## الملخص

يتناول هذا البحث مدى قابلية تنفيذ عقود تمويل التقاضي من طرف ثالث (TPLF) في القانون الأردني، بوصفها نمطاً تعاقدياً مستحدثاً يثير إشكاليات فقهية وإجرائية وأبعاداً متصلة بالنظام العام سواء في التقاضي أو مع التحكيم. ورغم أن التشريع الأردني، المتأثر بالفقه الإسلامي، لا ينظم هذه العقود صراحةً، إلا أنه يقوم على موازنة دقيقة بين حرية التعاقد من جهة، وبين فرض قيود صارمة لضمان انسجام العقود مع النظام العام من جهة أخرى. ومن هذا المنطلق، يجادل البحث بإمكانية تكييف عقود TPLF كعقود غير مسماة استناداً إلى المادة (87) من القانون المدني الأردني، شريطة استيفائها شروط الانعقاد العامة وعدم تعارضها مع قواعد النظام العام والآداب، لا سيما المادة (165). وتستند الدراسة إلى المنهج الوصفي والتحليلي المقارن، مستفيدة من المبادئ الأساسية للقانون المدني، ودراسات الحالة المقارنة، والمفاهيم الفقهية الإسلامية مثل الغرر والميسر.

كما يقدم البحث نماذج افتراضية لعقود صحيحة وأخرى باطلة، مبرراً أن سيطرة الممول المفرطة أو تقاسم الأرباح بشكل غير متناسب قد يجعل هذه العقود باطلة وغير قابلة للتنفيذ. كما تدعم البيانات الإحصائية حول عوائق الوصول إلى العدالة في الأردن فرضية أن تمويل التقاضي من طرف ثالث يمكن أن يسد حاجة نظامية ملحة، لا سيما في ظل ارتفاع تكاليف التقاضي وطول أمد الفصل في النزاعات.

ويطرح البحث أن عقد المضاربة يمثل إطاراً فقهياً بديلاً لصياغة نماذج تمويل أكثر انسجاماً مع مبادئ الشريعة الإسلامية، تقوم على تقاسم المخاطر والعوائد بصورة متناسبة، وبما يحقق التوازن بين الاستثمار وتحقيق المنفعة المشروعة والمشاركة مع الحفاظ على استقلال القضاء وحياده. ويخلص البحث إلى ضرورة وضع إطار تنظيمي يحدد الشروط الموضوعية لنفاذ هذه العقود، ويفرض واجبات إفصاح محدودة تضمن استقلالية المدعي وتتسجم مع اعتبارات النظام العام الأردني.

**الكلمات المفتاحية:** تمويل التقاضي من طرف ثالث؛ التحكيم؛ العقود غير المسماة؛ تنفيذ أحكام التحكيم؛ اتفاقية نيويورك لتنفيذ قرارات التحكيم؛ القانون الأردني؛ عقود التمويل الإسلامي؛ الشريعة؛ الغرر والميسر؛ الوصول إلى العدالة؛ النظام العام.

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## 1 Introduction

The emergence of Third-Party Litigation Funding (TPLF) has dramatically shifted how disputes, both in court and in arbitration, are funded (Behrens, 2025). Under a TPLF agreement, a private investor or fund finances a claimant's legal expenses in exchange for a share of any financial recovery (United States Government Accountability Office, 2022). Created to reduce the financial burden of expensive, complex litigation, this mechanism has become a sophisticated financial-and-legal instrument with significant ramifications for access to justice, procedural fairness, and judicial integrity (Chen Wenjing, 2019).

It was first received sceptically, given its perceived contradiction with common law prohibitions on champerty and maintenance (*Trendtex Trading Corp v Credit Suisse*, 1982; *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, 2006). Over time, however, courts and legislatures in jurisdictions such as the United States (*Charge Injection Technologies Inc v E.I. DuPont de Nemours & Co.*, 2016), the United Kingdom (*Arkin v Borchard Lines Ltd*, 2005), and Australia (*Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, 2006), followed more recently by several continental European states (Cordina & Storskrubb, 2022) and Canada (Molavi, 2018) have integrated TPLF into their procedural and market frameworks. This international spread mirrors wider trends in financialised legal claims, in which litigation is treated as a capital-investable and thus risk-assessable asset (Lombard & Borraine, 2023).

The proliferation of TPLF contracts in the United States and Europe, for instance, can be attributed to a confluence of economic, institutional, and market factors, including rising litigation costs, the unbundling of legal services, and the emergence of a specialised investment market for legal claims (European Commission, 2025). Courts and arbitral tribunals in such jurisdictions have gradually accepted third-party funding to help people access fair legal help. In the UK, for example, the Civil Justice Council (CJC) published a comprehensive overview of third-party funding in England and Wales. It made 58 recommendations to reform further the system (Civil Justice Council, 2025). Other states in the USA, like West Virginia and Wisconsin, have put in place laws to force third-party funding providers to reveal their arrangements (Wis. Stat. § 804.01(2)(bg), 2018; W. Va. Code § 46A-6N-6, 2019).

In addition, the rise of special litigation finance companies made TPLF an organised business, particularly after the global financial crisis and various international controversies (Clarkin et al., 2025). In this context, the Jordanian legal system must be analysed to determine whether these international trends apply to civil law practice and domestic policy regulation.

TPLF is applauded for reducing the cost of litigation by shifting litigation risk away from claimants (Hodges, 2022; Howie & Moysa, 2019). It also brings market discipline, with funders evaluating cases (Behrens, 2025). But it raises important questions about who controls the money, what conflicts might arise, and whether justice can be commercialised. These problems are especially concerning in Jordan, a civil law nation beginning to grapple with international investment and transnational disputes.

Jordanian law strongly upholds the freedom of contract, grounded in the Civil Code No. 43 of 1976 and influenced by Islamic law, as stated in Article 87. It also maintains a rigid boundary policy. Principles such as *gharar* (prohibiting excessive uncertainty), judges' authority to ensure fair procedures, and the lack of clear provisions on litigation financing challenge the enforcement of TPLF agreements.

This paper examines whether TPLF contracts are enforceable in Jordan, assessing their consistency with local principles of contract validity, public policy, and procedural fairness.

This study seeks to answer two queries in relation to the experience elsewhere, where the TPLF models have been established, notably the United Kingdom, Singapore, and the UAE:

- (1) Is third-party litigation funding legally enforceable under Jordanian law?
- (2) What are the law or institution changes required to address the legal, ethical, and practical barriers to its implementation?

This research will discuss such questions. It will identify the boundaries of the existing legislation, suggest methods of its interpretation, and examine how such reforms would impact the predictability of the law, the accessibility of justice to people, and the appeal of Jordan to foreign investors. By situating this discussion within the broader context of legal modernisation and international commercial practice, the research contributes to debates on the role of private capital in dispute resolution and the limits of permissible innovation in civil justice systems.

## 2 Understanding Third-Party Litigation Funding (TPLF)

### 2.1 Definition and Structures

Third-Party Litigation Financing (TPLF) is a non-recourse financing agreement in which an uninterested third party, usually a private litigation financing company, funds litigation on behalf of a claimant in return for a contractually stipulated share of any award or settlement amount (Howie & Moysa, 2019). The fundamental characteristic of TPLF is that the funder bears the full financial risk of the litigation and is reimbursed only if the case succeeds and yields a favourable financial outcome. This framework links the investor's return exclusively to litigation success and separates the investor's financing decisions from the merits of the claim (Hodges, 2022).

However, in its Draft Legislative Guide, UNCITRAL equates third-party funding with the provision of financial or equivalent non-financial support by a third party not involved in the legal dispute. As it states:

*“Third-party funding is any provision of direct or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.”* (UNCITRAL, 2020)

This takes two primary forms: (1) commercial funding, when the funder provides resources for a return depending on the success or outcome of the case; and (2) non-profit funding, given as a grant or donation and for which there is no expected financial repayment. The definition also applies to indirect arrangements, where the recipient of the benefit is not directly part of the funding agreement but indirectly receives the benefits. Non-money support, such as services or goods, is also defined as the equivalent support (UNCITRAL, 2020).

The TPLF is more or less a contract, yet the law involves a bigger issue. First, it introduces a third party into the court system, which may enable the funder to influence the recipient, the method used to resolve the case, and the lawyer appointed (Behrens, 2025). Second, it harms fairness because it can lead to unfair treatment. Third, it raises ethical and policy concerns about treating contracts as goods, particularly when they involve fairness or morality (Locatelli, 2024).

These issues are particularly urgent in civil law states (including Jordan), where contracts are governed not only by written terms, but also by the state's order, honesty, and judicial oversight. The Jordanian Civil Code (No. 43 of 1976), although acknowledging the doctrine of freedom of contract in Article 87, maintains that all contractual agreements are subject to Article 165, which invalidates agreements incompatible with public order or morals. Under Jordanian law, both the substantive validity and procedural consequences of TPLF remain uncertain. This uncertainty indicates that the author must address the issue more explicitly.

Moreover, without explicit legislation and case law governing TPLF, courts would likely treat such financing agreements as unnamed contracts and assess them on a case-by-case basis, based on their aim, design, and impact on the justice system.

### 2.1.1 Distinguishing TPLF from Similar Legal Financing Instruments

The TPLF has often been misdescribed because it superficially resembles contingency fees, legal insurance, and traditional loans. It also differs from each of those agreements in both function and legal form.

#### A. Contingency Fees

A contingency fee agreement is a direct contractual relationship between a client and a lawyer in which the lawyer is paid only if the claim succeeds, usually as a percentage of the award. The key is that the lawyer, as a professional, assumes the risk of litigation (Spier & Prescott, 2019). Nevertheless, the agreement remains rooted in the lawyer-client relationship. It is subject to professional conduct regulations, including limits on percentage recoveries and exclusions in specific areas (e.g., family or criminal law).

Under Jordanian law, contingency fee agreements occupy an ambiguous legal position. Although the Jordanian Bar Association Law (No. 11 of 1972) and the Civil Code (No. 43 of 1976) do not explicitly prohibit them, courts still scrutinise them under public order and professional ethics. The Jordanian Code of Ethics for Lawyers does not categorically ban contingency fees. Still, it limits them indirectly by restricting excessive charges, conflicts of interest, and other improper influence on judicial decisions.

By contrast, third-party financing litigation (TPLF) involves a non-lawyer third party funding litigation expenses in return for a share of the proceeds. Jordanian law has no regulatory framework for it. The Jordanian Civil Code has no specific provision governing TPLF, and the Bar Association's ethical codes apply only to lawyer funders, not non-lawyer funders. Thus, treating a third-party funding contract as a contingency fee agreement contradicts Jordanian legal doctrine. TPLF carries out a business deal which is not governed by the lawyer-client trust. The individuals contributing money are not lawyers and are only interested in earning money. Nonetheless, German contract law allowed the TPLF arrangements on the condition that the money provider was not a lawyer and did not completely control the lawsuit (Howie & Moysa, 2019).

A recent case from a common law jurisdiction demonstrates confluence between the two. In *PACCAR Inc v. Road Haulage Association Ltd* [2023], the UK Supreme Court held that litigation funding agreements with third parties who have no role in the conduct of the litigation but who will be paid a share of any damages received by the claimant are "damages-based agreements" as defined in the legislation governing them and hence not enforceable unless in compliance with the Damages-Based Agreements Regulations (DBA 2013) (Cordina & Storskrubb, 2022). The case demonstrates the need for strict structural differentiation between TPLF and contingency fees to prevent misclassification.

#### B. Legal Expense Insurance

Legal cost insurance is a prospective pooling of risk. Its clients pay premiums to the insurer for legal costs coverage for future litigation (International Bar Association, 2019).

Unlike TPLF, however, the insurer has no interest in recovery and usually does not handle litigation. Coverage exclusions and limits are defined in advance, and insurance law, rather than contract or investment law, governs the relationship. Legal insurance is accepted and commonly applied in civil law jurisdictions, e.g., France and Germany, where protection juridique policies are consumer-oriented and highly regulated, underscoring their role as a non-speculative financial protection rather than a profit-seeking mechanism (Spier & Prescott, 2019).

In Jordan, legal expense insurance is not widely adopted. However, in principle, like other non-life insurance products, it would be permissible in law as long as the agreement is governed solely by the insurance law principles of good faith and indemnity. At the same time, TPLF depends upon and is subject to success in claims. It is closer to private equity investment than to insurance, and potential involvement in joint strategic decision-making puts it closer to a litigation partnership than to risk transfer (Molavi, 2018).

### C. Traditional Loans

Standard loans have repayment obligations that do not depend on litigation results. They are typically interest-bearing and secured through collateral. The lender does not have any direct interest in the result of litigation except for the ability of the debtor to repay (Richmond, 2005; Sebok & Cardozo, 2022)

TPLF is different categorically. As a non-recourse agreement, repayment is required only upon a successful outcome, and the funder bears all downside risk. The Court has upheld this distinction. For example, in *ChargeInjectionTechnologies Inc. v. E.I. DuPont de Nemours & Co.*[2016], The Delaware Superior Court ruled that a non-recourse litigation finance agreement did not fall under state usury laws because it imposed no absolute duty to repay.

Jordanian litigation loans can be regulated under ordinary provisions in the Civil Code, but enforcement of profit-sharing, contractual funding for contingencies could raise concerns under Articles 87, 88 and 640 or if such an arrangement takes a form commercially resembling speculative or unjust enrichment contracts or runs counter to the prohibition under Sharia principles about *Gharar* (uncertainty).

## 2.2 Economic and Legal Justifications

Third-Party Litigation Funding (TPLF) is a multilateral legal-economic instrument with normative and functional significance. Its global growth is not accidental but rests on compelling economic and legal grounds. TPLF may help individuals access justice, share and benefit from the risks of legal claims, and invest in and utilise justice. For these reasons, TPLF appears genuine and influences the rules and legislation governing its enforcement, especially in Jordan.

### 2.2.1 TPLF as a Facilitator of Access to Justice

Access to justice is widely recognised across jurisdictions as an essential aspect of the rule of law. However, in most jurisdictions, legal remedies remain practically inaccessible to a significant portion of the population because of the high costs of litigation (UN Human Rights Committee, 2007). TPLF addresses this structural drawback through non-recourse funding, which allows meritorious claims to proceed without the claimant bearing upfront legal costs (Herliana, 2025). Under these arrangements, the funder bears the financial risk, while the claimant must repay only if the case succeeds (Howie & Moysa, 2019). This funding model has

been particularly important in facilitating access to justice for expensive, resource-intensive litigation, including class actions, antitrust, and environmental litigation. In countries such as Australia and the United Kingdom, TPLF has facilitated structurally disadvantaged claimants to dispute powerful institutional defendants in court, such as consumers, workers, and minority shareholders, *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006]; *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005];(Cordina & Storskrubb, 2022).

The necessity for TPLF in Jordan is not purely hypothetical. Doing Business 2020 data on contract enforcement notes that the average time to resolve a commercial dispute in Jordan is 600 days. Expenses (including attorney fees, court fees, and enforcement costs) are 38.2% of the claim's value (World Bank, 2020). These delays and expenses severely limit potential litigants, especially those without access to large amounts of capital. Currently, TPLF is an effective way to redistribute financial risk and ensure judicial remedies are not reserved for those with significant economic resources.

In developing legal systems, Herliana (2025) argues that TPLF could provide a transferable access-to-justice model by reducing dependence on overloaded legal aid systems and encouraging private-sector involvement in funding dispute resolution. This matters in jurisdictions where public interest litigation is underdeveloped or procedural barriers hinder broad legal mobilisation (Herliana, 2025).

### 2.2.2 Risk-Sharing and Claim Monetization

Beyond its core social justice impact, TPLF performs important financial functions through risk sharing and claim monetisation. Conventional litigation requires claimants to bear all financial risk and invest substantial resources, with no guarantee of recovering those resources. TPLF transfers this risk to a third party who is usually capable of evaluating and bearing such risk. This creates a more effective allocation of legal and financial resources (Chen Wenjing, 2019).

From a purely economic view, legal claims are contingent assets that could be economically beneficial but remain uncertain. TPLF monetises the potential value of these contingent assets by allowing claimants to convert their uncertain right to monetary compensation for damages into either present capital or financial leverage (Steinitz, 2011).

The monetisation process also aids financial innovation. By converting legal claims into investment opportunities, TPLF keeps legal disputes within vast alternative investment portfolios. In international arbitration, particularly in high-value cases, investors including Hedge Funds and Sovereign Wealth Vehicles have invested Billions of dollars in legal dispute portfolios that contain Commercial and intellectual property arbitrations, turning disputes into institutional-grade investment products (Behrens, 2025). For example, the average Portfolio Deal in the United States was approximately \$9.7 million in 2023, while the average Single Case deal was approximately \$4.8 million, and some Law Firms received in excess of \$250 million in Mass Tort or Commercial Funding (U.S. Government Accountability Office, 2022).

Funders diversify their exposure across arbitral jurisdictions, legal sectors, and procedural stages, mimicking the risk-spreading seen in traditional asset management (Westfleet Advisors, 2023; GlobeNewswire, 2024). Behrens (2025) states that this risk pool reduces funders'

exposure to single-claim volatility, while claims bundling enables hedged investment vehicles akin to securitised assets or receivables. Multi-claim hedging, which Lombard and Borraine (2023) identified as being used in bankruptcy, is now essential to investment arbitration financing.

### 2.2.3 The Dual Function of TPLF: Investment and Justice-Enabling Mechanism

One of TPLF's characteristics is its dual function: it serves as both a justice-delivery mechanism and a mechanism for distributing investment capital. It is therefore an alternative investment class in which returns are derived from legal rather than market outcomes. As such, it appeals to hedge funds, private equity firms, and litigation finance firms seeking to diversify their portfolios (Spier & Prescott, 2019). To invest this way, these investors perform comprehensive due diligence, build detailed risk models, and predict the likelihood of litigation success. Behaviorally, they act similarly to investors in venture capital and/or private credit.

Normally, the funder's role is passive, but in certain cases it may include limited veto rights over settlement budget decisions, raising fundamental questions of procedural fairness and party autonomy (Sahani, 2020). In fact, the funder's role in litigation and arbitration cannot be underestimated, particularly where mandatory disclosure rules do not apply. As cautioned by Samir Parikh, litigation "financers will never be passive partners" (Parikh, 2023). This concern is reflected in some cases, such as *Abu-Ghazaleh v. Chaul* [2009], where the court held that third-party funders were real parties to the claim for adverse costs purposes due to their significant control over the claim; also, in recent disputes (e.g., *Sysco v. Burford Capital* (SD Tex, 2023) (unreported) discussed in Mark A Behrens (2025), the risks of funder influence on settlement decisions and overriding of decisions made by the party.

Despite this potential systemic risk, particularly where funders exert undue influence, as in *Abu-Ghazaleh v. Chaul* and *Sysco v. Burford Capital*, the benefits from the claimant's perspective are often compelling. TPLF minimises financial risk, minimises psychological distress from delayed litigation, and balances between mismatched parties, especially in transnational disputes and/or investor-state arbitration (Hensler et al., 2000). Importantly, Locatelli (2024), drawing on empirical and comparative law studies, argues that TPLF's legitimacy lies in its capacity to harmonise private capital investment with respect for judicial procedure, party autonomy, and ethical limits (Locatelli, 2024). Under these regulated frameworks, funders tailor financing terms to the merits of the claim, with claimants retaining control and procedural strategy remaining free (Locatelli, 2024).

This investment-justice alignment defines TPLF among other justice funding instruments. Whereas loans demand a return on investment regardless of success, and insurance policies rely on cross-subsidies from pooled premiums, TPLF aligns both the funder's economic self-interest and the claimant's rights enforcement. For that reason, its twin role best positions it to promote both economic innovation and procedurally fair justice, provided it remains tied to definitive legal limits.

## 2.3 TPLF in Litigation vs. Arbitration

Third-party litigation financing (TPLF) has revolutionised dispute resolution by introducing non-recourse financing for both litigation and arbitration. Although the fundamental principle is the same, third-party funders advance legal costs in return for a proportion of any settlement or judgment- the institutional design, procedural environment, and strategic advantages of litigation and arbitration differ substantially (Sahani, 2017). These

factors influence how TPLF is perceived, negotiated, and administered in each setting (Howie & Moysa, 2019; Li, 2024).

### 2.3.1 Structural and Procedural Differences

The main difference between litigation and arbitration lies in their institutional frameworks. Litigation is typically conducted in an open court with rigid rules governing proceedings, evidence admissibility, and the court calendar. This makes the process transparent and predictable, yet it is likely to be time-consuming, involve predetermined steps, and be expensive, particularly when courts are in high demand or a judge has numerous cases (Howie & Moysa, 2019).

Unlike litigation, arbitration is contract-based and inherently party-driven. Parties can appoint arbitrators, choose the rules, limit discovery, and determine how quickly the dispute will be resolved (UNCITRAL Model Law 1985 (as amended in 2006), arts 19–20; Born, 2001). This flexibility is useful, particularly in high-value or complex cases, where customising the procedure can save time and money (Li, 2024).

This makes the perception of risks and deals by the TPLF suppliers significantly different due to these differences. Formal laws and lengthy litigation procedures can tie up capital and escalate risk (International Council for Commercial Arbitration, 2018). Arbitration, however, offers clearer timeframes and outcomes, making litigation financing more attractive (Behrens, 2025).

### 2.3.2 Confidentiality and Commercial Strategy

Perhaps the most significant contrast in the litigation-arbitration dichotomy is in the degree of confidentiality. Litigation is almost always pursued in public forums, with pleadings, hearings, and judgments open to public access (Reuben, 2006). This public accessibility, while normatively good, also exposes parties to reputational risk and access to sensitive business information (Schmitz, 2006). By contrast, arbitration is always confidential, making it particularly advantageous for commercial claims and attractive to claimants seeking to avoid undesirable publicity or selective disclosure (Nottage et al., 2021; Noussia, 2010; Reuben, 2006). From the funders' point of view, confidentiality reduces reputational exposure and maximises commercial value in financing claims involving proprietary or market-sensitive material. This difference influences the drafting of financing agreements. Funders may demand stronger confidentiality clauses in litigation to mitigate reputational risk, while arbitration's default privacy reduces this need.

### 2.3.3 Procedural Autonomy and Cost Management

Litigation and arbitration differ significantly in case management and cost control. Litigation's procedural costs are mainly fixed by statutory regimes, procedural steps, and court fees, and they are neither changeable by agreement nor waivable (Civil Procedure Law No 24 of 1988 (Jordan), arts 160–162; Jordanian Bar Association Law No 11 of 1972, art 46; Civil

Procedure Rules 1998 (UK), arts 44.2–44.3; Federal Rules of Civil Procedure (US) arts 54(d)). Thus, cost predictability is limited, and funders may experience uncertainty in cost and duration (Hensler et al., 2000; Higgins, 2017). By comparison, arbitration lets parties contractually agree to allocate costs, limit discovery, and streamline procedural steps (UNCITRAL Model Law 1985, as amended in 2006, arts 19–20). The parties can also stipulate in advance whether the tribunal's fees, expert fees, or funding costs are recovered in the final award. Funders can then more accurately model risks and price tranches of funding with greater predictability (Howie & Moysa, 2019; van Oeveren & Kühn, 2018).

Moreover, institutional arbitration rules increasingly recognise the role of Third-Party Funding (TPF) and provide procedural mechanisms to incorporate or disclose funding arrangements. It should be noted that no single rulebook would necessarily "integrate financing into procedural planning" in a prescriptive fashion; however, some of the largest institutions have rules that mandate disclosures of TPF and provide procedures for dealing with its effects. For example, the ICSID Arbitration Rules (2022, Rule 14(4)), ICC Arbitration Rules (2021, Article 11(7)), and SIAC Arbitration Rules (2025, Rule 38.4) are prominent examples.

Litigation may still be favoured in domestic disputes, where costs are lower, procedural traditions are well known, and court decisions carry strong domestic enforcement authority (Molavi, 2018). Funders may finance litigation in such cases, especially in class actions where statutory rights are in issue but not subject to arbitration (International Council for Commercial Arbitration, 2018). Although TPLF's financial argument applies to both litigation and arbitration, the distinctive procedural, structural, and strategic advantages of each forum significantly affect fund allocation (Behrens, 2025). Funders and claimants thus have to carefully weigh the differentials in determining the optimum course of dispute resolution for funded claims.

### 3 Foundational Legal Framework Governing TPLF Agreement under Jordanian Law

To determine the possibility of Third-Party Litigation Funding (TPLF) in Jordanian law, the relevant legal background must first be considered. This section outlines the relevant foundational principles of Jordanian contract law (specifically Arts. 87, 163, and 165 of the Civil Code), procedural law, and Sharia. Particular focus is placed here on the description of the operative legal doctrines and restrictions themselves. It also provides background for the detailed analysis in the following sections of TPLF's specific challenges and opportunities in TPLF agreements in Jordan.

#### 3.1 Doctrines of Contract Validity and Atypical Agreements Under Jordanian Civil Law

Freedom of contract underpins Jordanian private law, stemming from the liberal idea of party autonomy but qualified by regulatory tools that ensure agreements reflect the parties' will and the lawfulness of society and the law. The interplay among Article 87 (freedom of contract), Article 163 (conditions of validity), and Article 165 (public order and morals) remains central to Jordanian contract law. This general perception of public order carries significant economic, ethical, and social value. The legal writing in Jordan has studied it extensively (Al-Dhneibat, 2020). It provides the normative backdrop against which atypical agreements such as TPLF must be assessed.

As Jordan increasingly encounters contractual innovations imported from common law jurisdictions, such as TPLF, civil law constraints become critical. The provisions not only define enforceability in formal terms, but also grant the judiciary discretion to reconcile private innovation with systemic justice. The following subsections discuss the doctrinal, judicial, and

practical effects of the three articles in detail, and the third summarises their combined applicability to the possibility of enforcing TPLF agreements under Jordanian law.

### 3.1.1 Freedom of Contract: facilitated by law, but shaped by context.

The principle of freedom of contract, which is articulated in Article 87 of the Jordanian Civil Code No. 43 of 1976, is the cornerstone of the private law of Jordan. By stipulating that contracts arise from mutual consent through offer and acceptance, Article 87 gives parties the freedom to design the terms and form of their legal relationships without unnecessary state intervention, so long as their arrangements accord with mandatory legal rules and public policy. This contractual freedom has long been used to promote legal certainty, increase commercial predictability, and embrace sectoral mechanisms such as arbitration clauses, penalty clauses, anticipatory remedies, and complex patterns of risk allocation.

The judicial application of Article 87 supports its apparent flexibility. As Al-Aljdo'u & Karabsheh (2024) show in their comparative study, Jordanian law does not codify the rule of anticipatory breach, and no doctrinal precedent supports its application. Although parties increasingly insert performance-contingent and penalty clauses into contracts, courts normally enforce them because Article 87 gives them interpretative latitude. This shows the judiciary's willingness to facilitate private ordering even without doctrinal precedent, particularly in commercial contracts where legal certainty and timing mechanisms are essential.

The Jordanian Court of Cassation has consistently upheld this autonomy. In Cassation Decision No. 916/2022, it upheld the enforceability of an arbitration clause in a cross-border commercial agency dispute (distribution agreement), emphasising the priority of contractual intention in regulating dispute-settlement mechanisms, even though arbitration clauses are prohibited in domestic distribution disputes (Aladaseen, 2025). Such decisions reflect a jurisprudential commitment to accord party autonomy a fundamental place, especially in commercial contexts where negotiated risk and procedural preferences play a critical role.

Nevertheless, this autonomy is not without limitation. Jordanian courts treat freedom of contract as conditional, not an absolute right. They engage in a substantive examination of the matter, and they apply the principles of "public order" and "good morals" to the contractual provisions. In doing so, the court ensures that exercising contractual freedom does not lead to unjust enrichment, exploitation, or conflicts with mandatory law. For instance, courts intervene when liquidated damages provisions result in unjust enrichment (Case No. 8709/2023). The court's intervention thus limits the potential for the contract to become oppressive and instead ensures a fair exchange between the parties.

This judicial approach closely relates to the rising importance of the doctrines of good faith and equity of unfair terms as interpretive tools. Although the Jordanian Civil Code does not expressly impose a general duty of good faith, courts increasingly apply this principle when adjusting obligations in response to unforeseen circumstances. Haloush (2021) notes that Jordanian courts have been receptive to denying enforcement where unrelated contingencies, such as undue delays, force majeure, or economic duress, disrupt the contractual balance. Indeed, excessive penalty clause provisions have been invalidated where enforcement would

yield consequences foreign to substantive unfairness (See Article 364 Civil Law and Cases No. 8709/2023, 1654/2023 and 114/2021).

These interpretations mean that Article 87 is not independently doctrinal, though it is foundational. Rather, it interacts with the general principles of justice, public order, and societal stability. The legislature's formulation of Article 87 establishes contractual autonomy as a presumptive rule, not an absolute one. Thus, the courts play a corrective role, ensuring that freedom of contract is not used as a tool of injustice.

This balance is even more pronounced in the emerging area of third-party litigation funding (TPLF). On its face, Article 87 appears to uphold the validity of TPLF agreements because business partners are free to negotiate their rights and obligations, such as cost recovery procedures, profit distributions, and who will pursue the litigation. However, this freedom is not the ultimate or decisive factor in determining enforceability.

### 3.1.2 Conditions of Contract Validity.

In Jordanian Civil Law, a contract is only valid after it satisfies four fundamental provisions as stipulated in the Civil Code No. 43 of 1976: (a) mutual consent, (b) a lawful and determinate object, (c) a lawful cause, and (d) capacity. These conditions act as doctrinal filters, requiring the private agreement to be internally consistent and externally in harmony with Jordanian legal and public policy standards. This doctrinal structure is essential not only for traditional contracts but also for assessing the enforceability of innovative agreements such as TPLF contracts.

#### Mutual Consent: Free and Informed Agreement

Consent underpins contractual obligability in the Jordanian system. This requires the parties to willingly and knowingly express their will, free from coercion, fraud, misrepresentation, or substantial error. Article 213 of the Jordanian Civil Code reiterates this essential principle, stating that “the basis of a contract is the consent of the contracting parties and the obligations they have undertaken therein” (Jordanian Civil Code, art. 213). Accordingly, article 239 provides that where the meaning of a contract is clear, it must be adhered to without deviation through interpretation. But where ambiguity exists, the court is to ascertain the common intention of the parties and not apply the strict meaning of the language, relying upon the nature of the transaction, good faith, and customary usages as guidelines. Likewise, Article 214 mandates that contracts be interpreted by their purpose and meaning, not by language use, and that literal language applies except when its application is not feasible. Article 216 further provides that contract terms apply and should not be disregarded except when their application is not feasible (Jordanian Civil Code, arts. 214, 216, 239).

Jordanian courts have consistently upheld this harmonised legal framework. For example, the Court of Cassation, in Decisions No. 5635/2020 (Civil) and No. 188/2021 (Civil), annulled an agreement on the ground that proper consent must be free from external economic and informational coercion. These Decisions, and many others, solidify that proper consent is infeasible in scenarios with imbalance or coercion, whether through verbal or physical fraud, external pressure, or internal misunderstanding.

The principle of free and informed consent is particularly important for TPLF agreements. Litigants in economic distress may enter into funding agreements without understanding the long-term consequences. Critiques of TPLF practices have repeatedly raised concerns about informational inequality and exploitation (Beisner et al., 2024). Therefore, these concerns should be addressed in court so that any consent given to enter into a TPLF agreement is free from coercion, fraud, duress, undue influence, etc. — and therefore not vitiated by inequality

or uncertainty. As Al-Qheiw et al. (2023) emphasise, free and genuine expression of intention not only reveals the parties' intent but also deters attempts to avoid obligation through fraud.

This context also raises a crucial and yet unanswered question relevant to TPLF contracts' enforceability: In disputes regarding validity and consent, and specifically where economic imbalance is at hand, which party bears the burden to prove that the consent was not voluntarily and genuinely given, the stressed litigant seeking funding, or the sophisticated funder? And what kind of evidence would be needed to prove a lack of genuine consent? Secondly, should the burden be viewed differently than in a standard commercial contract? Should the stressed litigant be treated as a weaker party similar to the consumer? This question is complex and cannot be answered with a straightforward 'yes' or 'no'; moreover, it falls outside the scope of this research.

#### Legitimate and Determinate Object: Certainty and Lawfulness

Articles 88(4), 157 to 163 stipulate that the contract object must be capable, certain or at least determinable, and must serve a legal function. Jordanian courts also require that the contract object be judicially enforceable and not involve any illegal or morally questionable activities (Haloush, 2021). A concrete litigious right, especially one that has matured into a pending case, meets these criteria. Potential proceeds, although future, are knowable based on the litigation's outcome.

In TPLF contexts, the financed object, generally the proceeds of a lawsuit, must be clearly identified and legally determinable. Jordanian law, consistent with broader civil law traditions, accepts the assignability or transferability of litigious rights in existence if they are certain and pending in court. This rule derives from Article 160(1) of the Civil Code, which permits a future thing to be the object of a financial transaction if the risk (uncertainty) is eliminated. In other words, a certain litigious right already concretised into a lawsuit pending in court may form the certain and identifiable object required for a valid contract, as the speculation inherent in purely theoretical claims has largely been removed. By contrast, funding attached to purely speculative claims would likely fail the test of definiteness and legality, and might be challenged as involving excessive, unregulated risk (gambling). This is evident in Cassation Decision No. 3325/2005 (Civil), where the Court annulled the settlement for lack of a definite object, i.e., the settled amount, underscoring the judicial commitment to contractual precision and legitimacy.

#### Lawful Cause: Moral and Legal Legitimacy of Contractual Obligations

The Cause (sabab) of the contract refers to the rightful and socially acceptable reason that motivates the parties to contract. Although the cause doctrine has subsided in certain modern jurisdictions (e.g., the USA and the UK), it remains one of the most significant components of contract validity in Jordanian law (Haloush, 2021). If the TPLF agreement serves the public good in promoting access to justice, the reason is likely legitimate. However, if the contract serves high speculative profiteering or interference in the integrity of judicial processes, the courts in Jordan, applying Article 165 and relying upon considerations of public policy, can invalidate the contract.

Yet one can argue, as Beisner et al. (2024) do, that a funding agreement might prioritise financial returns over judicial integrity. In response to this, the law in Jordan provides for a substantive examination of contract cause. This response goes beyond the formalistic test for

consideration so as to ensure that courts must actually look into the real intent or motivation for the agreement between parties. Further, the Civil Code provides for an additional layer of review in the form of "lawful benefit". Article 166 of the Civil Code expressly states that "a contract shall not be valid if it does not contain a lawful benefit for its parties". Therefore, if a contract of TPLF, under substantive analysis, is discovered to have a benefit or objective on behalf of the funder to extract undue financial benefits by litigating on frivolous grounds, or taking advantage of the claimant state, and so on, then a court can decide that such a 'benefit' is not 'lawful' and invalidate the contract on public policy grounds. This application of "lawful benefit", along with that of lawful cause, allows courts to filter out abusive TPLF practices that threaten the fairness and integrity of the judicial process, even if other elements might superficially appear to be present.

#### Capacity: Related but Separate Safeguard

While the above conditions focus on cause, object, and consent, Articles 116–121 of the Civil Code treat capacity as a separate subject matter; parties to a binding contract must have legal capacity, protecting the contract system against unfair advantages by or against weak parties. Under TPLF contracts, this underscores funders' obligation to ensure claimants understand the obligations they undertake. This principle aligns with the general fairness and public policy inherent in Jordanian law.

Jordanian courts have the doctrinal tools to determine a valid contract and balance innovation with doctrinal integrity.

As a result, properly regulated and ethically structured TPLF agreements can withstand judicial review, while abusive transactions can be filtered out by applying Articles 163, 165, and 166.

### 3.1.3 The 'All-or-Nothing' Dilemma: Contract Nullity and the Limits of Severability

Article 213 of the Jordanian Civil Code establishes that "the contract is the law of the contracting parties," and accepts contractual autonomy as a principle of private law. However, Articles 163, 164(2), 165, and 169 expressly limit this autonomy, rendering contracts subject to annulment when they violate public policy (*niḡām ʿāmm*) or good morals (*ʿadāb ʿāmma*). These provisions serve as doctrinal safeguards, ensuring that private bargains do not override legal or ethical imperatives (Al-Dhneibat, 2020).

Having said that, Article 164(2) grants courts the power to void specific clauses within a contract that violate public policy or legal principle, leaving other parts of the contract in force, unless the illegal clause was the principal cause (*al-dāfiʿ*) for concluding the contract. In that case, the contract becomes void as a whole. This applies a causal test for nullity and is a doctrinal compromise between severability and absolute invalidity, frequently having an all-or-nothing effect.

Article 165 also grants courts additional power to annul contracts whose subject matter is illegal *per se* or contrary to good morals or public policy. It does not consider severability or causal relevance as under Article 164(2); if the contract's object is illegal, the contract is automatically void. To this end, Article 169 provides a structural test for contract divisibility. It provides that even if a contract is only partially void, the entire contract is void unless each part is distinct, measurable, and hence divisible. Accordingly, even if a clause is not central under Article 164(2) and the subject matter is not illicit under Article 165, the contract may still be void as a whole if its form cannot be objectively divided under Article 169.

This intricate doctrine is highly relevant when interpreting TPLF contracts. These complex contracts often involve multiple interconnected provisions, such as funder finance, funder control, percentage recovery, and dispute resolution. If a term (e.g., excessive funder control) violates public policy and is not a cause of the contract, Article 164(2) may allow severance. If, though, no divisible structure exists in the contract (e.g., integrated performance obligations), then Article 169 can nevertheless invalidate the whole contract. This structural vulnerability worsens the all-or-nothing risk. Conversely, TPLFs that include claimant autonomy terms, fair profit allocations, and modular, separable clauses are likely to pass judicial review. To reduce unpredictability, Jordanian courts might adopt jurisprudential rules to assess structural and motivational centrality and provide interpretive guidance on applying Articles 164(2) and 169. This would keep commercially effective contracts enforceable and improve legal predictability in complex agreements.

### 3.2 Procedural Law Context

#### 3.2.1 Doctrinal Gaps in TPLF Governance

Jordanian Civil Procedure Law No. 24 of 1988 and Arbitration Law No. 31 of 2001 contain no provisions that recognise or prohibit or regulate TPLF (Qtiashat & Qtaishat, 2021) a source of funds increasingly common in international commercial litigation. Such legislative silence differs sharply from the global trend towards greater resort to TPLF as a mechanism of providing access to justice and controlling litigation risk, more particularly in high-value and complex civil and commercial matters (Abrams & Chen, 2013). The absence of any statutory treatment reveals a significant regulatory gap in Jordan's codified procedural framework.

Al-Qudah (2020) noted that the Jordanian judiciary is bound by the principle of legality (*mabda' al-mashru' iyyah*), under which judges are usually required to interpret the law as written. This reflects a civil law culture that values clear, predictable rules and careful judges.

This lack of regulatory clarity means courts cannot legally or institutionally consider the existence or involvement of third-party funders. Nor can they assess how much influence a funder can exert over principal decisions in litigation, including settlement strategy, appeal, or procedural course (Steinitz, 2010). As Steinitz explains, "The funder is a silent party who has significant influence on the litigation but is neither subject to the rules of professional responsibility nor does it owe fiduciary duties to the claimant" (2010, p. 1283). As a consequence, a third-party funder can, in effect, be the economic power behind litigation but will incur no obligation to disclose their involvement to the court or adverse party. In simple terms, they are legally and procedurally invisible (Sahani, 2020).

This uncertainty creates major system-configuration issues. It violates fair process principles, including transparency, equality of arms, and effective judicial review (Shannon, 2014; Steinitz, 2010). Defendants are strategically disadvantaged because they cannot see the economic dynamics at play in their case. Moreover, unknown funders create potential conflicts of interest, especially when a lawyer's fiduciary duty to the client conflicts with the funder's economic agenda. In a legal system such as Jordan's, which emphasises formal standing,

procedural order, and court review, the absence of any mechanism to manage, or even recognise, third-party economic influence risks compromising adjudicative legitimacy.

### 3.2.2 Omission of Statutory Recognition

This is not merely a failure to follow the rules because TPLF is not formally recognised under Jordanian law; it directly affects the process. Articles 113–114 of the Jordanian Civil Procedure Law provide that a third party may be involved only when it has a direct legal interest. Economic interests, like those of TPLF arrangements, do not meet that standard. Accordingly, third-party funders cannot intervene, file motions, attend hearings, or incur cost liability, even when they influence the course or outcome of the litigation.

Such systemic exclusion creates a doctrinal and practical gap. Funders can influence litigation outcomes while remaining legally invisible. Unlike jurisdictions that have institutionalised mechanisms to monitor such influence, Jordanian law does not regulate funder involvement. Singapore, Australia, and the United Kingdom require disclosure of funding arrangements and use discretionary powers to assess influence and allocate costs (Stroble & Welikson, 2020). Notably, the United Arab Emirates is also a civil law country and has adopted regulatory approaches similar to those of other jurisdictions. Parties are expressly obliged under the 2022 DIAC Arbitration Rules themselves to disclose third-party funding arrangements, including identification of funder and potential exposure to adverse costs liability (DIAC, 2022, Art. 22.1). Such institutional disclosure is evidence for movement toward regulated incorporation of funders rather than their exclusion. The omission of statutory recognition not only undermines procedural integrity but also leaves judges without doctrinal guidance when assessing the legitimacy of privately financed claims.

## 3.3 Sharia-Based Constraints on Risk Allocation

Jordan's civil law recognises Islamic jurisprudential principles as a primary legal source under Article 2 of the Civil Code. This elevates Sharia from a symbolic reference to a doctrinally important source of law. Therefore, courts must evaluate new contractual agreements such as TPLF not only for formal validity but also for compliance with core Islamic legal prohibitions and moral standards.

### 3.3.1 Prohibition of *Gharar*, *Maisir*, and *Riba*

Three major prohibitions in Islamic contract law directly bear on the legality of TPLF agreements: *Gharar* (uncertainty), *Maisir* (speculation or gambling), and *Riba* (usury).

*Gharar* (uncertainty) refers to excessive uncertainty about a contract's subject matter or outcome (Al-Zuhayli, 2007). Thus, if a TPLF agreement gives the funder a purely contingent return on the success or outcome of litigation, with no stated terms or proportionate risk-taking, it could be void for *gharar*. The risk is highest in a “non-recourse” transaction, where all losses fall on the funder unless the case succeeds. That makes sense; Sharia attempts to exclude contracts where a party undertakes undue, undefined risk.

*Maisir* (Gambling) is prohibited under Qur'anic injunctions (e.g., Qur'an 2:219), and renders suspect any agreement in which profit is speculative rather than performance-based (Kamali, 2008). Bin Salamon et al. (2015) defined it as “the betting of something of value with unnecessary risk with the hope of gain based on elements of chance and uncertain events that may involve, to a certain extent, economic manipulation and, on occasion, loss of the contextual elements of economic reality”. Litigation funding agreements, akin to a wager on the success

of a court verdict, where both sides undertake no substantive duty other than success or failure itself, may be doctrinally indistinguishable from gambling.

*Riba* (usury), the charging or receiving of interest or guaranteed capital appreciation, is categorically forbidden in Islamic contract law. This is perhaps the most direct challenge. TPLF models that offer the funder a fixed or time-linked return, such as an uplift amount based on the case duration or payback guarantees, risk being considered *riba*.

Article 640 of the Civil Code states that "If the loan contract stipulates an additional benefit in excess of what is required by the contract, other than documenting the lender's right, the stipulation is void and the contract is valid." The Court of Cassation also held in case No. 275/2018 that interest payments are invalid on public policy grounds, even if the contract formally provides for them. This is because the parties are not legal entities eligible to lend or receive interest. Because the contract included an article permitting interest at 15%, it must be declared invalid from this perspective. That means funders cannot simply structure contracts to appear permissible while securing a return in the form of interest.

Thus, it is important to distinguish between structurally distinct TPLF models. While some models, such as success-based recoveries without guaranteed principal, may comply with Sharia if complemented with Islamic profit-sharing principles, others, such as fixed-return or case duration-based models, are more clearly prohibited.

### 3.3.2 *Maqasid al-Sharia and the Public Interest*

*Maqasid al-Shari* is Islamic law's higher objectives, provide a purposive and moral framework in which TPLF arrangements must be examined. These objectives include protecting justice, property, dignity, and social harmony (Kamali, 2008). With the right structure, TPLF can serve the public interest (*maslahah*) by extending justice to litigants who lack resources. In such cases, principles like *jalb al-maslaha* (the extension of benefit) and *raf' al-haraj* (the elimination of hardship) may support TPLF's conditional permissibility. This demonstrates Islamic law's flexibility to adapt to new situations when they align with its broader objectives.

However, this permissibility is not a blank check; it is subject to strict review. If the funding secures excessive rates of return, exerts undue influence over litigation conduct, or undermines the claimant's autonomy, the arrangement violates the Sharia prohibition of *akl al-mal bi'l-batil* (unjust enrichment). It falls short of the broader policy test. Güney (2024) emphasises that Sharia compliance demands more than formal procedural alignment; it must substantively fulfil the *maqāsid al-Sharī'a*, including the pursuit of justice, equity, and the prevention of harm.

Accordingly, a TPLF contract must, among other things, do more than avoid technical breaches; it must exhibit moral contractual conduct, offer a reasonable risk-reward distribution, and facilitate, not hinder, the administration of fair justice.

### 3.3.3 *Analogies with Mudarabah, Musharakah and Ju'alah*

Islamic finance has several nominate contract structures that are informative analogues for evaluating the Sharia permissibility of TPLF structures. While TPLF remains a recent creation

and is not directly codified in Islamic jurisprudence, its essential characteristics- TS-bearing, profit-contingency, and non-guaranteed returns- have clear analogues in Islamic contracts that emphasise risk-sharing and legal causation.

*Mudarabah* (profit sharing) enjoys the greatest doctrinal similarity. With a typical *mudarabah* arrangement, a partner for funds (*rab al-mal*) invests funds in a working partner (*mudarib*), who manages the venture in return for a pre-agreed percentage of profits. The funder bears losses, except in cases of misconduct or negligence (Sapuan, 2016; Sweify, 2022). Therefore, it is also known as a “silent partnership” (Al-Zuhayli, 2007; Sapuan, 2016). Similarly, in a non-recourse TPLF, the funder funds the litigation but bears the loss if the case is lost and shares in the proceeds if the litigant wins. The funder does not provide legal services, but bears the risk and reward of the litigation outcome. The absence of guaranteed returns and the emphasis on clear risk allocation, where each party bears risk, bring TPLF closer to *mudarabah* than to prohibited interest-bearing contracts. The similarity persists further when the fund partner remains passive and does not obstruct the litigant's or his attorney's strategic direction.

*Musharakah* (Profit-Risk Partnership), another nominee form, involves parties investing capital and sharing profits and losses in a set ratio. This partnership is based on a joint venture structure; however, the joint venture's return is not fixed (Sweify, 2022). While less directly comparable to typical TPLF, which usually involves a one-directional investment of capital, *musharakah* can theoretically be a portfolio-like class action in which funders invest in a group of resources whose revenue is shared among claimants; this supports the doctrine of permissibility, as it retains proportionality and transparency and directly addresses concerns about *gharar* and *riba*.

*Ju'alah* is another corresponding model, as the term refers to commission or reward (Mohamed et al., 2020). In this case, it is a contract of compensation, where one party makes a one-sided pre-funding promise in return for a successful outcome. Doctrinally, it suffices that a reward may be promised without mutualism or guarantee of outcome.

Within this structure, a party (the *ja'il*) binds themselves to compensate any person (the *'amil*) who procures a specified legal objective, e.g., winning in a legal claim. Here, *Ju'alah* closely mirrors the non-recourse feature of the vast majority of TPLF arrangements, whereby the funder provides resources or strategic support in exchange for payment upon, and only upon, the successful litigant. Because the funder's right is not guaranteed, and any loss rests entirely with the funder, the structure forgoes the interest-based compensation that would otherwise raise *riba* issues. Moreover, the structure functions well within the *maqasid al-shariah*, particularly when applied to support access to justice.

Thus, while TPLF may not be an ideal model of any Islamic contract form, doctrinal counterparts, specifically *mudarabah* and *Ju'alah*, offer highly persuasive models for structuring Sharia-compliant litigation funding. Jordanian legal doctrine, by allowing recourse to Islamic material under Article 2 of the Civil Code, can thus readily accommodate such arrangements, provided they reflect the values of transparency, fairness, and legal causation.

#### 4 Core Legal Challenges to the Enforceability of TPLF Agreements in Jordan

The previous section explained the doctrinal and policy constraints under which Jordanian law could evaluate TPLF. Article 87 of the Civil Code recognises the parties' freedom to form

atypical (unnamed) contracts. Still, such contracts must conform to the general foundations of validity and avoid violating public order, good morals, or causing undue harm. Moreover, Sharia-legislated prohibitions on gharar (undue uncertainty), maisir (speculation), and riba (usury) impose substantive constraints on monetary arrangements based on risk and contingency, one of the very foundations on which TPLF is organised.

This section applies this composite legal structure to the enforceability in Jordan of TPLF agreements. It proceeds from the dilemma of legislative restraint and doctrinal ambiguity. It then analyses whether TPLF can be classified as a void speculative contract or valid contingent agreement offering mutual advantage.

#### 4.1 Judicial Silence and the Status of TPLF as an Atypical Contract

TPLF is neither expressly regulated nor prohibited by the statutory legislation in Jordan. The Civil Code in Jordan and the Civil Procedure Law No. 24 of 1988 do not address the question regarding the allowability, disclosure requirement, or the ethical constraints on third-party funding arrangements. Such absence of legislative or jurisprudential guidance stands in comparison with common law jurisdictions, such as the United Kingdom, where landmark court decisions have shaped its application (e.g., *PACCAR Inc. v Road Haulage Association Ltd*, 2023), Singapore, which has introduced specific legislation for regulation (Civil Law Act, 2017), and Australia, where judicial precedent and financial services licensing now govern the practice (*Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd*, 2006; Corporations Act, 2001).

Given this vacuum, the legal status of TPLF must be assessed under the general contract rules of the Jordanian Civil Code, particularly Article 87, which permits atypical contracts (unnamed contracts), provided they do not violate statutory provisions, public order, or morality. The flexibility of contract formation is a central principle in contemporary Arab civil codes and finds its theoretical foundation in Al-Sanhuri's (1952) work. He wrote that unnamed contracts reflect the dynamic nature of contractual autonomy, constrained only by imperative legal norms. Courts may therefore enforce TPLF agreements as non-typical contract types by analogy if they meet the conditions of validity and are non-exploitative and non-speculative.

However, this approach carries risks. Two significant doctrinal as well as procedural concerns arise:

**First**, the risk of judicial interpretation: where no statutory framework or settled case law exists, TPLF will likely face differing judicial interpretations across courts. These divided determinations undermine clarity: a ruling in favour of a TPLF contract may be overturned in another. This ambiguity deters individuals from using the courts and reduces claimants' ability to obtain the monetary compensation they need to claim. This is particularly true in civil-law countries like Jordan, where courts traditionally apply the code strictly and show little familiarity with new categories of contract.

**Second**, the absence of procedural safeguards raises serious doubts about the integrity of the judicial system and procedural fairness. Public order under Jordanian legal tradition extends beyond criminal or security interests; it includes values such as transparency, fairness, and the

prevention of economic coercion. TPLF agreements with unconscionable clauses, such as funders claiming the majority of damages, imposing hidden fees, or exercising control over settlement, could offend the broader notion of public order. Such concerns are even more heightened within the Jordanian setting, where procedural rights (such as the right to fair legal process and protection from undue interference) are protected by the Constitution, and professional ethics (e.g., Article 40 in the Bar Association Law) prohibit undue third-party interference in the progress of the litigation. For example, a funder's contractual right to veto a settlement may allow financial interests to override the legal interests of a claimant. Without disclosure or judicial oversight, these arrangements could distort litigation outcomes and compromise judicial neutrality. From a comparative legal perspective, the UK and Singapore have implemented disclosure provisions, case-management powers, and adjustments to cost orders to maintain procedural fairness and trust in the judiciary (Civil Justice Council, 2025; Eken, 2021; European Law Institute, 2024; Rowles-Davies & Cousins, 2014). Jordan has no comparable protections. Hence, although TPLF may fall within the scope of Article 87 atypical contracts, its enforceability still depends on whether it complies with established legal doctrines.

Therefore, the following sections address whether TPLF agreements fall within the prohibitive provisions on speculation arrangements or qualify as lawful contingent contracts under Article 166.

#### 4.2 The Nature of TPLF: Gambling Contract or Lawful Investment

In general, under a TPLF agreement, a non-related third party finances a litigant's litigation costs in exchange for a guaranteed percentage share of any recoveries obtained. In most cases, a funder bears the financial risk of a loss and is compensated only if a claimant succeeds. To the extent that TPLF enables access to justice, its legality under Jordanian law and Sharia principles depends considerably on how risk, reward, and mutual benefit are structured.

Islamic jurisprudence and civil law theory distinguish between *maisir* (prohibited speculative gain) and *ghurm bil-ghanam* (the principle that profit is earned through legitimate risk-bearing), a key distinction in assessing financial contracts, including TPLF. Islamic finance permits contracts of uncertainty (*gharar*) to some degree if they serve a valid economic or social objective and offer fairness and clarity. Such contracts are also necessary in many legitimate commercial arrangements, such as *mudarabah* and *musharakah*, which are profit-and-loss sharing partnerships.

##### 4.2.1 Argument: TPLF as Prohibited Gambling Contract

Under Article 915 of the Jordanian Civil Code, “[a] gambling or wagering contract is void, even if both parties consent”. This is not merely a procedural rule; it reflects a substantive principle in both civil law and Islamic jurisprudence, which reject agreements based purely on chance or speculative gain. Those arrangements remain invalid because the profit lacks a legitimate cause (*sabab*) and fails to deliver a recognisable ethical or social benefit. Arrangements with no practical or productive purpose in law are thus fundamentally incompatible with public policy and Sharia norms.

One might also argue that certain types of TPLF agreements resemble a form of gaming contract. If a funder remains entirely inactive in litigation proceedings yet derives spectacularly high returns without equitable risk-sharing or a clearly recognised contribution in law, the agreements become a speculative wager on judicial decisions. At that point, the funding party

has made a speculative bet on judicial rulings rather than an "advantageous" mutual agreement under Article 166, which states that all contractual agreements must have a legitimate benefit (*manfa'a mashrū'a*) to both contracting parties. Although this benefit is generally presumed, it is rebuttable if the contract's objective is narrow, aimed at financial exploitation, and lacks any legitimate or social purpose.

The issue here extends beyond *gharar* (uncertainty) to the very nature of the benefit itself. If the funder has guaranteed their own benefit, without ensuring that there has been an enhancement of access to justice or an improvement in the process of adjudication, the contract may fail both the civil law requirement of *sabab* under Article 166 and the prohibition under Article 915, and the Sharia prohibition on *maysir* (unearned speculative gain or gambling). According to Al-Zuhayli (2007) and Kamali (2008), an invalid contract includes excessive uncertainty, gambling, or usury because such contracts undermine fairness and trust in the court. Under both Sharia and civil law, speculative funding agreements based on speculative benefit must be deemed void under Article 915. It explains the nullity of gambling contracts not only because of their element of chance but also because they cannot achieve legal and moral objectives. Hence, a TPLF contract, being profit-producing without risk-sharing, legal benefit, or an overall moral function in the justice system, would fall within the scope of the annulment criteria under Article 915.

It is also worth noting that other legal systems, not only Jordan, use such a strict approach. Egyptian civil law (Article 739), closely aligned with Jordanian doctrine, likewise voids gambling contracts. German civil law also rejects contingent agreements that lack lawful utility. However, it recognises limited exceptions when the assumed risk clearly serves a productive or distributive function, such as insurance, investment, or venture contracts (BGB § 138; Hadjiani, 2002).

#### 4.2.2 Counterargument: TPLF as a Permissible Contingent Contract

A different doctrinal approach argues that TPLF can be a permissible contingent contract under Jordanian civil law and Islamic legal principles. Article 166 of the Civil Code of Jordan states that:

*"A contract is not valid unless it involves a legitimate benefit (manfa'a mashrū'a) to the parties. Such benefit is presumed unless proven otherwise."*

This presumption allows enforcement of uncertain or contingency return contracts, so long as they do not contravene the law, public order, or morals. In other words, agreements should be structured around a lawful cause (*sabab*) and produce mutual advantage. A properly balanced TPLF contract, with no significant structural inequity, meets this standard: the funder assumes financial risk in anticipation of profit, and the claimant gains access to justice that would otherwise be financially unattainable. Jordanian jurisprudence recognises that *manfa'a mashrū'an* (legitimate benefit) encompasses material gain, moral and indirect interests. The Court of Cassation Decision No. 5290/2021 affirms this position:

*"The interest is the legitimate benefit intended to be achieved through recourse to the judiciary [...] The benefit may be material, moral, or indirect, and it need not accrue personally to the claimant".*

In this respect, making justice accessible is, in itself, a morally and socially legitimate cause that satisfies the *sabab* (lawful cause) condition in civil and Islamic law. Moreover, TPLF serves the public interest by allowing litigants to assert rights and seek remedies they otherwise could not because of cost barriers.

From the Islamic finance standpoint, TPLF also resembles a lawful investment rooted in principles of risk-sharing and ethical profit. It resembles contract forms such as *musharakah* and *mudarabah*, in that capital is invested on the condition that the investor (i.e., the funder) shares profits and losses; this applies the principle of *ghurm bil-ghunm* (no profit without risk) (Usmani, 2002). This structural legitimacy is also supported by rules issued through the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI), which accepts that uncertainty in a contract is permissible where it is minor (*gharar yasir*). The contract operates in a permissible and fruitful manner (AAOIFI, 2017, ss 12). Conversely, excessive uncertainty would render a contract invalid, but only if it would cause unfair gains or exploitation (Kamali, 2008).

The analogy of Islamic investment supports TPLF. Like *mudharabah*, the investor assumes financial risk in a legal arrangement, and any returns are based on success; they are not guaranteed, not exploitative, and not usurious. Under those circumstances, TPLF is not a mere conspiracy. It shares the characteristics of a valid special contract under Article 87 and a legal investment within the terms and conditions of Islamic commercial ethics.

Ultimately, a TPLF contract that distributes risk equally, avoids force, and helps individuals secure justice satisfies the civil-law requirements of an acceptable contingent contract and the Islamic-law requirements of an acceptable investment. On the contrary, I believe a contract is better than gambling, and it improves its ability to preserve legal purpose and its leverage.

#### 4.2.3 Doctrinal Balance and Pathways for Reform

The enforceability of TPLF contracts under Jordanian law focuses not only on how the contract is formed but also on consideration and compliance with the themes of fairness, social order, and the rule of law. Such contracts that promote access to justice, equitable risk-sharing, and non-exploitative agreements could be enforced under Articles 87 and 166. Conversely, coercive or deceptive agreements may be set aside under Articles 165 or 915 because they violate public order or standards of morals.

However, doctrinal permissibility alone does not ensure procedural integrity. Without statutory regulation, Jordanian courts remain vulnerable to the structural imbalances TPLF may introduce into litigation, where agreements are hidden, one-sided, or overly intrusive. Although the law currently permits the recognition of TPLF, it requires more legislation and judicial rulings to ensure fair, ethical enforcement. To do this, Jordan should consider certain changes. First, Jordan should require mandatory disclosure of all TPLF agreements to enhance transparency. Second, restrain the ability of the funder to influence both the settlement and direction of the cases in a way that allows access by the person claiming to be so. These reforms, following examples from the UK and Singapore, would protect against abuse while permitting TPLF to realise its intended role in improving access to justice (Marquais & Grec, 2020; Portenti, 2024; Rowles-Davies & Cousins, 2014).

#### 4.3 Arbitration Law and Public Policy

TPLF in arbitration raises unique doctrinal and regulatory issues under Jordanian law, particularly in international commercial and investor-state arbitral proceedings. At the same time, TPLF has

increasingly been used to expand access to justice in arbitral proceedings; its compatibility with Jordanian public policy and enforceability under the 1958 New York Convention remain legally unsettled. Jordanian Law of Arbitration No. 31 of 2001 (as amended) contains no explicit provisions relating to third-party funding. Neither statutory nor institutional rules require disclosure of funding arrangements, management of conflicts of interest, or regulation of funders' influence on the arbitral process. This procedural vacuum is significant for arbitral awards. Uncontrolled TPLF within the arbitral process can distort party autonomy, unbalance procedures, and compromise the legitimacy and enforceability of arbitral awards (Brekoulakis and Rogers, 2019).

#### 4.3.1 Public Policy Objections and Arbitral Enforcement Risks

Public policy objections to TPLF mostly occur at the enforcement stage, namely under Article V(2)(b) of the New York Convention, where national courts have discretion to refuse the enforcement of an award if the award contravenes the forum state's public policy. Jordanian courts have wide discretion here, interpreting public policy with reference to moral, legal, and religious values. This is in addition to Article 49 of the Arbitration Law.

One main risk arises when TPLF agreements confer excessive control on the funder of the arbitration or provide excessively high monetary returns, leaving the claimant with only a nominal share of the award. Such arrangements may violate fundamental rules of proportionality and legal cause (*sabab*), and may amount to *gharar* or *maysir* under Islamic jurisprudence, as discussed in Section 4.3.

To ground these legal risks, consider two illustrative TPLF arrangements. In one permissible arrangement, the funder finances legal expenses against 30% of an award, and the claimant has full control over litigation strategy and settlement decisions. This arrangement supports lawful cause (*sabab*) and mutual benefit (*manfa'a mashrū'a*), simplifies the path to justice, and preserves each party's freedom. By contrast, an unacceptable agreement would give the funder 70 per cent of the award and allow it to block the settlement. A Jordanian court could view this as speculative profiteering and an inappropriate shifting of legal agency, violating public policy under Article 165 of the Civil Code.

Courts in *Abu-Ghazaleh v. Chaul* and *Sysco v. Burford Capital* have also warned against excessive funder control and inappropriate returns, upholding the need to limit enforcement to what aligns with fairness and the public interest. The case evidenced an international trend to review TPLF agreements for fairness, transparency, and financial responsibility. Those standards are valid under Jordanian public policy.

However, Jordanian law imposes no statutory obligation to disclose TPLF arrangements. Arbitrators have a general obligation to act impartially, which requires disclosing all relationships that may give rise to justified doubts (Arbitration law, Article 15/3).

#### 4.3.2 Resolving the Normative Tension: Jordan's Substantive Approach to TPLF

Jordan's legal regime reflects a dual character: a civil law tradition influenced by Sharia and a commitment to international arbitration standards under instruments like the New York Convention. These two components may conflict when applying arbitral awards that encompass TPLF deals. The Convention seeks a mere rule to enforce awards. However, Jordanian courts can apply a broader public policy standard to determine whether an award, or the agreement to fund it, conflicts with local law or

ethics. For example, when a claimant recovers only a small portion of the award after the funder's returns, legal fees, and costs, the court can examine the TPLF contract for imbalances, coercion, and undue influence.

Jordanian legal regime provides a clear pathway for courts to resolve this tension by distinguishing between the arbitral award and its financing. Article 49 of the Arbitration Law clarifies this power rather than creating a conflict. While Article 49(A) provides a comprehensive list of procedural and jurisdictional grounds for annulment, Article 49(B) provides Jordan's Court with a powerful, non-derogable mandate: to annul any award on its own initiative if its very content violates public order. This focus on the award's "content" is the indispensable distinction. An exploitative TPLF agreement, even if offensive to public policy, remains a collateral agreement; its terms do not form the substantive content of the arbitral award. This dual approach empowers courts to surgically excise or void an unethical funding agreement while preserving the enforceability of arbitral awards and the claimant's underlying recovery intact.

The tactical nature of this method aligns with the cautious manner in which courts operate, as Shao (2021) notes and as *seen in the A v. Venezuela* case. In this instance, tribunals assessed funding contracts for alignment with the public interest, yet kept the award enforceable. Thus, the principal legal risk in Jordan is not in the annulment of the award itself, but in the funder's inability to enforce its return under a contract deemed unethical or disproportionate. Only in exceptional cases that involve arbitrators themselves, such as undisclosed conflicts of interest by which a tribunal becomes biased, might the award face nullification under Articles V(1)(d) or V(2)(b) of the New York Convention.

Therefore, TPLF is not incompatible with Jordanian arbitration law. The issue, however, is the funding agreement's ethical and procedural nature. Jordanian courts remain guardians of public policy by ensuring TPLF arrangements meet national standards of fairness, transparency, and lawful cause before lending them the state's enforcement power.

## 5 Conclusion and Recommendations

Consistent with this paper's position, Third-Party Litigation Funding (TPLF) in Jordan remains unregulated and therefore in a doctrinal vacuum, with no express approval or prohibition. Thus, its enforceability depends on the extent to which it complies with a demanding tripartite framework in each of three separate domains: (1) the doctrinal domain, involving the principles of contractual freedom and the public order of the Civil Code; (2) the procedural domain, relating to fair administration of justice; and (3) the ethical and religious domain, based on the fundamental principles of Islamic law.

The primary legal consequence is that TPLF agreements are treated as typical contracts (unnamed contracts) and are subject to rigorous judicial review. While Jordanian courts can use the latent instruments under Articles 87, 165, and 166 of the Civil Code to strike down abusive contract provisions, this ad hoc approach creates uncertainty that deters legitimate investment. To resolve this heterodox confusion and to open the true potential, the author suggests the following means of coordination:

### 1) Specific Legislative Amendments to Civil Procedure and Arbitration Laws:

A. Amend the Civil Procedure Law to expressly recognise and define TPLF agreements. Essential reforms include: i) Mandatory disclosure of funding arrangements, including the identity of the funder and the material terms involved, at the commencement of proceedings. ii) Limiting the control of the funder by preventing interference with the litigation strategy, settlement or choice of counsel. iii) An

express power for the Court to consider approval of the funding agreement and whether or not to approve the funding agreement.

B. Amendments to the Arbitration Law must ensure that any required disclosure is made in a manner consistent with international best practices in arbitration (UNCITRAL Notes on Organising Arbitral Proceedings; ICC Arbitration Rules).

- a) Tribunals must be granted authority to enforce compliance by parties to their respective disclosure obligations.
  - b) Guidance must be created to provide a definition of "the public interest" to provide a balance between investors' confidence and Jordanian legal and moral values. The interpretation guidelines should outline permitted risk-sharing agreements among parties, specify when third-party funding returns are sufficient to be considered acceptable by the Court, and require that all parties disclose their role as third-party funders in the dispute. Lastly, there should be protection afforded to the parties against any form of exploitation by third-party funders.
- 2) Jordan should adopt effective models from other jurisdictions. The UK's framework, particularly following *PACCAR v Competition Appeal Tribunal* (UKSC 28, 2023), gives considerable focus to cost liability and control by regulatory authorities. It also requires disclosure of funding to the court, with protective principles such as conflict-of-interest prohibitions and anti-money-laundering legislation (Civil Justice Council, 2025). This model includes adaptable mechanisms suitable for the civil law of Jordan.
  - 3) One notable regional example is the London Court of International Arbitration (LCIA) facilities set up in the Dubai International Financial Centre (DIFC). The LCIA-DIFC was one of the first centres in the Middle East to accept third-party funding in arbitration. In Jordan, the LCIA-DIFC's experience indicated that internationally accepted best practices can be localised. It also provides evidence that TPLF can be part of a civil law system without compromising arbitration integrity.
  - 4) The TPLF framework in Jordan should adopt Sharia-compliant arrangements inspired by Islamic finance contracts such as *Mudarabah* (profit-sharing) and *Musharakah* (joint venture). These Islamic agreements provide for risk- and reward-sharing in equal parts, bringing doctrinal coherence and ethical legitimacy within Jordan's legal tradition.

Hence, Jordan must reconcile the doctrinal, procedural, and ethical dimensions. A successful approach is to ensure that statutory amendments, judicial guidance, and Sharia-based contractual models work together as one.

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