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The Economic Analysis of the One-way Fee-shifting Rule in Litigation

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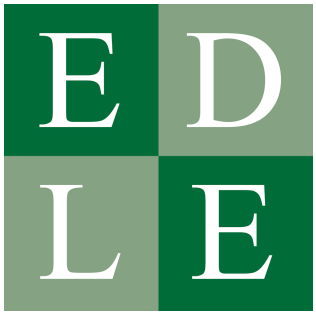

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The Economic Analysis of the One-way fee-shifting Rule in Litigation

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Contents

Chapter 1

Introduction

The components, the magnitude and the allocation of civil litigation costs play a crucial role in the overall litigation process dynamics. First of all, litigation costs, and in particular the way in which they are allocated between litigants, affect parties' strategies in litigation[1]. In fact, when deciding on how much to invest in litigation, parties must consider who will ultimately bear such costs. The financial risk of litigation can result in excessive and aggressive investments increasing the total costs of litigation and the duration of trials. Second, litigation costs may affect the Plaintiff's decision on whether to bring a case to court or not and the litigants' subsequent choice between settlement and litigation[2]. In fact, the burden of litigation costs can undermine the Plaintiff's access to justice,

[1]This is according to the standard theory of litigation developed by Landes (1971), Posner (1973a), and Gould (1973) where litigating parties are rational actors who seek to maximize their returns from the litigation process by investing resources in the process.

[2]Shavell (1981), was the first to extend the work of Landes (1971) and Gould (1973) on the incentives to sue and to consider the settlement option.

the Defendant's choice to defend and the litigants' power in bargaining a favourable settlement. The presence of cost barriers can exclude meritorious cases from justice. This can impact on legal compliance by increasing the people's incentive to deviate from existing legal rules and by making private enforcement more likely[3]. Finally, litigants' incentives and behaviour can be affected by the presence of instruments for financing civil litigation aimed at distributing the financial risk of civil litigation among larger groups of individuals like legal expenses insurances, mass litigations and public legal aid[4].

In sum, litigation costs and how they are allocated impact on the overall legal system efficiency. Indeed, the more a legal system keeps the social welfare loss of the discussed dynamics minimal the more a legal system is efficient. However, such dynamics cannot be considered separately and are interdependently connected. Taken individually, higher costs of litigation represent a waste of resources; they increase the dissipation of the case value hence increasing the welfare loss[5]. However, due to higher litigation costs litigants may be less willing to litigate and this decreases the litigation rate[6] or at least discourages the weakest cases from going to court, which would help courts focusing on more merito-

[3]For papers on fee-shifting and legal compliance see Rose-Ackerman and Geistfeld (1987) and Hylton (1993).
[4]For instance see Barendrecht et al. (2014).
[5]See Luppi and Parisi (2012).
[6]See Massenot et al. (2016) and Luppi and Parisi (2012).

rious cases[7]. A lower litigation rate can make the system more efficient and lowers the duration of trials. Focusing on meritorious cases, instead, increases the probability of creating "new" precedents and this reduces legal uncertainty[8] and reduces litigation rate in the long term[9]. This results in a trade-off between litigation costs and litigation rate that will be further discussed in the thesis both from a qualitative and quantitative prospective.

The economic literature regarding the effects of legal costs and of how they are allocated on the aforementioned variety of decisions (before and during the litigation process) is extensive and is still developing thanks to the contribution of several Law and Economics scholars. In particular, Katz and Sanchirico (2010) survey the literature on fee-shifting where "fee-shifting" refers to the main legal rules for allocating the costs of litigation between a Plaintiff and a Defendant. Despite the large number of contributions on the topic, there remain several open questions and different issues that warrant further investigation. Most importantly, the literature mainly focuses on two allocation costs rules; the American Rule, providing that a party always pays her own fees (independently of the litigation outcome) and the English Rule, according to which the

[7]See Massenot et al. (2016) and Carbonara et al. (2015).

[8]See "The use of cost litigation rules to improve the efficiency", submission to the Australian Law Reform Commission review of the litigation cost rules.

[9]This is exacerbated in common law systems.

loser in a lawsuit is required to bear at least part of the winner's legal expenses. However, there also exists a third type of rule, the One-Way fee-shifting Rule, where fees are shifted in favour of only one party. Under this rule, one party recovers her litigation costs in the event of litigation (the advantaged party) whereas the other party (the disadvantaged one) is not allowed to do so. If the Plaintiff is the advantaged party the rule is known as the Favouring Plaintiff Rule; if the Defendant is the advantaged party the rule is instead known as the Favouring Defendant Rule.

The general aim of this thesis is to use and refine traditional models of civil litigation in the attempt to describe the features of the One-way fee-shifting Rule and its effects on the litigation process.

The thesis is divided into six chapters. Chapter 1 (this chapter) presents an introduction to the topic and lays out the structure of the work. Chapter 2 provides a general framework of the topic of litigation costs as a preparation to better understand the remaining chapters. Chapter 3 proposes a theoretical framework which takes into account all of the characteristics and peculiarities of the One-way fee-shifting Rule; this chapter offers an explanation on the effects of the rule on the litigation process and illustrates a comparison with the more common English Rule. Chapter 4 adopts numerical solutions in order to serve as an exam-

ple for the model presented in the previous chapter and to extend results. Chapter 5 shows how the One-way fee-shifting Rule could be used as a policy instrument, making a case for the adoption of such tool in actual legal systems; the chapter investigates whether in Europe the Favouring Plaintiff fee-shifting Rule can be an alternative to legal aid for assisting wealth-constrained Plaintiffs in pursuing cases that would otherwise be dropped. Finally, Chapter 6 lays out the general conclusion of the thesis and provides insights for future reasearch..

In order to provide the reader with a general view on the research project, Section 1.1 offers a an overview on the One-way fee-shifting Rule existing literature laying the foundation for the thesis research questions that are discussed and motivated in Section 1.2.

1.1 The One-way fee-shifting Rule: Related literature

The following literature overview aims at showing how the Law and Economics contribution on the analysis of the One-way fee-shifting Rule is still lacking leaving the door open for new theoretical and empirical research. As a general remark, the beginning of each chapter includes a more precise and specific discussion on the literature relevant for the

chapter itself.

As it will be later discussed, from a quantitative theoretical prospect the Law and Economic literature has modeled litigation as a rent-seeking scenario where parties (litigants) expend resources (mainly investments in attorneys' fees) to increase the probability of winning a case[10]. In this setting it is possible to show how litigants' resources are affected by different fee-shifting rules and how this impacts on others litigation dynamics (e.g. the incentive to sue, the settlement stage, and the legal compliance). While a variety of scholars applied rent-seeking models focusing only on the English Rule and on the American Rule[11], the only rent-seeking contribution on the One-way fee-shifting Rule has been developed by Braeutigam et al. (1984) and extended by Hylton (1993). Among other things, Braeutigam et al. (1984) offered a theoretical attempt to capture the effect on total legal expenditures and on the minimum level of merit of cases that plaintiffs will be induced to bring by moving from the American Rule to the One-way fee-shifting Rule (without considering the possibility of settlement). The change leads to an increase in total legal expenditures. However, the effect on the minimum merit of the case and

[10]For fee-shifting rent-seeking analysis see for instance Braeutigam et al. (1984), Katz (1988) and Farmer and Pecorino (1999).

[11]In this regards, the main contributors are Katz (1988), Hause (1989), Farmer and Pecorino (1999), Hirshleifer and Osborne (2001), Baye et al. (2000) and Luppi and Parisi (2012).

hence on the litigation rate is ambiguous. Hylton (1993) included into the analysis the effect of different fee-shifting rules on legal compliance. It was shown how a One-way pro-Plaintiff fee-shifting Rule maximises legal compliance compared to the American Rule.

Shavell (1981) set a simple game-theoretic model to analyse and compare the effects of different fee-shifting rules on the settlement rate. The model is based on the hypothesis that rational individuals may end up in litigation (as opposed to settling) because of possible differences in their expectations about the relative probability of winning the case. The author concluded that the Favouring Plaintiff Rule always provides the highest settlement rate because it adds more credibility to Plaintiffs' cases than the English Rule. Wagener (2003) extended Shavell (1981) analysis to antitrust litigation. The author suggested that granting successful antitrust plaintiffs an award of their attorneys' fees (One-way fee-shifting Rule) may result in a structure under which an opportunistic Plaintiff can extract sizeable settlement far greater than the expected award at verdict, regardless of the strength of the Plaintiff's antitrust claim. Therefore, this may cause abuses in antitrust litigation and an increasing number of nuisance litigation. The author concluded arguing that mandatory One-way fee-shifting in private antitrust litigation

(15 U.S.C.) should be then discarded; judges should determine whether to apply the rule or not according to several factors (relative financial strengths of the litigants, the egregiousness of the Defendant's conduct, the novelty of the Plaintiff's claim).

From a qualitative perspective, Krent (1993) developed an analysis on the US debate over the One-way attorney fee-shifting statute with a focus on cases involving private litigants suing federal state or governments. The author concluded that the One-way fee-shifting Rule 1) may lead to more effective governance by incentivising small parties and public interest group to contrast government overreaching and forcing government agencies to take into account more fully the costs of their action 2) may encourage firms to comply with federal regulation. However, in many contexts, One-way fee-shifting is not needed and in others is quite inefficient (public loss). The author suggests that the rule is probably more efficient where there is no significant monetary stake (this to minimise the self interested behaviour of the private bar and watchdog groups) and when parties are somehow sensitive to litigation costs.

The theoretical literature on the One-way fee-shifting Rule has several shortcomings. First, the model by Braeutigam et al. (1984) rather than focusing on the intrinsic characteristics of the One-way fee-shifting Rule

(i.e. how the rule directly affects the litigants behaviours and the probability of winning at trial) only focuses on the effects of moving from the American Rule to the One-way fee-shifting Rule on legal expenditures and on the litigation rate. The model is pretty basic, it does not discuss the functional form for the probability of winning at trial and does not allow litigants to face different returns from investing in litigation[12]. Second, the effects of moving from the English Rule to the One-way fee-shifting Rule are not treated by the authors. The lack of a comparison between the English Rule and the One-way fee-shifting Rule does not provide theoretical support for possible policies aimed at introducing the One-way fee-shifting Rule in a legal system where the default rule is the Loser-pays Rule. Indeed no scholars have discussed about the issue.

Furthermore, despite the analysis on the settlement stage offered by Shavell (1981) is general, no scholars have considered the One-way fee shifting Rule as a possible instrument for favouring wealth-constrained Plaintiff's access to justice. The paper by Wagener (2003) is case and country specific (it only considers private antitrust litigation in the US) and again it does not account for comparisons between the English Rule and the One-way fee-shifting Rule.

[12]These aspects are instead considered in several paper analysing the English Rule and the American Rule. See for instance Katz (1988), Farmer and Pecorino (1999), Luppi and Parisi (2012) and Carbonara et al. (2015).

Finally, the literature does not include any analysis on the Partial One-way fee-shifting Rule where the successful favoured litigant can recover only a fraction of her litigation costs.

The absence of a solid and extensive theoretical analysis on the One-way fee-shifting Rule has also narrowed the empirical analysis on the topic. Indeed the main empirical and experimental papers on fee-shifting rules do not account for the One-Way fee-shifting Rule[13]. Particular cases where the One-way fee-shifting Rule is adopted have been studied by Eisenberg et al. (2014) and Eisenberg and Miller (2013). In particular, Eisenberg et al. (2014) empirically analyzed fee awards in Israel, where Judges have discretion to award fees, with the English Rule operating as a default . Using a dataset of 2641 Israeli cases terminated by judgment in district courts in 2005, 2006, 2011, and 2012 the authors concluded that in tort cases won by individuals against corporate defendants, corporations paid their own fees plus Plaintiffs' fees in 99 percent of the cases (One-way fee-shifting Rule pro Plaintiff). This is because corporation on average have a higher ability to pay than individuals; therefore, Judges use the One-way fee-shifting Rule to protect more individuals. Eisenberg and Miller (2013) extended the empirical research on fee-shifting by empirically studying fee clauses in 2,347 US contracts in large corporations'

[13]See Coursey and Stanley (1988), Coughlan and Plott (1997) and Hughes and Snyder (1995).

public securities filings. As a matter of fact, contracting parties have the possibility to opt out of the default American Rule on fee-shifting. The authors showed indeed that 37 percent of the contracts specified the English Rule while 17,2 percent of contracts specified the One-way fee-shifting Rule. This suggests that the American Rule may not be optimal in many commercial contracts since parties usually reject it.

However, these interesting findings are based on qualitative hypotheses and lack a solid theoretical basis.

1.2 Research Questions and Motivations

First of all, the mechanisms and the dynamics through which litigation costs impact on the litigation process can not be fully understood without a clear, detailed and complete view of the components, the allocation and the financing of such costs. This is why Chapter 2 provides a general legal analysis of litigation costs. How are litigation costs defined? How are litigation costs allocated between parties in different countries? Are there mechanisms for financing those costs? The chapter answers the aforementioned questions through a positive analysis and providing an intuitive case study.

Chapter 3 investigates the effects of different litigation rules on the litigants' incentives to spend resources in litigated civil cases and on litigants' probability of winning at trial. Since the pioneering work of Landes (1971) and Posner (1973b), the Law and Economics literature has modeled litigants as rational agents who maximise their utilities in terms of return from litigation. The choice variables are investment in lawyers' fees, costs for evidence taking and experts' fees. Assuming that each litigant takes the other's decision as given, litigants reach a Nash equilibrium which depends on several factors such as the stake at trial, the marginal costs of legal resources and the sensitivity of trial outcomes to the parties' individual efforts. Those situations where parties spend resources to improve their share of (or probability of winning) a fixed stake, are known in Economic literature as rent-seeking (Tullock (1967)). As shown in the literature overview, no exhaustive rent seeking analysis can be found in the area of the One-way fee-shifting Rule. Hence, Chapter 3 aims at contributing to the existing literature by refining the existing models of litigation choices in order to account for the One-way fee-shifting Rule. This leads to the main research questions of the research project:

1) What are the effects of the One-way fee-shifting Rule on litigants' behaviour and decisions? Is the rule effective at discouraging (encouraging) the disadvantaged (favoured) litigant? How does the One-way fee-shifting Rule compare with other rules and mainly with the English Rule?

The Chapter 3 analysis indeed shows that the One-Way fee-shifting Rule provides incentives to the favoured litigant to exert more effort than the disadvantaged one. This increases the favoured litigant's probability of winning at trial, decreasing the winning probability for the disadvantaged litigant; the One-Way fee-shifting Rule is the only Rule that allows the policymaker to influence the litigation process in favour of one of the two parties. The chapter provides answers to another set of research questions:

2) What are the the implications for the legal system's efficiency of moving from the English Rule to the One-Way fee-shifting Rule?

Despite the fact that the model does not consider the litigants' possibility of settling the case (no exit option is available) it is shown how such a movement[14] has an ambiguous effect on litigants' total legal expenditure

[14]The chapter aims to provide policies advise for European countries. This is why the model does not consider the American Rule. However, for the purpose of completeness the Appendix includes a Section accounting for the American Rule as well.

and on the litigation rate as well[15]. As a matter of fact while the shift always decreases the disadvantaged litigant legal expenditure, the effect on the advantaged litigant expenditure is not predictable and depends on how the disadvantaged litigant reacts to her opponent legal expenditures choice. The litigation rate decreases if total litigation costs increase and vice-versa (trade off); therefore there is ambiguity on such factor as well when shifting from the English rule to the One-Way fee-shifting Finally, the chapter provides insights to answer the following research question:

3) How and where can the One-Way fee-shifting Rule be applied as an instrument for policy?

Following the results, several examples where the One-Way fee-shifting rule could be indeed used as an effective policy instrument for making legal system more efficient or more equal are provided.

Chapter 4 extends the previous chapter analysis by means of numerical evaluations as the complexity of the model does not allow for closed solutions[16]. The main focus is on the second set of research questions. By assuming a specific form of the probability of winning at trial, it is shown how, when moving from the English Rule to the One-Way fee-

[15]This chapter considers total legal costs and litigation rate as the main proxies for the legal system efficiency.

[16]In mathematics, an expression is said to be a closed-form expression if it can be expressed analytically in terms of a finite number of certain "well-known" functions.

shifting Rule, total litigation costs always decrease while the litigation rate increases.

Chapter 5 presents a different approach to study the issue by using a general settlement model where legal expenditures are taken as given. The aim is to understand how litigants behaviour, before going to court, is affected by the use of the One-Way fee-shifting Rule. More precisely, it is shown how a Favouring Plaintiff Rule could be used as an instrument for assisting wealth-constrained Plaintiffs in pursuing cases that would otherwise be dropped; and in particular how, in this respect, the rule could be a valid alternative to legal aid. The chapter answers the following research questions:

4) How do the Favouring Plaintiff Rule and legal aid differently affect the Plaintiff's credibility and incentive to sue, the litigation/settlement rate and the settlement amount? How do the two instruments compare with the English Rule?
5) Can the Favouring Plaintiff fee-shifting Rule be an alternative tool to legal aid for assisting wealth-constrained Plaintiffs in pursuing cases that would otherwise be dropped?

First, the result achieved in the previous chapter is confirmed: with respect to the English Rule, the favouring Plaintiff Rule increases the num-

ber of cases that the Plaintiff brings to justice. In fact, the rule increases the Plaintiff's credibility to sue and her willingness to go to court even if cost barriers are present. However, this result mainly reflects on the settlement stage (which is not considered in Chapter 3). More precisely, all of the new credible cases that are brought to court by the Plaintiff and some of the cases that would be litigated under the English Rule are settled before the trial. This suggests that the Favouring Plaintiff Rule increases the settlement rate and the settlement amount; however it decreases the litigation rate. Second, it is shown that a similar result can be achieved with the use of legal aid; however legal aid always increases the litigation rate and public expenditure. Therefore, the chapter suggests that the Favouring Plaintiff Rule can be a valid alternative to legal aid for assisting wealth constrained Plaintiffs in bringing to justice cases that would have otherwise been dropped and, under certain conditions it might also be more effective than legal aid.

Chapter 6 presents a final discussion on the results achieved in the previous chapters; further, it shows how such results can be discussed in the same framework.

In sum, this thesis contributes to the literature by developing a solid theoretical analysis of the intrinsic characteristics of One-way fee-shifting

Rule. First, the analysis permits to compare the rule with the more commonly used English Rule in terms of litigants' behaviour, total litigation costs and litigation rate. Second, the analysis shows how the One-way fee-shifting Rule can be used as a policy instrument and more precisely as an alternative to legal aid for assisting wealth constrained Plaintiffs in bringing to justice cases that would have otherwise been dropped. Future research can build on this framework to empirically test the model implication and to enlarge the qualitative debate on the One-way fee-shifting Rules.

Chapter 2

Civil Litigation Costs: A Legal Analysis

2.1 Introduction

The mechanisms and the dynamics through which litigation costs impact on the litigation process can not be fully understood without a clear, detailed and complete view on the components, the allocation and the financing of litigation costs. This is why this chapter provides a general legal analysis of litigation costs. This Chapter is organised as follows. Section 2.2 describes what are the main components of litigation costs and their relative magnitude. Section 2.3 provides a detailed analysis and description of the rules governing the allocation of legal expenses among litigants. Section 2.4 describes the existing mechanisms for financing civil

litigation and how each instrument works. Each of the aforementioned sections provides a general view of the analysed topic and briefly describes how different developed world's jurisdictions fit into the analysis. Section 2.5 concludes with a case study: following the analysis of the previous sections, it is shown how litigation costs, their allocation and their financing work in Italy.

2.2 The definition of litigation costs

Litigation costs can be divided in three main classes: attorneys' fees, court costs and costs for evidence taking. These classes are individually analysed in Subsections 2.2.1, 2.2.2 and 2.2.3 respectively. The analysis is mostly based on the two most important comparative studies on litigation costs and fee allocation present in the literature. First, the book by Hodges, Vogenauer and Tulibacka which contains the first major comparative study (more than 30 jurisdictions) of litigation costs and methods of funding litigation (see Hodges et al. (2010)). Second, the book edited by Mathias Reiman including 40 national reports commissioned by the International Academy of Comparative Law (see Reimann (2012)) that extends the first contribution by increasing the number of national reports and by offering a more detailed analysis. The national reports provided by the aforementioned books cover a substantial portion of the world legal system, including both Civil Law and Common Law countries. In almost every country the distinction between attorneys' fees and court costs is conspicuous; Subsection 2.2.3 shows instead that, depending on the type of legal system, costs for evidence taking can be considered as court costs or attorney's fees. However, for the stake of

completeness, costs for evidence taking are individually considered.

2.2.1 Attorneys' fees

Attorneys' fees represent the compensation the client has to pay to his or her lawyers for legal services performed by the latter on the client's behalf. While most jurisdictions leave the determination of attorneys' fees to the market, others tend to regulate attorneys' fees to various extents. When fees are not regulated, lawyers either fix an hourly rate, charging for each hour they work on the client's behalf, or, for simple or routine cases, set a flat fee. Moreover, some jurisdictions usually allow for success oriented fees; for instance, by contingency/conditional fees the lawyer is paid by a predefined judgment-share/premium only in the event of victory. Fees are usually determined according to the case complexity (size and type), the lawyers reputation, the location where the case is filed and the clients resources. When instead attorneys' fees are regulated, they can be set by official schedules that are tied to the litigated amount or to the court in which the case is litigated; these schedules provide either an absolute amount or a maximum-minimum range and can be bindingly exclusive or not. Moreover, success oriented fees can be prohibited or limited. Attorneys' fees typically represent the

largest share of litigation costs[1]; this is especially true for Common Law countries. In fact, common law jurisdictions are characterised by the so-called adversarial procedural system. While in a typical civil law trial the judge dominates the scene by deciding on the basis of his or her internal conviction, in a typical common law trial the parties, through their lawyers, directly control the process by organising the case and by developing the fact with their sole initiative. Therefore, common law systems are characterised by higher lawyers' efforts and by a more passive role of the court, consequently attorneys fees have a higher impact on total litigation costs than in civil law countries[2].

2.2.2 Court costs

Court costs are given by expenses the court has to support when a case is filed and litigated. First of all, almost every jurisdiction charges a filing fee on litigants for the use of the state's court. The filing fee can be a unique amount that has to be payed by parties at the beginning of the case or a series of subsequent payments (one for each step that the case reaches). Moreover, the size of the fee can be either fixed, or related to the amount in dispute (many jurisdictions cap court costs so as not to give rise of astronomical fees for very large cases). Others minor court costs

[1] This is confirmed by the national reports in Hodges et al. (2010) and Reimann (2012).
[2] See Luppi and Parisi (2012).

are represented by court transcripts, charges for depositions, printing documents and payment for witnesses appointed by the court; these costs are usually charged on litigants at the end of the trial. Although court costs are usually lower than attorneys' fees, they can reach relatively high values. This is especially true for civil law jurisdictions where, given the inquisitorial system, courts play an active and central role, and thus require higher costs; these costs are usually shifted to litigants.

2.2.3 Costs for evidence taking

Costs for evidence taking are minor costs that are not directly intended for financing the state court system or for paying for lawyers' work. These costs mostly consist of compensation to witnesses and experts. While in most civil law countries witnesses and experts are appointed by the court (i.e. their payments are included as court costs) in common law jurisdictions each party selects and pays his or her own experts and witnesses. The selection can also be directly made by lawyers, increasing the attorneys' fees. Costs for evidence taking also include minor costs like ordering, obtaining and copying documents. Costs for evidence taking have a low impact on overall litigation costs, and they are secondary both to court costs and attorneys' fees[3]. However, for complex cases, they can

[3]See Hodges et al. (2010) and Reimann (2012).

play an important role and must be carefully taken into account by parties.

2.3 The allocation of litigation costs

The previous Section has described the components of litigation costs, this Section analyses instead how the private cost of civil litigation is allocated between a Plaintiff and a Defendant in different jurisdictions. According to the "Loser-pays Rule", the loser in a lawsuit is typically required to bear the winner's legal costs. The American Rule instead, provides that each party ordinarily pays his or her own litigation costs, independently of the litigation outcome. However, most of the systems that apply the Loser-pays Rule do not fully reimburse the winner and provide him or her only partial compensation[4]. On the other hand, also under the American Rule, some costs may be shifted to the loser[5]. Therefore, most jurisdictions operate in between the Loser-pays Rule and the American Rule, making the aforementioned dichotomy too simplistic. In this regard, the book edited by Reimann (2012) defines three possible types of legal systems. First, the "Major Shifting Systems" where the loser bears all the winner's litigation costs, or at least a considerable part of them, and where all the categories of litigation costs are subject to shifting. Second, the "Partial Shifting Systems" where either only a part of the winner's overall litigation costs is shifted to the loser or where only

[4]See for instance, Carbonara et al. (2015).
[5]For instance, in the US some evidence costs can be shifted to the losing party.

court costs and costs for evidence tacking are subject to shifting. Finally, the "Minor Shifting Systems" where, although the American Rule is the default rule, thanks to some exceptions, a small part of the winner's legal costs (usually court costs or costs for evidence taking) can be reimbursed to the winner by the loser[6]. Although shifting (completely or partially) or not shifting litigation costs to the loser defines a jurisdictions default cost rule, in some countries, a third type of rule, where fees are shifted in favour of only one party, can be applied as an exception. This is the so-called One-Way fee-shifting Rule. Under this rule, one party recovers at least part of the litigation costs, whereas the other party (i.e. the disadvantaged one) is not allowed to do so. Thus, if the Plaintiff was the chosen beneficiary, a successful Plaintiff would recover litigation costs, while a successful Defendant would not. Subsections 2.3.1, 2.3.2 and 2.3.3 describe and analyse the Loser-pays Rule, the American Rule and the One-way fee-shifting Rule respectively. For each rule the debate over its positive and negative effects on litigants' behaviour and on the legal system efficiency is also described.

[6]See for instanceVargo (1992).

2.3.1 The Loser-pays Rule/English Rule

The Loser-pays Rule provides that the party who loses in court pays at least a fraction of the other party's litigation costs (regardless of whether the winning party is the Plaintiff or the Defendant). The rule is also known as the English Rule; in fact, it can be traced back to the century english law[7]. The Loser-pays Rule can either shift all the litigation costs to the loser (unlimited costs-shifting), or only a fraction of the costs (limited costs-shifting). National reports (Reimann (2012) and Hodges et al. (2010)) show that, although most of the world's jurisdictions provide for costs-shifting[8], the type and the size of the costs that are shifted vary greatly across different legal systems[9]. Following the analysis of the previous section, the application of unlimited or limited fee-shifting categorises a jurisdiction as a Major or Partial Shifting System respectively. There are two main arguments in favour of the Loser-pays Rule. The most popular justification reflects a basic idea of fairness. Proponents of the Loser-pays Rule argue that it is just that the loser must compensate the winner. The prevailing party, should not suffer financially for having

[7]The Statute of Gloucester (1278), one of the most important pieces of legislation enacted in the Parliament of England during the reign of Edward I, was the probable origin of the English Rule (Woodroffe (1997)).

[8]The loser-pays rule is an important principle especially in European legal systems and it is expressed in all European codes of civil procedure (see Bungard (2006)).

[9]For instance, some countries like Italy, Spain and Russia shift in all the categories of litigation costs and tend to make the winner completely "whole". Others countries, like England, France and Australia instead completely shift court costs and costs for evidence taking; however the winner never recovers all the litigation costs either because the amount of recoverable attorneys' fees is capped or because the Judge has the power to limit the recoverable attorneys' fees amount Reimann (2012).

to prove the justice of his or her position. For instance, Pfennigstorf (1984) writes that "A claimant who is forced to resort to court action to enforce his claim against a reluctant debtor is entitled to recover the full value of the claim and should not be expected to be satisfied with a lesser amount because of the necessity of suing. Likewise, one who successfully defends himself against an unjustified claim raised by another person should come out of the experience without financial loss". The second main justification in favour of the Loser-pays Rule focuses instead on the rule's incentive effects. The Loser-pays Rule could discourage the filing of non-meritorious or frivolous cases; i.e. of lawsuits that, due to their lack of legal merit, have little to no chance of being won[10]. In fact, in the event of defeat a party would bear also the winner's legal costs, this two-fold risk would make the party unwilling to litigate unfounded legal claims[11]. On the other hand, the opponents of the Loser-pays Rule (especially with unlimited fee-shifting) emphasise that the rule adversely affects low income individuals (who also tend to be more risk-adverse than high-income individulas). In order to avoid the large financial risk of having to pay all the litigation costs, these individuals could indeed refrain from bringing a valid claim to the court or could accept unfavourable

[10]Litigating frivolous cases would only represent a waste of public resources and time and would clog the litigation system lowering its efficiency.

[11]See for instance Shavell (1981), Rowe (1982) and Farmer and Pecorino (1998).

settlement amounts, unless they are quite confident to win[12]. In fact, under the Loser-pays Rule it is true that the winning litigant gets away free (or cheaply), but only at the risk of being hit so much harder in the event of defeat (Reimann (2012)). It is also argued that a higher financial risk in litigation increases parties expenditures in litigation, decreasing the overall legal system efficiency. More precisely, under costs-shifting, a successful litigant has a higher litigation outcome than in the case without costs-shifting. For instance, if the Plaintiff prevails in litigation, under the American Rule she or he wins only the contested stake; under the English Rule instead, she or he wins the stake and is also awarded legal costs. Moreover, under a loser-pays system each additional unit of legal expenditure has to be discounted by the probability of prevailing at trial and being reimbursed. Therefore, under the English Rule, the value of winning the case and the expected marginal benefit of legal expenditures are higher resulting in greater legal expenditures during the litigation process[13]. However, these issues can be somehow mitigated. First, the negative effect of the rule on poor litigants can be reduced by the use of instruments for financing civil litigation like legal aid, success oriented attorney's fees or third party contracts[14]. Second, capping the

[12]Davis (1999).
[13]See for instance Braeutigam et al. (1984), Katz (1987) and Luppi and Parisi (2012).
[14]See for instance Tuil and Visscher (2010).

amount of recoverable costs (limited cost-shifting) would make parties less willing to "fight harder"[15]. Therefore, most of the contributions on the Loser-pays Rule tends either to emphasise the virtues of the rule or to find instruments aimed at reducing the possible shortcomings of the rule.

2.3.2 The American Rule

The American Rule provides that each litigant has to bear only her or his own litigation costs, regardless of the litigation outcome. Therefore, the losing party does not have to reimburse the winners' legal costs (or just reimburses a small and insignificant fraction of them)[16]. As outlined by the name of the rule, the only country that by and large rejects the loser-pays principle is the United States. In fact, the default litigation costs rule in the US enforces the principle that each side pays only her or his own costs. Court costs and costs for evidence taking are routinely shifted; however the use of the court in the US is tipically cheap and most of the evidence is carried out by lawyers (increasing attorneys' fees). This makes the fraction of the costs that is shifted almost irrelevant[17]. Of course, the main arguments in favour of the American Rule

[15] See Carbonara et al. (2015) and Hyde (2002).
[16] For an historical overview of the America Rule see Leubsdorf (1984).
[17] See Reimann (2012).

coincide with the main objections to the Loser-pays Rule that are analysed in the previous subsection. Briefly, under the American Rule, a party with less resources should be less discouraged from going against a party with a deeper pocket in fear of having to pay both her or his own costs and the opponent's costs[18]. Moreover, the American Rule decreases the value of the litigated amount (the winning party gets the contested stake but not the reimbursement of costs), and this lowers litigants expenditures increasing the legal system efficiency[19]. On the other hand, the main objections to the American Rule is that it increases the likelihood of a Plaintiff bringing to justice frivolous or non-meritorious cases or of a Defendant continuing abusive practice (because litigants have to pay anything except their costs increase)[20]. Moreover, it is true that without cost-shifting the burden on each side is lower but at the price of having to pay even when winning hands-down (Reimann (2012)). However, the issues raised by the use of the American Rule are mitigated by the fact that although the rule is a default rule, many statutes at both the federal and state levels allow the winner to recover reasonable litigation costs (including attorney's fees)[21]. The issue of frivolous and non-meritorious cases reaching the court and clogging the legal system is also mitigated

[18]Davis (1999).
[19]See for instance Braeutigam et al. (1984), Katz (1987) and Luppi and Parisi (2012).
[20]See for instance Shavell (1981), Rowe (1982) and Farmer and Pecorino (1998).
[21]See Cohen (2006).

by the presence of Rule 68 of the Federal Rules of Civil Procedure: if a settlement offer designated as an offer of judgment is made in civil litigation, the offer is rejected and the final court decision is less favourable than the final offer that was made, then the party who rejected the offer is subject to reimburse at least a fraction of the opponent's litigation costs[22].

2.3.3 The One-way fee-shifting Rule

The One-way fee-shifting Rule represents a third possible type of litigation cost rule and stands in between the American Rule and the Loser-pays Rule. In fact, under the rule, one party recovers at least a fraction of the litigation costs in the event of victory, whereas the other party (i.e. the disadvantaged one) is not allowed to do so. Thus, if the Plaintiff was the chosen beneficiary, a successful Plaintiff would recover at least a fraction of the litigation costs while a successful Defendant would not. When the Plaintiff is the favoured party the rule is also known as the Favouring Plaintiff fee-shifting Rule. On the other hand, when the party that recovers litigation costs is the Defendant, the rule is known as the Favouring Defendant fee-shifting Rule. The One-way fee-shifting Rule originated as an exception to the American Rule. In particular,

[22] See Bone (2008).

the American Civil Rights Attorney's Fees Award Act of 1976[23] allowed a Federal court to award reasonable attorneys' fees to a predefined (either the Plaintiff or the Defendant) prevailing party in certain civil rights cases. Therefore, unlike the English or the American Rules, the One-way fee-shifting Rule is not a default rule, but it is a rule that can be applied depending on various circumstances; e.g. the type of litigants or the type of case that is litigated. For instance, in the US, the Truth in Lending Act (TILA) is a federal Law which sets norms aimed at protecting consumers in their transactions with lenders and creditors. Among other things, the act provides that a One-Way fee-shifting favouring Plaintiff Rule is applied in litigations where a consumer sues a creditor that violated one or more consumer rights under TILA[24] (only the consumer can recover litigation costs)[25]. In other countries, such as Israel and South Africa, judges have full discretion with regard to fees award and denial, and they often apply the One- Way fee-shifting Rule for certain types of litigation and litigants[26]. European countries instead rarely apply the One-way fee-shifting Rule. England and Wales, for instance, privilege Plaintiffs in public interest litigation by protecting them from cost lia-

[23]Often referred to as "Section 1988" (since the law is codified in 42 U.S.C. 1988(b)).

[24]TILA can be found at 15 U.S.C. 1600 et. seq. It is implemented by the Federal Reserve Board's Regulation Z at 12 CFR, Part 226 and by the Federal Reserve Board's Official Staff Commentary to Regulations Z to (OSC).

[25]For other examples of these kinds of federal laws in the US see Krent (1993).

[26]For instance, Eisenberg et al. (2012) show how in Israel, in cases won by individual plaintiffs, corporations had to pay their own litigation costs plus plaintiffs? litigation costs 99 percent of the time.

bility if they lose their case[27]. Moreover, in 2013, England introduced a One-way costs shifting Rule for personal injury cases: a losing Plaintiff does not pay a Defendant's costs but a losing Defendant pays the Plaintiff's costs[28]. Unlike the American Rule vs the English Rule debate, the debate over the positive and negative effects of the One-Way fee-shifting Rule on litigants' behaviour and on the legal system efficiency is at an embryonic phase[29]. Among other things, this thesis aims to fill the gap by providing a detailed economic analysis of the One-way fee-shifting Rule (Chapter 3 and 4 and also showing how the rule could be used as a policy instrument in European countries (Chapter 5). The two main findings are that: 1) the One-way fee-shifting Rule incentivises the favoured litigant to exert more effort than the disadvantaged one; this increases the favoured litigant's probability of winning at trial 2) the Favouring Plaintiff fee-shifting Rule can be an alternative to legal aid for assisting Plaintiffs in pursuing meritorious cases that would otherwise be dropped.

[27] See Reimann (2012).

[28] The Rule was implemented by the introduction of new Civil Procedure Rules 44.13 to 44.17 from 1 April 2013.

[29] Braeutigam et al. (1984) study the effects on litigants' expenditure and on the litigation rate of moving from the American Rule to the One-way fee-shifting Rule finding an increase in the overall litigation costs. Rosen-Zvi (2009) show instead that the rule can be used in order to reduce inequalities in the legal system.

2.4 Mechanisms for financing civil litigation

This Section briefly describes the main instruments (pubic legal aid, legal expenses insurances, success oriented fees, outside investments in litigation and class actions) aimed at distributing the litigants' financial risk of civil litigations among larger groups or at shifting it to different individuals. These instruments shift the burden of litigation costs from litigants to other parties; e.g tax payers, lawyers, public institutions, private individuals etc. Understanding how these instruments work is crucial in order to have a complete view of litigation costs and of the problem of the access to justice[30].

2.4.1 Public Legal Aid

Public legal aid is provided by states in order to assist people who cannot afford litigation costs but require it in order to obtain access to justice. The conditions under which a citizen can receive legal aid and the way in which legal aid is provided vary across different jurisdictions. However, all jurisdictions of the developed world provide some form of legal aid[31].

[30] "*From a law and economics perspective the fact that many different financing mechanisms are available on the market only seems positive and beneficial. The competition between those different mechanisms can also allow an increase of quality and a diversified supply of financing mechanisms to litigants.....A facilitative type of regulation stimulating the emergence of differing financing mechanisms in a competitive environment seems a better way to simulate access to justice and hence to remedy market failures.*" See J.P.B de Mot, M.G. Faure, L.T. Visscher (2017), TPF and its alternative: An economic approach in H van Boom (2017) (pp. 31-54).

[31] See Hodges et al. (2010) and Reimann (2012).

The conditions for access to legal aid are generally set with reference to financial resources and the merit of the case. Once these requirements have been met the recipient can either receive a fraction of the trial expenses he or she incurs (proportional legal aid system) or a fixed amount (fixed legal aid system)[32]. Other forms of legal aid support litigants by waiving court fees or cost for evidence taking or by directly providing them with legal representation in court[33]. Public legal aid shifts the burden of legal costs (or at least a fraction of it) from litigants to taxpayers. The role of legal aid is crucial especially in European countries where, according to the Charter of Fundamental Rights of the European Union, those who lack sufficient resources to support the cost of a trial have the right to receive state-financed legal aid[34]. This principle is confirmed in the majority of the constitutions of European countries[35]. Although legal aid is the most traditional instrument for facilitating people's access to justice, legal aid has the limit to help only a small fraction of litigants who cannot access justice. First, the financial thresholds that have to be satisfied in order to receive legal aid are usually very low, and this makes legal aid unavailable for the middle class[36]. Second, in the presence of a

[32]For a more precise definition of proportional and fixed legal aid systems see Lambert and Chappe (2014).
[33]For instance this is the case in the US where the state usually provides the use of the court system at a low rate for people that have few resources.
[34]See Article 47 of the Charter of Fundamental Rights of the European Union.
[35]For a detailed description of public legal aid systems in European countries see Barendrecht et al. (2014).
[36]See Reimann (2012).

loser-pays system, legal aid does not cover the costs the loser has to reimburse to the winner in the event of defeat. Third, legal aid usually covers only a small fraction of the overall recipient's litigation costs. Moreover, legal aid increases pubic spending which is a major concern from a budgetary perspective. Therefore, legal aid is under the threat of reduction and cutbacks[37]. This threat contributed to the recent development of alternative instruments for financing civil litigation that are discussed in the following subsections. All of these issues are considered in Chapter 3 which indeed identifies the One-way fee-shifting Rule as an alternative (and in some cases more efficient) instrument to legal aid for avoiding that potential Plaintiffs do not bring to justice meritorious cases because of the presence of cost barriers (in Europe).

2.4.2 Legal expenses insurances

Legal expenses insurance is a type of insurance that protects individuals against the financial risk of a lawsuit. The burden of litigation costs is then distributed among all the policyholders. There are two main types of legal expenses insurances: the before-the-event insurance which is purchased before a dispute occurs, and the after-the-event insurance which is purchased after a dispute has arisen. While the former is quite

[37] See for instance Tuil and Visscher (2010).

common among developed world's jurisdictions[38], the latter is quite rare and can be mainly found in the United Kingdom (where, however, it represents small percentage of total legal expenses insurances business)[39]. Despite legal expenses insurance is one of the most common instruments for financing civil litigation, it has some issues. First, the insurance premium is usually high[40] and it is not affordable by all potential litigants. Second, legal expenses insurances usually apply only to certain types of lawsuits[41] and the amount of costs that are covered by the policy is often capped. Third, when the insurance is offered by an insurer that also offers other forms of insurance, a conflict of interest can arise[42].

2.4.3 Success oriented fees

Most of the jurisdictions where the determination of attorneys' fees is left to the market accomodates success-oriented lawyer fees either under the form of contingent fees or conditional fees[43]. Under contingent fees, the client's lawyers get a share of the final judgment only if the client wins, and they get nothing if the clients loses[44]. Under conditional fees, in-

[38] One exception is represented by the US where legal expenses insurances are quite rare (see Kilian (2003)).
[39] For a more detailed analysis of legal expenses insurances see Faure and De Mot (2011).
[40] Intuitively this is especially true for the after-the-event insurances. The UK report in Reimann (2012) shows that the premium is usually around the 25% of the cover amount.
[41] Usually to defendants in tort cases.
[42] See for instance Bowdre (1993).
[43] Conditional fees are also known as No-win-no-fee Agreements.
[44] Here the client insures himself or herself against two risks: against paying lawyers in the event of defeat and also against having to pay a lot if little is gained.

stead, the client's lawyers get a premium if the case is won and nothing if the case is lost; the premium is not related to the adjudicated amount[45]. Therefore, both contingent and conditional fess provide lawyers with a higher fee if the case is won; the main difference between the two schemes is that the former pays a percentage of the judgment, whereas the latter pays an amount which is unrelated to the adjudicated amount. With success oriented fees, the burden of litigation costs is shifted completely or in part[46] to the client's lawyers. Contingent fees are widely used in the US[47] where they represent a trademark of the legal system[48]. In most of the European countries contingent fess are, instead, forbidden. Indeed, giving a lawyer a direct interest in the outcome of litigation is seen as unethical[49]. This prohibition contributed to the development of conditional fees that are instead permitted in almost all of the European countries (as well as in the US and in the other developed world's jurisdictions)[50]. Conditional and contingent fees are intended to align lawyers and clients' interest so to incentivise lawyers' effort to represent the client. Moreover, these schemes should favour access to justice for people who

[45]For a more detailed definition and comparison of contingent and conditional fees see Emons (2007).
[46]The client still has to pay the costs that are not reimbursed by the loser in the event of victory.
[47]Kritzer (1991) observes that in around 87% of all torts and 53% of all contractual issues in the US, plaintiffs retain their lawyer on a contingency basis.
[48]See Reimann (2012).
[49]Pactum quota litis is not allowed by the ethical code of the European association of lawyers.
[50]For a detailed analysis of conditional fees see Kirstein and Rickman (2004).

are not willing or able to support a high financial risk[51]. However, success oriented fees present also some issues: they are not permitted by all jurisdictions; they may lead to really high payments in the event of victory (especially with contingent fees); and they may incentivise lawyers to sell-out their clients' interest (e.g. if a quick settlement reaps substantial awards whereas obtaining more money for the client beyond that point may involve so much time that is not cost-efficient for the lawyer)[52].

2.4.4 Outside investments in litigation

Outside investment in litigation is a mechanism that allows third parties either to finance a litigant's legal fees in exchange for a share of any judgment in the litigant's favour or directly to buy and pursue a Plaintiff's case. Therefore, there are two main types of outside investment in litigation: 1) Third party funding, where a third party supports a litigant's litigation costs (either a Plaintiff or a Defendant) in exchange of a judgment share in the event of victory[53]. In other words, here the litigant transfers the burden of litigation costs to the third party by renouncing to a judgment share in the event of victory. 2) Assignment of claims, where a Plaintiff sells and assigns his or her case to a third party that directly

[51] See for instance Posner (1973b),Emons (2000) and Emons and Garoupa (2004).
[52] See Horowitz (1995).
[53] For a comparative legal and economic approach to the study of third party litigation funding and for a more detailed analysis see De Morpurgo (2011).

pursues the case in court and becomes liable for the final judgment[54]. Here, the litigant entirely avoids the financial risk of litigation by selling his or her case at a discounted rate. Third party fundings are widespread and common in England, Wales, Australia and in some US states. In others countries, on the contrary, third party fundings are either prohibited (e.g. some US states) or only recently introduced (e.g. most European jurisdictions). The strategy of assigning a claim is, instead, spread in most civil law countries jurisdictions, while it is forbidden in almost all common law countries[55]. The main issues of these instruments are that they are suited only for cases that although they threaten to be costly, they also promise to be rewarding, and also could incentivise an excessive recourse to litigation[56].

2.4.5 Class Actions

A class action is a lawsuit where one or several Plaintiffs represent the interest of a large number of similarly situated claimants. This instrument distributes the burden of litigation costs among all the people represented by the Plaintiff. Although in a class action individual Plaintiffs usually do not pay anything out-of-pocket, class action are limited to

[54] A new creditor replaces the old one and then sues in his or her own right.

[55] For a more precise analysis on which countries apply either third party fundings or assignment of claims see Reimann (2012).

[56] See Lyon (2010).

certain types of cases and are not provided by all the legal systems. In particular, class action originated in the United States and is still predominantly a U.S. phenomenon[57]. However, Canada, as well as several European countries with civil law, have made changes in recent years to allow consumer organizations to bring claims on behalf of consumers (the so-called representative or group litigations). For instance, on November 1, 2018 Germany introduced the new German Declaratory Model Action (Musterfeststellungsklage)[58]. The new German Declaratory Model Action allows specific and defined consumer associations (the so-called qualified institutions) to initiate a declaratory action for the benefit of consumers against corporations in order to achieve a binding declaratory judgment regarding certain facts or legal questions. Consumers are not directly involved. In order to obtain an enforceable title, the individual consumer must assert any of her claims against the defendant company in a separate subsequent dispute on the basis of the binding determinations made in the model declaratory decision; this is a sort of opt-in option for the individuals. Therefore, the model declaratory action differs from the US-style class actions in several aspect: 1) in a US-style class action the decision is binding for all the individual members of the group unless

[57]For a detailed analysis of US class actions see Macey and Miller (1991).

[58]The Model was introduced in the wake of the so-called Diesel emissions issue involving Volkswagen and other car manufacturers which became public for the first time in September 2015.

they opt-out from the class. 2) In a US-style class action, the individual members of the group participate in a potential award even if they have not actively participated in the proceedings. 3) After the class action is completed, no further claims can (or need to) be asserted in individual follow-up proceedings.

2.5 Case study: Italy

As it is well-known, Italy operates under a civil law system. However, although Italian judges have a central and active role for developing the facts of a case, lawyers have strong powers in shaping claims, defences and evidences to submit to the judge. In fact, pursuant to article 115 in the Code of Civil Procedure, the judge has the duty to serve a judgment only on the basis of the evidence submitted by the parties or by the Public Prosecutor in cases where he is required or permitted to intervene (cases involving public interests). Therefore, Italy uses a blend of adversarial and inquisitorial elements in its court system and can not be considered as a truly inquisitorial jurisprudence[59].

2.5.1 The components of litigation costs

Court costs: In Italy court costs vary according to the value of the case and the trial activity performed. The so-called "Contributo unificato" is a payment that parties have to make at the beginning of the case[60]. Other court fees are charged for specific activities like the service of documents or the registration of the final judgment. Court costs represent only a small fraction of the case value (for instance for a dispute involving

[59] See Grossi and Pagni (2010).

[60] See Article 6 and 10 of the "Testo Unico Spese di Giustizia"; the fee is set with reference to the amount in controversy.

€25000, court fees amount to around €100) and are usually much lower than attorneys' fees[61].

Attorneys' fees: Attorneys' fees in Italy are regulated by law[62]. A recent regulation has liberated lawyers fees from statutory fixed maximum and minimum amount. However, the ministerial decree 55/14 provides that if the client and the lawyer do not find an agreement on costs, a fixed tariffs system, set by the national bar council and approved by the Minister of Justice, applies. Looking at the aforementioned tariff system[63] (which is a reference point for Italian lawyers), it is clear how attorneys' fees are on average much larger than court costs and represent the largest share of overall litigation costs (for instance for a dispute with a value in between €26000 and €52000, the average attorney's fee is €7000).

Costs for evidence taking: Costs for evidence taking in Italy are mostly represented by experts' fees. Experts are appointed by the court who also sets their fees with reference to the relative professional tariff. However, parties also hire their experts that submit their reports to the court[64].

[61] See Reimann (2012).
[62] See Article 13, law 247/2012.
[63] Tariffs can be found in the ministerial decree 55/14.
[64] See Cappelletti (2013).

2.5.2 The allocation of litigation costs

In Italy the basic rule concerning civil litigation costs allocation is set by article 91 (paragraph 1) of the Code of Civil Procedure. According to that provision, the loser in a lawsuit has to reimburse all the winner's litigation costs[65]; i.e. lawyers' fees, court costs and costs for evidence taking. Therefore, following the categorisation made by Reimann (2012), Italy is a "Major shifting" system that applies the Loser-pays Rule with an almost unlimited costs shifting. However, as stated by Article 92 of the Code of Civil Procedure, the judge is free to limit the amount of recoverable costs when: 1) parties are both partly successful 2) there are "other serious and exceptional reasons" that must be specifically indicated in the judgment. In particular, the judge can exclude from costs shifting those costs that he or she considers unnecessary or unfair. Moreover, Article 45 of law 699/2009, makes a victorious party liable for at least a part of her or his legal costs when the party obtains a judgment which is less convenient than a conciliation offer she or he had refused before. Therefore the default Loser-pays Rule presents several exceptions and limitations that usually reduce the share of litigation costs that is shifted.

[65]This principle is called "Principe della Soccombenza".

2.5.3 Mechanisms for financing civil litigation

Public Legal Aid: Clause 24 of the Italian Constitution states: "Everyone is allowed to take legal action for the protection of her/his rights and legitimate interests. Defence is an inviolable right at any grade of the proceedings. The means of action and defence before all Courts are guaranteed to the indigent by public institutions. The law determines the conditions and legal means to remedy miscarriages of justice". In this regard, Italy provides a public legal aid system: if a person falls below a predetermined financial threshold (namely if his or her annual income falls below €10,766.33) he or she may qualify for free legal assistance and may be exempted from court fees and other charges[66]. Note that the financial threshold is quite low and this can exclude from access to justice people that while having an income above the threshold, have no sufficient resources to bear the financial risk of a lawsuit. Of course, in order to be eligible for legal aid a person has also to pass a merit test which demonstrates that the claim is "not manifestly unfounded". When the merit test and eligibility criteria are satisfied, the State bears the litigation costs of the legal aid recipient.

Legal expenses insurances: As required by the European Directive

[66]This is the so-called "gratuito patrocinio".

87/344/EEC, legal expenses insurances have been adopted in Italy[67]. However, Legal expenses insurances are not widespread and are generally related to automobile liability and household policies[68].

Success-oriented fees: Success-oriented fees, and in particular contingency fees, have been recently permitted by the law 247/2012, Article 13. The article provides that all the agreements between lawyers and their clients concerning fees are permitted. These agreements, to be valid, must be in writing; no other regulation is provided by the law.

Outside investments in litigation: Third parties litigation funding is not specifically considered by the Italian courts. In principle, there is nothing to prevent third party funding of litigation. However, there is little evidence to suggest that third party funding will become prevalent in the Italian legal system in the immediate future[69].

Class actions: Class actions have been introduced in Italy in 2007 with Article 140-bis in the Italian Consumer Code[70]. The article regulates the so-called "collective action" stating also the merits requirements to be fulfilled in order to initiate it. Collective actions are "intended as an avenue for consumer associations and committees to obtain, for the benefit of their members whose "collective interests" were violated, damages

[67] See "Codice delle Assicurazioni private" (D.Lgs. 209/2005) art 173 and 175.
[68] See Il Sole-24Ore, January 26, 2009, 20.
[69] See De Morpurgo (2011).
[70] On January 1, 2010, Article 140 bis entered into force.

for certain contractual or tort claims, or in respect of unfair commercial or anticompetitive conducts". However, class actions are not a widespread phenomenon in Italy[71].

[71] See "Class Actions in Italy: Recent Developments", Thomas F. Cullen and Margherita Magillo, Jones Day Milan Office, May 9, 2013.

2.6 Conclusion

The components of litigation costs, the rules governing their allocation and the mechanisms for financing such costs greatly vary among different jurisdictions. In almost all jurisdictions attorneys's fees represent the main and the most unpredictable component of litigation costs. In fact, while court costs are mainly predetermined small fees to be paid in order to initiate or continue a case, costs for evidence taking are often born by lawyers and thus charged as part of attorneys' fees. Most of the developed world's jurisdictions shift some of the winner's litigation costs to the loser operating in between the pure English Rule and the American Rule. Instruments aimed at distributing the litigants' financial risk of civil litigations among larger groups, are provided and permitted by different jurisdictions to various extents. However, these instruments present some limitations and do not always guarantee the right of full access to justice to everyone. This chapter provided a general view on the topic of litigation costs and laid the foundations for a complete understanding of the essays presented in this thesis.

Chapter 3

The Economic Analysis of the One-way Fee-shifting Rule

OVERVIEW

Among other things Chapter 2 provided an analysis of the different rules according to which litigation costs are allocated between parties. Briefly, in the vast majority of Western countries, the loser is typically forced to bear at least part of the winner's legal expenses (the English rule), while in the United States, each litigant traditionally bears her own costs (the American rule). Further, there also exists a third type of rule where fees are shifted in favour of only one party (the One-Way fee-shifting Rule). While the American and the English rules have been deeply studied in the Law and Economics literature, little contribution has been made to the analysis of the One-Way fee-shifting Rule and on its effects on the

litigation process. Building on the existing literature, the aim of this chapter is hence to provide a theoretical framework which accounts for all of the characteristics of the One-way fee-shifting Rule and that allows for comparison with the more common English Rule[1]. By the use of a general model, first it will be demonstrated that the One-Way fee-shifting Rule indeed incentivises the favoured litigant to exert more effort than the disadvantaged one and this increases the favoured litigant's probability of winning at trial. Second, it will be shown how a movement from the English Rule to a rule favouring one of the two parties has an ambiguous effect on litigants' total legal expenditure and on the litigation rate as well. As a matter of fact, while the shift always decreases the disadvantaged litigant legal expenditure, the effect on the advantaged litigant expenditure is not predictable and depends on how the disadvantaged litigant reacts to her opponent's legal expenditures choice. The litigation rate decreases if total litigation costs increase and vice-versa (trade off); therefore the effect of the aforementioned movement on the litigation rate can not be predicted as well. This chapter results can be used as a theoretical support for all of the policies aimed at discouraging certain types of litigants by the use of a One-way fee-shifting Rule.

[1]A comparison with the American Rule is provided Appendix C

3.1 Introduction

In the field of Law and Economics, "fee-shifting rules" refers to the main legal rules for allocating the private costs of civil litigation (mainly attorneys' fees) between a Plaintiff and a Defendant. In the vast majority of Western countries, the loser is typically required to bear at least part of the winner's legal expenses; this mechanism is called the English Rule[2]. Another rule is applied instead in the United States, where in a lawsuit, a party always pays her own fees unless otherwise specified by contract or statute; this is called the American Rule. Thus, under this mechanism, the loser is not required to reimburse any of the winner's legal costs. As shown in Chapter 2, the possibility of alternative procedural schemes has recently gained significant attention. As a matter of fact, in some countries, a third type of rule where fees are shifted in favour of only one party can be applied: the so-called One-Way fee-shifting Rule. Under this rule, one party recovers the attorney's fees in the event of litigation whereas the other party (i.e. the disadvantaged one) is not allowed to do so. Thus, if the Plaintiff was the chosen beneficiary, a successful Plaintiff would recover the attorney's fees while a successful Defendant would

[2]This rule is also known as "The loser-pays Rule".

not[3].

In the United States, at the state and federal levels, various statutes provide for this type of fee-shifting system. For instance, the Truth in Lending Act (TILA) is a federal Law which sets norms aimed at protecting consumers in their transactions with lenders and creditors. Among other things, the act provides that a One-Way fee-shifting favouring Plaintiff Rule is applied in litigations where a consumer sues a creditor that violated one or more consumer rights under TILA[4] (only the consumer can recover litigation costs)[5]. In other countries, such as Israel and South Africa, judges have full discretion with regard to fees award and denial, and they often apply the One- Way fee-shifting Rule for certain types of litigation and litigants[6]. Again, in countries such as Italy, despite the default rule is the English Rule, the court can deviate from this rule in various situations by denying some costs to the prevailing party[7]. Finally, one-sided attorneys' fee clauses, which provide for

[3]When the Plaintiff (Defendant) is the party that can recover litigation costs, the terms One-Way fee-shifting favouring Plaintiff (Defendant) Rule and One-way pro-Defendant (pro-Plaintiff) Rule are interchangeably used.

[4]TILA can be found at 15 U.S.C. 1600 et. seq. It is implemented by the Federal Reserve Board's Regulation Z at 12 CFR, Part 226 and by the Federal Reserve Board's Official Staff Commentary to Regulations Z to (OSC).

[5]For other examples of these kinds of federal laws see Krent (1993).

[6]See Eisenberg et al. (2012).

[7]From Chapter 2: in Italy, the standard rule concerning costs and fees allocation is set by Article 91, paragraph 1, of the Code of Civil Procedure. According to that provision, at the end of the proceeding the court will order the losing party to reimburse her opponent's expenses, including lawyer's fees. Therefore, what is adopted in Italy is clearly the English rule (in Italian, it is called "principio della soccombenza"). The court can deviate from this rule in several situations. Firstly, the court may exclude those costs that are thought to be excessive or unnecessary. Secondly, the court may order a party to reimburse the other party any expense incurred as a result of her unfairness, irrespective of who was successful. Finally, if no party is totally successful, or there is another good reason, the court may decide that each party bears her own costs. In sum, Italian judges have a certain degree of discretion in awarding or denying fees to the prevailing party.

only one party to recover costs in case of litigation, are becoming more prevalent in the contract terms of industrialised countries[8]. Despite the wide application of such rules, no real and conclusive contribution has been given in the literature on the economic analysis of its structure and legal effects. The main goal of this Chapter is hence to provide a theoretical framework which accounts for all of the features of the One-way fee-shifting Rule and that allows for comparison with the more common English Rule[9]. The One-Way fee-shifting Rule is the only rule in which the two parties face different expected costs from litigation; intuitively, this significantly affects the entire litigation process. More intuitively, the advantaged party should be more willing to engage in litigation and to exert a lot of effort, due to her ability to recover attorney's fees, while the disadvantaged party should be deterred from pursuing a claim or asserting a defense to the lawsuit. In some contexts, this rule may appear unfair. For example, the unilateral fee clauses are often the result of the weaker party's inability to negotiate the terms of the contract[10]. Thus, some States have prohibited these clauses[11]. At the same time, it is clear how in other contexts, the features of the One-way fee-shifting

[8]For instance, some contracts between a tenant and a landlord provide that in case of litigation over unpaid rent, only the landlord can recover attorney's fees.

[9]For the comparison with the American rule see Appendix C of this Chapter.

[10]See Bright (2012).

[11]The Florida legislature, in 1988, came up with a solution to this problem. If a contract contains a unilateral attorney-fee clause, a court may also allow reasonable attorney fees to the other party if it prevails. The unilateral clause is statutorily rendered reciprocal.

Rule may allow policymakers to counterbalance gaps between litigants that do not depend on the merit of the case[12], or even to block certain abusive recourses to litigation.

This Chapter provides a general theoretical model which shows the aforementioned discouraging power of the One-way fee-shifting Rule. It will be demonstrated that the rule is indeed an effective policy instrument for discouraging (encouraging) the disadvantaged (favoured) litigant. The chapter also describes the implications for total legal expenditures and the litigation rate[13] due to a movement from the English system[14] to a system favouring one of the two parties. These implications should be considered and weighted upon when deciding whether to apply a One-way fee-shifting system or not. The Chapter results can be used as a theoretical support for all of the policies aimed at discouraging certain type of litigants by the use of a One-way fee-shifting system[15].

The Chapter is structured as follows. After a literature review on the topic, in Section 3.3, and more precisely in Subsection 3.3.2 a general model is used to provide an analysis of the characteristics of the One-way fee-shifting Rule and to understand why, unlike the English Rule, the One-Way fee-shifting Rule can be used as a policy instrument for gaining

[12]The exact meaning of "gaps" and merit will be discussed in Section 4 of the chapter.
[13]Thus the major implications for the legal system efficiency (See Luppi and Parisi (2012)).
[14]The terms Rule and system are used interchangeably.
[15]See Section 5 for examples.

a justice where the outcome of civil litigations is not affected by litigants ”gaps” that do not depend on the merits of the case[16]. In Subsection 3.3.3 instead, the effects of adopting the One-Way fee-shifting Rule (in terms of transitioning from an English Rule[17]) on total legal expenditures and on the litigation rate is investigated. Section 3.4 explains the meaning of litigants "gaps". Briefly, "ability gaps" refers to all the situations in which one of the two litigants has a higher return from spending in litigation than the other. The merit of the case is then one of the factors that may contribute to the presence of ability gaps. The aim is to show when the adoption of a One-way fee-shifting system may be desirable. Finally, Section 3.5 presents concluding remarks.

[16]Again the exact meaning of 'gaps' and merit will be discussed later on in this chapter.
[17]For the comparison with the American rule see Appendix C.

3.2 Related Literature and Contribution

3.2.1 Literature Overview

The literature on fee-shifting is extensive and is still developing due to the contributions of various theoretical, experimental and empirical research. The effects of alternative procedural rules on civil litigation can be analytically derived thanks to Tullock (1967) and Tullock et al. (1983)'s Model of Rent-seeking. Tullock provided a basic model where parties incur costs in the unproductive competition over a fixed rent[18]. It is clear how legal expenditures at a civil trial constitute an interesting type of rent-seeking contest. As a matter of fact, in most litigation settings, by spending resources, litigants compete for the winning of a fixed prize. Consider, for instance, litigation involving two parties fighting for the appropriation of a piece of land whose ownership is uncertain. Although litigation may dissipate some of the value of winning the case, the value of the land is given and is to be considered independent of the parties' litigation choices. This chapter refers to the literature which focuses on risk neutral parties' behaviour at trial and on their decision on whether to litigate or not. In fact, both choices directly depend on the parties' estimates of the ultimate litigation's outcome. This chapter does not

[18]The rent is not affected by parties choices.

follow the literature on the settlement stage; for simplicity it is indeed assumed that parties can not agree on a settlement[19].

Braeutigam et al. (1984) developed a general model to study the effects of moving from the American Rule to the English Rule or the One-way fee-shifting Rule on litigants' expenditures and on the Plaintiff's incentive to sue. The author concluded that both the English Rule and the One-Way fee-shifting Rule increase litigants total expenditures in litigation when compared to the American Rule. However, the effect on the Plaintiff's incentive to sue is ambiguous. Katz (1987) was the first scholar to explain Braeutigam et al. (1984) results by applying Tullock's specific success function in the general model. The author concluded that the English Rule encourages greater expenditure in litigated cases than the American Rule. As a matter of fact, under the English Rule a successful litigant has a higher litigation outcome than under the American Rule: if the Plaintiff prevails in litigation, under the American Rule she wins only the contested stake, under the English Rule instead, she wins the stake and she is also awarded legal costs. Moreover, under a loser-pays system each additional unit of legal expenditure has to be discounted by the probability of prevailing at trial and being reimbursed. Thus, under the English Rule, the value of winning the case and the expected marginal

[19]The analysis on settlement stage is considered in Chapter 5 of the thesis.

benefit of legal expenditures are higher than under the American Rule resulting, other things being equal, in greater legal expenditures during the litigation process. As the vast majority of the literature, Katz (1987) used Tullock's functions for comparisons between the American and the English Rules only and did not consider the possibility of One-way fee-shifting. Hause (1989) extended the Katz Rent-seeking Model showing how although the English Rule provides higher legal expenditures with respect to the American Rule, the English Rule decreases the Plaintiff's incentive to sue and hence the litigation rate. Indeed, under the English rule, parties are less willing to enter in litigation because the greater expenditures lower the claim's expected value; this is because of the higher costs litigants face in case of loss. Farmer and Pecorino (1999) introduced into the model the possibility for parties of having a decreasing or increasing return to litigation by allowing for different degrees of Plaintiff's complaint merit. The authors found that only in the presence of decreasing return to scale in the legal investment[20] the English Rule provides a lower litigation rate than the American Rule. Luppi and Parisi (2012) solved the Litigation Rent-seeking Model under the special case in which the Defendant could bring a counterclaim against the Plaintiff.

[20] i.e. when the positive effect, in terms of litigation outcome, of investing in legal expenditures decreases as legal expenditures increase.

The authors showed that, in equilibrium, while under the American Rule parties spend more than half of the value of the case on their litigation efforts, under the English Rule parties always dissipate more than half of the case value. Again, even though under the English rule individuals may rationally spend more in litigation, they may choose to litigate less often.

To sum up, the main result of the literature is that the English Rule decreases the number of initiated trials and increases legal expenditures for litigated case. This results in a trade-off between legal expenditures per trial and the litigation rate (incentive to sue) (Baye et al. (2000)). This finding is also confirmed by experimental and empirical research. Hughes and Snyder (1995) using data from Florida, where the English rule was applied to medical malpractice claims during the period 1980-85, examined the rules' effects on litigation process. Among other things, data confirmed that the English Rule significantly decreased the litigation rate. Coughlan and Plott (1997) conducted an experiment to test the basic rent-seeking model by Katz (1987) and concluded that the data demonstrates that game theoretic equilibrium models produce good qualitative predictions of the relative institutional response to changes in the allocation rule. They indeed concluded that the English Rule produces

significantly higher expenditures at trial than the American Rule. On the other hand, the frequency of trial is significantly lower under the English Rule.

The aforementioned literature uses the total legal expenditures and the litigation rate as the main proxies for the legal system efficiency. Higher (lower) total litigation costs (litigation rate) reduces the social welfare loss. Indeed, unlike the efforts of two competitors in the marketplace, the efforts (legal expenditures) of two litigants are not capable of increasing the value of the litigated asset, and cause a dissipation of a good portion of its net value (Parisi (2002)). However, total costs of litigation are the product of two factors: total expenditures per litigated case, and the number of cases that are actually litigated. Therefore, an excessive recourse to litigation (a higher litigation rate) may reduce the social welfare loss as well (Katz and Sanchirico (2010)).

More recent contributions focused instead on the effect of the English Rule and the American Rule on case selection and legal evolution. Luppi and Parisi (2012) showed that, under the American Rule, as the Plaintiff does not fully internalise the costs of the litigation, she will be more likely to file cases with low probability of success. On the other hand, under the English Rule, the loser-pays rule forces a losing party to internalise

the litigation costs imposed on his opponent. This leads prospective litigants not to file cases with low success probability. Therefore, although the English Rule provides higher legal expenditures, the rule not only reduces the litigation rate but also avoids that non meritorious cases are litigated. Non meritorious cases should not be litigated and represent a welfare loss and a decrease in the legal system efficiency. Moreover, in common law systems, the selection of cases has an impact on the evolution of judge-made law. Cases with a high probability of success, once they are adjudicated, would create a "predominant flow of positive precedents". This would reinforce future similar cases. On the contrary, cases that have a low probability of success will create a "flow of negative precedents", which may further reduce the probability of success of future similar claims (Parisi and Fon (2009)). Carbonara et al. (2015) analysed a partial English Rule where the amount of recoverable costs for the winning party is uncertain. Most interesting is that under this rule only cases with "balanced merit" are litigated; those are the cases that, from a social point of view, the society wants to see litigated, in order to promote clarity and certainty in the law. Indeed frivolous cases should not be filed, and strong cases should be settled without litigation. The English Rule creates this desirable selection effect.

As discussed in the thesis introduction, the existing theoretical literature refers mainly to the analysis of the American and the English Rules, ignoring the relevance of alternative procedural schemes. Again, the only theoretical contribution accounting for the One-Way fee-shifting Rule is the one by Braeutigam et al. (1984). However, rather than providing an economic analysis of the intrinsic characteristics of the One-Way fee-shifting Rule, Breautigan et al. focused on the effects of applying such a rule on total legal expenditures and on the litigation rate. In this regards, by the use of a general rent-seeking model[21] the authors demonstrated how moving from the American Rule to the One-Way fee-shifting one increases total legal expenditures and ambiguously affects the favoured party decision to engage in litigation. A possible attempt for the analysis of alternative fee-shifting rules has also been made in experimental literature by Coursey and Stanley (1988) and Rowe Jr and Anderson (1996). These authors analysed a special type of rule, where a party who rejected a pretrial offer must pay all the litigation costs if the judge's award is less favourable than the pretrial offer[22]. The result is basically that the rule is effective in decreasing the litigation rate. However, these studies can not be introduced in a framework where the litigants compete for a

[21] Without using a particular form for the success function.
[22] California Law 998, Federal Rule 68.

fixed stake; moreover the One-Way fee-shifting Rule greatly differs from the rule analysed by these authors. It is indeed clear how the Law and Economics contribution to the One-Way fee-shifting Rule is still poor and should be improved.

3.2.2 Contribution

This chapter aims at contributing to the existing literature by focusing on the economic analysis of the One-way fee-shifting Rule. The "Partial One-way fee-shifting Rule", where the advantaged party is able to recover just a fraction of costs in case of litigation, will be analysed as well[23]. The Chapter also provides some policy implications. The first goal is to demonstrate how the One-Way fee-shifting Rule affects the litigation process by increasing the probability of winning at trial for the favoured party. Following the existing literature the chapter uses then a general rent-seeking model where each party selects her level of legal expenditure in order to win a case. One of the key characteristics of existing models is that litigants may face different returns from investing in litigation[24] because of differences in their legal merit[25]. However, there are other factors that can generate a difference in litigants' return from

[23]This concept will be better explained later in the chapter.
[24]On the probability of winning at trial.
[25]From the legal dictionary: "merits refers to the substance of a legal dispute and not the technicalities that can affect a lawsuit".

legal expenditures. For instance, one reason may be that one party is a person or an institution which has access to better legal representation and for which litigation does not represent a stress or a waste of time[26]. This chapter also contributes to the existing literature by considering then the possibility for litigants to differ not only in terms of the merit of the case but more generally in terms of ability. For the purpose of this analysis, "ability gaps" refers to all of the situations in which one of the two litigants has a higher return from spending in litigation than the other. The merit of the case is indeed only one of the factors that affects the ability. Differences in ability play an important role in the litigation process; in fact, the more able party can easily support legal costs and win the case. It is assumed that in an ideal legal system, the merit of the case should be the only relevant characteristic that affects the return from legal expenditures (i.e. the litigant with the stronger claim should have a higher return from investing in litigation). This concept assumes that for every case of litigation, a correct legal outcome always exists. This is particularly true for cases which involve a fixed stake under dispute. Therefore, in this Chapter litigants may face ”ability gaps” in a sense of difference between their returns to litigation caused by factors other than

[26]This would generally translate to lower opportunity costs for litigation in the first place. A more exhaustive explanation of ability is offered in Subsection 3.4 of the chapter.

the merit of the case. By the introduction of the ability it is shown how the One-Way fee-shifting Rule is the only rule that can be used to reduce the effects of "ability gaps" on the litigation process. This concept has never been considered in the literature. In fact, the adoption of different fee-shifting systems has always been viewed as a potential policy aimed at making the legal system more efficient; this chapter will go further by also viewing the One-Way fee-shifting Rule as an instrument towards the goal of fairness[27]. Finally, following Braeutigam et al. (1984) the effects of moving from the English system to the One-way fee-shifting one on total legal expenditures and on the litigation rate are considered[28]. Breautigam et al. only consider the effect on litigants expenditures of moving from the American rule to the English or to the One-way fee shifting one without allowing for ability gaps between litigants.

[27] Again, in this regard it is assumed that fairness increases when the litigation outcome is not affected by "ability gaps" depending on factors different than the real merit of the case.

[28] As the vast majority of the literature, this chapter considers total legal expenditures and the litigation rate as the two main proxies for the legal system efficiency. Future works can investigates on the One-way fee-shiofting Rule effects on case selections and on the Law evolution.

3.3 The Model

Following Braeutigam et al. (1984), Katz (1987) and Hause (1989) this model considers a sequential two-player litigation game, where each risk neutral player selects her level of effort, in order to win a case. The value of the contested case is assumed to be fixed (i.e. the dispute is not on the amount in question) and is not affected positively or negatively by the parties' expenditures[29]. Each litigant can increase her probability of winning the case by undertaking a higher litigation effort (i.e. increasing legal expenditures). Consider, for example, litigation involving two parties, where the Plaintiff claims the ownership of a Defendant's land V. The players' effort in this case may be interpreted as the parties' investments (through lawyers) in discovery (e.g., number of witnesses or pieces of evidence that litigants brings to court to support their respective claims). The larger the Plaintiff's investment in discovery and hence litigation, the larger the probability that the court will be persuaded by the evidence presented and the larger the probability that she will win the case (be granted ownership of the land).

The model permits to analyse and compare three different fee-shifting

[29]Relaxing the "fixed-stake" assumption might provide a fruitful extension for future research; by allowing for endogenous stakes, it would be possible to analyse, first theoretically and then empirically, whether and to what extent judges correct the effects of fee-shifting rules by means of their discretionary power in allocating the contested stake.

rules. The first one is the English Rule: the loser bears the winner's legal expenses. Then, the One-Way pro-Defendant Rule, where only the Defendant can recover litigation costs in case of her winning. Finally, also a system where a successful Plaintiff can recover only a fraction of her litigation costs (while a successful Defendant can fully recover litigation costs) is considered; this system is called a Partial One-way pro-Defendant system. For the sake of simplicity, the model does not consider the favouring Plaintiff rules; indeed, the implications and the results of the One-Way pro-Plaintiff rule are symmetric with respect to the One-way favouring Defendant Rule case[30]. The components of the model are:

- X and Y are the legal expenditures for the Plaintiff and for the Defendant respectively. Each unit of X and Y has a unitary cost.

- $\bar{p} \equiv p(X, Y, A) \in (0, 1)$ is the probability that the Plaintiff wins the case. This probability depends on litigants' expenditures and on the ability A. $1 - \bar{p}$ is then the probability that the Defendant wins the case.

- $A \in (0, \infty)$ is the relative ability of Plaintiff vis-a'-vis Defendant.

[30]The chapter aims at providing policies advise for European countries. This is why the model does not consider the American Rule. However, for the purpose of completeness the Appendix includes a Section accounting for the American Rule as well.

The higher the value of A, the higher the Plaintiff's ability. It is assumed that if $A < 1$ the Defendant is more able than the Plaintiff[31] and vice versa.

- V is the fixed stake for which the Plaintiff has sued the Defendant.
- $f \in [0, 1]$ is the fraction of Plaintiff's litigation costs X that the Plaintiff can recover in the event of victory. Of course, $1-f$ is the fraction of Plaintiff's litigation costs X that the Plaintiff cannot recover in the event of victory. The Defendant always fully recovers her fees in case of victory[32].
- ΠP and ΠD are the expected returns from litigation for the Plaintiff and for the Defendant respectively; they are defined as follows:

$$\begin{cases} \Pi P = \bar{p}(V - (1-f)X) + (1-\bar{p})(-Y - X) \\ \Pi D = (1-\bar{p})(0) + \bar{p}(-V - fX - Y) \end{cases}$$

In words, when the Plaintiff wins (with probability $\bar{p}$) she gets the stake V and she pays her non-recoverable litigation costs ($(1-f)X$). When instead the Plaintiff loses (with probability $1-\bar{p}$) she pays both her litigation costs and the Defendant's costs (X and Y). The same reasoning applies for the Defendant's expected return from litigation. Note that when the Defendant wins (with probability $1-\bar{p}$) her payoff

[31] The meaning of relative ability will be more precisely defined later on.
[32] f depends on the exact shifting rule, this will be discusses in more detail below.

is 0. As a matter of fact, in this case the Defendant simply avoids to lose the stake V and fully recovers litigation costs. After some computations, ΠP and ΠD can be rewritten as follow:

$$\begin{cases} \Pi P = \bar{p}(V + fX + Y) - Y - X \\ \Pi D = -\bar{p}(V + fX + Y) \end{cases}$$

If $f = 1$, the English Rule applies: the loser is required to bear all of the winner's legal expenses. If $f = 0$ the complete One-way fee-shifting pro-Defendant Rule applies: the Defendant is always able to recover fees, while the Plaintiff cannot. For $0 < f < 1$, the Plaintiff can recover only a fraction of her fees and hence a hybrid rule which lies in between the English Rule and the complete One-way pro-Defendant Rule applies. This hybrid rule is called partial One-way fee-shifting pro-Defendant Rule. The lower the value of f, the more the Defendant is favoured by the rule and hence the closer the rule is to a complete One-way pro-Defendant system.

3.3.1 Assumptions

The analysis is based on the following assumptions:

- **Assumption 1 (AS1)**

  $p_x > 0$ ($p_y < 0$), $p_{xx} < 0$ ($p_{yy} > 0$). Where subscripts indicate partial

differentiation. For instance, p_x and p_y is the partial derivative of the probability function $p(X, Y, A)$ with respect to X and Y.

The probability that the Plaintiff wins is increasing (decreasing) in the Plaintiff's expenditure (Defendant's expenditure) at a decreasing (increasing) rate.

- **Assumption 2 (AS2)**

  $p_A > 0$

  The higher the Plaintiff's relative ability, the higher her probability of winning at trial. Therefore, ability refers to all those characteristics (except legal expenditures) that enable one party to increase her probability of victory. Thus, when the Plaintiff is more able than the Defendant, in order to have an equal probability of victory at trial, the Defendant must spend more than the Plaintiff.

- **Assumption 3 (AS3)**

$$\text{If } A = 1\text{: } \begin{cases} p > 1/2 \ _{when} \ X > Y \\ p = 1/2 \ _{when} \ X = Y \\ p < 1/2 \ _{when} \ X < Y \end{cases}$$

$$\text{If } A < 1\text{:} \begin{cases} p > 1/2 \ when \ X > Y + e \\ p = 1/2 \ when \ X = Y + e \\ p < 1/2 \ when \ X < Y + e \end{cases}$$

$$\text{If } A > 1\text{:} \begin{cases} p > 1/2 \ when \ X > Y - c \\ p = 1/2 \ when \ X = Y - c \\ p < 1/2 \ when \ X < Y - c \end{cases}$$

When the Plaintiff and the Defendant have the same ability (i.e. $A = 1$), the litigant with the highest (lowest) legal expenditure has a higher (lower) equilibrium probability of winning at trial. If, instead, the litigants spend the same amount, the equilibrium probability of winning is the same. When the Defendant is more able than the Plaintiff (i.e. $A < 1$), the probability that the latter wins is lower with respect to the previous case, other things being equal. Therefore, the Plaintiff has to spend more to reach the same level of probability, in order to compensate her disadvantage in term of ability. For instance, if the Plaintiff wants to be more likely of succeeding (i.e. $p > 1/2$), then spending $X > Y$ is not enough: she must add

an amount such that her ability deficit is counterbalanced; this positive amount e, is decreasing in A. The same reasoning applies when the Plaintiff is more able than the Defendant (i.e. $A > 1$). In this case, c is the amount needed for the Defendant to compensate for the Plaintiff higher ability.

- **Assumption 4 (AS4)**

  $p_{xA} > 0$, $p_{yA} < 0$, $p_{xA} = -p_{yA}$

  The marginal productivity of $X(Y)$ increases (decreases) with A. Moreover, the magnitude of these changes is the same[33]. This assumption provides that abilities and returns from legal expenditures are positively related, i.e. the higher a party's ability, the more effective is one unit of investment in legal expenditure. It is duly noted that this assumption is based on a generalised concept of legal expenditures. In reality, there are various forms of legal expenditures, some for which abilities may not have any effect (e.g. administrative filings). Furthermore, there is no intuitive basis to suggest an opposite case (where the more a litigant is able, the less effective is her legal expenditure). Therefore, the net effect across all forms of legal expenditures will be subject to this assumption.

[33] Intuitively, the more able one litigant is, the higher will be her marginal return from investing in legal expenditures.

- **Assumption 5 (AS5)**

$$\text{For each } A\text{: } \begin{cases} p_x = -p_y \ when & X = Y \\ p_x > -p_y \ when & Y > X \\ p_x < -p_y \ when & Y < X \end{cases}$$

The magnitude of the marginal productivity of X is higher (lower) than the one for of Y only when $Y > X$ ($X < Y$). They have the same value when $X = Y$. This is true for every value of A. This is directly derived from AS1 and AS4.

- **Assumption 6 (AS6)**

$\frac{dX}{dV}, \frac{dY}{dV} > 0$

Any increase in the stake for which the Plaintiff has sued the Defendant will increase the expenditures by both parties.

3.3.2 The discouraging nature of the One-Way fee-shifting Rule

$$\begin{cases} \Pi P = \bar{p}(V + fX + Y) - Y - X \\ \Pi D = -\bar{p}(V + fX + Y) \end{cases}$$

Agents are assumed to be rational, hence they seek to maximise their own expected return from litigation (i.e. ΠP or ΠD), by choosing how

much to spend in the litigation process (i.e. X or Y). Therefore, the analysis is conducted using the standard Nash equilibrium concept (full information). A stable equilibrium[34] thus consists of choices of X and Y such that each party simultaneously optimises the value of the lawsuit herself. Formally, this requires that each litigant chooses the optimal level of effort according to the following first order conditions:[35]

$$\frac{\partial \Pi P}{\partial X} = 0 \Rightarrow (Y + V + fX)p_x + pf = 1$$

$$\frac{\partial \Pi D}{\partial Y} = 0 \Rightarrow -(V + fX + Y)p_y/p = 1$$

In words, both litigants will continue to invest in litigation until marginal benefits, on the left side of equation, equal marginal costs, on the right side of the equation. For instance, the Plaintiff will continue to invest in legal expenditure until her benefit in terms of higher probability of winning at trial ($(Y + V + fX)p_x + pf$) is equal to her marginal cost, hence the cost of investing one more unit in legal expenditure (1).

The equations can be rearranged as:

[34] Stable means that small perturbations do not result in movements from the equilibrium.

[35] At a regular interior Nash equilibrium it is also true that $\frac{\partial^2 \Pi P}{\partial X^2} < 0$ and $\frac{\partial^2 \Pi D}{\partial Y^2} < 0$. Thus it is assumed that the second order conditions are negative.

$$\frac{\partial \Pi P}{\partial X} = 0 \Rightarrow (Y + V + fX)p_x + pf - 1 = 0$$

$$\frac{\partial \Pi D}{\partial Y} = 0 \Rightarrow -(V + fX + Y)p_y - p = 0$$

Thus it follows that:

$$(Y + V + fX)p_x + pf - 1 = -(V + fX + Y)p_y - p$$

After some computations the following condition must hold in equilibrium:

$$\frac{p_x + p_y}{-p_y} = \frac{1 - p(1+f)}{p} \quad (1)$$

The following conditions must hold in order to satisfy the equilibrium condition (1) and AS3 of the model:

$$\begin{cases} X < Y & If \ p > \frac{1}{1+f} \\ X = Y & If \ p = \frac{1}{1+f} \\ X > Y & If \ p < \frac{1}{1+f} \end{cases} \quad (2)$$

For instance, when $p > \frac{1}{1+f}$, the right hand side of (1) is negative[36]; thus, to satisfy the equilibrium condition, the left hand side has to be negative too. The left hand side is negative only when $p_x + p_y < 0$; following the model AS5, this is true only when $X > Y$. The same reasoning applies when $p = \frac{1}{1+f}$ and when $p < \frac{1}{1+f}$.

Proposition 1:

- Under the English Rule (i.e. $f = 1$) the litigant with the highest ability always spends more than the other one. If instead the litigants have the same ability, they will spend the same amount in equilibrium.

$$X < Y \text{ if } A < 1$$

$$X = Y \text{ if } A = 1$$

$$X > Y \text{ if } A > 1$$

- Under the complete One-way pro-Defendant fee-shifting Rule (i.e. $f = 0$) the Defendant always spends more than the Plaintiff. This is true for each possible level of ability.

$$X < Y, \forall A$$

- Under the partial One-Way pro-Defendant fee-shifting Rule (i.e. $0 < f < 1$), the Defendant spends more than the Plaintiff both when the

[36] $\frac{1-p(1+f)}{p} < 0$ if $p > \frac{1}{1+f}$.

litigants have the same ability and when the Defendant is more able than the Plaintiff. When the Plaintiff is more able that the Defendant, the latter spends more only up to a certain level of ability, say $\hat{A} > 1$*. In this point, the litigants spend the same amount, but beyond the Plaintiff spends more than the Defendant.*

$$X < Y \ if \ A < 1$$

$$X < Y \ if \ A = 1$$

$$\begin{cases} X < Y & if \ A < \hat{A} \\ X = Y & if \ A = \hat{A} \\ X > Y & if \ A > \hat{A} \end{cases}$$

Up to $\hat{A} > 1$*, the Defendant tries to offset her ability deficit by spending more than the Plaintiff. The lower the value of* f*, the higher is the value of* $\hat{A}$*, thus the more the Plaintiff is favored*[37].

[37] See Appendix A for proof.

Proposition 2:

- When the English Rule is applied (i.e. $f = 1$) the litigant with the highest ability always has a higher probability of winning at trial.

- When the One-Way pro-Defendant Rule is applied (i.e. $0 \leq f < 1$), the Defendant may have a higher probability of winning at trial even when she is less or equally able than the Plaintiff (i.e. when $A \geq 1$). Indeed, the One-way pro-Defendant Rule allows the Defendant to spend more than the Plaintiff even when the Defendant is less able (for $1 < A < \hat{A}$ when $0 < f < 1$ and for $A > 1$ when $f = 0$). When the positive effect of the Defendant's expenditure on the probability of victory dominates the Defendant's deficit in ability ($p_x + p_y > p_A$), she has a greater chance to win than the Plaintiff[38]*. On the other hand, when the Defendant is more able than the Plaintiff, she always has a higher probability of winning at trial.*

To sum up, the Defendant is favoured by a One-way pro-Defendant Rule in a sense that she is incentivised to spend more than the Plaintiff in trying to overcome a possible "ability gap". This reduces the equilibrium probability of victory for the Plaintiff. This result is exacerbated

[38]Namely, when $1 < A < \hat{A}$ the Defendant spends more than the Plaintiff even when she is less able. If in this range (or in a part of it) the effect of the difference in legal expenditures on the probability of success overcomes the ability one, the Defendant has a higher equilibrium probability of success even if she is less able. This depend on the exact form which is chosen for $\bar{p}$.

the lower the value of f, and then the closer the rule is to a complete One-way pro-Defendant Rule. The Plaintiff's equilibrium probability of success increases with f, while the opposite is true for the Defendant's one. Unlike the English Rule, the features of the One-way fee-shifting Rule may therefore allow policymakers to counterbalance "ability gaps" between litigants and this makes the rule a possible instrument for policies aimed at incentivising certain types of litigants[39].

3.3.3 Implications on the legal system efficiency

In the previous Section, it has been shown why and how the One-way fee-shifting Rule is an effective policy instrument aimed at discouraging the disadvantaged litigant. This Section describes instead the implications of moving from the English system to the One-way favouring Defendant one on litigants' expenditures, dissipation of case value and parties choice to engage in litigation. These effects are of course related to the legal system efficiency and then should be considered when deciding whether to apply a One-Way fee-shifting system or not. Braeutigam et al. (1984) is followed in this regards.

[39]Examples of this policies are provided in the next section of this chapter.

Legal expenditures

As previously shown, starting from the litigants' expected returns from litigation:

$$\begin{cases} \Pi P = \bar{p}(V + fX + Y) - Y - X \\ \Pi D = -\bar{p}(V + fX + Y) \end{cases}$$

In equilibrium:

$$\frac{\partial \Pi P}{\partial X} = 0 \Rightarrow (Y + V + fX)p_x + pf - 1 = 0$$

$$\frac{\partial \Pi D}{\partial Y} = 0 \Rightarrow -(V + fX + Y)p_y - p = 0$$

$$\frac{\partial^2 \Pi P}{\partial X^2} < 0 \Rightarrow (Y + V + fX)p_{xx} + 2p_x f < 0$$

$$\frac{\partial^2 \Pi D}{\partial Y^2} < 0 \Rightarrow -(V + fX + Y)p_{yy} - 2p_y < 0$$

Given AS1:

$$\frac{\partial^2 \Pi P}{\partial X \partial f} = Xp_x + p > 0$$

$$\frac{\partial^2 \Pi D}{\partial Y \partial f} = -Xp_y > 0$$

$$\frac{\partial^2 \Pi P}{\partial X \partial Y} = (V + fX + Y)p_{xy} + p_x + fp_y = -\frac{\partial^2 \Pi D}{\partial Y \partial X}$$

The goal is now to find and to study the signs of $\frac{dX}{df}$, $\frac{dY}{df}$ and $\frac{d(X+Y)}{df}$. By doing so, it is possible to understand the effect on each litigant's expenditures and on total legal costs of moving from the One-way favouring Defendant Rule to the English Rule (i.e. the effects on X, Y and $X+Y$ of an increase in f). Accordingly, the effects of moving from the English Rule to the One-way favouring Defendant Rule (that are the ones relevant for this chapter's policy advises) can be derived.

Totally differentiating first order conditions with respect to f gives:

$$\begin{cases} \frac{dX}{df}\frac{\partial^2 \Pi P}{\partial X^2} + \frac{dY}{df}\frac{\partial^2 \Pi P}{\partial X \partial Y} + \frac{\partial^2 \Pi P}{\partial X \partial f} & = 0 \\ \frac{dX}{df}\frac{\partial^2 \Pi D}{\partial Y \partial X} + \frac{dY}{df}\frac{\partial^2 \Pi D}{\partial Y^2} + \frac{\partial^2 \Pi D}{\partial Y \partial f} & = 0 \end{cases}$$

Solving this system gives:

$$\frac{dX}{df} = \frac{\frac{\partial^2 \Pi D}{\partial Y \partial f}\frac{\partial^2 \Pi P}{\partial X \partial Y} - \frac{\partial^2 \Pi P}{\partial X \partial f}\frac{\partial^2 \Pi D}{\partial Y^2}}{\frac{\partial^2 \Pi D}{\partial Y^2}\frac{\partial^2 \Pi P}{\partial X^2} - \frac{\partial^2 \Pi D}{\partial Y \partial X}\frac{\partial^2 \Pi P}{\partial X \partial Y}}$$

$$\frac{dY}{df} = \frac{-\frac{\partial^2 \Pi D}{\partial Y \partial f}\frac{\partial^2 \Pi D}{\partial X^2} - \frac{\partial^2 \Pi P}{\partial X \partial f}\frac{\partial^2 \Pi P}{\partial X \partial Y}}{\frac{\partial^2 \Pi D}{\partial Y^2}\frac{\partial^2 \Pi P}{\partial X^2} - \frac{\partial^2 \Pi D}{\partial Y \partial X}\frac{\partial^2 \Pi P}{\partial X \partial Y}}$$

Proposition 3: *By moving from the One-way favouring defendant sys-*

tem to the English one, while the effect on the Defendant's equilibrium expenditure is uncertain, it is certain that the Plaintiff increases her equilibrium legal expenditure. Therefore, the disadvantaged party's expenditure always increases, while the favoured party's expenditure can either decrease or increase. The effect on total legal expenditure (i.e. on the dissipation of the case value) is then ambiguous and depends on the specific form of the Plaintiff's winning probability function[40].

$$\frac{dX}{df} > 0, \frac{dY}{df} > or < 0$$

Where $\frac{dY}{df} > or < 0$ *means that the sign of* $\frac{dY}{df}$ *cannot be determined.*

Conversely, Proposition 3 implies that, when moving from the English system to the One-Way favouring Defendant system, the Plaintiff undoubtedly decreases her legal expenditure. The effect on the Defendant's expenditure is not predictable; therefore the effect on the total legal expenditure is ambiguous. Intuitively, when the complete One-Way pro-Defendant rule is implemented, the Plaintiff's expected value in winning the case decreases: if the Plaintiff wins, she gains only the contested stake; under the English Rule, instead, she gains the stake and also gets a reimbursement for legal expenditure. Moreover, under a complete One-

[40] See Appendix for proof.

Way favouring Defendant system, the Plaintiff does not discount each additional unit of legal expenditure by the probability of winning and being reimbursed; therefore the Plaintiff's expected marginal cost of legal expenditure is higher with respect to the English rule. In sum, under a complete pro-Defendant system, the Plaintiff faces a lower expected value in winning the case and a higher expected marginal cost of legal expenditures than under the English Rule; this results in a drastic reduction in the Plaintiff's legal expenditures. On the other hand, when the complete One-Way favouring Defendant Rule is adopted, the Defendant's expected value of winning the case and her legal expenditure's marginal cost do not change. Therefore, the Defendant's expenditure can only be affected by the the Plaintiff's expenditure choices; this effect cannot be predicted. For instance, the Defendant can respond to a Plaintiff's expenditures increase either by increasing her expenditures as well (as the two choices were strategic complements) or by decreasing them by being intimidated; hence, this ambiguity makes impossible to understand the direction of total legal expenditure in the general model.

Litigation Rate

To reach the litigation stage analysed so far, the Plaintiff moves first deciding whether to file the case or not[41]. If the Plaintiff does not file the case, she would get a payoff of zero, otherwise, if the case is brought, the Defendant decides wether to engage in the contest or not (hence loosing the amount V). In the subgame after the Plaintiff decides to file the case, the payoff for the Defendant is $-V$ if she does not engage the contest and ΠD^*[42] if she files the case. Therefore, the Defendant chooses to accept to litigate only if $\Pi D^* > -V$. Similarly, the Plaintiff files the case only if $\Pi P^* > 0$. In other words, $\Pi D^* > -V$ and $\Pi P^* > 0$ are the participation constraints respectively for the Defendant and for the Plaintiff. To sum up, the higher ΠP^* and ΠD^*, the more litigants are willing to engage in litigation and the higher the litigation rate is. As a matter of fact the higher ΠD^* and ΠP^* the more likely is that the participation constraints are satisfied.

Proposition 4: *Moving from the One-way favouring defendant system to the English one, the effect on litigation rate depends on the effect of such a movement on total litigation costs. The litigation rate decreases if*

[41] The settlement stage is not considered in this model.

[42] ΠD^* is the equilibrium return from litigation for the Defendant. ΠP^* is the equilibrium return from litigation for the Plaintiff.

total litigation costs increase and vice-versa. The opposite is true when moving from the English rule to the One-way favouring defendant rule.

$$\Pi D^* + \Pi P^* = \bar{p}^*(V + fX^* + Y^*) - Y^* - X^* - \bar{p}^*(V + fX^* + Y^*) = -X^* - Y^*$$

When higher values of f increase total expenditures $((X^* + Y^*))$, litigants are more willing to engage in litigation ($\Pi D^* + \Pi P^*$ increases). The opposite is true when higher values of f decrease total expenditures $((X^* + Y^*))$.

This Section has shown how the Plaintiff's legal expenditure and her willingness to litigate are always higher under the English Rule than under the One-way pro Defendant Rule. Moreover, it has been shown that the litigation rate is always higher under the system providing the lower total litigation costs. The general model does not permit to capture the effect on the Defendant's litigation costs, and consequently on the litigation rate and on total litigation costs of moving from the One-way favouring defendant system to the English one. Therefore, the effect of the aforementioned shift on the legal system efficiency is ambiguous.

3.4 Implications of results and ability gaps

In this chapter it has been shown how the characteristics of the One-way fee-shifting Rule allow policymakers to influence the litigation process in favour of one of the two parties. As a matter of fact, given the model's assumptions, it has been shown that the discouraging effect of the pro-Defendant Rule on the Plaintiff decreases her probability of winning and reduces her incentive to invest in legal expenditures and willingness to engage in litigation. On the other hand, the Defendant is better off both in terms of success probability and convenience to litigate[43]. Before proceeding, it is necessary to define more precisely the meaning of "ability". In this context, ability refers to all those characteristics that enable one party to increase her benefit (in terms of greater probability of victory) by investing one unit of effort. Thus, when the Plaintiff is more able than the Defendant, in order to have an equal probability of victory in the contest, the Defendant must spend more than the Plaintiff. In this chapter's model a possible difference in ability among parties is represented by the general parameter A. Where if $A > 1$, the Plaintiff is more able than the Defendant, otherwise $(0 < A < 1)$ the Defendant is more able than the Plaintiff.

[43] Is the extent to which the participation constraint is easily satisfiable.

In the existing literature the exogenous parameter $A > 0$ is usually denoted by η, and only represents the merit of the Plaintiff's complaint in a particular case. Low values of η represent weak claims, while high values represent strong claims. As a matter of fact, the higher the Plaintiff's merit the more the Plaintiff has sufficient reasons or precedence in law to make her case likely that it would be won. This chapter makes the interpretation of the parameter (called A) more general. Despite the fact that the merit of the case is one of the factor that surely affects A, differences in litigants abilities can be caused by many other factors. Hereinafter some of these factors are suggested. Firstly, the monetary wealth and the power (e.g. political influence) of the Plaintiff vis-a'-vis the Defendant plays an important role. The richer and more powerful the Plaintiff, the greater are the chances that she is able to secure better legal representation to prove her case hence obtaining a higher return from effort, and thus more likely that $A > 1$[44]. Secondly, ability could be also affected by the litigants' willingness to support non-monetary costs of litigation. As a matter of fact, litigation does not imply only monetary cost, but also psychological costs (e.g. external pressure and stress) and

[44]Yoon (2009) shows how wealthier litigants have a higher return from legal representation and this, all things being equal, increases the probability of a favourable legal outcome. Moreover, to assess the differences in the quality of legal representation, Albert Yoon provided surveys to a random sample of 455 Article III judges asking their impressions of the quality of the legal profession in civil cases. Among others, the interesting result is that Judges observed a significant disparity in legal representation quality in litigation where an individual is usually matched against a more powerful individual like a firm, an insurer or the government.

professional costs (e.g. use of time to defend instead of working). Those costs can be seen as opportunity costs[45]. The higher the Plaintiff's ability to support human costs vis-a'-vis the Defendant, the higher the value of A and vice versa. Finally, litigants could undertake illegal or unfair activities in order to obtain a greater probability of success; this influences relative ability as well. Therefore, in order to understand the direction of A the claims merit has to be considered together with the combined effect of all the factors that may affect the parameter. For instance, despite the fact that the Defendant's claim could have higher merit than that of the Plaintiff, A can be higher than 1. As a matter of fact, the Plaintiff may exploit her power and willingness to support human costs in order to counterbalance the gap in merit, hence having a higher ability. Hence, following the model, a One-way favouring Defendant Rule can be used when the policymakers recognise ex-ante that there exists a positive difference in ability among the parties (i.e. $A > 1$) due reasons other than the merit of the case (e.g. differences in wealth or power). Intuitively, in cases where a litigant could benefit by taking advantage of her greater economic capacity, power, or propensity for illegal activity, a rule to discourage her participation in litigation proceeding and to reduce

[45]For instance, according to Walle (2013) litigations also result in opportunity costs: the time spent by Plaintiffs and Defendants on collecting documents, conferring with counsel and preparing for litigation cannot be spent on more productive activities.

her chances of winning would seem justified. On the other hand, the use of the rule would be unjustified in cases where the difference in ability depends solely on the merits of the case. Why damage the litigant who deserves most to win the case?

This chapter provides theoretical support to policies aimed at reducing undesirable ability gaps between litigants and shows how these policies, given the trade off between litigation rate and total litigation costs, do not necessarily make the litigation system less efficient. An example of this kind of policy can be found in a recent bill introduced in the United States House, the Saving High-tech Innovators from Egregious Legal Disputes Act[46]. The aim of the Bill is to limit the excessive recourse to litigation of non-practicing entities (NPEs') [47], people or companies that enforce patent rights against accused infringers in an attempt to collect licensing fees, without manufacturing products or supplying services based upon such patents. Within the patent law community, there is a general perception that NPEs' use the high cost of litigation to gain an unfair advantage over potential defendants[48]. In recent decades, there have been numerous cases where NPEs have gained windfall revenues from set-

[46]See The SHIELD Bill by Representatives Peter DeFazio and Jason Chaffetz. The text is available at http://cdn.arstechnica.net/wp-content/uploads/2013/02/SHIELD-Act-113th-final.pdf.

[47]Also known with the pejorative term "patent-trolls".

[48]"According to a 2009 economic survey commissioned by the American Intellectual Property Law Association (AIPLA), in patent infringement cases where the amount in dispute is between $1 million and $25 million, total litigation costs average in excess of $3 million, roughly 60 percent of which is incurred during discovery. In cases where the amount in dispute exceeds $25 million, average total litigation costs" WIPO Magazine (February 2010 V1).

tlements with accused infringers, where litigation has been threatened, but defendants presumable do not have the power to defend the lawsuit. This problem is particularly pronounced in the technology sector, where patents are central to the structure of the market, and where small risk averse start up firms do not have the capital to engage in expensive litigation. This may further be of particular concern as such pervasive litigation may have a negative externality on technological development. Indeed, the Shield Act Bill tries to fix this issue by setting a "One-Way favouring Defendant Rule" for this type of litigation: if the Plaintiff loses in court, then she pays the other side's costs and legal fees; otherwise each party pays her own fees. This should reduce NPEs' incentive to participate in litigations, while increasing the Defendant's convenience to litigate and her probability of winning the case.

One can easily imagine other applications of the One-Way fee-shifting Rule. Firstly, it can be used to protect individuals in tort cases against corporations. Corporations have, on average, a greater wealth and more "power" than individuals. Thus, by applying the One-way favouring Plaintiff Rule (if the individual is the Plaintiff), or the One-Way favouring Defendant Rule (if the individual is the Defendant), it would be possible to reduce this ability gap, balancing the benefits that the corporation

draws from the burdens of litigation costs. Secondly, the rule can be used to limit the so-called "intimidation lawsuits" where agents start legal actions in order to deter journalists from pursuing investigation about them. The Plaintiff is generally a powerful agent that can easily support the legal and human costs of a dispute, even if the case merit is extremely low.

To sum up, there exist many contexts in which favouring one of the two litigants seems to be desirable. Ability gaps may be reduced, and the legal system can even become more efficient (i.e by reducing certain types of frivolous recourse to litigation). The One-way fee-shifting Rule is the only fee-shifting system that can be used not only to influence legal system efficiency, but to reduce the effects of litigants' gap on the litigation outcome. As a matter of fact, it is the only rule where the most able litigant can face a lower probability of success[49]. Of course in applying the One-way fee-shifting system the policymaker should also consider the implications on legal system efficiency, so the trade off between litigation costs and litigation rate.

[49]This effect of the rule is higher the closer we get to a complete One-way pro-Defendant rule.

3.5 Conclusion

By using and applying a general rent-seeking model, this chapter has demonstrated how, unlike the English Rule (and the American Rule as well) the One-way fee-shifting Rule can reduce the effects on litigation outcome of ability gaps between litigants. As a matter of fact, the One-Way fee-shifting Rule discourages one of the two litigants by decreasing her probability of success independently of her ability. Under a loser-pay system, the litigant with the highest ability always has a higher probability of winning at trial than the other; this is not necessarily true under a One-Way fee-shifting system. For instance, by applying a pro-Defendant Rule, the Plaintiff may face a lower probability of winning at trial even if she is more able than the Defendant, and vice versa for the pro-Plaintiff case. This result is exacerbated the closer the rule is to a complete One-Way fee-shifting Rule. As a result, when moving from the English rule to the One-way fee-shifting one, the discouraged litigant is always worse off in terms of probability of success and is thus less willing to engage in litigation and to exert effort. This features may allow policymakers to use a One-Way fee-shifting system when they recognise ex-ante that there exists a difference in ability among the parties due to

reasons different than the merit of the case (e.g. differences in wealth or power). This chapter has also considered the implications of moving from an English system to a One-way fee-shifting system on total litigation cost and litigation rate. Despite the fact that this effect is ambiguous, a trade off between litigation rate and litigation costs has been found and this has to be considered by policymakers in choosing whether to adopt the One-Way fee-shifting rule.

In summary, an economic analysis of the One-way fee-shifting rule and of its possible application as well has been provided. Future works should consider some possible complications in the model. For example, the ability can be considered as endogenous parameter and the presence of asymmetric informations between litigants can also be included. Moreover, empirical evidence could be used to test the propositions set out in this chapter.

3.6 Appendix

A) Proof of Proposition 1

Step 1:

(2) can be rewritten as:

$$\begin{cases} X < Y \quad if \quad f > \frac{1-p}{p} \\ X = Y \quad if \quad f = \frac{1-p}{p} \\ X > Y \quad if \quad f < \frac{1-p}{p} \end{cases} \qquad (3)$$

In order to satisfy condition (3) and the Assumption 3 it is true that:

- If $A = 1$: $\begin{cases} X = Y \quad when \ f = 1 \\ X < Y \quad otherwise \end{cases} \qquad (a)$

When the litigants have the same ability and spend the same amount (i.e. $A = 1$ and $X = Y$), given Assumption 3, they must have the same probability of prevailing at trial (i.e. $p = 1/2$). To satisfy (3), f must then be equal to 1[50]. By the same reasoning, when $A = 1$ and $X < Y$, the Defendant has a higher probability of winning at trial (i.e $p < 1/2$)

[50] $f = \frac{1-\frac{1}{2}}{\frac{1}{2}} = 1$.

then, to satisfy (3), f must be lower than one. Finally, since f can't be higher than one, it is impossible to have $A = 1$ and $Y < X$.

$$\bullet \text{ If } A > 1 \begin{cases} X > Y \ when \ f > \frac{1-2S}{1+2S} \\ X = Y \ when \ f = \frac{1-2S}{1+2S} \\ X < Y \ when \ f < \frac{1-2S}{1+2S} \end{cases} \qquad (b)$$

When the litigants spend the same amount and the Plaintiff is more able than the Defendant (i.e $A > 1$ and $X = Y$), given Assumption 3, the Plaintiff must have an higher probability of winning at trial (i.e. $p = 1/2 + S > \frac{1}{2}$, with $0 < S < 1/2$). The higher the Plaintiff's ability, the higher her probability of winning at trial (i.e. the higher A, the higher S). To satisfy (3), f must then be equal to $\frac{1-2S}{1+2S}$[51]. By the same reasoning, the cases in which $X > Y$ and $Y < X$ can be explained.

$$\bullet \text{ If } A < 1 \begin{cases} X > Y \ when \ f > \frac{1+2S}{1-2S} \quad impossible \\ X = Y \ when \ f = \frac{1+2S}{1-2S} \quad impossible \Longrightarrow X < Y, \forall f \\ X < Y \ when \ f < \frac{1+2S}{1-2S} \end{cases} \qquad (c)$$

This is derived by the same reasoning as the previous cases. Since $\frac{1+2S}{1-2S}$ is higher than 1, and f $\in [0, 1]$, when $A < 1$, the Defendant always spends

[51] $f = \frac{1-(\frac{1}{2}+S)}{\frac{1}{2}+S} < 1$, since $0 < p < 1, \quad 0 < S < \frac{1}{2}$.

more than the Plaintiff.

Step 2:

Now, fixing $f = 1$, $f = 0$ or $0 < f < 1$ the first, the second and the third part of Proposition 1 are respectively reached.

For instance, when $0 < f < 1$:

- $X < Y \ if A < 1$
- $X < Y \ if \ A = 1$
- $\begin{cases} X < Y & if \ A < \hat{A} \\ X = Y & if \ A = \hat{A} \\ X > Y & if \ A > \hat{A} \end{cases}$

When the Defendant is more able than the Plaintiff, or when they have the same ability, the Defendant always spends more than the Plaintiff, otherwise conditions (a) and (c) wouldn't be satisfied. When instead the Plaintiff is more able than the Defendant, the latter spends more only for all the levels of ability which are compensated by f, then for all $A < \hat{A}$. When instead $A = \hat{A}$, X becomes equal to Y. Finally, for all the $A > \hat{A}$, the Plaintiff spends more than the Defendant, otherwise condition (b) wouldn't be satisfied.

The lower is f, the higher is S and consequently the higher is $\hat{A}$. Therefore, the closer f is to $f = 0$ (i.e. when the rule tends to a complete pro-Defendant rule) the more the Defendant is favoured by the rule (i.e. the higher is the defendant's ability deficit which is compensated by the rule)

B) Proof of Proposition 3

Here it is shown that:

$$\frac{dX}{df} > 0, \frac{dY}{df} \lesseqgtr 0$$

Defining:

$$g = \frac{\partial^2 \Pi D}{\partial Y^2}\frac{\partial^2 \Pi P}{\partial X^2} - \frac{\partial^2 \Pi D}{\partial Y \partial X}\frac{\partial^2 \Pi P}{\partial X \partial Y}$$

Since

$$\frac{\partial^2 \Pi D}{\partial Y^2}, \frac{\partial^2 \Pi P}{\partial X^2} < 0 \, and \, \frac{\partial^2 \Pi D}{\partial Y \partial X} = -\frac{\partial^2 \Pi P}{\partial X \partial Y}$$

g is always positive.

By totally differentiating the FOCs with respect to V $\frac{dX}{dV}$ and $\frac{dY}{dV}$ are found. By substitution and following Assumption 6 it can then ben written:

$$\frac{dX}{dV} = \frac{(-p_y)(\frac{\partial^2 \Pi P}{\partial X \partial Y}) + (-p_x)(\frac{\partial^2 \Pi P D}{\partial Y^2})}{g} > 0$$

$$\frac{dY}{dV} = \frac{(p_y)(\frac{\partial^2 \Pi P}{\partial X^2}) + (-p_x)(\frac{\partial^2 \Pi P}{\partial X \partial Y})}{g} > 0$$

Since g is always positive it follows that

$$(-p_y)(\frac{\partial^2 \Pi P}{\partial X \partial Y}) + (-p_x)(\frac{\partial^2 \Pi D}{\partial Y^2}) > 0 and (p_y)(\frac{\partial^2 \Pi P}{\partial X^2}) + (-p_x)(\frac{\partial^2 \Pi P}{\partial X \partial Y}) > 0$$

For simplicity:

$$(-p_y)(\frac{\partial^2 \Pi P}{\partial X \partial Y}) + (-p_x)(\frac{\partial^2 \Pi D}{\partial Y^2}) = L$$

$$(p_y)(\frac{\partial^2 \Pi P}{\partial X^2}) + (-p_x)(\frac{\partial^2 \Pi P}{\partial X \partial Y}) = N$$

Then:

$$\frac{dX}{dV} = \frac{L}{g} > 0$$

$$\frac{dY}{dV} = \frac{N}{g} > 0$$

Now given Section 3.3.1 derivatives it is known that

$$\frac{dX}{df} = \frac{(-p_y X)(\frac{\partial^2 \Pi P}{\partial X \partial Y}) + (-p_x X - p)\frac{\partial^2 \Pi D}{\partial Y^2}}{g}$$

By substitution this can be rewritten as

$$\frac{dX}{df} = \frac{X[L] - p\frac{\partial^2 \Pi D}{\partial Y^2}}{g}$$

Since

$$X, L, -p\frac{\partial^2 \Pi D}{\partial Y^2} > 0$$

Then

$$\frac{dX}{df} > 0$$

By the same reasoning:

$$\frac{dY}{df} = \frac{X[N] - p\frac{\partial^2 \Pi P}{\partial X \partial Y}}{g}$$

Therefore, the sign of $\frac{dY}{df}$ depends on the sign of $\frac{\partial^2 \Pi D}{\partial X \partial Y}$ which is ambiguous.

Then:

$$\frac{dY}{df} \lessgtr 0$$

$\frac{dY}{df}$ can be either higher or lower than 0.

C) American Rule

In this appendix the American Rule is briefly added to the chapter analysis. In particular it is shown how, like the English Rule, the American Rule cannot be used for reducing the effect on litigation outcome of 'ability gaps' between litigants. Moreover, the effects on the litigation rate and on litigants' behaviour of moving from the American Rule to the One-Way Fee-shifting Rule is explored.

In order to account for the American Rule the expected return functions in the original model are modified such that[52]:

$$\begin{cases} \Pi P = \bar{p}(V + bY) - bY - X \\ \Pi D = -\bar{p}(V + bY) - Y(1 - b) \end{cases}$$

Now, if $b = 0$, the American Rule applies: each party has to pay her litigation costs. If $b = 1$, a complete One-way fee-shifting pro-Defendant Rule applies: the Defendant can always recover fees, while the Plaintiff cannot. Solving the usual first order conditions:

$$\frac{\partial \Pi P}{\partial X} = 0 \Rightarrow (V + bY)p_x - 1 = 0$$

[52]The assumptions remain the same as in Section 3.1.

$$\frac{\partial \Pi D}{\partial Y} = 0 \Rightarrow -(V + bY)p_y - pb - (1 - b) = 0$$

It can then be written:

$$(V + bY)p_x - 1 = 0 = -(V + bY)p_y - pb - (1 - b)$$

After some computations the following condition which holds in equilibrium is obtained:

$$\frac{p_x + p_y}{p_x} = b(1 - p)$$

Given the model assumptions, it follows that when the American Rule is applied (i.e. $b = 0$) the two litigants always spend the same amount. In fact, $\frac{p_x+p_y}{p_x} = 0$ only if $X = Y$. Therefore, when the American Rule is applied the litigant with the highest ability has always a higher probability of winning at trial. Under the complete One-way pro-Defendant fee-shifting Rule (i.e. $b = 1$) instead, the Defendant always spends more than the Plaintiff and hence the Defendant can have a higher probability of winning at trial even when she is less able than the Plaintiff. Like the English Rule, the American Rule cannot then be used for reducing

the effect of litigants' ability gaps on the litigation process. To sum up, the One-Way fee-shifting Rule can be used as an instrument for equality policies both in countries where the default rule is the English Rule or in countries where the default rule is the American one.

Following the familiar process used in Section 3.3 of the Chapter and Braeutigam et al. (1984) , it can also be shown that moving from the American Rule to the One-Way fee-shifting Rule while the litigation rate decreases, total legal expenditure always increases. Therefore the trade-off between litigation costs and the litigation rate is confirmed and should be considered by the policymaker when deciding on whether to apply or not the One-Way fee-shifting Rule.

Chapter 4

The One-way Fee-shifting Rule effects on total litigation expenditures and the litigation rate

OVERVIEW

Chapter 3 provided a theoretical framework which accounts for all of the characteristics of the One-way fee-shifting Rule and that allows for comparison with the more common English Rule. The Chapter has demonstrated how the One-Way Fee-Shifting Rule incentivises the favoured litigant to exert more effort than the disadvantaged one and this increases the favoured litigant's probability of winning at trial. However, the general model did not permit to capture the effects of a movement from the English Rule to a rule favouring one of the two parties on litigants'

total legal expenditure and on the litigation rate as well. Therefore, this Chapter solves the general model by the use of specific Tullock's success probability functions with decreasing returns from legal expenditures to show how, a movement from the English Rule to a rule favouring one of the two parties always decreases total legal expenditures and always increases the litigation rate. This trade-off must be considered when deciding wether to apply the rule or not.

4.1 Introduction

Chapter 3 introduced a general economic model for showing how the One-Way Fee-Shifting Rule increases the favoured litigant effort and probability of winning at trial[1]. However, the effect on litigants' total legal expenditure and on the litigation rate of a movement from the English Rule to a rule favouring one of the two parties is ambiguous and cannot be derived looking at the general model. In particular, PropositionS 3 and 4 of Chapter 3 explain how the effect of the aforementioned movement on total litigation costs and on litigation rate depends on the specific form of the Plaintiff's winning probability function in the model.

For instance, under a complete pro-Defendant system, the Plaintiff faces a lower expected value in winning the case and a higher expected marginal cost of legal expenditures than under the English Rule; this results in a reduction in the Plaintiff's legal expenditures. On the other hand, when the complete One-Way favouring Defendant Rule is adopted, the Defendant's expected value of winning the case and her legal expenditure's marginal cost do not change. Therefore, the Defendant's expenditure can only be affected by the the Plaintiff's expenditure choices; this effect cannot be predicted. For instance, the Defendant can respond to a Plain-

[1]See Proposition 1 and Proposition 2 of Chapter 3.

tiff's expenditures increase either by increasing her expenditures as well (as the two choices were strategic complements) or by decreasing them by being intimidated.

However, following the aforementioned reasonings, it is reasonable to expect that the effect on the Plaintiff's expenditure is much higher than the effect on the Defendant's one (which is affected only by Plaintiff's expenditure). This should result in lower total costs of litigation when moving from the English system to the complete pro-Defendant one.

Hypothesis 1: Moving from the One-way Favouring Defendant system to the English one, the total legal expenditure always increases.

The same reasonings apply for the partial One-Way pro-Defendant Rule. The closer we get to a complete One-Way pro-Defendant Rule, the more intense are the aforementioned trade-offs.

Moreover, since higher litigation costs result in a lower litigation rate[2], following Hypothesis 1 it is then reasonable to expect that overall the litigation rate decreases when moving from the One-way favouring defendant system to the English one.

[2]See Chapter 3.

Hypothesis 2: Moving from the One-way Favouring Defendant system to the English one, the litigation rate decreases, and vice-versa moving from the English rule to the One-way Favouring Defendant rule.

Intuitively, a shift from the One-way favouring Defendant system to the English system makes the Defendant (the Plaintiff) less (more) willing to engage in litigation. Conversely, a shift from the English system to the One-way Favouring Defendant one makes the Plaintiff (the Defendant) less (more) willing to engage in litigation. As a matter of fact, when the One-Way fee-shifting Rule favouring Defendant is implemented, the Defendant's expected cost of losing the case dramatically decreases. For instance, under the complete One-Way pro-Defendant Rule a losing Defendant bears only her own costs; under the English Rule instead, she bears the Plaintiff's cost as well. Therefore, the Defendant is more willing to engage in litigation. On the other hand, the Plaintiff's expected cost of losing the case doesn't change with the application of a pro-Defendant system. However, the Plaintiff should be less willing to engage in litigation because she knows that the Defendant is now more willing to litigate. It is reasonable to expect that the positive effect on the Defendant's willingness to engage in litigation is much higher than the negative effect on the Plaintiff 's willingness to engage in litigation. This results in higher

litigation rate when moving from the English system to the complete One-way pro-Defendant one. The same reasonings apply for the partial One-way pro-Defendant Rule. The closer we get to a complete One-way pro-defendant Rule the more exacerbated are the aforementioned implications.

Therefore, two hypothesis have been set. First, the dissipation of the value of a case through litigation[3] is likely to be higher under the English Rule than under the One-way fee-shifting Rule. This should be true given the dramatic effect of the One-Way fee shifting system on the disadvantaged party's expenditures[4]. Second, the English Rule reduces the litigation rate: it is more difficult to satisfy the participation constraints under the English Rule than under the One-way fee-shifting Ruke. To sum up, it has been hypothesised that the One-way favouring Defendant system provides a greater incentive for parties to sue than the English system which entails higher equilibrium legal expenditures. This result fits with the trade off between legal expenditures and litigation rate found in previous literature comparing the English and the American rules[5].

In the next section, the model introduced in Chapter 3 is solved using

[3]Total legal costs.

[4]For example moving from the English system to the favouring Defendant one dramatically decreases the Plaintiff's expenditures; this effect is expected to be higher than the effect on Defendant's expenditures, so total expenditures decrease.

[5]See Chapter 3 literature review.

Tullock's success probability functions with decreasing returns to legal expenditures. This permits to show how the Propositions that have been reached in Chapter 3 are confirmed in this setting and, most importantly, to test the two Hypothesis set in this Chapter.

4.2 Chapter 3 Propositions and Hypothesis Testing

This Chapter starts from the general model introduced by Chapter 3. Therefore, a sequential two-player litigation game, where each risk neutral player selects her level of effort (X for the Plaintiff P and Y for the Defendant D) in order to win a case, it is considered. The value of the contested case (V) is assumed to be fixed (i.e. the dispute is not on the amount in question) and is not affected positively or negatively by the parties' expenditures. Each litigant can increase her probability of winning the case by undertaking a higher litigation effort (i.e. increasing legal expenditures).

Litigants expected returns from litigations are:

$$\begin{cases} \Pi P = \bar{p}(V - (1-f)X) + (1-\bar{p})(-Y - X) \\ \Pi D = (1-\bar{p})(0) + \bar{p}(-V - fX - Y) \end{cases}$$

Where:

- $\bar{p} \equiv p(X, Y, A) \in (0, 1)$ is the probability that the Plaintiff wins the case. This probability depends on litigants' expenditures and on the ability A. $1 - \bar{p}$ is then the probability that the Defendant wins the case.

- $f \in [0,1]$ is the fraction of Plaintiff's litigation costs X that the Plaintiff can recover in the event of victory. Of course, $1-f$ is the fraction of Plaintiff's litigation costs X that the Plaintiff can't recover in the event of victory. The Defendant always fully recovers her fees in case of victory. If $f = 1$, the English Rule applies: the loser is required to bear all of the winner's legal expenses. If $f = 0$ the complete One-way fee-shifting pro-Defendant Rule applies: the Defendant is always able to recover fees, while the Plaintiff cannot. For $0 < f < 1$, the Plaintiff can recover only a fraction of her fees and hence a hybrid rule which lies in between the English Rule and the complete One-way pro-Defendant Rule applies. The lower the value of f, the more the Defendant is favoured by the rule and hence, the closer the rule is to a Complete One-way pro-Defendant system.

In this section this general model is solved by using a specific form for the litigants success probability functions $\overline{p}$ and $1-\bar{p}$. Katz (1987) offered as a possible formulation of litigation success functions the Tullock's function where success depends on the ratio of the litigants respective expenditures. Namely, the probability that the Plaintiff wins is $p = \frac{\eta X}{\eta X + Y}$ where X and Y are the legal expenditures for the Plaintiff and for the Defendant respectively, and $\eta \geq 0$ is the merit of the Plaintiff's claim in

a particular case. Farmer and Pecorino (1999) added to this specification the legal technology parameter r which allows for different returns to scale from expenditures in litigation, so $p = \frac{\eta X^r}{\eta X^r + Y^r}$ where a positive (negative) value of r identifies increasing (decreasing) returns to scale[6]. This specification has been exploited in the majority of literature on the economic analysis of fee-shifting systems. Despite this fact, this success probability function has never been applied in the analysis of the One-way fee-shifting Rule.

This chapter contributes to the literature by solving the general model using Pecorino and Farmer probability functions. The only exception is that ability A is used instead of merit η.

Moreover, it is assumed that $r < 1$ (i.e. decreasing returns from legal expenditures). In most civil litigation cases, it is reasonable to expect that a litigant's increase in the amount invested in legal expenditures is much more productive (in terms of gaining a higher probability of winning a trial) when legal expenditures are low. As a matter of fact the lower are the legal expenditures the lower is the amount of relevant pieces of evidence that the litigant has been already brought to court to show her reasons. The first pieces of evidence are usually the most relevant for the case. Furthermore, for simplicity it is assumed that $r = 1/4$; as

[6]Litigants have access to the same legal technology.

a matter of fact a Nash equilibrium with $f = 1$ does not exist under the English rule if $r \geq 1$ (See Carbonara et al. (2015)) and assigning a precise numerical value to r permits to reach closed form solutions when solving the model.

The probability function $p = \frac{AX^{\frac{1}{4}}}{AX^{\frac{1}{4}}+Y^{\frac{1}{4}}}$ satisfies all the assumptions that have been made in Chapter 3; indeed solving the model derives results consistent with the Chapter's 3 propositions and permits to test the hypothesis made in this Chapter.

Litigant's expected returns from litigation can be rewritten as:

$$\begin{cases} \Pi P = \frac{AX^{\frac{1}{4}}}{AX^{\frac{1}{4}}+Y^{\frac{1}{4}}}(V + fX + Y) - Y - X \\ \Pi D = -\frac{AX^{\frac{1}{4}}}{AX^{\frac{1}{4}}+Y^{\frac{1}{4}}}(V + fX + Y) \end{cases}$$

$$\frac{\partial \Pi P}{\partial X} = 0 \Rightarrow \frac{4A^2(f-1)X^{5/4} + A\sqrt[4]{Y}(5fX + V - 8X + Y) - 4X^{3/4}\sqrt{Y}}{4X^{3/4}\left(A\sqrt[4]{X} + \sqrt[4]{Y}\right)^2} = 0$$

$$\frac{\partial \Pi D}{\partial Y} = 0 \Rightarrow -\frac{A\sqrt[4]{X}\left(4A\sqrt[4]{X}Y^{3/4} - fX - V + 3Y\right)}{4Y^{3/4}\left(A\sqrt[4]{X} + \sqrt[4]{Y}\right)^2} = 0$$

The first order conditions system cannot be explicitly solved. Therefore,

in order to analyse the equilibrium of the game, numerical solutions are provided[7]. In particular, it will be shown how numerical solutions are consistent with each of the chapter's propositions and hypothesis.

4.2.1 Proposition 1

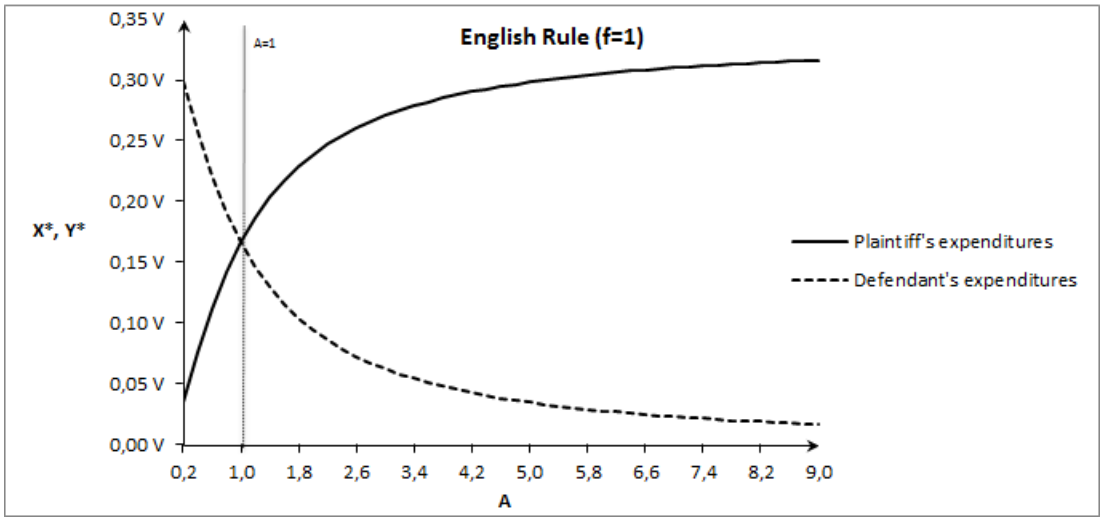
Graphs [1], [2], [3] and [4] show the equilibrium values of X and Y for each value of A[8] under the different fee-shifting systems described in the previous Sections. For simplicity of illustration only the cases of $f = 0,5$ and $f = 0.7$ are considered for the Partial One-Way pro-Defendant rule. The x-axis denotes the ability parameter A, and the y-axis denotes the level of equilibrium expenditure. Therefore, the continuous and the dashed curves represent the equilibrium expenditures for the Plaintiff and for the Defendant respectively.

Graph [1] shows the English Rule case and confirms that when $f = 1$ the litigant with the highest ability always spends more than the other one; if instead the litigants have the same ability they will spend the same amount in equilibrium. As a matter of fact, the dashed curve is above (below) the continuous one when $A < 1$ ($A > 1$), and the two curves cross at $A = 1$.

[7]Numerical solutions have been obtained simulating the model by the use of Wolfram Mathematica.

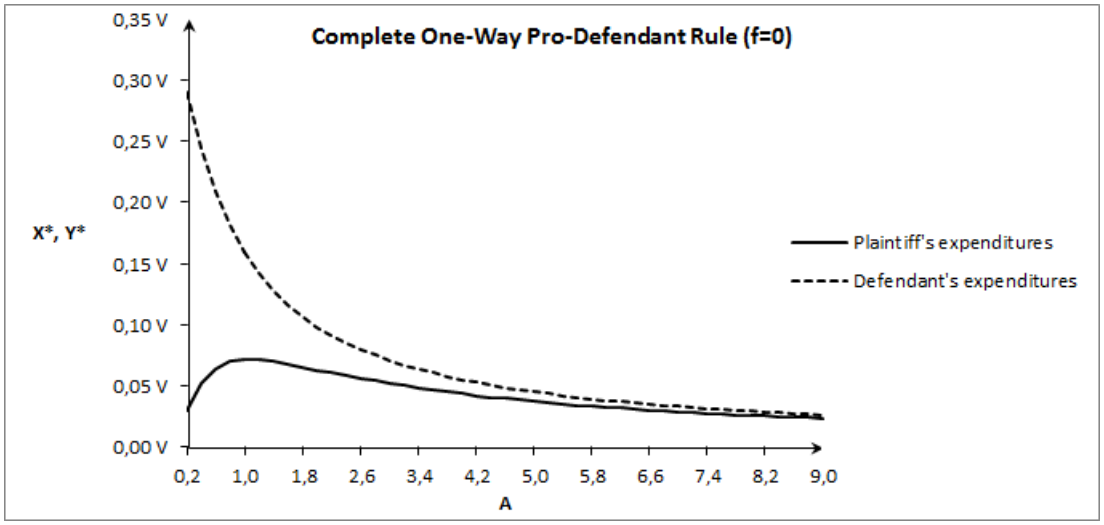
[8]Note that while parameter A tends to infinity, the analysis presented here considers $0 < A < 9$ for the purpose of illustration.

Graph [1]



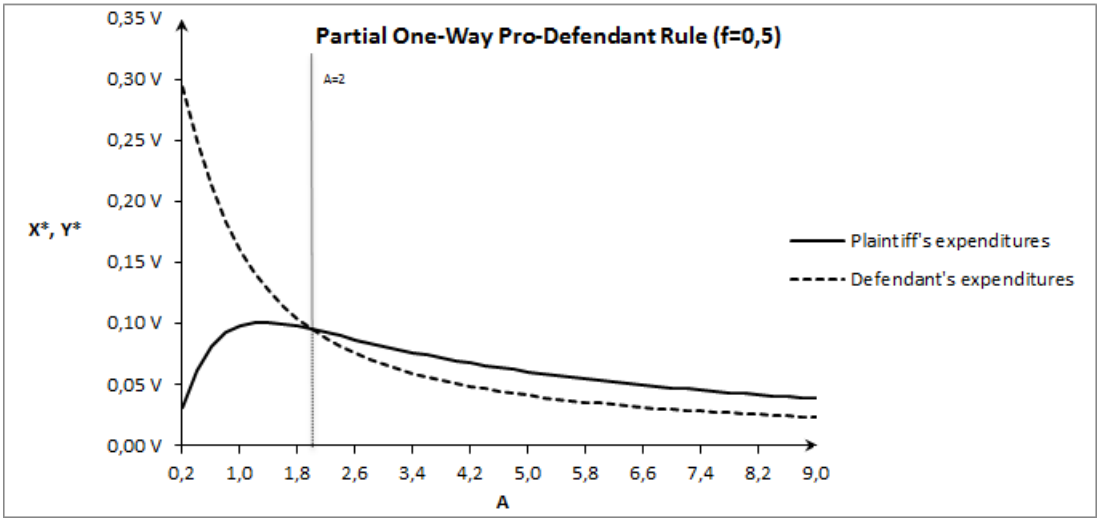
Graph [2] shows instead the Complete One-Way pro-Defendant fee-shifting Rule case. When $f = 0$ the Defendant always spends more than the Plaintiff. As a matter of fact the dashed curve is always above the continuous one. As $A \to \infty$, $X \to Y$.

Graph [2]

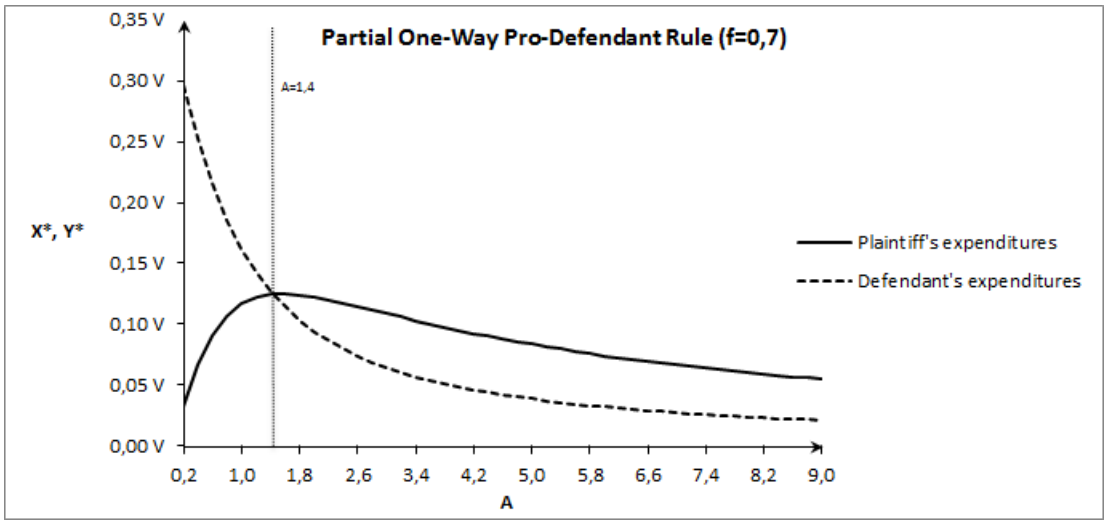


Finally, the last two Graphs show the Partial One-Way pro-Defendant Rule case. The Defendant's portion of recoverable costs is 50% in Graph [3] and 70% in Graph [4]. When $0 < f < 1$, the Defendant spends more than the Plaintiff both when the litigants have the same ability and when the Defendant is more able than the Plaintiff. When instead the Plaintiff is more able than the Defendant, the latter spends more only up to a certain level of ability, $\hat{A} > 1$. At this point, the litigants spend the same amount, but beyond it the Plaintiff spends more than the Defendant. As a matter of fact, when $f = 0,5$ the dashed curve is above (below) the continuous one when $A < 2$ ($A > 2$), and the two curves cross at $A = 2$. When instead $f = 0,7$ the dashed curve is above (below) the continuous one when $A < 1,4$ ($A > 1,4$), and the two curves cross at $A = 1,4$. Therefore, comparing the case of $f = 0,5$ (Graph [3]), and the case of $f = 0.7$ (Graph [4]), it is observed that the lower the value of f, the higher is the value of $\hat{A}$: $2 > 1,4$.

Graph [3]



Graph [4]



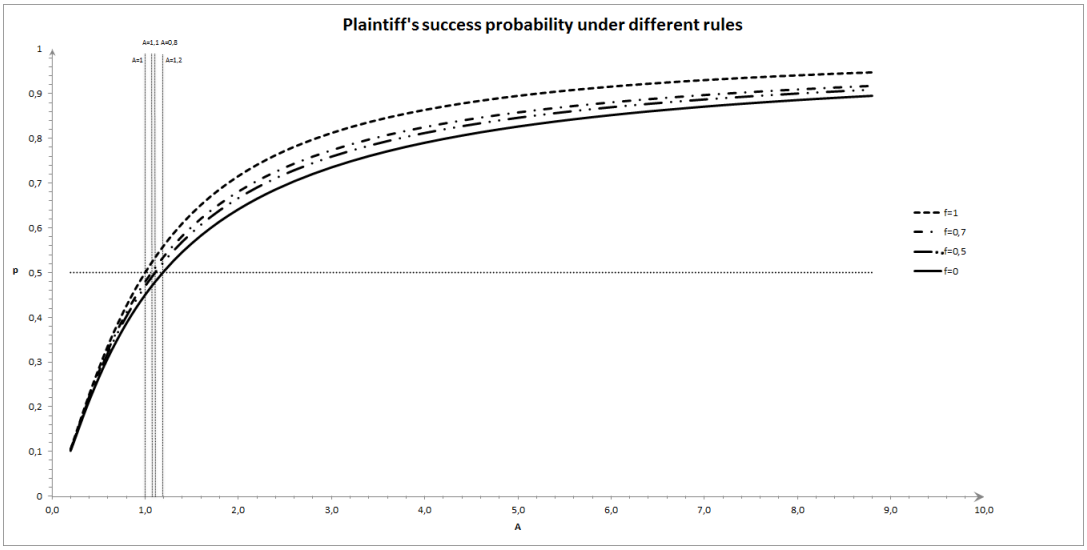
4.2.2 Proposition 2

Graph [5] shows the Plaintiff's equilibrium probability of winning at trial for each value of A under the different fee-shifting systems described in the previous Sections. The x-axis denotes the ability parameter A, and

the y-axis denotes the Plaintiff's equilibrium probability of success p. The lower the value of f (i.e. the closer to a Complete One-Way pro-Defendant Rule), the lower is the Plaintiff's equilibrium probability of success. As a matter of fact, the curve for $f = 1$ is always above the one for $f = 0$. The curves for $f = 0,7$ is above the $f = 0,5$ curve and they are in between the $f = 1$ and $f = 0$ curves. All the curves monotonically increase as A increases.

The $f = 1$ curve exceeds $p = 0,5$ at $A = 1$, thus when the English Rule is applied the litigant with the highest ability always has a higher probability of winning at trial. The curve for $f = 0$ instead, exceeds $p = 0,5$ at $A = 1,2$. Therefore, when the Complete One-way pro-Defendant Rule is applied, there is a range $(1 < A < 1,2)$ in which a less able Defendant has a greater chance to win than the Plaintiff. The Partial One-Way pro Defendant Rule also allows for a range in which a less able Defendant has a grater probability of success than the Plaintiff, but this range is smaller than the one provided by the Complete One-way pro-Defendant Rule ($1 < A < 1.1$ for $f = 0,5$ and $1 < A < 1.08$ for $f = 0,7$). Therefore, the closer the rule is to a Complete One-Way fee-shifting System the higher is the counterbalancing effect on ability gaps.

Graph [5]

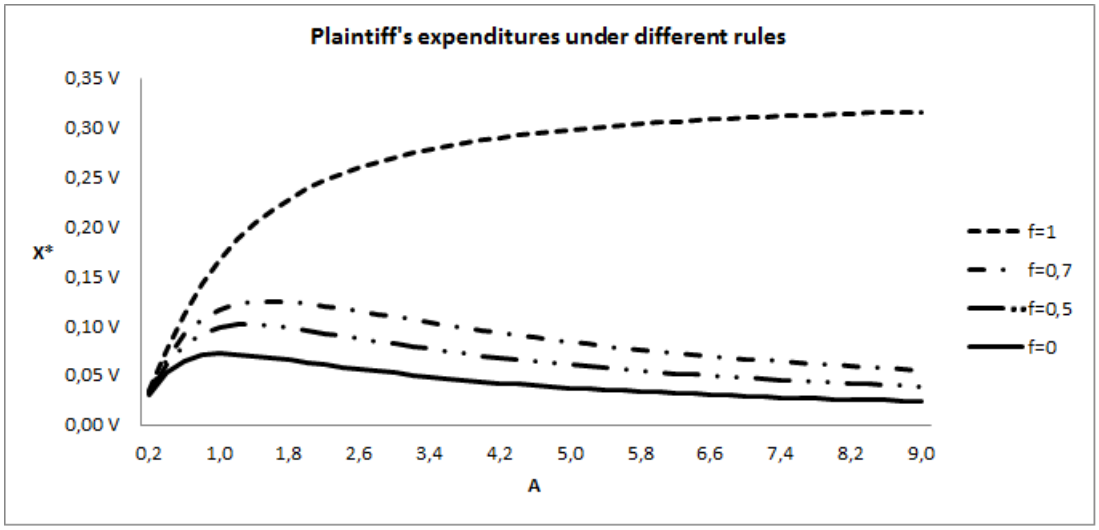


4.2.3 Proposition 3 and Hypothesis 1 Testing

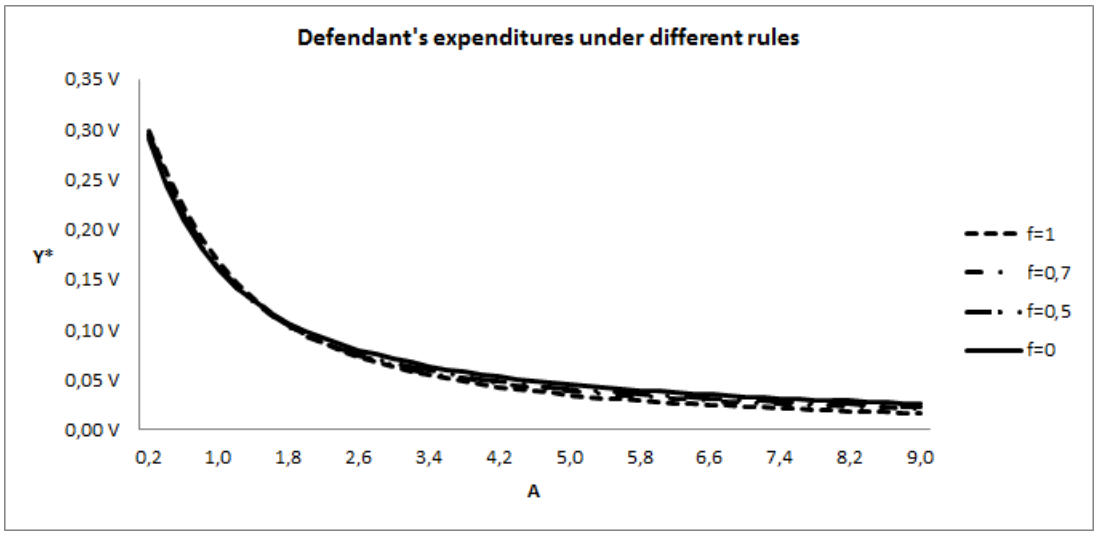
Graph [6] (Graph [7]) shows the equilibrium values of X (Y) for each value of A under the different fee-shifting systems described in the previous Sections. The x-axis denotes the ability parameter A, and the y-axis denotes the level of equilibrium expenditure. When moving from the One-way favouring defendant system to the English one (i.e when the parameter f goes from 0 to 1), while the effect on Defendant equilibrium expenditure is uncertain, it is certain that the Plaintiff increases her equilibrium legal expenditure. As a matter of fact in Graph [6], the $f = 1$ curves is always above the other curves; the curves for $f = 0,7$ is above the $f = 0,5$ curve and they lie in between the $f = 1$ and $f = 0$

curves. Graph [7] shows instead that Y can either decrease or decrease with f depending on A. Total equilibrium expenditure (i.e. $X^* + Y^*$) always increases with f. As a matter of fact in Graph [8], representing the total expenditure for each value of A under different rules, the $f = 1$ curves is always above the other curves; the curves for $f = 0,7$ is above the $f = 0,5$ curve and they lie in between the $f = 1$ and $f = 0$ curves. Hypothesis 1 is verified, meaning that the certain effect on the Plaintiff's legal expenditure is always higher than the uncertain effect on the Defendant's legal expenditure.

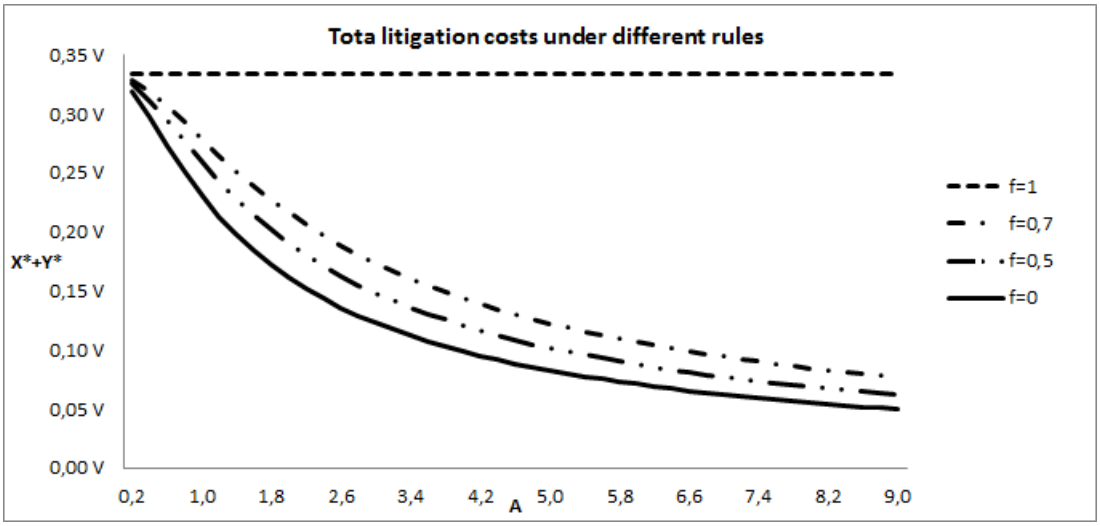
Graph [6]



Graph [7]



Graph [8]

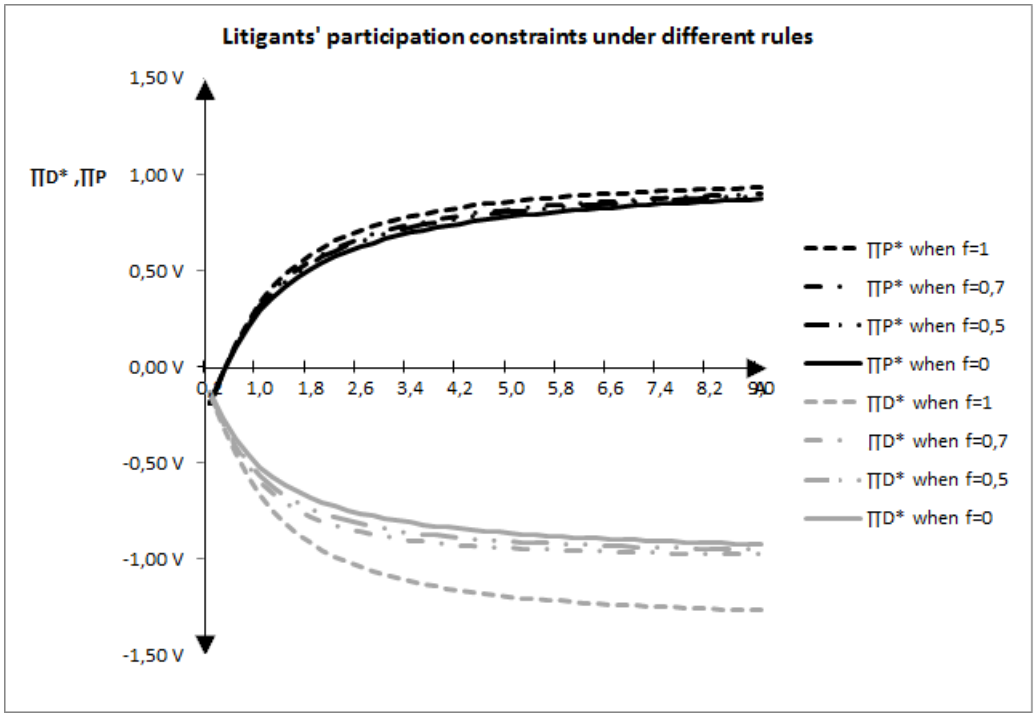


4.2.4 Proposition 4 and Hypothesis 2 Testing

Moving from the One-way favouring defendant system to the English one, the litigation rate decreases. As a matter of fact, $\Pi D^* + \Pi D^* = -X^* - Y^*$

decreases with f. This is clear looking at Graph [8]. Since $X^* + Y^*$ increases with f, the inverse is true for $-X^* - Y^*$. Moreover, Graph [9] shows that when f goes from 0 to 1 the reduction in Defendant willingness to litigate is higher than the rise in Plaintiff willingness to litigate, and this is why the overall effect on litigation rate is negative. Hypothesis 2 is verified. The x-axis denotes the ability parameter A, and the y-axis denotes the return from litigations for the Plaintiff and for the Defendant. The analysis is similar to the one done for previous Graphs. Note that the distance among grey curves is greater than the distance among black curves.

Graph [9]



For the purpose of completeness, the higher is the value of the parameter r the greater is the marginal return from legal expenditures for both the Plaintiff and the Defendant. This means that the effect of legal expenditures on the litigation process increases with r. Therefore, it is reasonable to expect that the effect of a change in the fee-shifting system on litigants' behaviour is greater the higher is the marginal return from legal expenditures. For instance, when the parameter r is equal to $0,5$ the range in which a less able Defendant has a greater chance to win than the Plaintiff increases with respect to the case in which $r = 0,25$ ($1 < A < 1,2$ for $r = 0,25$ and $1 < A < 1,4$ for $r = 0,5$) under a complete One-way favouring Defendant fee-shifting Rule. By the same reasonings, the higher the value of r the grater are total litigation costs and litigation rate under each fee-shifting rule. This is mathematically verifiable by solving the model with $0,25 < r < 1$ and by analysing the equilibria.

4.2.5 A final note

First, it has been assumed that litigants' returns from legal expenditures (in terms of higher probability of winning at trial) are decreasing. Therefore, all real world cases where each litigant's initial expenditures are more effective than subsequent expenditures fully fit with the analysis. That is, cases where each litigant knows the ideal steps to follow for supporting her rights and knows how each step could contribute to the increase of her probability of winning at trial are, de facto, cases with decreasing return to legal expenditures: the formal investigation undertaken by both litigants (the discovery phase) follows precise and ordered steps. The most common types of civil cases such as contracts, tort, complaints against the government and property disputes most likely satisfy the aforementioned characteristics. As a matter of fact, for those cases, lawyers usually know what are the pieces of evidence (e.g. documents, recording and interrogatories) needed to prove their clients' rights and thus know where and how to invest resources (i.e. starting from most effective discoveries). Of course, when cases are complex and lawyers need several attempts (and many of the attempts could be useless in providing pieces of evidence) to understand how to organise the discovery phase, returns from legal expenditures may be increasing; however, this

seems more plausible for criminal cases. Second, the positive effect of each litigant's legal expenditures on her probability of winning at trial is increasing in her ability. This assumption, as shown in Chapter 3 (Section 3.4) is reasonable for most types of civil cases and several examples have been provided.

4.3 Conclusion

The general model has been solved using Tullock's success functions. Results are consistent with each of the third chapter's proposition. Moreover, this chapter's hypothesis has been successfully tested. The One-Way Fee-Shifting Rule incentivises the favoured litigant to exert more effort than the disadvantaged one and this increases the favoured litigant's probability of winning at trial. Moreover, a movement from the English Rule to a rule favouring one of the two parties always decreases total legal expenditures and always increases the litigation rate. Therefore, the rule can be used for reducing ability gaps between litigants and this may also increase the overall litigation system efficiency (i.e. when the benefit in terms of lower legal expenditure is higher that the cost in term of higher litigation rate). Of course the magnitude of the trade off between litigation costs and litigation rate is not captured by the model and depends on several exogenous variables like the type of dispute and the characteristics of litigants that must be evaluated by the policy maker.

Chapter 5

The Favouring Plaintiff Fee-Shifting Rule: An Alternative to Legal Aid in Financing Civil Litigation

OVERVIEW

This chapter aims to investigate whether (in Europe) the Favouring Plaintiff fee-shifting Rule can be an alternative to legal aid for assisting wealth-constrained Plaintiffs in pursuing cases, that would otherwise be dropped. According to the Favouring Plaintiff fee-shifting Rule, in litigation a successful Plaintiff is able to recover attorney's fees, while a successful Defendant is not. By means of a game theoretic model, it is firstly shown that the rule, by reducing the Plaintiff's expected cost from litigation, is effective in facilitating the Plaintiff's access to Justice. Fur-

thermore, under certain conditions it might also be more effective than legal aid. Moreover, it is shown how the litigation rate and the number of settled cases are differently affected by legal aid and by the Favouring Plaintiff fee-shifting Rule. In particular, while legal aid increases the litigation rate, the number of cases that are litigated rather than settled always decreases under the Favouring Plaintiff fee-shifting Rule. Finally it is briefly discussed how the Favouring Plaintiff fee-shifting Rule could be implemented from a policy perspective.

5.1 Introduction

Under the European Convention on Human Rights, every citizen has the right to counsel and the right to a fair trial in the determination of his civil rights and obligations or in any criminal charge against him[1]. Those who lack sufficient resources to support the cost of a trial have the right to receive state-financed legal aid[2]. This principle is confirmed in the majority of the constitutions of European countries. For instance, Clause 24 of the Italian Constitution states: "Everyone is allowed to take legal action for the protection of her/his rights and legitimate interests. Defence is an inviolable right at any grade of the proceedings. The means of action and defence before all Courts are guaranteed to the indigent by public institutions. The law determines the conditions and legal means to remedy miscarriages of justice". Each country sets the conditions under which a citizen can receive legal aid and the way in which legal aid is provided[3]. The conditions for access to legal aid are generally set with reference to financial resources and on the merit of the case[4].Therefore,

[1]See Article 6 of the European Convention on Human Rights.

[2]See Article 47 of the Charter of Fundamental Rights of the European Union.

[3]For a detailed comparative study on legal aid in Europe see Barendrecht et al. (2014).

[4]In Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, a person has the right to free legal aid if two conditions are satisfied: 1) if he does not have sufficient resources to pay for legal assistance (the means test) 2) when the interests of justice so require (the merits test). Three factors should be taken into account when determining if the interests of justice is satisfied and then if the case passes the merit test: the seriousness of the offence and the severity of the potential sentence; the complexity of the case; and the social and personal situation of the Defendant. Any one of the three factors can warrant the need for the provision of legal aid (See Zaza and Marion (2014)). Both the "mean" and the "merit" test to determine whether legal aid is provided or not can vary from country to country.

one of the purposes of Legal aid (the one considered in this Chapter) is to reduce the likelihood that potential Plaintiffs do not bring to justice meritorious claims because of the presence of cost barriers. In fact, by frustrating access to justice, cost barriers increase the incentive from people to deviate from legal rules and can incentivise prospective litigants to resolve conflicts out of the court system, potentially leading to unlawful conducts.[5]. This chapter considers the most common European "legal aid system", that is the proportional system, where the state provides the litigant entitled to legal aid with at least a fraction of the trial expenses she incurs[6]. In particular, when the merit requirements are fulfilled, the fraction of the Plaintiff's own legal costs that is borne by the State is set by the latter according to the former's financial resources: the lower the Plaintiff's resources, the higher the fraction of the Plaintiff's costs that are reimbursed by the State. The maximum income allowing the beneficiary of legal aid to receive full compensation usually corresponds to the country poverty threshold, and thus is extremely low; higher thresholds guarantee, instead, a partial compensation. For instance, as shown by Barendrecht et al. (2014), in France the maximum monthly income for a full coverage is €929; this amount rises to €1393 for a partial coverage

[5]This chapter investigates the issue of access to justice; therefore it is considered the case in which only the Plaintiff may be entitled to legal aid. In fact, the Defendant doesn't face the choice of bringing a case to justice.

[6]Legal aid can also take the form of a fixed payment to the entitled litigant. For a more detailed discussion on different types of legal aid system in the European Union, see Lambert and Chappe (2014).

which ranges from 15% to 100%. In the United Kingdom, instead, when disposable income exceeds £315 (full coverage), the recipient has to pay a financial contribution which is proportional to the exceeding amount. Finally, other countries, such as Germany, Italy and Belgium, provide only full coverage; however the recipient of legal aid may be required to pay a fixed cost. Before proceeding, it must be noted that although legal aid covers at least a fraction of the recipient's own legal costs, legal aid does not cover the costs the recipient is ordered to reimburse to her opponent in the event of defeat[7]. Therefore, even if the Plaintiff has been granted legal aid, the Plaintiff is not guaranteed to be free of financial risk: if she looses the case, she has to pay 100% of her opponent's lawyer costs[8]. To sum up, legal aid is a way of financing civil litigation by public spending with the goal of assisting people who cannot afford legal costs to bring a case to justice[9].

Although legal aid is considered as an aspect of the European human rights system, it increases public spending which is a major concern from a budgetary perspective. Therefore, legal aid is under the threat of reduction and cutbacks (Tuil and Visscher, 2010). This threat contributed to

[7]In Europe, the loser in a lawsuit is typically required to bear at least a fraction of the winner's legal costs.

[8]When the Plaintiff has little or no money and therefore cannot pay her opponent's costs, the court usually makes a cost order against the Plaintiff, which is not to be enforced until it can be shown that the Plaintiff has the resources to pay.

[9]Hereinafter the term "bringing a case to justice" refers to the notion of a case gaining credibility and hence gaining the possibility of being either litigated or settled, rather than being dropped.

the recent development of alternative instruments for financing civil litigation and facilitating access to justice for wealth-constrained Plaintiffs. Among the most discussed alternative instruments, are: legal expenses insurances, third-party funding, and contingency or conditional fees. In the case of legal insurance, a private insurer can cover the costs of litigation in exchange for a premium. Third party funding is instead a contract between the Plaintiff and a private party which pays at least part of the Plaintiff's legal costs in exchange for a share of any judgment in favour of the Plaintiff. Finally, contingency/conditional fees provide that the lawyer bears the litigant's litigation costs in exchange for a judgment-share/premium in the event of victory[10]. The law and economics literature on the analysis of the aforementioned instruments, and in particular on their functioning and on the comparisons of their relative advantages and drawbacks, is quite extensive and it is still developing based on the contributions of both theoretical and empirical scholars[11].

The aim of this chapter is to contribute to the literature on the comparison between legal aid and alternative mechanisms to facilitate access to justice, by introducing the so-called "Favouring Plaintiff fee-shifting Rule"[12] into the analysis. In the field of law and economics, fee-shifting

[10]For a more detailed analysis of legal insurance, third party funding, and conditional/contingency fees, see Heyes et al. (2004), Kirstein and Rickman (2004) and Emons (2007).

[11]For a more compete overview of this literature, see Tuil and Visscher (2010).

[12]For simplicity hereinafter called "the Favouring Plaintiff Rule".

refers to the main legal rules for allocating the private costs of civil litigation (mainly attorneys fees) between a Plaintiff and a Defendant. In lawsuits in the United States, a party always pays her own fees unless otherwise specified by contract or statute (American Rule), while in Europe the loser is typically required to bear the winner's legal expenses (English Rule)[13]. However, a third type of rule can be applied where fees are shifted in favour of only one party: the so-called One-way fee-shifting Rule. Under this rule, one party recovers the attorneys' fees in the event of victory in trial whereas the other party (i.e. the disadvantaged one) cannot do so. Thus, if the Plaintiff was the chosen beneficiary, a successful Plaintiff would recover the attorneys' fees while a successful Defendant would not (the Favouring Plaintiff fee-shifting Rule). Since this chapter analyses a mechanism to facilitate access to justice for wealth constrained Plaintiffs, hereinafter only the Favouring Plaintiff discussed. As opposed to the American and the English Rules, the Favouring Plaintiff fee-shifting Rule is the only rule where the two parties face different expected costs from litigation[14]. Intuitively, this significantly affects the decision on whether to bring a case to court or not, and in general, the

[13]For simplicity of analysis is only considered the extreme case case in which the English Rule requires the loosing party to fully reimburse the winning party. However, as recently discussed by Carbonara et al. (2015), courts usually impose a limit on recoverable litigation expenditures.

[14]In particular, while the Defendant always has to bear her litigation costs, the Plaintiff pays her own litigation costs only in the event of defeat.

litigants' choice between settlement and litigation. More specifically, due to her ability to recover attorneys' fees, the Plaintiff should be more willing to engage in litigation, have higher credibility to sue, and attract a more favourable settlement. In contrast, the Defendant should be deterred from litigation and should be incentivised to offer a higher settlement amount. These intuitions render the Favouring Plaintiff Rule a perfect candidate as an alternative to legal aid. In the United States, at the state and federal levels, various statutes provide for this type of fee-shifting system[15], and consequently, in the United States, scholars drew their attention on the economic and legal analysis of the rule (Krent (1993), Rowe Jr and Anderson (1996), Wagener (2003) and Rosen-Zvi (2009)). However, the rule has never been applied in Europe[16].

By the use of a simple theoretical model and building on the existing literature, this chapter demonstrates how the Favouring Plaintiff fee-shifting Rule could work in European countries (where the default is the English Rule), and analyses whether it could be a viable alternative to legal aid. The main result is that the Favouring Plaintiff Rule can indeed serve as an alternative to legal aid. In fact, similar to legal aid but

[15]For instance, the Truth in Lending Act (TILA) is a federal law which sets norms aimed at protecting consumers in their transactions with lenders and creditors. Among other things, the Act provides that a One-Way fee-shifting Favouring Plaintiff Rule is applied in litigation where a consumer sues a creditor that has violated one or more consumer rights under the TILA (only the consumer can recover litigation costs). TILA can be found at 15 U.S.C. 1600 et. seq.. Moreover 15 U.S.C. also provides that successful Plaintiffs in private antitrust litigation are granted an award of their attorneys' fees.

[16]This assertion is according to my knowledge, and is subject to further research.

with a different magnitude, the Favouring Plaintiff fee-shifting Rule adds credibility to cases that would otherwise be dropped, hence making it profitable for the Plaintiff to bring these cases to justice. However, while under legal aid some of the cases that have become credible are settled and others are litigated (litigation rate increases), under the Favouring Plaintiff Rule, the cases that have become credible are instead always settled. Furthermore, under the Favouring Plaintiff Rule, the litigation rate decreases because it becomes more profitable for litigants to settle some of the cases that would have been previously litigated. Finally, both under legal aid and the Favouring Plaintiff Rule, the bargained settlement amount increases. The chapter concludes by showing when the Favouring Plaintiff Rule could be reasonably used[17] to facilitate access to justice for a wealth-constrained Plaintiff, hence allowing the state to save public resources which have become more limited since the financial crisis.

The rest of the chapter is organised as follows. Section 5.2 briefly shows the chapter's related literature and the chapter's contribution; Section 5.3 modifies a game theoretic model, introduced by Kirstein and Rickman (2004), to analyse and compare the effects on the Plaintiff's credibility to sue and on the litigants' choice between settlement and litigation, of both legal aid and the Favouring Plaintiff fee-shifting Rule; Section 5.4

[17] As an alternative to legal aid.

concludes by providing policy implications and discussions on the results achieved in the previous sections.

5.2 Related Literature and Contribution

This Chapter builds on the law and economic literature on litigation and, in particular, on the branch of literature which analyses the effects of procedural arrangements on the Plaintiff's decision to bring a case to justice and on the subsequent litigants' decision on whether to settle or to litigate the case[18]. In this regard, following Posner (1973b), Shavell (1982) sets a simple game-theoretic model to analyze and compare different fee-shifting rules. The model is based on the hypothesis that rational individuals may end up in litigation (as opposed to settling) because of possible differences in their expectations about their relative probability of winning the case[19]. Following this hypothesis, Kirstein and Rickman (2004) slightly modified Shavell's model in order to analyze third party funding in Europe; they showed how these contracts efficiently increase the Plaintiff's credibility of filing cases, as well as the settlement amount.

This Chapter slightly modifies Kirstein and Rickman's model with the aim of analyzing and comparing the effects of legal aid and the Favouring Plaintiff Rule on the Plaintiff's credibility to sue, and on the litigants' choice between litigation and settlement[20]. In fact, while there are var-

[18]The attention is not focused on the litigation process itself but on what happens before.
[19]See next Section for a more detailed explanation.
[20]Starting from the benchmark case where no instrument for financing civil litigation is applied.

ious models which could facilitate such a comparison, the Kirstein and Rickman framework seems to be the most appropriate due to its simplicity and intuitive assumptions.

The Chapter results on the analysis of the Favouring Plaintiff Rule are indeed consistent with Shavell (1982): the Favouring Plaintiff Rule always provides less litigation and adds more credibility to Plaintiffs' cases than the English Rule. On the other hand, there is no existing literature which uses a game theoretic model to analyse legal aid; nevertheless, the results on legal aid are quite intuitive and consistent with their underlying purpose[21]. However, the main contribution of this Chapter is not the single economic analysis of legal aid and of the Favouring Plaintiff Rule, but rather their comparison. In fact, this is the first Chapter that identifies the Favouring Plaintiff Rule as a possible (and under certain conditions, better) alternative to legal aid in assisting wealth-constrained Plaintiffs' access to justice. Therefore, this Chapter's contribution concerns the literature on access to justice and on the different ways of financing litigation.

The Chapter also sets a backdrop for discussions on the policy implications of alternative litigation funding mechanisms. The Favouring Plaintiff Rule could indeed be used as an instrument for facilitating wealth-

[21] See the introduction.

constrained Plaintiffs' access to justice in Europe. While this provides policymakers with a valid alternative to legal aid, it may lead to several concerns that are briefly discussed at the end of the Chapter and that further enlarge the literature debate on the topic.

5.3 The Model

Following the literature based on the "divergent expectation" hypothesis[22], this Section presents a simple game theoretic model. The model analyses and compares the effects on the Plaintiff's credibility to sue and on the litigants' choice between settlement and litigation, of two distinct mechanisms: legal aid and the Favouring Plaintiff fee-shifting Rule[23]. By reducing the expected litigation costs for the Plaintiff, legal aid is designed with the aim of favouring the access to justice for those Plaintiffs that would not otherwise be able to bring their cases to justice. The model shows how the Favouring Plaintiff Rule can be used to pursue the same goal in a different way, and compares the two mechanisms. The model considered in the analysis has been developed by Kirstein and Rickman (2004). In order to fit the model with the Chapter aim, one of the model specifications has been modified. Namely, while in the original model both litigants costs are included into a single variable, in this Chapter the Defendant's and the Plaintiff's legal costs are considered as two distinct variables. This permits to analyse the case in which a successful Defendant has to bear her litigation costs (Favouring Plaintiff Rule) and to account for the Plaintiff's obligation to reimburse the

[22]This hypothesis will be better explained later on in the analysis.
[23]The analysis refers to European countries, and hence the English Rule is the default fee-shifting rule.

Defendant's costs in the event of defeat under legal aid.

Before moving to the analysis and the comparison of legal aid and of the Favouring Plaintiff Rule (Subsections 5.3.2, 5.3.3 and 5.3.4), it is shown how the Plaintiff and the Defendant behave in the benchmark case, where no mechanism for financing civil litigation is in place (Subsections 5.3.1).

5.3.1 The Benchmark Case

This section describes the benchmark case where no mechanism for financing civil litigation is applied. The sequential litigation game is described as follows:

A Plaintiff (P) has a claim (with a fixed value V) against a Defendant (D). Both litigants are assumed to be rational and risk-neutral. Before the Plaintiff decides whether to bring the case to the court or not, the two litigants bargain over a settlement (s). For simplicity settlement costs are normalised to zero. If a settlement is not reached, the Plaintiff has the possibility to either sue the Defendant or to drop the case. In the event of litigation, each litigant incurs litigation costs. Hereinafter, X represents the Plaintiff's litigation costs while Y represents the Defendant's litigation costs. The values of X, Y, s and V are positive by definition. The default litigation cost rule is the English Rule, where

the loser in a lawsuit has to pay all the litigation costs, i.e. her costs plus the winner's costs $(X+Y)$. Persuant to the "divergent expectation" hypothesis, each litigant has her own belief on the probability that the Plaintiff will prevail at trial. These beliefs are represented by $q_i \in (0,1)$ where $i \in \{P, D\}$. Therefore, the Defendant's belief about the Plaintiff's probability of success is q_D. On the other hand, the Defendant's belief about her probability of success is $1 - q_D$. Note that the origin of differences in litigants' beliefs is not explained in the model, the model assumes that parties somehow come to their beliefs. In Particular, litigants may form different beliefs about the case outcome due to different reasons. Firstly, litigants may have different informations about the case; the Defendant for instance may know more about her likelihood of being found liable. Secondly, litigants may differently evaluate the legal arguments that they are supposed to present in court. Finally, an important role could be also played by litigants' degree of optimism and by their experience. All of these explanations are consistent with the presence of informations asymmetries between the Plaintiff and the Defendant. The assumption is crucial for the development of the model. In fact, when litigants have the same beliefs litigation never occurs (it would be irrational to litigate)[24].

[24]See Kirstein and Rickman (2004)

The expected returns from litigation for the Plaintiff (ΠP) and for the Defendant (ΠD) are then:

$$\Pi P = q_P(V) + (1 - q_P)(-Y - X) \tag{5.1}$$

$$\Pi D = (1 - q_D)(0) + (q_D)(-V - X - Y) \tag{5.2}$$

If the Plaintiff wins (with expected probability q_P), she gets the case value V. If instead the Plaintiff loses (with expected probability $1 - q_P$), following the English Rule, she pays both her and the Defendant's litigation costs ($X + Y$). The same reasoning applies to the Defendant's expected return from litigation. Note that when the Defendant wins, her payoff is 0. In fact, in this case the Defendant simply avoids losing the case value V and fully recovers litigation costs.

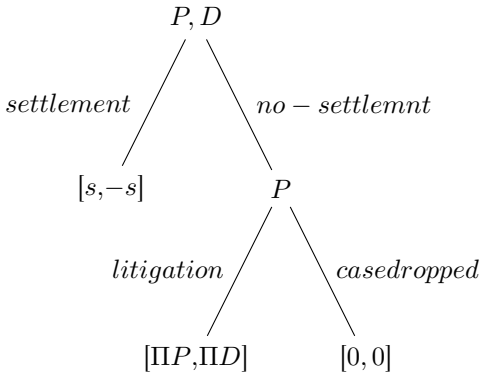


Figure 5.1: The benchmark game

Figure 1 represents the sequence of the game. In the first stage of the

game, parties bargain over a possible settlement (out of court), if they reach an agreement (i.e. settle the case) the payoffs are s and $-s$ for the Plaintiff and the Defendant respectively. If the litigants do not reach an agreement, the game moves to the second stage where the Plaintiff has to decide on whether to sue the Defendant or to drop the case. If the case is dropped, the payoff is 0 for both litigants, otherwise, the case is brought to the court and the payoffs are given by ΠP and ΠD.

The model is solved by backward induction. In the second stage the Plaintiff brings the case to the court only if her expected return from litigation is higher than what she would otherwise get by dropping the case, i.e. if $\Pi P > 0$. This condition can be written as:

$$q_P > \frac{X + Y}{V + X + Y} \tag{5.3}$$

When condition (5.3) is satisfied, the litigants go to court unless a settlement has been reached in the first stage of the game. If the condition is not satisfied the case is instead dropped. In the first stage, the Plaintiff settles the case only if the agreed settlement amount is higher than what she would have expected from litigation, i.e. if $s > \Pi P$. By the same reasoning, the Defendant settles only if $s < -\Pi D$. The settlement range is then $[\Pi P, -\Pi D]$. Therefore a settlement is reached (the range is not

empty) only when $-\Pi D > \Pi P$, i.e. when:

$$q_P < q_D + \frac{X+Y}{V+X+Y} \tag{5.4}$$

In other words, a mutually beneficial settlement exists when the Plaintiff's minimum acceptable settlement amount is smaller than the Defendant's maximum acceptable settlement amount. If this condition does not hold, the case proceeds to court. For simplicity, it is assumed that during the settlement stage the two litigants have the same bargaining power, therefore, with the symmetric Nash bargaining solution, the settlement outcome is $(\Pi P - \Pi D)/2$:

$$s = 0,5[(q_P + q_D)(V+X+Y) - X - Y] \tag{5.5}$$

Differences in litigants bargaining power would simply shift the range point in which the settlement is reached; the more powerful the Plaintiff (Defendant), the closer the settlement is to ΠP ($-\Pi D$). Of course, the settlement is reached only when the Plaintiff's threat to sue in the second stage is credible, i.e. only when equation (5.3) is satisfied[25]. To sum up, in the benchmark case:

[25]Note that when a case is credible and when the settlement range is non-empty, it is assumed that parties settles with equal bargaining power (so they settle in the middle of the range). This is why the settlement process is not modeled as an offer from the Defendant to the Plaintiff.

- Litigation occurs if $q_P > q_D + \frac{X+Y}{V+X+Y}$, i.e. if condition (5.4) is not satisfied.
- The case is dropped if $q_P < \frac{X+Y}{V+X+Y}$, i.e. if condition (5.3) is not satisfied.
- The case is settled if $\frac{X+Y}{V+X+Y} < q_P < q_D + \frac{X+Y}{V+X+Y}$, i.e. if both condition (5.3) and condition (5.4) are satisfied.
- The settlement amount is $s = 0,5[(q_P + q_D)(V + X + Y) - X - Y]$ (equation (5.5)).

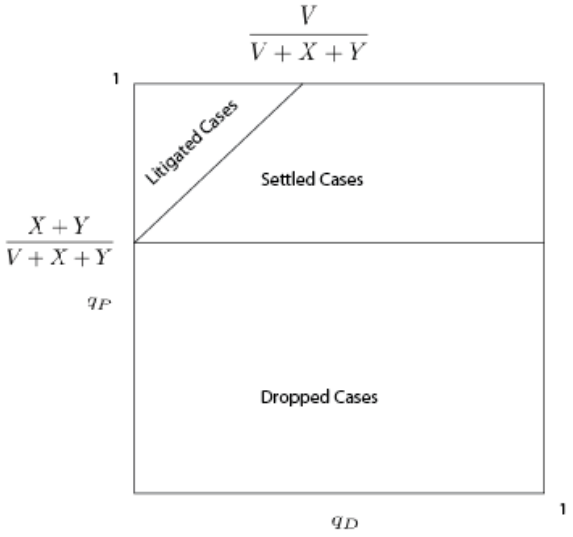


Figure 5.2: The benchmark game outcomes

According to the results that have been reached, Figure 2 represents the game outcome for each possible combination of the parameters q_P and q_D[26]. The case is dropped in the lower rectangle where $q_P < \frac{X+Y}{V+X+Y}$.

[26]These results are consistent with the results achieved in the existing law and economics literature. See for instance

In the right area of the upper rectangle the litigants settle the case for s and, finally, litigation occurs in the upper left triangle. The more the Plaintiff is optimistic with respect to the Defendant, and the greater the case value V with respect to total costs $X + Y$, the more likely it is that the Plaintiff brings the case to justice (i.e. the smaller is the "dropped cases" area). Note that when litigation occurs (in the upper left triangle), the Plaintiff's belief on her probability of winning at trial is always higher than the Defendant's beliefs on the Plaintiff's probability of winning a trial; i.e. $q_P > q_D$. This is true for any possible value of litigants' costs (X, Y) and case value V; intuitively, even if the case is credible, the Plaintiff always prefers to settle when she has a lower belief on her probability of winning at trial than the Defendant.

5.3.2 Legal Aid

Following the model introduced for the benchmark case, this subsection shows how introducing proportional legal aid affects the number of cases that are brought to justice, the decision to settle, and the settlement amount. Other things being equal, the presence of legal aid affects the expected returns from litigation for the Plaintiff, i.e. ΠP and, consequently, the amount which is bargained in the event of settlement, i.e. s.

Shavell (1982) and Kirstein and Rickman (2004).

Therefore, under legal aid, the litigants' expected returns from litigation are given by:

$$\Pi P^A = q_P(V) + (1 - q_P)(-Y - fX) \tag{5.6}$$

$$\Pi D = (1 - q_D)(0) + (q_D)(-V - X - Y) \tag{5.7}$$

Where f represents the fraction of the Plaintiff's own legal costs that is not reimbursed by the state. If $f = 0$ legal aid covers all the litigation costs incurred by the Plaintiff (full coverage); if $f = 1$ the state does not provide any legal aid to the Plaintiff (hence the benchmark case is restored). If finally, f is between 0 and 1, legal aid covers only a fraction $1 - f$ of the legal costs incurred by the Plaintiff (partial coverage). Note that if the Plaintiff looses the case, legal aid is not available for costs payable by the Plaintiff to the Defendant: f affects X, not Y. The specifcation of f is consistent with the proportional legal aid system applied by most European countries. The game can be represented by Figure 3.

As in the benchmark case, the game is solved by backward induction. In the second stage, the Plaintiff brings the case to court only if her expected return from litigation is higher than what she otherwise would get by dropping the case, i.e. if $\Pi P^A > 0$. This condition can be written

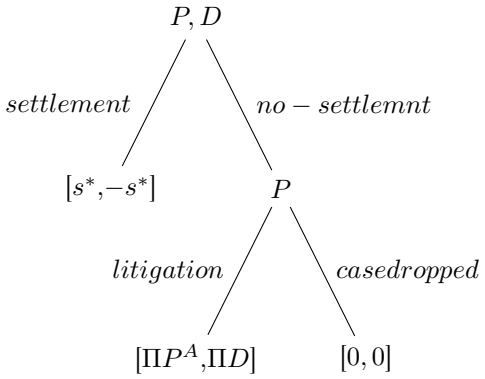


Figure 5.3: The legal aid game

as:

$$q_P > \frac{fX + Y}{V + fX + Y} \tag{5.8}$$

When condition (5.8) is satisfied, the litigants go to court unless a settlement has been reached in the first stage of the game; otherwise the case is dropped. In the first stage, the Plaintiff settles the case only if the agreed settlement amount is higher than her expected return from litigation, i.e. if $s^* > \Pi P^A$. By the same reasoning, the Defendant settles if $s^* < -\Pi D$. Therefore, the settlement range is $[\Pi P^A, -\Pi D]$. A settlement is reached only if the range is not empty, i.e. if $-\Pi D > \Pi P^A$, hence if:

$$q_P < q_D \frac{V + X + Y}{V + fX + Y} + \frac{fX + Y}{V + fX + Y} \tag{5.9}$$

If no settlement is reached, the case proceeds to court. During the settlement stage, the two litigants have the same bargaining power, and

therefore the settlement outcome is:

$$s^* = 0,5[(q_D)(V + X + Y) + q_P(V + fX + Y) - fX - Y] \quad (5.10)$$

Of course, the settlement is reached only if the Plaintiff's threat to sue in the second stage is credible, i.e. only if condition (5.8) is satisfied. To sum up, the main results of the game are the following:

- Litigation occurs if $q_P > q_D\frac{V+X+Y}{V+fX+Y} + \frac{fX+Y}{V+fX+Y}$, i.e. if condition (5.9) is not satisfied. Note that if litigation occurs q_P is always higher than q_D.
- The case is dropped if $q_P < \frac{fX+Y}{V+fX+Y}$, i.e. if condition (5.8) is not satisfied.
- The case is settled if $\frac{fX+Y}{V+fX+Y} < q_P < q_D\frac{V+X+Y}{V+fX+Y} + \frac{fX+Y}{V+fX+Y}$, i.e. if both condition (5.8) and condition (5.9) are satisfied.
- The settlement amount is $s^* = 0,5[(q_D)(V+X+Y)+q_P(V+fX+Y)-fX-Y)]$ (equation (5.10)).

Figure 4 represents the game outcome for each possible combination of the parameters q_P and q_D. The more the Plaintiff is optimistic with respect to the Defendant, and the greater the case value V with respect to the amount of Plaintiff's costs that is not reimbursed by the state plus

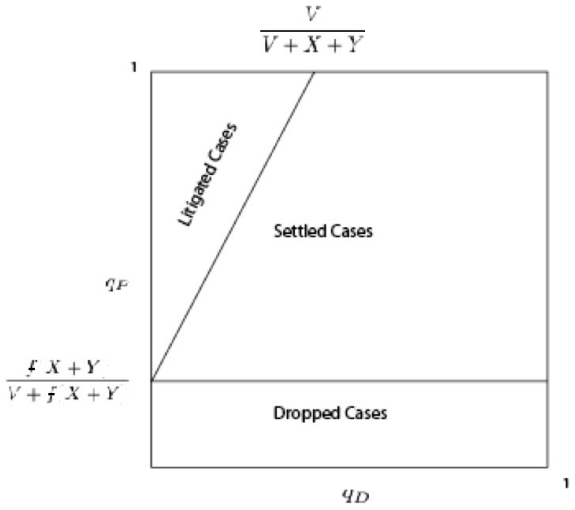


Figure 5.4: The legal aid game outcomes

the Defendant's costs $fX+Y$, the more likely it is that the Plaintiff brings the case to justice (i.e. the lower is the "dropped cases" area). Note that even if legal aid covers all the Plaintiff's own litigation costs (i.e. when $f = 0$), the Plaintiff is not willing to bring to court certain cases because of the cost she would have to reimburse to the Defendant in the event of defeat: even under full coverage, the Plaintiff is not guaranteed to be free of financial risk. Again, if litigation occurs (in the upper left triangle), the Plaintiff belief on her probability of winning at trial is always higher than the Defendant's beliefs on the Plaintiff's probability of winning a trial; i.e. $q_P > q_D$.

By comparing Figure 2 and Figure 4, it is possible to analyse the effects on the Plaintiff's credibility to sue and on the litigation versus settlement

process, if legal aid is introduced into the analysis; i.e. when moving from the benchmark case (English rule) to the case with legal aid.

1. In Figure 4, the area of the lower rectangle (where the threat to sue is not credible and the cases are dropped) is always smaller with respect to the same area in the Figure 2 ($\frac{X+Y}{V+X+Y} > \frac{fX+Y}{V+fX+Y}$). Under legal aid, the Plaintiff's threat to sue becomes more credible, i.e. legal aid makes cases credible, that were otherwise weak. In fact, legal aid lowers the Plaintiff's expected costs from litigation, increasing her expected return from litigation ($\Pi P^A > \Pi P$), and consequently her willingness to bring a case to justice. Thus, the number of cases that are dropped decreases with the introduction of legal aid. This result is exacerbated the greater is the percentage of the Plaintiff's costs supported by the state (i.e. the lower is f); in fact, the more the state supports the Plaintiffs, the higher is the increase in the Plaintiff's expected return from litigation.

2. The area of the upper left triangle in Figure 4, where credible cases are litigated, is larger with respect to the same area in the Figure 2. This is true given the analysis that has been conducted in the previous point. Under legal aid, the number of cases that are litigated then increases. In fact, some of the cases that were settled or dropped

in the benchmark case are instead litigated under legal aid. In fact, for a subset of cases that were either settled or dropped in the benchmark case, the Plaintiff is more inclined to litigate instead of reaching a settlement, as the burden of legal costs has been reduced (ΠP^A is bigger than ΠP). On the other hand, the Defendant's incentive to settle is the same as in the benchmark case (ΠD doesn't change). Therefore the condition for litigation to occurs ($\Pi P > -\Pi D$) is more likely satisfied. As before, this result is exacerbated the greater the percentage of the Plaintiff's costs supported by the state is.

3. The area of the graph where cases are settled is larger under legal aid (Figure (4)). In fact, a subset of cases that were not brought to justice without legal aid is now settled. This subset is bigger than the subset of settled cases that are instead litigated under legal aid. This can be shown by looking at the conditions for settlement under the two instruments. In the benchmark case the case is settled in the interval $\frac{X+Y}{V+X+Y} < q_P < q_D + \frac{X+Y}{V+X+Y}$; under legal aid instead the case is settled in the interval $\frac{fX+Y}{V+fX+Y} < q_P < q_D \frac{V+X+Y}{V+fX+Y} + \frac{fX+Y}{V+fX+Y}$. Mathematically, when legal aid is provided: 1) the right part of the interval always decreases, increasing the settlement range ($\frac{X+Y}{V+X+Y} > \frac{fX+Y}{V+fX+Y}$). 2) the left part can instead either decrease (decreasing

the settlement range) or increases (increasing the settlement range) ($q_D\frac{V+X+Y}{V+fX+Y} + \frac{fX+Y}{V+fX+Y} > [<]q_D + \frac{X+Y}{V+X+Y}$ only if $q_D > [<]\frac{fX+Y}{V+fX+Y}$). However, even if the left part of the interval decreases, it decreases less than the right part of the interval (in fact $\frac{X+Y}{V+X+Y} - \frac{fX+Y}{V+fX+Y} > q_D + \frac{X+Y}{V+X+Y} - q_D\frac{V+X+Y}{V+fX+Y} - \frac{fX+Y}{V+fX+Y}$ is always verified). Therefore, overall the settlement rate increases. Moreover, since the Plaintiff is less willing to accept a settlement offer, the bargained settlement amount under legal aid increases from s to s^* (with $s^* > s$) [27]. Again, this result is exacerbated the greater the percentage of the Plaintiff's costs supported by the state is.

This analysis leads to Proposition 1.

Proposition 1: Legal aid 1) Adds credibility to the Plaintiff's threat to sue, i.e. the number of cases that are dropped by the Plaintiff decreases. 2) Increases the number of cases that proceed to trial, i.e. the litigation rate increases. 3) Increases the number of cases that are settled out of court. 4) Increases the settlement amount.

5.3.3 The Favouring Plaintiff fee-shifting Rule

According to the Favouring Plaintiff fee-shifting Rule, fees are shifted only in favour of the Plaintiff; while a successful Plaintiff would recover

[27] This is the case continuing to assume that the party has the same bargaining power.

litigation costs, a successful Defendant would not. The Defendant always has to pay her costs independently of the outcome of the case. Below it is analysed how the model changes with the introduction of the Favouring Plaintiff Rule. Other things being equal, the Favouring Plaintiff Rule affects the expected returns from litigation for the Plaintiff and for the Defendant, i.e. ΠP and ΠD and, consequently the settlement amount s. Under the Favouring Plaintiff fee-shifting Rule, the litigants' expected returns from litigation are then given by:

$$\Pi P^P = q_P(V) + (1 - q_P)(-X) \tag{5.11}$$

$$\Pi D^P = (1 - q_D)(-Y) + (q_D)(-V - X - Y) \tag{5.12}$$

In the event of victory, the Plaintiff (with expected probability q_P) gets the value of the case V and recovers litigation costs. When instead the Plaintiff loses (with expected probability $1-q_P$), she has only to pay her costs X. In fact, the Defendant always has to pay her costs Y independently of whether she wins (with expected probability $1-q_D$) or whether she loses (with expected probability q_D); in the latter case the Defendant also loses the case value V and has to reimburse the Plaintiff's costs X. The game can be represented by Figure 5. In the second stage, the Plaintiff brings the case to the court only if her expected return from litigation

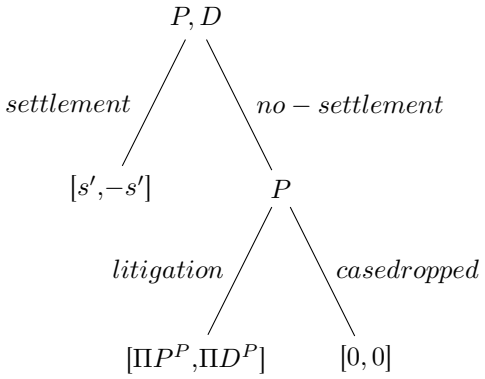


Figure 5.5: The favouring Plaintiff game

is higher than what she otherwise would get by dropping the case, i.e. if $\Pi P^P > 0$. This condition can be written as:

$$q_P > \frac{X}{V + X} \tag{5.13}$$

When condition (5.13) is satisfied, the litigants go to court unless a settlement has been reached in the first stage of the game; otherwise the case is dropped. In the first stage, the Plaintiff settles the case only if the agreed settlement amount is higher than her expected return from litigation, i.e. if $s' > \Pi P^P$. By the same reasoning, the Defendant settles if $s' < -\Pi D^P$. Therefore the settlement range is $[\Pi P^P, -\Pi D^P]$. A settlement is reached only when the range is not empty, i.e. when $-\Pi D^P > \Pi P^P$, hence when:

$$q_P < q_D + \frac{X + Y}{V + X} \tag{5.14}$$

If no settlement is reached, the case proceeds to court. During the settlement stage, the two litigants have the same bargaining power, therefore the settlement outcome is:

$$s' = 0,5[(q_P + q_D)(V + X) - X + Y] \tag{5.15}$$

Of course, the settlement is reached only when the Plaintiff's treat to sue in the second stage is credible, i.e. only if condition (5.13) is satisfied. To sum up, the main results of the game are the following:

- Litigation occurs if $q_P > q_D + \frac{X+Y}{V+X}$, i.e. if condition (5.14) is not satisfied. Note that if litigation occurs q_P is always higher than q_D.
- The case is dropped if $q_P < \frac{X}{V+X}$, i.e. if condition (5.13) is not satisfied.
- The case is settled if $\frac{X}{V+X} < q_P < q_D + \frac{X+Y}{V+X}$, i.e. if both condition (5.13) and condition (5.14) are satisfied.
- The settlement amount is $s' = 0,5[(q_P+q_D)(V+X)-X+Y]$(equation (5.15)).

Figure 6 represents the game outcome for each possible combination of the parameters q_P and q_D.

By comparing Figure 2 and Figure 6, it is possible to analyze the

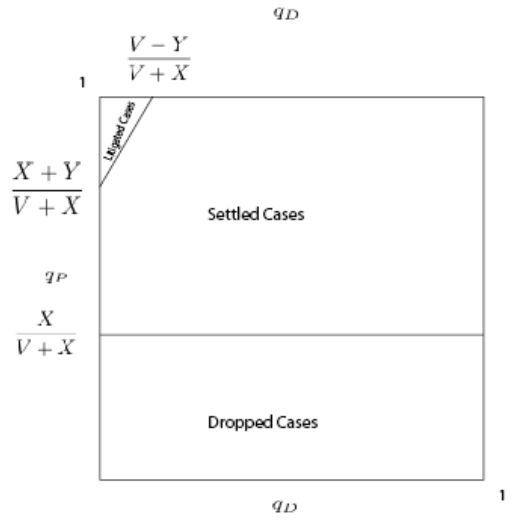


Figure 5.6: The favouring Plaintiff game outcomes

effects on the Plaintiff's credibility and on the litigation versus settlement process when moving from the benchmark case (English rule) to the Favouring Plaintiff Rule.

1. In Figure 6 the area of the lower rectangle (where the threat to sue is not credible) is smaller with respect to the same area in Figure 2 ($\frac{X+Y}{V+X+Y} > \frac{X}{V+X}$). Under the Favouring Plaintiff Rule, the Plaintiff's threat to sue becomes then more credible. In fact, the Favouring Plaintiff Rule lowers the Plaintiff's expected costs from litigation, increasing her expected return from litigation ($\Pi P^P > \Pi P$). This increases the likelihood of a case becoming credible and, consequently, the number of cases that are dropped decreases. This result is exacerbated the higher are the Defendant's litigation costs (the higher

Y, the higher $\Pi P^P - \Pi P$).

2. The area of the upper left triangle in Figure 6 (where credible cases are litigated) is smaller with respect to the same area in Figure 2 ($\frac{X+Y}{V+X+Y} > \frac{fX+Y}{V+fX+Y}$ and $\frac{V-Y}{V+X} < \frac{V}{V+X+Y}$). Therefore, under the Favouring Plaintiff Rule, the number of cases that proceed to court decreases. In fact, some of the cases that were litigated under the English Rule are instead settled for s' under the Favouring Plaintiff Rule. This is because although the Favouring Plaintiff Rule increases the Plaintiff's expected return from litigation ($\Pi P^P > \Pi P$) and decreases the Defendant's one ($\Pi D^P < \Pi D$), the negative effect on the Defendant's expected return from litigation is greater than the positive effect on the Plaintiff's expected return from litigation. Mathematically, $\Pi P^P - \Pi P < \Pi D - \Pi D^P$ only when $(1 - q_D)Y > (1 - q_P)Y$, i.e. when $q_P > q_D$; when litigation occurs this is always true. Following the model, this results in an overall decrease in the number of the credible cases that proceed to court (the condition for litigation to occurs ($\Pi P > -\Pi D$) is less likely to be satisfied), and consequently in an increase in the number of the credible cases that are settled. Moreover, a decrease in the litigation rate also means that all the credible cases that were dropped in the benchmark case

do not proceed to court but are instead settled for s'.

3. The area of the graph where cases are settled is larger when the Favouring Plaintiff Rule is applied (Figure 6). In fact, both the non-dropped and the non-litigated cases that were dropped or litigated in the benchmark case are now settled for s'. Moreover, Under the Favouring Plaintiff Rule, the bargained settlement amount (continuing to assume that the parties have the same bargaining power) increases from s to s' ($s' > s$); in fact given her higher expected return from litigation the Plaintiff is less willing to accept a settlement offer; on the other hand the Defendant, given the lower expected return from litigation is more willing to offer higher settlement.

This analysis leads to Proposition 2.

Proposition 2: By applying the Favouring Plaintiff Rule 1) The Plaintiff's credibility to sue increases, i.e. the number of cases that are dropped decreases. 2) The number of cases that proceed to trial decreases, i.e. the litigation rate decreases 3) Both the non-dropped and the non-litigated cases that were before dropped and litigated are settled. 4) The settlement amount increases.

5.3.4 Legal aid versus The Favouring Plaintiff Rule

In the previous subsections, it has been demonstrated how legal aid and the Favouring Plaintiff Rule can affect the Plaintiff's credibility to sue and the litigants' choice between settlement and litigation in Europe. In this subsection legal aid and the Favouring Plaintiff Rule are compared to show how the two instruments differently affect the Plaintiff credibility to sue, the litigation rate, and the settlement rate and amount.

The Plaintiff's credibility to sue

Both legal aid and the Favouring Plaintiff Rule increase the Plaintiff's credibility to sue, hence they both achieve the goal of decreasing the number of cases that are not brought to justice. In fact, both instruments reduce the Plaintiff's expected costs from litigation. In particular, while under legal aid the state bears at least a fraction of the personal costs that the Plaintiff would otherwise have to support, under the Favouring Plaintiff Rule the Defendant, by bearing her legal costs also in the event of victory (instead of the Plaintiff), reduces the burden of legal costs for the Plaintiff. Therefore, while legal aid reduces or eliminates the Plaintiff's financial risk of having to pay her own legal costs, the Favouring Plaintiff Rule eliminates the Plaintiff's risk of having to reimburse her opponent's

legal costs. The magnitude of the decrease in the number of dropped case is different between the two instruments. Intuitively, the instrument that reduces more the Plaintiff's expected costs from litigation is the instrument that is more effective in decreasing the number of cases that are dropped. This can be investigated by the usual graphical analysis. Firstly, as demonstrated in previous sections, both in Figure 4 (legal aid) and in Figure 6 (the Favouring Plaintiff Rule) the area where cases are dropped is always smaller than the same area in Figure 2 (the benchmark case). Secondly, the area where cases are dropped in Figure 4 (legal aid) is bigger than the same area in Figure 6 (Favouring Plaintiff rule) only when $\frac{fX+Y}{V+fX+Y} > \frac{X}{V+X}$ (i.e. when $Y > X(1-f)$). On the other hand, the area where cases are dropped in Figure 4 (legal aid) is smaller than the same area in Figure 6 (Favouring Plaintiff rule) only when $\frac{fX+Y}{V+fX+Y} < \frac{X}{V+X}$ (i.e. when $Y < X(1-f)$). Therefore, the Favouring Plaintiff Rule is more effective in increasing the Plaintiff's credibility to sue than legal aid only when

$$X(1-f) < Y \tag{5.16}$$

i.e. when the amount of the Plaintiff's legal cost that is reimbursed through legal aid ($X(1-f)$) is higher than the Defendant's legal costs (Y). The likelihood that the condition is satisfied depends then on three

factors: (i) the amount that the state does not reimburse to the Plaintiff under legal aid (positive relationship), (ii) the Plaintiff's legal costs (negative relationship), and (iii) the Defendant's legal costs (positive relationship). This result is intuitive: the higher is (i), the lower is (ii) and the higher is (iii), the more likely it is that the reduction in the Plaintiff's expected costs is higher under the Favouring Defendant Rule when moving from the benchmark case (as compared with the case of legal aid). Note that when the Defendant's legal costs are higher than the Plaintiff's legal costs (i.e. when $Y > X$), condition (5.16) is always satisfied; hence, in this case, the Favouring Plaintiff Rule is always more effective in increasing the Plaintiff's access to justice than legal aid.

The Litigation Rate

Under the Favouring Plaintiff Rule, the number of cases that are brought to court (i.e. the litigation rate) is always lower than under legal aid. In fact, while under legal aid some of the cases that were dropped in the benchmark case are litigated, under the Favouring Plaintiff Rule all the cases that become credible, and also some of the cases that were litigated in the benchmark case, are always settled. This is because under legal aid the decrease in the expected litigation costs for the Plaintiff is not compensated by a higher increase in the Defendant's litigation costs.

Graphically, the area of the upper left triangle (where litigation occurs) in Figure 4 (legal aid) is always bigger than the same area in Figure 6 (Favouring Plaintiff Rule). Of course, the gap between the litigation rates under the two instruments increases: (i) the higher is the negative difference between the negative effect on the Defendant's expected return from litigation and the positive effect on the Plaintiff's expected return from litigation under the Favouring Plaintiff Rule (i.e. the higher is Y), and (ii) the lower is the fraction of costs that is not reimbursed under legal aid (i.e. lower is f and the higher is X).

Settlement

Both legal aid and the Favouring Plaintiff Rule increase the number of cases that are settled out of court and the settlement amount. Graphically, both in Figure 4 (legal aid) and in Figure 6 (the Favouring Plaintiff Rule), the area where cases are settled is always bigger than the same area in Figure 2 (the benchmark case). However, the magnitude of the increase is different between the two instruments. Again, the difference depends on the quantum of costs that the state reimburses to the Plaintiff under legal aid and on the size of the litigants' costs. Of course, this result is strictly related to the previous ones. In particular, when the increase in the number of cases that are brought to justice is higher under the

Favouring Plaintiff Rule than under legal aid (i.e. when $X(1-f) < Y$), the number of settled cases and the settlement amount are always higher under the Favouring Plaintiff Rule than under legal aid. Graphically, when $\frac{fX+Y}{V+fX+Y} \geq \frac{X}{V+X}$ (i.e. when condition (5.16) is satisfied), the area where cases are settled in Figure 4 (legal aid) is always smaller than the same area in Figure 6 (the Favouring Plaintiff Rule). Moreover, in this case, the settlement amount is always greater under the Favoruing Plaintiff Rule ($s' > s^*$). On the other hand, when condition (5.16) is not satisfied the difference in the magnitude of the increase in the settlement rate and amount between the two instruments depends on the usual parameters.

This analysis leads to Proposition 3.

Proposition 3:

1) By reducing the Plaintiff's expected costs from litigation, both legal aid and the Favouring Plaintiff Rule achieve the goal of increasing the Plaintiff's credibility to sue and hence reduce the number of cases that are not brought to justice. In this respect, the Favouring Plaintiff Rule is more effective than legal aid only when it provides the Plaintiff with a higher benefit, i.e when it causes a higher reduction in her expected costs. This is always true when the Defendant's legal costs are higher

than the Plaintiff's legal costs. 2) While under legal aid the litigation rate increases, under the Favouring Plaintiff Rule the number of cases that are litigated decreases. 3) The number of cases that are settled out of court and the settlement amount increase both under legal aid and under the Favouring Plaintiff Rule. The difference in the increase between the two instruments depends on the outcomes of the changes in points 1) and 2). When the Favouring Plaintiff Rule is more effective than legal aid in increasing the Plaintiff's credibility to sue it also increases more the number of cases that are settled and the settlement amount.

5.4 Discussion and Conclusion

This Chapter began with the research question on whether the Favouring Plaintiff Rule can be an alternative to legal aid for assisting wealth constrained Plaintiffs in bringing to justice cases that would have otherwise been dropped. Further to the results of the model used in this Chapter, it was demonstrated that this is indeed the case and, under certain conditions the Favouring Plaintiff Rule may even be more effective. In fact, both legal aid and the Favouring Plaintiff Rule, reduce the Plaintiff's expected costs from litigation; hence, the Plaintiff needs less of its own resources to bring a case to justice. Under legal aid, the cost of reducing the Plaintiff's expected litigation expenditure is supported by the state, which bears at least a fraction of the Plaintiff's legal costs. Instead, under the Favouring Plaintiff Rule, the cost is supported by the Defendant, which supports a fraction of the Plaintiff's expected expenditures. Therefore, while legal aid increases public expenditure, the Favouring Plaintiff Rule simply shifts wealth from the Defendant to the Plaintiff. The issue that then arises is how the Favouring Plaintiff Rule can be implemented from a policy perspective. To implement such a rule policymakers would have to set the conditions under which the

rule would apply; such conditions would likely be similar to the income thresholds that each country stipulated for the access to legal aid. For instance thresholds could be set in a way that when the Plaintiff has an income below the existing threshold for legal aid access, the Favouring Plaintiff Rule would be applied if the Defendant has an income in a high pre-defined income category (for example an income higher than 200.000 euros per year). Thresholds could vary from country to country depending on income distribution and inequality level. The rule would apply only when the financial resources of the litigants are sufficiently disparate and would provide a one-way transfer of wealth from wealthy people to wealth-constrained people (never vice-versa). The effects of wealth inequality on the litigation and settlement process would then be reduced. Section 3 showed that when the Defendant has higher litigation costs than the Plaintiff ($Y > X$), the Favouring Plaintiff Rule is always more effective than legal aid in increasing the Plaintiff credibility to sue and the settlement amount. Although in this Chapter litigants' legal costs are exogenous, it is reasonable to expect that this is indeed the case in litigations among wealthy Defendants (i.e. with an income in a high income class) and Plaintiffs with low financial resources (i.e. that satisfy the requirements to have access to legal aid); in fact the Defendant is

not constraint and is more able to support the costs for expensive tests to prove her rights. To sum up the Favouring Plaintiff rule would allow European policymakers to save at least a part of the budget reserved for legal aid, and would reach the same goals of legal aid in a more effective way.. It is acknowledged that such provisions may lead to concerns about the aforementioned redistribute effects of such a policy; however, a debate on the appropriateness of using legal rules as an instrument of redistribution is outside of the scope of this Chapter, and nevertheless do not affect the results of the analysis.

Another possible issue is that, like legal aid, the Favouring Plaintiff Rule may have the shortcoming of adding credibility to some "low merit" cases (i.e frivolous cases) that would otherwise be dropped and that, if litigated, would only represent a waste of public resources and time. Therefore, both instruments may generate some inefficiencies. As such, it would appear that there is a trade-off between access to justice and legal system efficiency. Although an analysis of this trade-off is out of the scope of this Chapter, it has to be noted that while low merit cases that become credible could be litigated under legal aid - hence increasing the litigation rate, under the Favouring Plaintiff Rule, these cases are always settled and therefore the litigation rate is unaffected. This seems to be

an argument in favour of the Favouring Plaintiff Rule, relative to Legal Aid, regarding efficiency concerns.

This Chapter provides European policymakers with an alternative instrument to legal aid for avoiding that potential Plaintiffs do not bring to justice meritorious cases because of cost barriers. Another interesting extension is to consider also the case of Defendants that are not willing to enter the litigation process because of their low wealth and consequently accept unfavourable settlements. In fact, to solve this issue an alternative to legal aid could be represented by the Favouring Defendant Rule.

Future works could analyse the aforementioned concerns and extension, and could also consider some possible complications in the model[28].

[28]For example, litigants may differ in they risk preferences and hence the assumption of risk neutrality could be released.

Chapter 6

Conclusions

6.1 Results

While the Law and Economic literature regarding fee-shifting rules in litigation and their effects on litigants behaviour and decisions is wide and growing fast it has mainly focused on the analysis of the English Rule and of the American Rule and has failed in recognising the relevance of other rules. The general aim of this thesis is to use and to refine traditional models of civil litigation in an attempt to describe the features and the effects on the litigation process of another type of fee-shifting rule, the One-way fee-shifting Rule. This rule has a peculiar feature: fees are entirely shifted in favour of one party, regardless of the litigation outcome. While the approach adopted here is based on theoretical model and uses tools derived from Game Theory, the thesis has shown how the results

can be exploited to provide valuable policy implications.

Chapter 2 provided a descriptive analysis on litigation costs and laid out the foundations for a complete understanding of the essays presented in the remaining chapters of the thesis. The chapter provided descriptions and definitions of litigation costs, rules governing the allocation of legal expenses among litigants and mechanisms/instruments for financing civil litigation. The chapter also illustrated how different jurisdictions around the world fit into the analysis, finally presenting a case study about Italy.

Chapter 3 presented a contribution to the existing literature by applying and refining a general rent-seeking model to describe the feature of the One-Way fee-shifting Rule. The theoretical model has demonstrated how, unlike the English and the American Rules, the One-way fee-shifting Rule can reduce the effects on litigation outcome of ability gaps between litigants (ability gap refers to all the situations in which one of the two litigants has a higher return from spending in litigation than the other). The One-Way fee-shifting Rule, indeed, provides incentives to the favoured litigant to exert more effort than the disadvantaged one and this increases the favoured litigant's probability of winning at

trial. The aforementioned features make the One-way fee-shifting Rule a valuable policy instrument in reducing undesirable ability gaps between litigants. The chapter provided also some examples and possible areas of application of such rule. Regarding efficiency, the chapter has also considered the implications of moving from an English system to a One-way fee-shifting one on total litigation cost and litigation rate (two of the main indicators of a civil legal system efficiency). Despite the ambiguity of this effect, a trade off between litigation rate and litigation costs has been found; the litigation rate decreases if total litigation costs increase and vice-versa.

Chapter 4 provided a numerical valuations of the results of the general model presented in Chapter 3. The aim was to capture the effect of moving from an English system to a One-way fee-shifting one on total litigation cost and litigation rate which turned out to be ambiguous in the Chapter 3 general model. The main result was that when the aforementioned shift happens, total litigation costs always decrease while litigation rate increases. If the benefit in terms of lower legal expenditure is higher than the cost in term of a higher litigation rate, the adoption of the One-Way fee-shifting Rule implies an improvement in the legal system efficiency. The magnitude of the trade off between litigation costs

and litigation rate is not captured by the model and depends on several exogenous variables such as the type of dispute and the intrinsic characteristics of litigants; factors that the policy maker has to assess before deciding if to apply the One-way fee-shifting Rule or not.

Chapter 5 illustrated a different theoretical approach to the issues, by considering a general settlement model where legal expenditures are taken as given. Therefore, the model focused on the pre-trial bargaining stage and made legal expenditures exogenous (while in the previous chapters the settlement stage was not considered and legal expenditures were endogenous). The general aim was twofold: show how a Favouring Plaintiff Rule could be used as an instrument for assisting wealth constrained Plaintiffs in pursuing cases that would otherwise be dropped; and to show how, in this respect, the rule could be a valid alternative to legal aid. Firstly it has been showed that the One-way fee-shifting Rule (in its favouring Plaintiff verison), compared to the English Rule increases the number of cases that the Plaintiff would bring to justice by increasing the Plaintiff's credibility to sue and her willingness to go to court. However, the aforementioned increase does not translate into higher litigation rate, as suggested by Chapter 4, but it translates, instead, into a higher number of settled cases. As a matter of fact, both the non-dropped and the

non-litigated cases that were dropped under the English Rule are instead settled under the One-Way fee-shifting Rule. The Chapter also demonstrated how the features of the One-way fee-shifting Rule make it a valid, and under certain conditions better, alternative to legal aid in facilitating the Plaintiff's access to Justice. Therefore, from a policy perspective, the chapter provided European policymakers with an alternative instrument to legal aid for avoiding that potential Plaintiffs do not bring to justice meritorious cases because of cost barriers; and also discussed how the rule could then be implemented.

In sum, all the chapters of the thesis combine with each other to reach the goals of providing an economic analysis of the One-Way fee-shifting Rule and of its effects on the litigation process and of discussing policy implications also looking at concrete and real cases. The One-Way fee-shifting Rule incentivises the favoured litigant to exert more effort than the disadvantaged one and this increases the favoured litigant's probability of winning at trial. When moving from an English system to a One-way fee-shifting one, total litigation costs always decreases while the number of cases that are brought to justice increase. If a settlement stage is out of the picture (Chapter 3 and Chapter 4) a higher number of cases that are brought to justice translates into higher litigation rate;

otherwise (Chapter 5) it translates into higher number of cases that are settled. More precisely, the One-way fee-shifting Rule (Favouring Plaintiff) increases the Plaintiff's credibility to sue and this translates into higher settlement rate and settlement amount. A similar result can be achieved with the implementation of legal aid; however legal aid always increases litigation rate and public expenditure.

6.2 Insights for Future Research

First, this thesis aims at stimulating the academic and political debate on the analysis and the use of the One-way fee-shifting Rule which has been lacking so far. Future research might try to test the theoretical predictions of the models here provided, for example by means of laboratory experiments. Lawyers and political science scholars can exploit the results to identify classes of litigation, types of litigants or area of the law where the features of the One-way fee-shifting Rule can promote efficiency and/or fairness.

Furthemore, while this thesis mainly focused on how the One-way fee-shifting Rule impacts on legal expenditures and the litigation rate by affecting parties' incentives to litigate and their behaviours during the litigation stage, future research can focus on the effects of such rule on the incentives to comply with the law (i.e. on people primary conduct)[1] and on the type and merit of cases that are litigated (i.e. on the evolution and form of the law itself).

[1]Regarding compliance with the law, Hylton (1993) used numerical simulations showing how the Favouring Plaintiff One-way fee-shifitng Rule leads to the highest level of compliance and least amount of litigation. This conclusions, however, depend on the functional form used in his simulations, and assume that litigation costs are fixed and do not depend on litigants' choices.

Effects on the incentives to comply with the law: The core of the thesis showed how the One-way fee-shifitng Rule, compared to the English Rule, increases (respectively, decreases) the favoured litigant (disadvantaged litigant) probability of winning a trial and her willingness to litigate. When the Favouring Plaintiff Rule is adopted it makes a wrongdoer (the potential Defendant) possibility for being sued in court more likely and also increases her expected litigation costs. This can be seen as a disincentive for potential wrongdoers, acting as an increase in punishment for the violation of norms[2] and thus should helps promoting substantive compliance.

Effects on the evolution of the Law: Litigation and cases selection has the benefit of creating precedents and defining legal principles (Luppi and Parisi (2012)). From a social point of view, to promote transparency and certainty of the law, the "best cases" are those with balanced merits. As a matter of fact, frivolous cases should not be filed, and strong cases should be settled without litigation (Carbonara et al. (2015)). The One-way fee-shifting Rule could then be used to promote these "socially valuable litigation". For instance, the One-way fee-shifting Rule can reduce the effect of ability gaps between litigants that do not depend on

[2]In this regard see Rose-Ackerman and Geistfeld (1987).

the merit of the case. Those ability gaps can results in the filing of non meritorious cases that would not contribute to the evolution of the law.

To sum up, the general idea is that the One-way fee-shifting Rule should also be considered as an instrument for promoting legal compliance and socially valuable litigation. Future research could further develop the theoretical models illustrated in the present work in order to provide a more thorough and empirically grounded quantitative analysis.

Bibliography

Barendrecht, M., Kistemaker, L., Scholten, H. J., Schrader, R., and Wrzesinska, M. (2014). Legal aid in europe: Nine different ways to guarantee access to justice?

Baye, M. R., Kovenock, D., and De Vries, C. G. (2000). Comparative analysis of litigation systems. Technical report, Discussion Paper, Tinbergen Institute, TI 2000-103/2.

Bone, R. G. (2008). To encourage settlement: Rule 68, offers of judgment, and the history of the federal rules of civil procedure. *Nw. UL Rev.*, 102:1561.

Bowdre, K. O. (1993). Conflicts of interest between insurer and insured: Ethical traps for the unsuspecting defense counsel. *American Journal of Trial Advocacy*, 17:101.

Braeutigam, R., Owen, B., and Panzar, J. (1984). Economic analysis of altnative fee shifing systems, an. *Law & Contemp. Probs.*, 47:173.

Bright, J. C. (2012). Unilateral attorney's fees clauses: A proposal to shift to the golden rule. *Drake L. Rev.*, 61:85.

Bungard, B. C. (2006). Fee - fie - foe - fum: I smell the efficiency of the english rule finding the right approach to tort reform. *Seton Hall Legislative Journal*, 31:1.

Cappelletti, M. (2013). *Civil procedure in Italy*. Springer.

Carbonara, E., Parisi, F., and von Wangenheim, G. (2015). Rent-seeking and litigation: The hidden virtues of limited fee shifting. *Review of Law & Economics*, 11(2):113–148.

Cohen, H. (2006). *Awards of Attorneys' Fees by Federal Courts and Federal Agencies*. Hill.

Coughlan, P. and Plott, C. (1997). An experimental analysis of the structure of legal fees: American rule vs. english rule. california institute of technology. Technical report, Social Science Working Paper.

Coursey, D. L. and Stanley, L. R. (1988). Pretrial bargaining behavior within the shadow of the law: Theory and experimental evidence. *International Review of Law and Economics*, 8(2):161–179.

Davis, W. K. (1999). International view of attorney fees in civil suits:

Why is the united states the odd man out in how it pays its lawyers, the. *Ariz. J. Int'l & Comp. L.*, 16:361.

De Morpurgo, M. (2011). A comparative legal and economic approach to third-party litigation funding. *Cardozo Journal of International and Comparative Law*, 19:343.

Eisenberg, T., Fisher, T., and Rosen-Zvi, I. (2012). When courts determine fees in a system with a loser pays norm: Fee award denials to winning plaintiffs and defendants. *UCLA L. Rev.*, 60:1452.

Eisenberg, T., Fisher, T., and Rosen-Zvi, I. (2014). Attorneys'fees in a loser-pays system. *University of Pennsylvania Law Review*, pages 1619–1661.

Eisenberg, T. and Miller, G. P. (2013). The english versus the american rule on attorney fees: An empirical study of public company contracts. *CORNELL LAW REVIEW*, 98:327.

Emons, W. (2000). Expertise, contingent fees, and insufficient attorney effort. *International Review of Law and Economics*, 20(1):21–33.

Emons, W. (2007). Conditional versus contingent fees. *Oxford Economic Papers*, 59(1):89–101.

Emons, W. and Garoupa, N. M. (2004). The economics of us-style contingent fees and uk-style conditional fees. *Managerial and Decision Economics Vol. 27, No. 5 (Jul. - Aug., 2006), pp. 379-385.*

Farmer, A. and Pecorino, P. (1998). A reputation for being a nuisance: frivolous lawsuits and fee shifting in a repeated play game. *International Review of Law and Economics*, 18(2):147–157.

Farmer, A. and Pecorino, P. (1999). Legal expenditure as a rent-seeking game. *Public Choice*, 100(3-4):271–288.

Faure, M. and De Mot, J. (2011). Comparing third-party financing of litigation and legal expenses insurance. *JL Econ. & Pol'y*, 8:743.

Gould, J. P. (1973). The economics of legal conflicts. *The Journal of Legal Studies*, 2(2):279–300.

Grossi, S. and Pagni, M. C. (2010). *Commentary on the Italian code of civil procedure*. Oxford University Press, USA.

H van Boom, W. (2017). *Litigation, costs, funding and behaviour: Implications for the law*. London/New York: Routledge.

Hause, J. C. (1989). Indemnity, settlement, and litigation, or i'll be suing you. *The Journal of Legal Studies*, 18(1):157–179.

Heyes, A., Rickman, N., and Tzavara, D. (2004). Legal expenses insurance, risk aversion and litigation. *International Review of Law and Economics*, 24(1):107–119.

Hirshleifer, J. and Osborne, E. (2001). Truth, effort, and the legal battle. *Public Choice*, 108(1-2):169–195.

Hodges, C., Vogenauer, S., and Tulibacka, M. (2010). *The costs and funding of civil litigation: a comparative perspective*. Bloomsbury Publishing.

Horowitz, M. (1995). Making ethics real, making ethics work: A proposal for contingency fee reform. *Emory LJ*, 44:173.

Hughes, J. W. and Snyder, E. A. (1995). Litigation and settlement under the english and american rules: Theory and evidence. *Journal of Law and Economics*, pages 225–250.

Hyde (2002). Charles e. and williams, phillip l.(2002),'necessary costs and expenditure incentives under the english rule'. *International Review of Law and Economics*, 22:133–52.

Hylton, K. N. (1993). Fee shifting and incentives to comply with the law. *Vand. L. Rev.*, 46:1069.

Katz, A. (1987). Measuring the demand for litigation: is the english

rule really cheaper? *Journal of Law, Economics, & Organization*, 3(2):143–176.

Katz, A. (1988). Judicial decisionmaking and litigation expenditure. *International Review of Law and Economics*, 8(2):127–143.

Katz, A. W. and Sanchirico, C. W. (2010). Fee shifting in litigation: survey and assessment. *University of Pennsylvania Institute for Law and Economics Research Paper*.

Kilian, M. (2003). Alternatives to public provision: The role of legal expenses insurance in broadening access to justice: The german experience. *Journal of Law and Society*, 30(1):31–48.

Kirstein, R. and Rickman, N. (2004). " third party contingency" contracts in settlement and litigation. *Journal of Institutional and Theoretical Economics JITE*, 160(4):555–575.

Krent, H. J. (1993). Explaining one-way fee shifting. *Virginia Law Review*, pages 2039–2089.

Kritzer, H. M. (1991). *The justice broker: lawyers and ordinary litigation*. Oxford University Press.

Lambert, E.-A. and Chappe, N. (2014). Litigation with legal aid ver-

sus litigation with contingent/conditional fees. *Review of Law & Economics*, 10(1):95–115.

Landes, W. M. (1971). An economic analysis of the courts. *The Journal of Law & Economics*, 14(1):61–107.

Leubsdorf, J. (1984). Toward a history of the american rule on attorney fee recovery. *Law and Contemporary Problems*, 47(1):9–36.

Luppi, B. and Parisi, F. (2012). Litigation and legal evolution: does procedure matter? *Public Choice*, 152(1-2):181–201.

Lyon, J. (2010). Revolution in progress: Third-party funding of american litigation. *UCLA L. Rev.*, 58:571.

Macey, J. R. and Miller, G. P. (1991). The plaintiffs' attorney's role in class action and derivative litigation: Economic analysis and recommendations for reform. *The University of Chicago Law Review*, 58(1):1–118.

Massenot, B., Maraki, M., Thoeni, C., et al. (2016). Legal compliance and litigation spending under the english and american rule: Experimental evidence. Technical report, Goethe University Frankfurt.

Parisi, F. (2002). Rent-seeking through litigation: adversarial and inquisitorial systems compared. *International Review of Law and Economics*, 22(2):193–216.

Parisi, F. and Fon, V. (2009). *The economics of lawmaking*. Oxford University Press.

Pfennigstorf, W. (1984). The european experience with attorney fee shifting. *Law and Contemporary Problems*, 47(1):37–124.

Posner, R. A. (1973a). *Economic analysis of law*. Little Brown and Company.

Posner, R. A. (1973b). An economic approach to legal procedure and judicial administration. *The Journal of Legal Studies*, 2(2):399–458.

Reimann, M. (2012). Cost and fee allocation in civil procedure: a synthesis. In *Cost and Fee Allocation in Civil Procedure*, pages 3–56. Springer.

Rose-Ackerman, S. and Geistfeld, M. (1987). The divergence between social and private incentives to sue: a comment on shavell, menell, and kaplow. *The Journal of Legal Studies*, 16(2):483–491.

Rosen-Zvi, I. (2009). Just fee shifting. *Fla. St. UL Rev.*, 37:717.

Rowe, T. D. (1982). The legal theory of attorney fee shifting: A critical overview. *Duke Law Journal*, 1982(4):651–680.

Rowe Jr, T. D. and Anderson, D. A. (1996). One-way fee shifting statutes and offer of judgment rules: An experiment. *Jurimetrics*, pages 255–273.

Shavell, S. (1981). Suit and settlement vs. trial: A theoretical analysis under alternative methods for the allocation of legal costs.

Shavell, S. (1982). Suit, settlement, and trial: A theoretical analysis under alternative methods for the allocation of legal costs'(1 982) 1. *Journal of Legal Studies*, 1:55.

Tuil, M. and Visscher, L. (2010). *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical, and Economic Analysis*. Edward Elgar Publishing.

Tullock, G. (1967). The welfare costs of tariffs, monopolies, and theft. *Economic Inquiry*, 5(3):224–232.

Tullock, G., Mitchell, W. C., Buchanan, J. M., and Tollison, R. D. (1983). Toward a theory of the rent-seeking society.

Vargo, J. F. (1992). American rule on attorney fee allocation: The injured person's access to justice, the. *Am. UL Rev.*, 42:1567.

Wagener, W. H. (2003). Modeling the effect of one-way fee shifting on discovery abuse in private antitrust litigation. *NYUL Rev.*, 78:1887.

Walle, S. V. (2013). *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*. Maklu.

Woodroffe, G. (1997). Loser pays and conditional fees-an english solution. *Washburn LJ*, 37:345.

Yoon, A. (2009). The importance of litigant wealth. *DePaul L. Rev.*, 59:649.

Zaza, N. and Marion, I. (2014). European and international standards on the right to legal aid. Technical report, Open Society Justice Initiative.

Summary

While the Law and Economic literature regarding fee-shifting rules in litigation and their effects on litigants' behaviour and decisions is wide and growing fast it has mainly focused on the analysis of the English Rule and of the American Rule and has failed in recognising the relevance of other rules. The general aim of this thesis is to use and to refine traditional models of civil litigation in an attempt to describe the features and the effects on the litigation process of another type of fee-shifting rule, the One-way fee-shifting Rule. Under the One-way fee-shifting Rule, one party recovers her litigation costs in the event of litigation (the advantaged party) whereas the other party (the disadvantaged one) is not allowed to do so. If the Plaintiff is the advantaged party the rule is known as the Favouring Plaintiff Rule; if the Defendant is the advantaged party the rule is instead known as the Favouring Defendant Rule. While the approach adopted here is based on theoretical model and uses tools derived from Game Theory, the thesis has shown how the results can be exploited to show valuable policy implications. It has been shown how the One-way fee-shifting Rule incentivises the favoured litigant to exert more effort than the disadvantaged one and this increases the favoured litigant's probability of winning at trial. When moving from an English system to a One-way fee-shifting one, total litigation costs always decreases while the number of cases that are brought to justice increase. If a settlement stage is out of the picture a higher number of cases that are brought to justice translates into higher litigation rate; otherwise it translates into higher number of cases that are settled. More precisely, the One-way fee-shifting Rule (Favouring Plaintiff) increases the Plaintiff's credibility to sue and this translates into higher settlement rate and settlement amount. A similar result can be achieved with the implementation of legal aid; however legal aid always increases litigation rate and public expenditure.

Samenvatting:

Hoewel er een grote en groeiende hoeveelheid rechtseconomische literatuur beschikbaar is over regels betreffende proceskosten en de effecten daarvan op het gedrag en de beslissingen van de procespartijen, heeft deze literatuur zich vooral toegespitst op de analyse van de Engelse regel en de Amerikaanse regel en verzuimd het belang van andere regels te onderkennen. De algemene doelstelling van deze dissertatie is om traditionele modellen van civiele procesvoering toe te passen en te verfijnen in een poging de kenmerken en effecten van een ander type regel voor kostenafwenteling op het rechtsproces te beschrijven: One-way fee-shifting. Onder deze regel kan een van de partijen (de bevoordeelde partij) haar proceskosten in een rechtszaak op de andere partij afwentelen, terwijl dit voor die andere partij (de benadeelde partij) niet is toegestaan. Als de eiser de bevoordeelde partij is, staat de regel bekend als de 'eiser bevoordelende regel'; als de gedaagde de bevoordeelde partij is, staat de regel bekend als de 'gedaagde bevoordelende regel'. Hoewel de gekozen benadering is gebaseerd op theoretische modellen en gebruik maakt van instrumenten die zijn afgeleid van de speltheorie, laat de dissertatie zien hoe de resultaten kunnen worden benut om waardevolle beleidsimplicaties te laten zien. Er wordt aangetoond hoe One-way fee-shifting de begunstigde procespartij stimuleert om meer te investeren in het proces dan de benadeelde procespartij, en dit vergroot de kans van de begunstigde procespartij om het proces te winnen. Bij een overgang van het Engelse systeem naar een systeem van One-way fee-shifting nemen de totale proceskosten altijd af, terwijl het aantal zaken stijgt. Als een schikking niet mogelijk is, resulteert een hoger aantal zaken in meer gerechtelijke procedures; in het andere geval resulteert het in meer schikkingen. Nauwkeuriger gezegd verhoogt One-way fee-shifting (eiser bevoordelend) de geloofwaardigheid van de eiser dat hij een proces zal aanspannen en dit resulteert in een hoger schikkingspercentage en hogere bedragen waarvoor geschikt wordt. Een vergelijkbaar resultaat kan worden bereikt met rechtsbijstand; rechtsbijstand verhoogt echter altijd het percentage gerechtelijke procedures en de publieke uitgaven.

European Doctorate in Law & Economics

Curriculum vitae

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Short bio	
My main research interests are applied microeconomic theory and financial economics. **I am a teaching assistant at University of Bologna and Johns Hopkins-School od Advanced International Studies.** **I am also a market analyst for a private Italian Company. I develop econometrics model for agro-food commodities price forecasts.**	
Education	
B.A. in Financial Economics; University of Bologna	2007 -2010
M.Sc. in Economics (110 summa cum Laude); University of Bologna	2010 -2013
Ph.d in Law and Economics; Bologna, Hamburg, Rotterdam	2013 -now
Work experience	
Teaching assistantship; University of Bologna	2015 -2017
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Commodity Market Analyst; Areté Bologna	2016 -now
Prizes and awards	
Ph.D. Scholarship; University of Bologna	2013 -2016
Working Papers	
The Favouring Plaintiff Fee-Shifting Rule in Europe: An alternative to Legal Aid in Financing Civil Litigation.	2016
The Economic Analysis of the One-Way Fee-Shifting Rule In Litigation.	2014

European Doctorate in Law & Economics

EDLE PhD Portfolio

Name PhD student : Filippo Roda
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PhD training

Bologna courses	*year*
BEHAVIORAL L&E (CARBONARA) 30/30	2013
EXPERIMENTAL L&E (CASARI) 28/30	2013
ENFORCEMENT MECHANISM (VANIN) 30L/30	2013
STATISTICS (GIOVAGNOLI) 26/30	2013
GAME THEORY AND LAW (FRANZONI) 30/30	2014
EC. OF EUROPEAN COMPETITION LAW (DENICOLÒ) 30/30	2014
ITALIAN LEGAL SYSTEM (DE PRÀ) 30L/30	2014
EUROPEAN SECURITIES AND COMPANY (POMELLI)	2014
THE ECONOMIC ANALYSIS OF LAW (PARISI) 30L/30	2014
MODELLING PRIVATE LAW	2015
Specific courses	***year***
GERMAN LAW (HAMBURG)	2014
THE ECONOMICS OF LAW ENFORCEMENT (HAMBURG)	2014
RISK SAVVY (HAMBURG)	2014
ECONOMETRICS: INTRODUCTION (HAMBURG)	2014
ECONOMETRICS SEMINAR (ROTTERDAM)	2014
ACADEMIC WRITING SKILLS FOR PH.D STUDENTS (ROTTERDAM)	2014
Seminars and workshops	***year***
UNIVERSITY OF BOLOGNA (SEMINAR SERIES; DEP. OF ECONOMICS)	2013-2017
BOLOGNA NOVEMBER SEMINAR	2013
BACT SEMINAR SERIES	2014
EGSL LUNCH SEMINARS	2014
ROTTERDAM FALL SEMINAR SERIES	2014
ROTTERDAM WINTER SEMINAR SERIES	2014
ECONOMETRICS SEMINAR (ROTTERDAM)	2014
7TH JOINT SEMINAR "THE FUTURE OF LAW AND ECONOMICS"	2015
Presentations	***year***
BOLOGNA MARCH SEMINAR	2014
HAMBURG JUNE SEMINAR	2014
ROTTERDAM FALL SEMINAR SERIES	2014
ROTTERDAM WINTER SEMINAR SERIES	2015
BOLOGNA NOVEMBER SEMINAR	2016

JOINT SEMINAR 'THE FUTURE OF LAW AND ECONOMICS'	2016
Presentations (international) conferences	***year***
8TH JOINT SEMINAR "THE FUTURE OF LAW AND ECONOMICS", ROTTERDAM	2016
32ND EUROPEAN ASSOCIATION IN LAW AND ECONOMICS ANNUAL CONFERENCE, VIENNA	2015
2ND INTERNATIONAL WORKSHOP ON THE ECONOMIC ANALYSIS OF LITIGATION, TURIN	2015
ITALIAN SOCIETY OF LAW AND ECONOMICS (ISLE), 10TH ANNUAL CONFERENCE, ROME	2014
Teaching	***year***
MONETARY AND FINANCIAL MARKETS ECONOMICS, UNIVERSITY OF BOLOGNA	2015
INTELLECTUAL PROPERTY ECONOMICS, UNIVERSITY OF BOLOGNA	2016
ENTERPRISE ECONOMICS AND CORPORATE GOVERNANCE, UNIVERSITY OF BOLOGNA	2016
THE ECONOMIC ANALYSIS OF LAW, UNIVERSITY OF BOLOGNA	2016
THE ECONOMIC ANALYSIS OF CONTRACTS, UNIVERSITY OF BOLOGNA	2016
GAME THEORY, UNIVERSITY OF BOLOGNA	2016
MICROECONOMICS, JOHNS HOPKINS UNIVERSITY, SAIS CENTER	2016
Others	***year***
MARKET ANALYST (MARKET INTELLIGENCE), BOLOGNA	2016-now